MANAGING CULTURAL RESOURCE ISSUES ON INDIAN LANDS

Rebecca W. Watson
Welborn Sullivan Meck & Tooley, P.C.

I. Introduction

Opportunities for tribes and their partners to engage in economic development projects on Indian lands are at a high. A strong interest in developing "new energy" (as well as conventional energy) on Western public lands has brought a renewed focus to the natural resources on tribal lands. The scale of renewable energy projects and the need for new transmission make the large expanses of land and abundant resources found on federal and Indian lands attractive locations for renewable energy projects. Like federal lands, however, Indian lands carry an added layer of federal laws and bureaucracy that can be a disincentive to some private developers. This paper will focus on an area of law–cultural resource protection–that applies to federal and Indian lands.[1] Knowledge of, experience in and sensitivity to managing cultural resource considerations can make the difference between a project that is timely and successfully completed and a project that is subject to delay or community resistance. Project proponents that can successfully manage cultural resource compliance may find opportunities on Indian and federal lands that other developers have ignored. Tribes that have developed "blueprints" for cultural resource compliance on their reservations may find new business coming to their communities.

This is an area of law that is complex, first, because it is a reflection of the complicated, and changing, relationship between the federal government and Indian tribes[2] and Indian tribes and the larger community. Second, multiple federal and tribal laws overlap and require a coordinated compliance strategy. Two fundamental laws that apply to activities on tribal lands—the National Environmental Policy Act ("NEPA")[3] and the National Historic Preservation Act ("NHPA")[4]—create complex bureaucratic processes with multiple players that are not always well-meshed. Two other federal statutes that apply in certain circumstances, the Native

---

[1] Michael E. Webster, *Mineral Development of Indian Lands: Understanding the Process and Avoiding the Pitfalls*, 39 ROCKY MTN. MIN. L. INST. 2-1 (1993); SHERRY HUTT ET AL., CULTURAL PROPERTY LAW (2004); JOHN F. CLARK & MELISSA C. MEIRINK, *Cultural Resources Protection*, ch. 176, AMERICAN LAW OF MINING (2d ed. 2010); Lynn H. Slade, *Mineral and Energy Development on Native American Lands: Strategies for Addressing Sovereignty, Regulation, Rights and Culture*, 56 ROCKY MTN. L. INST. 5A-1 (2010); Walter E. Stern, *Developing Energy Projects on Federal Lands: Tribal Rights, Roles, Consultation, and Other Interests (A Developer's Perspective)*, Paper No. 15A, ROCKY MTN. MIN. L. FDN. (2009) ; Paul E. Frye, *Developing Energy Projects on Federal Lands: Tribal Rights, Roles, Consultation, and Other Interests (A Tribal Perspective)*, Paper No. 15B, ROCKY MTN. MIN. L. FDN. (2009) ; WALTER ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED (Fulcrum Pub. 2010) (providing an Indian perspective on some fundamental principles of Indian law and, in particular, the religious and cultural issues that are addressed by the federal laws discussed in his paper).

[2] There are 564 federally recognized Indian tribes in the United States and most provisions of the laws to be discussed are focused on these Indians. Native Alaskans are somewhat unique and subject to other laws. For an up-to-date list of federally recognized tribes visit the Bureau of Indian Affairs website, *available at*: *http://www.bia.gov/WhoWeAre/BIA/OIS/TribalGovernmentServices/TribalDirectory/index.htm*

[3] 42 U.S.C. § 4321 *et seq.* (2010).

[4] 16 U.S.C. § 470 *et seq.* (2010).

American Graves Protection and Restoration Act ("NAGPRA")[5] and the Archeological Resource Protection Act ("ARPA")[6] overlap the coverage of NHPA, but have different requirements and processes. Each tribe may have its own individual cultural resource laws that require compliance. Finally, addressing cultural resource compliance requires something unique in federal environmental law–recognition of and sensitivity to religious, spiritual and cultural values. Two other federal laws, the American Indian Religious Freedom Act ("AIRFA")[7] and Religious Freedom Restoration Act ("RFRA")[8] have attempted to assist with this consideration.

This paper begins with an introductory discussion of several key concepts that are foundational to cultural resource protection on Indian lands. This section is followed by detailed discussions of the several relevant federal laws on cultural resource protection, including: NEPA; NHPA Section 106 process and tribal cultural resource protection laws; NAGPRA; ARPA; and AIRFA and RFRA in the context of Indian sacred sites and environmental justice considerations.

II. Key Concepts in Cultural Resource Law Compliance

A brief discussion of several fundamental Indian law concepts may be helpful before approaching the particular requirements of the individual cultural resource laws. To be sure, it is well beyond the scope of this paper to discuss these topics in detail, but identification of these principles should help illuminate the requirements of federal cultural resource protection. Recognition of *tribal sovereignty*, the *government-to-government* relationship and federal *trust responsibility* is an important first step in understanding how tribes relate to project proponents, federal agencies and state and local governments in the context of cultural resource management. *Consultation* implements these legal relationships and an understanding of *Indian Country* will clarify the applicability of certain cultural resource laws.

A. Tribal Sovereignty and the "Government to Government" Relationship

The concept of inherent tribal sovereignty is critical to understanding the relationship of tribes to the federal government and to non-federal third parties. Sovereignty is the inherent authority of indigenous tribes, as domestic nations, to govern themselves within the borders of the United States as delineated in treaties, the Constitution, federal law, executive orders and court decisions.[9] In 1831, the U.S. Supreme Court held that the tribes reserved their sovereign powers, subject to the authority of Congress over Indian affairs, and that state laws did not apply to the tribes.[10] More recently, the Court has limited the scope of a tribe's sovereignty on their reservation as to nonmembers in criminal[11] and civil[12] matters. The "government-to-

---

[5] 25 U.S.C. § 3001 *et seq.* (2010).

[6] 16 U.S.C. § 470aa *et seq.* (2010).

[7] 42 U.S.C. § 1996 *et seq.* (2010).

[8] 42 U.S.C. § 2000bb *et seq.* (2010).

[9] *See, e.g., Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) (the power of the United States precludes tribes from intercourse with other nations); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) (tribes are "domestic dependent nations"); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823) (tribes have no power to grant lands).

[10] *Cherokee Nation*, 30 U.S. 1.

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

[12] *Montana v. United States*, 450 U.S. 544, 565-66 (1981); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Nevada v. Hicks*, 333 U.S. 353, 367-69 (2001).

government" relationship recognizes this unique legal relationship between sovereigns–an Indian tribe and the federal government. The government-to-government relationship was described by President Clinton in an Executive Memorandum[13] and directs agencies that undertake activities affecting "Native American tribal rights or trust resources" to implement them in a "knowledgeable, sensitive manner respectful of tribal sovereignty." More significantly, agencies were ordered to consult, "to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments."[14] The government-to-government relationship requires direct consultation between appropriate federal officers and tribal officials.

Practice Tips:

- Sovereignty will dictate who/how to approach a tribe.
- State and local laws are limited on Indian lands.

B. Federal Trust Responsibility

The doctrine of the federal government's trust responsibility to Indian tribes begins with the treaties between the United States and the tribes and the holding of the U.S. Supreme Court that tribes are "domestic dependent nations" whose "relation to the United States resembles that of a ward to his guardian."[15] As early as 1790, Congress imposed limitations on tribal land sales without federal approval.[16] The Supreme Court has recognized "the undisputed existence of a general trust relationship between the United States and Indian people"[17] where the federal government "has charged itself with moral obligations of the highest responsibility and trust."[18] The federal trust responsibility to Indian tribes applies to all federal agencies, and most agencies have developed policies and procedures to implement this responsibility.[19] Inherent in this relationship is an enforceable fiduciary responsibility on the part of the federal government to Indian tribes to protect their lands and resources, unless altered by mutual agreement.[20]

---

[13] Memorandum from the White House to the Heads of Executive Departments and Agencies, "Government-to-Government Relations with Native American Tribal Governments" (April 29, 1994).

[14] *Id.; see also* 36 C.F.R. §§ 800.2(c)(2)(ii)(B)-(C).

[15] *Cherokee Nation,* 30 U.S. at 16-17.

[16] *See* Act of July 22, 1790, § 4, 1 Stat. 137; 25 U.S.C. § 177 (2010) (current codification) ("No purchase, grant, lease, or other conveyances of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.").

[17] *United States v. Mitchell*, 463 U.S. 206, 225 (1983).

[18] *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1941).

[19] *Nance v. EPA*, 645 F. 2d 701, 710 (9th Cir. 1981) ("any federal government action is subject to the United States' fiduciary responsibility toward the Indian tribes"); *Pyramid Lake Paiute Tribe of Indians v. US Dep't of Navy*, 898 F. 2d 1410, 1420 (9th Cir. 1990); *see also, e.g.,* U.S. DEPARTMENT OF THE INTERIOR, DEPARTMENTAL MANUAL, PART 512, Ch. 2, *available at: http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/blm_manual.html.*

[20] A well-known example of the federal trust responsibility is the recently resolved *Cobell* litigation, *see, e.g.,* 455 F.3d 301 (D.C. Cir. 2006), that, over the course of 14 years, resulted in two Secretaries of the Department

Typically, the Bureau of Indian Affairs ("BIA") will exercise the federal government's approval authority over any agreement to operate on tribal or allotted lands. It is the BIA's approval that is the "federal action" triggering compliance with federal cultural resource laws.

C. Consultation

Consultation is a key component of how the government's trust responsibility and recognition of tribal sovereignty are implemented. Consultation is a critical component of each of the laws to be discussed–NEPA, NHPA, NAGPRA, ARPA, AIRFA, and RFRA.[21] As President Obama noted at his first tribal meeting, "[m]eaningful dialogue between Federal officials and tribal officials has greatly improved Federal policy toward Indian tribes. Consultation is a critical ingredient of a sound and productive Federal-tribal relationship."[22] In 2000, President George W. Bush issued an Executive Order directing federal agencies to improve their consultation and coordination with tribal governments.[23] In November, 2009, President Obama identified a failure of the federal government to implement the 2000 Executive Order and directed all federal agencies to promptly develop consultation implementation plans.[24] At its most basic, consultation consists of notifying a tribe about a proposed project and seeking their input. "Successful consultation is a two-way exchange of information, a willingness to listen, and an attempt to understand and genuinely consider each other's opinions, beliefs, and desired outcomes.[25] Project proponents should tread carefully in initiating consultation with an affected tribe. It is important, first, to consult with the federal agency that is preparing the NEPA document or has the statutory duty to consult. A project proponent should recognize that consultation may be required with multiple tribes–those directly impacted by the proposed development and other affected tribes who may have a cultural, spiritual or historic relation to the project area. Developers should appreciate that tribes may regard a "cold" contact by a private party as inappropriate in the context of the federal agency's responsibility to the tribe in the government-to-government relationship. Finally, there are specific consultation requirements in each of the federal statutes discussed. Failure to consult adequately can result in litigation and project delay.[26]

---

of the Interior being held in contempt and legislation, signed into law by President Obama, awarding $3.4 billion in damages, *see* Claims Resolution Act of 2010 (H.R. 4783).

[21] *See Stern, supra* note 1, at 15A-35, for useful chart on consultation under these separate laws.

[22] *See* Press Release, White House (Nov. 5, 2009), *available at: http://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president.*

[23] Exec. Order 13175, Consultation and Coordination with Indian Tribal Governments, 66 *Fed. Reg.* 67249 (Nov. 6, 2000)"

[24] Memorandum from White House to the Heads of Executive Departments and Agencies, "Consultation and Coordination with Indian Tribal Governments" (November 5, 2009); agency-adopted consultation policies are generally available on agency websites, *see, e.g.*, BLM MANUAL HANDBOOK, § 8120, "Tribal Consultation Under Cultural Resources Authorities" (December 4, 2004); BLM MANUAL HANDBOOK, H-8120-1, "Guidelines for Conducting Tribal Consultation" (December 4, 2004); BLM Programmatic Agreement (as amended), *http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2010/im_2010-037__tribal.html* (2010).

[25] David Grachen, *A Traditional Cultural Property Study of New Echola, available at: http://www.nathpo.org/PDF/Tribal_Consultation.pdf.*

[26] *Pueblo of Sandia v. United States*, 50 F.3d 856, 860 (10th Cir. 1995); *see also La Cuna de Aztlan v. Dept. of the Interior*, Case No. 10-CV-2664 WQH (S. D. Cal., filed Dec. 26, 2010) (La Cuna de Aztlan Sacred Sites Protection Circle Advisory Committee sued to enjoin six solar power plants in California over inadequacies in NHPA consultation), *www.signonsandiego.com/news/2010/dec/28/indian-activists-lawsuit-block-big-solar-farms.*

Practice Tips:

- Contact the federal agency before initiating tribal contact.
- Contact tribal legal counsel on how, when and who should approach the tribe.

D. "Indian Country"

"Indian country" presents a legal, geographic, and cultural landscape.[27] As a general rule, most Indian land is held in trust by the federal government for the beneficial use of an Indian tribe, and any Indian land not held in trust is subject to federal restraints on alienation.[28] As defined in federal criminal law since 1948, "Indian country" means: (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.[29] Although these definitions sound straightforward, in practice it can be a difficult task to identify Indian country. What is and is not within the "limits of an Indian reservation" or a "dependent Indian community" is not always clear. And, the federal cultural resource laws have slightly different definitions for Indian lands. As to Indian country, treaties between the United States and Indian tribes were the primary means of extinguishing Indian title to lands and reserving title to lands to the tribe.[30] These treaties or Acts of Congress may have been altered by later statutes.[31] "Dependent Indian communities" are neither reservations nor allotments, but are areas set aside by the federal government for use by the Indians and are under federal superintendence.[32] An "Indian allotment" is land owned by individual Indians and either held in trust by the United States or restricted by statute in its alienation.[33] Finally, Indian country obviously represents only a small fraction of the lands that tribes historically occupied or have a cultural connection to. Several of the laws to be discussed, *infra,* require consideration of cultural resources found on both "Indian country" and federal lands.

---

[27] *See* Lynn H. Slade, *Mineral and Energy Development on Native American Lands: Strategies for Addressing Sovereignty, Regulation, Rights and Culture*, 56 ROCKY MTN. L. INST. 5A-1, 5A-5 (2010)(very thorough and helpful discussion on Indian country).

[28] *See, e.g.*, 25 U.S.C. § 177.

[29] 18 U.S.C. § 1151; s*ee also DeCoteau v. District County Court*, 420 U.S. 425, 427 n. 2 (1975) (applying this definition to civil jurisdiction).

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

[31] *See Hagen v. Utah*, 510 U.S. 399, 404 (1994).

[32] *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 530 (1988); *see also Hydro Resources Inc. v. EPA*, 608 F.3d 1131, 1148 (10th Cir. 2010) (Dependent Indian communities "consist only of lands explicitly set aside for Indian use by Congress (or its designee) and federally superintended.").

[33] FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 3.04[2] [c] (4th ed. 2005)

III. National Environmental Policy Act

NEPA should be viewed as the "umbrella" federal statute with NHPA as a strong partner for consideration of cultural resources–with each of the other laws discussed generally falling under this NEPA umbrella. NEPA established a procedure for federal agencies to evaluate the environmental impacts of "major federal actions."[34] NEPA is triggered by federal action, such as federal approval, federal permit or federal funding–actions that frequently occur on Indian lands.[35] NEPA is a procedural statute, it does not tell a federal agency whether or how to do a proposed action, but rather requires a federal agency to take a "hard look" at the environmental impacts from the proposed action.[36]

The scope of NEPA environmental impacts is broad and includes socio-economic and cultural impacts. The purpose statement of NEPA explicitly includes preservation of "important historic, cultural, and natural aspects of our national heritage."[37] NEPA also requires public participation[38] and the involvement of "cooperating agencies" (state, federal and tribal)[39] in assessing the impacts of, and alternatives to, a proposed federal action. Thus, NEPA consideration of cultural resources may be triggered when a project is proposed on Indian lands or tribes may be involved in a NEPA process in their role as members of the public or cooperating agencies if an off-reservation action may impact cultural resources on federal lands.

NEPA procedure is designed, first, to answer the question of whether there is a *significant* impact from the proposed federal action. NEPA compliance is typically documented in one of three ways: a *categorical exclusion*, an *environmental assessment*, or an *environmental impact statement*. Agencies may establish categorical exclusions ("CX") for those routine or narrowly circumscribed actions that neither individually nor cumulatively have a significant

---

[34] 42 U.S.C. §§ 4231-4347; 40 C.F.R. § 1500-1508; 42 U.S.C. § 4332(2)(C) (federal agencies to issue an environmental impact statement on every major federal action "significantly affecting the quality of the human environment"); *see also generally National Environmental Policy Act, Special Institute*, ROCKY MTN. MIN. L. INST. Vol. 2010, no. 4 (2010) (for a series of papers on NEPA fundamentals and current issues).

[35] *See* 40 C.F.R. § 1508.18 ("projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies"); *Davis v. Morton*, 469 F. 2d 593, 597-98 (10th Cir. 1972) (NEPA applicable to BIA approval of lease of tribal trust lands); the BIA has detailed NEPA guidance, *see, e.g.,* BIA, DIVISION OF ENVIRONMENTAL MANAGEMENT, NATIONAL ENVIRONMENTAL POLICY ACT HANDBOOK, 59 IAM 3-H (April 2005)(hereinafter "BIA NEPA HANDBOOK"); DEPARTMENT OF INTERIOR DEPARTMENTAL MANUAL, *Managing the NEPA Process- Bureau of Indian Affairs*, 516 DM 10 (May 27, 2004) (hereinafter "DOI DM 10"); *see generally* Dean B. Suagee, *The Application of the National Environmental Policy Act to Development" in Indian Country*, 16 AM. INDIAN L. REV. 377 (1991).

[36] *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989) ("NEPA merely prohibits uninformed—rather than unwise—agency action.").

[37] 42 U.S.C. § 4331(b)(4); 40 C.F.R. § 1508.08(b); *see also, e.g., Dine' Citizens Against Environment v. Klein*, No.07-CV-1475-JLK (D. Colo. Oct. 28, 2010) (remanding NEPA coal mine permit revision to agency for better analysis of mitigation provisions imposed by federal cultural resource laws for impacts to scientific, historic and cultural resources).

[38] 43 C.F.R. § 1503 (comments from the public are required for an environmental impact statement and optional, but frequent, for environmental assessments).

[39] 43 C.F.R. §§1501.6, 1508.5; *see also* Memorandum from Council on Environmental Quality (hereinafter "CEQ") to the Heads of Federal Agencies, "Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act" (January 30, 2002).

impact on the environment.[40] Administrative CXs are developed by the agency working with the Council on Environmental Quality ("CEQ"), are published in the Federal Register and are subject to "extraordinary circumstances" which can make the CX inapplicable. If it is not known whether or not an action is significant, an environmental assessment ("EA") is prepared and the agency either finds "significance" requiring a full-blown environmental impact statement or makes a "finding of no significant impact" ("FONSI"). A FONSI determination permits the agency to issue a Record of Decision ("ROD") and proceed with the proposed action.[41] EAs are not required to include public comments, but frequently agencies provide for EA comments. There are no specific regulations requiring the agency to seek the involvement of tribes in an EA, but potentially affected tribes are entitled to notice of public hearings and NEPA documents during the EA process.[42] An applicant (or its consultant) may prepare an EA for the federal agency, but the federal agency is still ultimately responsible for the content and conclusion of the EA.[43]

If an action will have a "significant" impact on the environment, an environmental impact statement ("EIS") must be prepared.[44] An EIS requires an agency to analyze and disclose: "1) environmental impact of the proposed action; 2) adverse environmental effects; 3) reasonable alternatives ; 4) relationship to short-term uses and long-term productivity; and 5) any irreversible and irretrievable commitments of resources."[45] An EIS must be prepared by the federal agency (or its contractor, paid for by the project proponent)–an applicant *may not* prepare an EIS. The EIS process includes *scoping* which invites the public to comment on the issues to be analyzed in the EIS. Affected tribes must be invited to participate in scoping.[46] Tribal interests in the NEPA process may include environmental, religious or cultural concerns as well as socio-economic and environmental justice issues. A tribe may also be a *cooperating agency* and play a more direct and influential role with the federal agency in drafting the EIS.[47] CEQ cooperating agency regulations require the lead federal agency to request the participation of cooperating agencies early in the NEPA process.[48] Consultation with affected tribes is a critical component of the NEPA process both in recognition of the government-to-government relationship and the consultation requirements of other cultural resources laws. Identification of who to contact in the tribal context can be a complex task.

---

[40] 40 C.F.R. §§ 1501.4(a), 1501.6, 1508.4.

[41] 40 C.F.R. § 1508.9.

[42] 40 C.F.R. §1506.6(b)(3). CEQ Environmental Justice guidance for NEPA encourages agencies to involve tribes in the preparation of both environmental assessments and environmental impact statements, *see* CEQ, *Environmental Justice: Guidance under the National Environmental Policy Act* (Dec. 10, 1997) *available at: http://ceq.hss.doe.gov/nepa/regs/guidance.html.*

[43] 40 C.F.R. §1506.5(c); s*ee, e.g.,* BIA NEPA HANDBOOK § 4.2.B (for external proposals "the applicant (tribe or third party) normally prepares the EA").

[44] 43 C.F.R. §1501.7.

[45] 42 U.S.C. §4332(c); *South Fork Band v. U.S. Dept. of Interior*, 643 F. Supp.2d 1192,1212 (D. Nev. 2009), *rev'd on other grounds*, 588 F.3d 718 (9th Cir. 2010).

[46] 40 C.F.R. §1501.7(a)(2); *see also* 40 C.F.R. §1501.2(d) (instructing agencies to consult "early with . . . Indian tribes. . . ."); *see, e.g.,* BLM MANUAL, *supra* note 24, §8120; BLM MANUAL HANDBOOK, *supra* note 24, at H-8120-1,.

[47] 40 C.F.R. §§ 1501.6, 1503.1(a)(2); §1508.5; *see also* CEQ Memorandum, *supra* note 39.

[48] 40 C.F.R. § 1501.6(a).

Practice Tip:
• "Authority centers" and differing perspectives may be found in tribal government, subdivisions or agencies of the tribal government, elders or affiliated nongovernmental organizations (NGOs).

Notice of meetings and the availability of NEPA documents must be provided to affected tribes.[49] The federal agency will publish a Draft EIS (DEIS) describing the purpose and need for the project, the alternatives to the proposed action, and an analysis of the environmental impacts and any mitigation measures from each of the alternatives. This is followed by the public comment period. [50] The federal agency's analysis of the comments and the issuance of a Final EIS (FEIS) is the last step in the NEPA process. The FEIS is then followed by the agency's decision in a ROD.[51]

Courts have held that an EIS must include a thorough discussion of the historic and cultural resources impacted by the project and the alternatives that would avoid or mitigate those impacts.[52] In addition, CEQ regulations require that an EIS identify and discuss any other environmental review and consultation requirements for the proposed project.[53] A BIA NEPA document must analyze compliance with any applicable tribal environmental laws–including cultural resource protection laws.[54] Recent litigation in the Ninth Circuit illustrates the importance of NEPA tribal consultation by federal agencies for projects occurring on federal lands where a tribe or tribes have religious or cultural ties.[55]

IV. National Historic Preservation Act – Section 106 Process

NHPA and its implementing regulations[56] require federal agencies to consult to identify historic properties and assess the effects of federally funded or federally permitted undertakings on historic properties. "[NHPA] creates a mechanism to promote these values neither by

---

[49] 40 C.F.R. § 1506(b)(3) ("when effects may occur on reservations.")

[50] 40 C.F.R. § 1503.1(a)(2) (comments must be sought from a tribe "when effects may be on a reservation.")

[51] 40 C.F.R. § 1505.2.

[52] *Te-Moak v. U.S. Department of the Interior*, 608 F.3d 512(9th Cir. 2010)(hereinafter "*Te-Moak*"); *Preservation Coalition, Inc. v. Pierce*, 667 F. 2d 851 (9th Cir. 1982); *National Indian Youth Council v. Andrus*, 501 F. Supp. 649 (D.N.M. 1980), *aff'd* 664 F.2d 220 (10th Cir. 1981); *Montana Wildlife Fed'n v. Morton*, 406 F. Supp. 489 (D. Mont. 1976); *Warm Springs Dam Task Force v. Gribble*, 378 F. Supp. 240 (N.D. Cal. 1974).

[53] 40 C.F.R. § 1502.25; the BIA NEPA Handbook recommends that such coordination also occur in an EA, *see* BIA NEPA HANDBOOK, *supra* note 35, §4.4.

[54] *See* BIA NEPA HANDBOOK, *supra* note 35, § 2.5.C.

[55] *Navajo Nation v. Forest Service*, 553 F.3d 1058(9th Cir. 2008), *cert. denied* 129 S. Ct. 2763 (2009) (hereinafter "*Snowbowl*") (challenge to consultation with the Hopi tribe in the context of ski area on Forest Service lands in Arizona); *Te-Moak*, 608 F.3d592 (9th Cir. 2010) (challenge to BLM compliance in context of mine plan amendment on lands significant to Te-Moak and Western Shoshone in Nevada).

[56] 16 U.S.C. §§ 470-470w-6; 36 C.F.R. Part 800 (regulations promulgated by Advisory Council on Historic Preservation).

forbidding the destruction of historic sites nor by commanding their preservation, but instead by ordering the government to take into account the effect any federal undertaking might have on them."[57] However, "[it] is no exaggeration to say that thousands of historic places across the country have been protected from the adverse effects of federal projects, or projects receiving federal permits, other types of formal approvals, or funding, as a result of [NHPA]."[58] Key partners in the NHPA Section 106 consultation process are the State Historic Preservation Officer ("SHPO") (a state entity authorized to consult with the federal action agency) and the Advisory Council on Historic Preservation ("ACHP") (an independent federal agency associated with the Department of the Interior, National Park Service).[59] In 1992, the role of Indian tribes was strengthened by requiring agencies to consult with a Tribal Historic Preservation Officer ("THPO") to the same degree as a SHPO.[60] Federally recognized Indian tribes have the option of designating a THPO and taking over all or part of the functions that a SHPO would perform on Indian lands.[61] Tribes may also enact tribal cultural resource management laws that, along with NHPA, will be enforced by a THPO.[62] If there is no THPO, a tribe has the right to be a consulting party with the "same rights of consultation and concurrence that the THPOs are given [in Section 106] except such consultations shall be in addition to and on the same basis as consultation with the SHPO."[63] On federal lands, Indian tribes have specific roles to play in NHPA Section 106 consultations, particularly those involving historic property to which the tribe attaches religious and cultural significance.[64] The focus in NHPA is on federally recognized tribes, but unrecognized tribes may seek to participate, and their role should be discussed with consulting parties.[65]

A. NHPA Section 106 Process: Big Picture

The Section 106 process is the regulatory mechanism for a federal agency to "take into account" the effects of federal actions on historic properties and is a sequential process that, generally, requires each step to be completed before moving to the next step.[66] NHPA

---

[57] *United States v. 162.20 Acres of Land More or Less, Situated in Clay County, State of Mississippi*, 639 F. 2d 299, 302, *cert. denied*, 454 U.S. 828 (1981).

[58] LESLIE E. BARRAS, SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT: BACK TO BASICS, PART I , 2 (2010) (hereinafter "Back to Basics"), *available at: http://www.preservationnation.org/resources/legal-resources/additional-resources/Back-to-Basics-Technical-Report.pdf.*

[59] 16 U.S.C. § 470a(b)(1).

[60] Protection of Historic Properties, 65 *Fed. Reg.* 77,698, 77,698-99 (December 12, 2000) (codified at 36 C.F.R. pt. 800)(final rule).

[61] 16 U.S.C. § 470w(14); *see also* National Association of Tribal Historic Preservation Officer ("NATHPO") website, *available at: www.nathpo.org/map./htm* (NATHPO is a non-profit organization that "supports the preservation, maintenance and revitalization of the culture and traditions of Native Peoples of the United States."); *see also* National Park Service, Tribal Historic Preservation Office program, *available at: www.nps.gov/history/hps/tribal/thpo.htm.*

[62] 16 U.S.C. § 470a(d)(2); 16 U.S.C. § 470a(5) (providing that the ACHP may enter into an agreement with a tribe to conduct NHPA compliance under the Tribe's regulations rather than the Section 106 regulations); *see also*, Native American Rights Fund Tribal Law Gateway, *available at: www.narf.org/nill/triballaw/index.htm containing materials on cultural resource management in tribal codes and ordinances).*

[63] 30 C.F.R. § 800.2(c)(2)(B).

[64] 16 U.S.C. § 470a(d)(6).

[65] *Snoqualmie Indian Tribe v. Federal Energy Regulatory Comm'n,* 545 F.3d 1207, 1215-16 (9th Cir. 2008) (when record closed the tribe was not federally recognized).

[66] *See infra* at Section III A-F.

regulations also direct the federal agency to coordinate Section 106 reviews with NEPA, NAGPRA, AIRFA and ARPA.[67] The trigger for NHPA is a federal "*undertaking*." Any project, activity or program funded by a federal agency or authorized by a federal permit, license or approval constitutes an "undertaking" subject to Section 106.[68] Section 106 requires federal agencies to "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."[69] (Emphasis added). Properties that are "*eligible*" for inclusion on the National Register are "*historic properties*" and include any prehistoric or historic district, site, objects or artifact.[70] The 1992 amendments to NHPA authorized the inclusion of "*traditional cultural properties*" ("TCPs").[71] TCPs are properties of traditional religious and cultural importance to an Indian tribe, and are eligible if they otherwise meet National Register criteria.[72] The Section 106 process includes the *identification* of historic properties, an *assessment of impacts or effects* on those eligible properties and a resolution of any adverse effects through *mitigation*. These steps are carried out within the context of *consultation* with identified "consulting parties," the public and review by the ACHP. The Section 106 process must be completed prior to any ground-disturbing activities, before any license or permit is issued or federal funds expended unless alternative, phased compliance with NHPA is employed. NHPA does not include a citizen's suit provision and, while there is disagreement in the circuit courts, injunctive relief can be awarded for failure to comply with NHPA.[73]

B. Consulting Parties and Public Participation

Consultation is defined as "seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the Section 106 process."[74] Therein lies a significant hurdle in the NHPA Section 106 process: there

---

[67] 36 C.F.R. § 800.3(2)(b).

[68] 16 U.S.C. § 470w(7); 36 C.F.R. § 800.16(y); *see also CITA-The Wireless Ass'n v. FCC*, 466 F.3d 105, 112-113 (D.C. Cir. 2006); *National Mining Ass'n v. Fowler*, 324 F.3d 752, 756 (D.C. Cir. 2003).

[69] 16 U.S.C. § 470f; 36 C.F.R. § 800.1. Criteria for inclusion in or eligibility for the National Register are found at 36 C.F.R. § 63 ("integrity of location, design, setting, materials, workmanship, feeling and association"); National Park Service guidance is *available at: www.2.cr.nps.gov.*

[70] *Colorado River Indians Tribes v. Marsh*, 605 F. Supp. 1425, 1437 (C.D. Cal. 1985); 466 F.3d at 110-1150 (D.C. Cir. 2006) (a property is "eligible for inclusion" if it has been designated by the Secretary or it meets the criteria for listing, without a formal listing).

[71] 16 U.S.C. § 470a (d)(6)(A); 36 C.F.R. § 800.16(l)(1). A "TCP" is defined as a property associated with cultural practices or beliefs of a living community (a) that are rooted in history and (b) are important in maintaining its cultural identity. "Culture" is defined to include, "the traditions, beliefs, practices, life-way, arts, crafts, and social institutions of any community . . ." DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, NATIONAL REGISTER BULLETIN 38, *Guidelines for Evaluating and Documenting Cultural Properties* (Rev. 1998) (hereinafter "NPS BULLETIN").

[72] *Id.*; *see infra* section IV. c.2.

[73] *San Carlos Apache Tribe v. United States*, 417 F.3d 1091 (9th Cir. 2005) (no direct right of action under NHPA); *but see, Boarhead Corp. v. Erickson*, 923 F.2d 1011 (3rd Cir. 1991); *Vieux Carré Prop. Owners, Residents & Assoc., Inc. v. Brown*, 875 F.2d 453 (5th Cir. 1989) (finding implied right to sue under NHPA § 305, authorizing attorney fees and costs to prevailing party); *Quechan Indian Tribe v. BLM*, Civil Action No. 10-CV-2241 LAB CAB (S. D. Cal. 2010) (injunction granted to Quechan Tribe over construction of proposed solar power plant on BLM lands in California for alleged NHPA consultation inadequacies).

[74] 36 C.F.R. § 800.16(f); *Pueblo of Sandia*, 50 F.3d at 859.

is a serious difference among consultation participants on how they view the process and outcome of Section 106 consultation. In listening sessions in the 1990's, the ACHP found,

> the word 'consultation' is interpreted differently by Indians and non-Indians. In general, American Indian participants believe that the word implies a 'give-and-take' dialogue ... more closely aligned with the process of negotiation ... and working towards a consensus. ... For non-Indians: if the tribes have been contacted, attended the meetings, and had the opportunity to discuss their views with the agency, then the tribes had been consulted regardless of the outcome.[75]

These differing expectations can create confusion and dissatisfaction with the NHPA Section 106 process among the consulting parties.

Finally, the number of parties involved in the consultation process adds to the complexity. NHPA 106 consultation involves several key parties: the federal action agency; project proponent; THPO/or Tribal representatives;[76] Keeper of the National Register (an officer of the U.S. Park Service that is the ultimate authority on "eligibility" questions); and the ACHP.[77]

Practice Tip:
• Understand and communicate consultation objectives. • Work towards shared expectations.

C. Section 106: Four Step Process

There are four steps to the Section 106 process: 1) identification of consulting parties and public participation; 2) identification of historic resources that may be impacted by the proposal; 3) assessment of the project's effects; and 4) development of ways to avoid, minimize or mitigate adverse effects on historic properties.

1. Step One – identification of consulting and interested parties

---

[75] 64 *Fed. Reg.* 27044, 27049 (May 18, 1999); *see also* FRYE, *supra* note 1, at 15B-2; U.S. Department of the Interior, The Secretary of the Interior's Standards and Guidelines of Federal Agencies Historic Preservation Programs, 63 *Fed. Reg.*, 20498, 20504 (April 24, 1998)("Try to identify solutions that will leave all parties satisfied...."); *see also* NATHPO, *Tribal Consultation, Best Practices in Historic Preservation,* (May 2005), *available at: http://www.nathpo.org.*

[76] The 1992 amendments to NHPA and the implementing rules provide for an enhanced role on and off-reservation for tribal representatives. 16 U.S.C. 4§ 70a(d)(6)(B); *see also, e.g.,* 16 U.S.C § 470a(d)(6)(B) ("a Federal agency shall consult with any Indian tribe . . . that attaches religious and cultural significance to traditional and cultural properties"). If a tribe does not have a THPO, the action agency must consult with the SHPO and a tribal representative. 36 C.F.R. § 800.2(c)(2)(i)(B).

[77] 16 U.S.C. §§ 470i, 470f (the ACHP "shall be" afforded "a reasonable opportunity to comment with regard to such undertaking"); *see also* Criteria for Council Involvement in Reviewing Individual Section 106 Cases, 36 C.F.R. Part 800, app. A (includes situations which present issues of concern to Indian tribes).

The federal agency, after determining that an "undertaking" is present, must identify the parties entitled to consult and invite them to join the consultation process.[78] In addition, the agency must consider the views of the public and may use the NEPA process to comply with this public participation requirement.[79] On Indian land, an agency will consult with either the THPO or a tribal representative. On off-reservation land, the agency is required to make a reasonable and good faith effort to identify and consult with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected.[80] This consultation process should invite the THPO tribal representative to identify concerns, advise on identification and evaluation of properties, provide views on effects of the undertaking on the historic properties and participate in the resolution of adverse effects. The NHPA consultation process must reflect the government-to-government relationship.[81] Documenting the communication between the agency and tribal parties is critical.[82]

Without a THPO, an initial hurdle is how and who to contact to properly involve tribes in the identification and consultation process: the tribal council; a local subdivision or chapter of a tribe; the tribal elders; a traditional cultural leader; the cultural resource agency of the tribe; or the tribe's legal counsel.[83]

Practice Tip:

- Persistence and recognition of each tribe's mode of communication, organization and sovereignty is necessary in NHPA consultation.
- Work with THPO/SHPO early.

2. Step Two – identification of historic properties

Identification of historic properties is accomplished by establishing an "area of potential effects" ("APE") and conducting a "reasonable and good faith effort" to survey and review

[78] 36 C.F.R. § 800.2(a)(4), 800.3(f).

[79] 36 C.F.R. §800.2(d)(1), (d)(3).

[80] 36 C.F.R. §800.2(c)(2)(ii)(A); 36 C.F.R. § 800.4(a)(1)(iii) ("seek information . . . from local government, Indian tribes, public and private organizations, and other parties likely to have knowledge of or concerns with historic properties in the area"); *see also* NPS BULLETIN, *supra* note 71, at 6-8; *Hualapai and Fort Mojave Indian Tribes*, 180 IBLA 158 (December 7, 2010) (discussion of an extensive, decade long consultation found adequate by IBLA).

[81] 36 C.F.R. §800.2(c)(2)(ii)(B),(C).

[82] *See e.g. Snowbowl*, 479 F.3d 1024, 1060 (9th Cir. 2007), *aff'd*, 553 F.3d 1058; *Te-Moak*, 608 F.3d at 609; *but see, Southern Utah Wilderness Alliance*, 177 IBLA 89, 95 (April 9, 2009) (a single written request to inquire if consultation would be needed was adequate).

[83] NPS BULLETIN, *supra* note 71, at 6 ("It should be recognized that expertise in traditional cultural values may not be found, or not found solely, among contemporary community leaders . . . ."); *see also Pueblo of Sandia* 50 F.3d at 861-2 (holding that Forest Service attempts to use mail and attendance at tribal meetings were not adequate or reasonable efforts to involve tribe in the NHPA identification process); *See generally* FRYE, *supra* note 1.

information on historic properties in the APE.[84] The APE is the "geographic area or areas within which an undertaking may cause changes in the character or use of historic properties."[85] This step includes consultation with Indian tribes, background research, and field investigations and surveys.[86] The properties identified are assessed to see if they meet the National Park Service criteria for listing in the National Register for Historic Places and THPOs or tribes are involved in eligibility determinations.[87] A dispute over eligibility may be elevated by anyone to the Keeper of the National Register for review.[88]

Without careful management, extensive surveys for historic properties can become a costly expense for an applicant and may not be required.[89]

Practice Tip:

- The scope of the survey requirement and the description of the APE should be carefully discussed and negotiated with the federal action agency.

The identification and eligibility of TCPs may be a sensitive issue to be addressed. Natural objects or landscapes "associated with the traditional beliefs of a Native American group about its origins, its cultural history, or the nature of the world," may be eligible for protection under NHPA.[90] A TCP must be an identifiable place[91] and oral tradition (some of which may be confidential) is typically important to identification of TCPs. The eligibility of a TCP rests on its *continued* importance to a tribe's cultural identity. Eligibility analysis involves inquiry into the following questions:1) does the property have an integral relationship to traditional cultural practices or beliefs; and 2) is the condition of the property such that relevant relationships

[84] 36 C.F.R. § 800.4(a), (b); 36 C.F.R. § 800.16(d); *Pueblo of Sandia*, 50 F.3d at 861-62 (failure of U.S. Forest Service to conduct a reasonable investigation and keep the SHPO informed); *Pit River Tribe v. United States Forest Serv.*, 469 F.3d 768, 787 (9th Cir. 2006) (failure to identify TCPs before issuance of geothermal leases), *on remand*, 2008 W.L. 538 1779 (E.D. Cal. 12-23-06); *Southern Utah Wilderness Alliance v. Norton*, 326 F. Supp.2d 102, 108-16 (D.D.C. 2004) (failure of BLM to engage in good faith effort to identify historic properties for proposed oil and gas seismic work), *see also Mack Energy Corp.*, 153 IBLA 277 (September 22, 2000) (APD permit triggered survey requirement).

[85] 36 C.F.R. §§ 800.2(c),800.16(d) (the APE is influenced by the scale of the undertaking and may be different for different kinds of effects of the undertaking).

[86] 36 C.F.R. § 800.4(b)(1); *see also Te-Moak*, 608 F.3d 592; *Muckleshoot Indian Tribe v. US Forest Serv.*, 177 F.3d 800, 805-07 (9th Cir. 1999) (describing "good-faith" consultation efforts); *Hualapai and Fort Mojave Indian Tribes*, 180 IBLA 158 (discussion of good faith efforts by BLM during inventory).

[87] 36 C.F.R. § 800.4(c)(1)-(2); 36 C.F.R. Part 63.

[88] 36 C.F.R. § 800.4(c)(4); 36 C.F.R. §§ 60.6(1), 60.12.

[89] *Wilson v. Block*, 708 F. 2d 735, 754 (D.C. Cir. 1983) *cert. denied*, 464 U.S. 956 (1983) (detailed survey of entire project is not required by law); *Te-Moak*, (description of survey requirements for amended mine plan),.

[90] NPS BULLETIN, *supra* note 71. For example, this has included places like Mt. Shasta in California, San Francisco Peaks in Arizona, Sweet Grass Hills in Montana, Quechan Indian Pass – Running Man Area in California, and Zuni Salt Lake, New Mexico. *See also*, ECHO-HAWK, *supra* note 1, at 332-33.

[91] *Hoonah Indian Association v. Morrison*, 170 F. 3d 1223, 1230 (9th Cir. 1999) (a historically significant trail could not be located despite reasonable efforts to do so and no NHPA violation was found).

survive?[92] Confidentiality concerns of a tribe over the location of TCPs can complicate an applicant's NHPA compliance. The history of looting, vandalism and disrespect for Indian cultural resources create an understandable sensitivity about disclosure of precise location information for TCPs that is recognized in NHPA.[93] Nonetheless, an applicant is required by NHPA to identify a boundary around historic resources in order for development to avoid historic properties. An inadequate boundary determination may increase the possibility of damage or after-discovered properties during construction and can result in a work-stoppage under other federal laws.[94] NHPA requires the federal action agency to make a "reasonable and good faith effort to identify historic properties." Courts have found that even in the face of a tribe's reluctance to identify sensitive properties, an agency will be faulted for failure to "reasonably pursue the information necessary to evaluate" a historic property's eligibility when "communications from the tribes indicated the existence of traditional cultural properties and . . . the Forest Service should have known that tribal customs might restrict ready disclosure of specific information . . . ."[95] If no historic properties are found, the 106 process ends after notification to the SHPO/THPO and "interested persons."[96] "Any person" may request ACHP review of an agency's finding that no historic properties have been found, and the ACHP has 30 days to respond.[97]

3. Step Three – assess effects

The third step requires the agency to consider the criteria of an "effect" and "adverse effect" to determine if there will be an adverse effect on any historic properties.[98] An "effect" may alter characteristics of the property that may qualify the property for inclusion in the National Register.[99] In consultation with the SHPO/THPO and any Indian tribe that attaches religious and cultural significance to identified historic properties, and considering the views of any consulting parties and the public, the agency applies the criteria of adverse effect.[100] An "adverse effect" is found when an "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."[101] These affects include physical destruction or

---

[92] NPS BULLETIN, *supra* note 71, at 10.

[93] "The head of a Federal agency [or SHPO] after consultation with the Secretary, shall 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 . . . (3) impede the use of a traditional religious site by practitioners . . .." 16 U.S.C. § 470w-3(a); *see also* Ethan Plout, Comment, *Tribal-Agency Confidentiality: A Catch-22 for Sacred Site Management*, 36 ECOLOGY L.Q. 137 (2009).

STERN [94] *See, e.g., infra* Section V.B (Historic and Archeological Protection Act and Reservoir Salvage Act, 16 U.S.C. § 469a-1.)

[95] *Pueblo of Sandia*, 50 F.3d at 860-62 (Pueblo argued that NHPA was violated when the Forest Service did not consider the entire canyon as a TCP when late-revealed information suggested TCPs in the canyon); *see also*, *supra* note 1, at I5A-12-14.

[96] 36 C.F.R. § 800.4(d).

[97] 36 C.F.R. § 800.5(d).

[98] 36 C.F.R. §§ 800.5(a), 800.9; BARRAS, *supra* note 58, at 3 (noting that between 2004-2008, SHPOs annually reviewed 114,000 actions, of which, 85% resulted in "no historic properties affected," 13% in "no adverse effects" determination, and 2% in a "memorandum of agreement" because projects caused adverse effects).

[99] 36 C.F.R. § 800.9(a).

[100] 36 C.F.R. § 800.5(a)

[101] 36 C.F.R. § 800.9(b).

damage to some or all of the property, change to the property, removal of the property or transfer of the property out of federal ownership.[102] If an agency finds "no effect," SHPO/THPO are notified and if no objection is received within 15 days, the agency may proceed.[103] If an agency determines there is "no adverse effect," it must notify and provide the documentation supporting this conclusion to the SHPO/THPO or consulting Indian tribe and seek their concurrence. If the consulting parties disagree over the effects determination, then the ACHP may review the finding and provide its opinion.[104]

4. Step Four – mitigation

In the fourth step, the action agency consults with the SHPO/THPO, other consulting parties, including Indian tribes, and the public to develop and evaluate alternatives to the undertaking that could avoid, minimize or mitigate the adverse effects.[105] The 1992 amendments to NHPA emphasized to federal agencies that they "shall" consult with any Indian tribe that attaches religious and cultural significance to TCPs.[106] An agency must also provide an opportunity for members of the public to weigh in on resolving adverse effects.[107] If the action agency, SHPO/THPO, and ACHP (if participating), agree on how to mitigate adverse effects, a *"memorandum of agreement"* ("MOA") may be executed by them and the MOA will evidence compliance with NHPA 106.[108] The agency may invite others to be signatories, including any Indian tribe that attaches religious and cultural significance to historic properties for which adverse effects are resolved in the MOA.[109] Once executed, the MOA will govern the implementation of the NHPA Section 106 process and the action agency must ensure that the terms of the MOA are met.[110] If there is no agreement on how to resolve effects, consultation is terminated and the agency requests ACHP comments,[111] but the action agency may proceed once it complies with the procedures.[112] However, to underscore the seriousness of such a decision, the statute requires the head of the agency, not a delegatee, to make the decision to proceed in the face of disagreement.[113]

D. Alternative procedures to NHPA Section 106

For an entire agency program or a large project with multiple undertakings, the rules provide an agency with the alternative to develop a "*programmatic agreement*" ("PA") rather

---

[102] 36 C.F.R. § 800.5(a)(1) and (2).
[103] 36 C.F.R. § 800.5(b).
[104] 36 C.F.R. § 800.5(c)(2).
[105] 36 C.F.R. § 800.6(a).
[106] 16 U.S.C. § 470a (d)(6)(B); 36 C.F.R. §800.6(c)(2)(i) and (ii).
[107] 36 C.F.R. § 800.6(a)(4).
[108] 36 C.F.R. § 800.6(b)(1) (an MOA is submitted to the ACHP to afford it the opportunity to comment).
[109] 36 C.F.R. § 800.6(c)(2)(i) and (ii).
[110] 36 C.F.R. § 800.6(c).
[111] 36 C.F.R. §§ 800.4(d), 800.5(c), 800.6(b)-(c), 800.7, 800.7(a).
[112] *Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1163-64 (9th Cir. 1998) (the action agency only needs to consider the views of interested parties); *Nat'l Mining Ass'n v. Fowler*, 324 F.3d 752, 755 (D.C. Cir. 2003) (NHPA is a procedural and not substantive statute); 36 C.F.R. § 800.7(c)(3), (4).
[113] 16 U.S.C. § 470h-2(1); *see, e.g., Quechan Indian Tribe of the Fort Yuma Indian Reservation v. Dep't of Interior*, 547 F. Supp.2d 1033, 1047 (D. Ariz. 2008) (agency must consider, not adopt, the ACHP's comments); *Hualapa and Fort Mojave Indian Tribes*, 180 IBLA at 165.

than an MOA.[114] A PA may make sense for a mine, a transmission line, concentrated solar power plant project or any large-scale project where it may be difficult to determine effects prior to approval of an undertaking.[115] The use of a PA allows for phasing of NHPA Section 106 compliance and permits final identification, assessment and mitigation to occur *after* the agency has approved the project.[116] A PA may only apply to Indian lands if the tribe and/or the THPO is a signatory.[117] Off-reservation, if the PA affects TCPs, the regulations require consultation with the tribe.[118] Like the MOA, the PA is held to be a binding, enforceable contract governing the implementation of the project and turns the procedural requirements of NHPA into substantive duties.[119] Either an MOA or PA can be used to address the handling of post-review discoveries.[120] In addition to the use of these agreements, the ACHP, pursuant to the 1999-2000 amendments to NHPA Section 106, added these options as alternatives to the NHPA step-by-step process: (a) program comments; (b) exempted categories of projects; (c) alternate procedures; and (d) standard treatments. Not all of these options have been used and it is unknown how effective they may become at reducing NHPA delay and compliance costs. [121]

E. Integrating NHPA and NEPA Process

Compliance with NHPA does not meet the NEPA cultural resource review requirements, nor does NEPA compliance meet NHPA Section 106 requirements–the separate requirements of each law must be met.[122] Nonetheless, NHPA regulations and NEPA encourage coordination, particularly in the areas of public participation, documentation and review[123] and the consideration of NEPA's "major federal action" and NHPA's "federal undertaking" triggers.[124]

---

[114] 36 C.F.R. § 800.14; BARRAS, *supra* note 58, at 49 (noting that 19 national-level PAs have been executed between ACHP and federal agencies); John F. Clark & Melissa C. Meirink, *Programmatic Agreements for Federal Historic Preservation Review and Consultation—Can They Help Avoid Regulatory Gridlock in the Mineral and Energy Boom?,* 54 ROCKY MT. MIN. L. INST. 7-1, 7-17 (2008); *see also* 2010 revisions to BLM's PA to include an addendum to the PA to better address consultation with the tribes, *available* at : *http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2010/im_2010-037__tribal.html.*

[115] 36 C.F.R. §§ 800.4(b)(2),800.14(b).

[116] 36 C.F.R. § 800.4(b)(2),(b)(1)(ii); *National Indian Youth Council v. Watt,* 664 F.2d 220, 226-27 (10th Cir. 1981) (approval of coal lease prior to completion of surveys allowed because identifications were made pursuant to MOA and *before* ground-disturbing activities); *Save Medicine Lake Coalition,* 156 IBLA 219 (Feb. 7, 2002) (completion of § 106 can be done after issuance of the Record of Decision).

[117] 36 C.F.R. § 800.14(b)(2)(iii).

[118] 36 C.F.R. § 800.14(f).

[119] 16 U.S.C. § 470h-2(1); 36 C.F.R. § 800.6(c)(1); *see also McMillan Park Comm. v. National Capitol Planning Comm.*, 759 F. Supp. 908, 911 (D.D.C. 1991), *rev'd on other grounds*, 968 F.2d 1283 (D.C. Cir. 1992); *Tyler v. Cisneros,* 136 F.3d 603 (9th Cir. 1998).

[120] 36 C.F.R. § 800.13

[121] *See, e.g.,* BARRAS, *supra* note 58, at 50 ("Exempting certain types of cold War-era family housing on military bases from Section 106 altogether through a "program comment" alternative was estimated to have saved the Army $3.5 million in avoided Section 106 reviews.").

[122] *Pres. Coal, Inc. v. Pierce,* 667 F.2d 851, 859 (9th Cir. 1982).

[123] 36 C.F.R. §§ 800.2(d)(3), 800.8(c).

[124] 36 C.F.R. §§ 800.8(a), 800.3(b); *see also Morris County Trust for Historic Preservation v. Pierce,* 714 F. 2d 271, 282 (3d Cir. 1983) (The regulations "envision that both statutes may be applied simultaneously . . . .").

The NHPA regulations allow federal agencies to use the NEPA process instead of the Section 106 rules if the following requirements are met:[125]

- Notify the SHPO/THPO and the ACHP "in advance" that the agency intends to use the NEPA process for Section 106 purposes.[126]
- Identify consulting parties during NEPA document preparation consistent with Section 106.[127]
- Identify historic resources and assess the effects on them consistent with Section 106 (follow the more precise requirements of NHPA for identification of historic resources).[128]
- Consult with SHPO/THPO, any Indian tribe that attaches religious or cultural significance to historic properties, other identified consulting parties and ACHP on the effects of the undertaking during NEPA scoping, environmental analysis, and the preparation of NEPA documents.[129]
- Involve the public in accordance with the agency's NEPA public participation procedures.[130]
- Develop alternatives and proposed measures with the consulting parties that avoid, minimize or mitigate any adverse effects on historic properties and include the measures in the EA or DEIS.[131] These measures also may be included in the final agency decision document as binding commitments or the agency may respond to the ACHP comments on the undertaking concerning mitigation.[132]

In addition, the agency must provide the consulting parties with a copy of the EA or DEIS on or before the date the NEPA documents are provided to the public for comment.[133] If any consulting party objects that the process did not comply with NHPA or disputes the resolution of adverse effects, the ACHP will have 30 days upon receipt of the objection to advise the action agency.[134] The agency may then approve the undertaking with or without mitigation (if the ACHP comments). This coordinated process, if carefully done in recognition of the somewhat different requirements of NEPA and NHPA, may save an applicant time, although in practice the time savings have not been routinely demonstrated.[135]

---

[125] *See e.g.*, 65 *Fed. Reg.* 77,698, 77,709 (Dec. 12, 2000) (codified at 36 C.F.R. § 800.8) ("The NEPA coordination provisions of this rule [800.8] only apply when the Federal agency independently chooses NEPA documents/process to substitute for the regulation section 106 process that they would have had to follow otherwise.")..

[126] 36 C.F.R. § 800.8(c).

[127] 36 C.F.R. § 808(c)(1)(i).

[128] 36 C.F.R. § 800.8(c)(1)(ii).

[129] 36 C.F.R. § 800.8(c)(1)(iii). The finding of an adverse effect on a historic property does not necessarily equate to NEPA "significance" and the requirement that an EIS must be presented.

[130] 36 C.F.R. § 800.8(c)(1)(iv).

[131] 36 C.F.R. § 800.8(c)(1)(v).

[132] 36 C.F.R. § 800.8(c)(4); *see also* 65 *Fed. Reg.* 77,709 ("Nothing in the rule requires adoption of mitigation measures since the option of formal Council comments instead is still available.")

[133] 36 C.F.R. § 800.8(c)(2)(i).

[134] 36 C.F.R. § 800.8(c)(3).

[135] *See* BARRAS, *supra* note 58, at 20 ("This [integration of NEPA and NHPA] has not been substantially realized, however. Only 28 NEPA substitution notices in total have been submitted to the Council from FY 1999 through FY 2007 . . . .").

V. Substantive Cultural Resource Protection Laws on Indian Lands

A. The Antiquities Act and Archeological Resources Protection Act

Although the Antiquities Act[136] has, of late, become better recognized as a presidential tool to preserve monuments,[137] the Act was passed in 1906, at the urging of President Theodore Roosevelt, to protect Indian ruins and artifacts from looters and developers. ARPA applies to federal and Indian lands in order to protect archeological resources which are declared to be an "irreplaceable part of the National heritage."[138] The Antiquities Act prohibits injury, destruction, appropriation or excavation of an historic or prehistoric "ruin," "monument," or "any object of antiquity" on federal or Indian lands without federal permission[139] and provides for civil and criminal penalties. After a court decision[140] raised issues of enforceability, the ARPA was enacted in 1979 to strengthen the protections of the Antiquities Act.[141] Sadly, ARPA has not brought an end to looting. For example, in 2009, antiquity looting in Blanding, Utah resulted in an indictment of 23 individuals (and the eventual suicide of one) for violations of ARPA and NAGPRA.[142]

The ARPA definition of "Indian lands" includes lands "of Indian tribes, or Indian individuals, which are either held in trust by the United States or subject to a restriction in alienation imposed by the United States."[143] ARPA prohibits excavation, damage, or attempts to excavate or damage archeological resources unless a federal permit is obtained.[144] To be covered by ARPA, an archeological resource must be at least 100 years old.[145] ARPA establishes a

---

[136] 16 U.S.C. §§ 431-433. For the history of the Antiquities Act, *see* Richard West Sellers, *A Very Large Array; Early Federal Historic Preservation, the Antiquities Act, Mesa Verde, and the National Park Service Act*, 47 NAT. RESOURCES J. 267 (2007).

[137] In 1916, President Roosevelt designated Mato Tipila (Bear Lodge) Devils Tower, Wyoming, a sacred site to 20 Plains Indian tribes as the first national monument under the Antiquities Act. *See* West, *supra* note 137, at 294.

[138] 16 U.S.C. § 470aa(a)(1).

[139] 16 U.S.C. § 433.

[140] In *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974) (the court found the Act void for vagueness in a case involving the appropriation of a *modern* Apache face mask placed in a cave on the reservation as part of a religious ceremony).

[141] 16 U.S.C. §§ 470aa-470ll. ARPA directed the Secretaries of Interior, Agriculture, Defense and TVA to issue uniform implementation regulations. Interior's rules are found at 43 C.F.R. Part 7. Interior has also issued supplemental regulations at 43 C.F.R. §§ 7.31-7.37 and BIA supplemental regulations are codified at 25 C.F.R. Part 262. *See generally,* Constance L. Rogers, *Digging In: An In-Depth Look at the Archaeological and Paleontological Resources Protection Acts (The Legal Perspective)*, Paper No. 14A, ROCKY MT. MIN. LAW FDN. (2010).

[142] Press Release, Department of Interior, *Federal Agents Bust Ring of Antiquity Thieves Looting American Indian Sites for Priceless Treasures* (June 10, 2009), *available at:http://www.doi.gov/archive/photos/salazar/06102009/index.html*

[143] 16 U.S.C. § 470bb(4); *see also Black Hills Inst. of Geological Research v. United States Dep't of Justice*, 812 F.Supp. 1015 (D.S.D. 1993) (holding that lack of Secretarial approval voided sale of dinosaur fossil found and sold by Indian allotee), *aff'd in relevant part*, 12 F.3d 737 (8th Cir. 1993), *cert. denied*, 513 U.S. 810 (1994).

[144] 16 U.SC § 470ee(a); *see also United States v. Shumway*, 112 F.3d 1413 (10th Cir. 1997) (conviction for excavating ancient Pueblo ruins).

[145] 16 U.S.C. § 470bb(1); *Bonnichsen v. United States*, 367 F.3d 865 (9th Cir. 2004) (the 9,000 year old remains of "Kennewick Man" were an archaeological resource under ARPA).

permitting procedure for the intentional excavation and removal of archeological resources[146] on federal and Indian land. An object is wrongfully obtained when it is excavated or removed in violation of the Act, or any other provision of federal, state or local law; the Act also prohibits trafficking in archeological resources removed without an ARPA permit.[147] Penalties for an ARPA violation include fines of up to $20,000, imprisonment for two years, and forfeiture.[148]

A permit is obtained from, and under the regulations of, the agency with jurisdiction over the lands.[149] On tribal lands, the BIA is the ARPA permitting authority; however, under certain conditions, ARPA exempts a tribal member or tribe from the requirement to obtain an ARPA permit.[150] A tribal member is exempt from the permit requirement if the tribe with jurisdiction has enacted a "tribal law regulating the excavation or removal of archeological resources" on Indian lands.[151] Excavation on Indian lands requires consent from the Indian landowners and the tribal authority.[152] An ARPA permit is required to conduct NHPA-required survey work on federal or Indian lands, but in sensitive areas survey work may be viewed as unacceptable by the tribe and can create a compliance issue for an applicant.[153]

ARPA also requires federal agencies to take AIRFA into consideration before issuing an ARPA permit. ARPA requires notification to any Indian tribe that may hold a site sacred if an ARPA permitted activity "may result in harm to, or destruction of, any religious or cultural site."[154] If the issuance of an ARPA permit may result in harm to any Indian religious or cultural site on public lands, at least 30 days before permit issuance, the land manager must first notify any tribe that may consider the site as having religious or cultural significance and, then upon request, may meet with the tribe to discuss their concerns including avoidance and mitigation measures.[155] ARPA provides that information that could reveal the nature and location of archeological resources "may not be made available to the public" unless disclosure would not

---

[146] 16 USC 470bb(1) ("any material remains of past human life or activities which are of archeological interest . . . "); 36 C.F.R. § 296.3(a) ("basketry, bottles, weapons, weapon projections, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items."). The term "of archeological interest" is defined 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." 43 C.F.R. § 7.3(a)(1).

[147] 16 U.S.C. § 470ee(b), (c); *see also United States v. Tidwell*, 191 F.3d 976, 981-82 (9th Cir. 1999) (trafficking conviction).

[148] 16 U.S.C. §§ 470ee(d), 470gg(b).

[149] 16 U.S.C. § 470cc; *see, e.g.*, 43 C.F.R. Part 7 (uniform regulations for the Department of the Interior); 43 C.F.R. § 7.35 (regulations for Indian lands).

[150] 43 C.F.R. § 10.3(b)(1); 16 U.S.C. § 470cc(g)(1).

[151] 16 U.S.C. § 470cc(g)(1); 25 C.F.R. § 262.4(a) (BIA regulations require a permit for a tribe on lands of another Indian tribe).

[152] 16 U.S.C. § 470cc(g)(2); 43 C.F.R . § 7.8(a)(5); 49 *Fed. Reg.* 1016, 1023 (January 6, 1984) (preamble).

[153] *See Northern Lights, Inc.*, 27 F.E.R.C. (CCH) P63,024, 650,80-85 (1984) (hydroelectric power project applied for ARPA permit on U.S. Forest Service lands, upon notification, the Confederated Salish and Kootenai Tribe objected; permit was denied, but tribe was later successful in litigation concerning the agency's failure to comply with NHPA).

[154] 16 U.S.C. § 470cc(c).

[155] 43 C.F.R. § 7.7(a).

expose the resources to harm.[156] In making this determination, the agency performs a balancing test.[157]

B. The Reservoir Salvage Act and Historical and Archeological Data Preservation Act

The Reservoir Salvage Act[158] and Historical and Archeological Data Preservation Act ("HADPA") together endeavor to preserve historical and archeological data that might be lost as a result of "any Federal construction project or federally licensed activity or program."[159] Thus, HADPA applies to any federally licensed activity, whether on federal, tribal or private lands. A federal agency must notify the Secretary if a federally licensed project may cause loss of historical or archeological properties.[160] HADPA, unlike ARPA, is focused on the collection and presentation of *data* and not the historical or archeological properties. In one case, HADPA has been held to apply only after licensing and the commencement of construction.[161] Notice must be provided to the Secretary if "significant" historic data may be lost or destroyed as the result of covered activity.[162] If the Secretary agrees that the properties are "significant," surveys and data recovery work must be initiated within 60 days of notice to the Secretary.[163] Construction must halt during this period for the collection of data. Normally, such surveys are done at the expense of the developer.[164] However, on non-federal lands, the Secretary is required to "compensate any person . . . damaged as a result of delays in construction or as a result of the temporary loss of the use of private or nonfederally owned land or reach a written agreement providing otherwise."[165]

Practice Tip:
• Cover HADPA data collection in NHPA (PA or MOA).

[156] 16 U.S.C. § 470hh(a); *see Southern Utah Wilderness Alliance v. U.S. Bureau of Land Management*, 402 F. Supp. 2d 82 (D.D.C. 2005) (remanding denial of documents where BLM did not see if parts of the forms requested could be released under ARPA).

[157] *Id.*

[158] 16 U.S.C. § 469-469c (HADPA amended the Reservoir Salvage Act in 1974).

[159] 16 U.S.C. § 469.

[160] 16 U.S.C. § 469a-1.

[161] *National Indian Youth Council v. Andrus*, 501 F.Supp. 649, 680 (D.N.M. 1980), *aff'd on other grounds*, 664 F.2d 220 (10th Cir. 1981).

[162] 16 U.S.C. § 469a-1.

[163] 16 U.S.C. § 469a-2(c).

[164] 16 U.S.C. § 469c-2; *but see* 43 C.F.R. § 3809.2-2(e)(3) ("The Federal Government shall have the responsibility and bear the cost of investigations and salvage of cultural and paleontology values discovered after a [mine] plan of operations has been approved. . . .").

[165] 16 U.S.C. § 469a-2(d).

C. Native American Graves Protection and Repatriation Act

NAGPRA[166] grew out of a long overdue recognition that Indian human remains and grave contents had received unique treatment as objects of scientific interest—treatment that was unacceptable in any other circumstance. Congress enacted NAGPRA to ensure that "human remains must at all times be treated with dignity and respect."[167] NAGPRA was enacted as the result of years of legislative efforts by Indians in state legislatures and Congress to ensure respect for Native American human remains and related funerary objects.[168] NAGPRA provides living descendants and culturally related tribes certain rights to ownership and disposition of burial remains and cultural items discovered on federal or Indian lands.

The statute has three components: 1) repatriation of covered items from museums and the federal government; 2) protection of burial sites and related cultural items on federal and tribal lands; and 3) prevention of trafficking in Native American human remains and cultural items. This discussion will focus on the second component. NAGPRA's definition of "*tribal lands*" includes "all lands within the exterior boundaries of any Indian reservation [and] all dependent Indian communities."[169] The term "*Native American*" is defined as, "of, or relating to, a tribe, people, or culture that is indigenous to the United States" and "Indian Tribes" in NAGPRA is a broader group than that covered by NHPA.[170] NAGPRA is focused on human remains and "*cultural items*," a term defined by the statute to include four types of items: "*associated funerary objects*" (objects retain association with human remains), "*unassociated funerary objects*" (objects no longer associated with human remains), "*sacred objects*" (ceremonial objects needed for current practice of traditional religion) and "*objects of cultural patrimony*" (objects have ongoing historical, traditional or cultural importance central to Native American culture).[171]

NAGPRA provides that the ownership and control of any Indian cultural objects discoved on federal or tribal lands is to the Indian tribes that are "culturally affiliated" or have the closest relationship to the objects. NAGPRA covers both inadvertent and intentional discoveries of covered cultural items.[172] "*Cultural affiliation*" means identity which can be "reasonably traced" historically or prehistorically between a present day Indian tribe and an identifiable earlier

---

[166] 25 U.S.C. §§ 3001-3013; *see also* LYNN H. SLADE & WALTER E. STERN, EFFECTS OF HISTORICAL AND CULTURAL RESOURCES AND INDIAN RELIGIOUS FREEDOM ON PUBLIC LANDS DEVELOPMENT: A PRACTICAL PRIMER, Public Land Law 8-1, 8-37- 8-52 (1992); STERN, *supra* note 1 at 15A-17--15A-26; *see also generally* NPS NAGPRA website, *available at: www.nps.gov/history/nagpra/.*

[167] S. Rep. No. 101-473, at 9 (1990);. ECHO-HAWK, *supra* note 1, at 258 (150,887 remains were held in federally funded institutions and 32,054 were repatriated by 2008). The issue today is what to do with the 118,833 remains that have not been identified. *See* Robert L. Kelley *Bones of Contention,* N.Y. TIMES (December 16, 2010); 25 U.S.C. § 3002.

[168] ECHO-HAWK, *supra* note 1, at 255-257; *see also* General Accountability Office Report, *Native American Graves Protection and Repatriation Act: After Almost 20 Years, Key Federal Agencies Still Have Not Fully Complied with the Act,* GAO-10-768 (July 2010).

[169] 25 U.S.C. § 3001(15)(A),(B).

[170] 25 U.S.C. § 3001(9); *Abenaki Nation v. Hughes,* 805 F.Supp. 234,249 (D. Vt. 1992); *compare* 25 U.S.C. § 3001(7); 36 C.F.R. § 800.2(g). Native Hawaiians and Alaska natives are covered.

[171] 25 U.S.C. § 3001(3)(A)- (D); 43 C.F.R. § 10.2(d)(2).

[172] *See generally San Carlos Apache Tribe v. United States,* 144 Fed. Appx. 635 (9th Cir. 2005) (NAGPRA did not apply because there was no discovery of NAGPRA-protected items.)

group."[173] The right of custody to any human remains or cultural items is outlined in the statute. For human remains and associated funerary objects (and for other cultural objects), the right of custody belongs to the lineal descendents, and, if the lineal descendents are not known, to the tribe on whose lands the objects were found, even if the cultural items belong to another tribe.[174] NAGPRA has a mechanism to address disputes between tribes over ownership or disposition.[175]

If covered objects are discovered on Indian or federal lands, NAGPRA requires that all activities that led to the discovery cease and that a "reasonable effort" be made to protect the discovered items.[176] For a discovery on federal land, the federal land manager must take steps to protect the items, provide notice to tribes "likely to be culturally affiliated" with the discovered items and then conduct a consultation process to develop a plan of action on eventual custody of the items.[177] The activities that led to the discovery may resume 30 days after certification that notice has been received.[178] Proof of consultation (or consent in case of a tribe) must be provided and disposition of the discovered objects must satisfy the NAGPRA requirements.[179] If resumption of the activity would require excavation, it is treated as an intentional excavation and an ARPA permit is required.[180] A discovery on Indian land requires immediate telephone notice followed by written notice to the affected tribe.[181] No consultation process is necessary, but consent from the tribe is required.[182] If human remains or NAGPRA covered items are discovered on Indian land, it can result in redesign, relocation or even cancellation of the project. Failure to comply with NAGPRA can result in both civil and criminal penalties.[183]

Practice Tips:

- Evaluate NAGPRA protected objects in NEPA/NHPA.
- Hire respected, experienced archeologists to conduct surveys prior to construction.
- Early in project planning, consult with tribes that might have NAGPRA items in the area, to plan, avoid and reach agreements on how to handle discoveries.

[173] 25 U.S.C. §3002(a); *see also* S. REP. NO. 101-473, at 9 ("geographical, kinship, biological, archeological, anthropological, linguistic, oral tradition, or historical evidence or other relevant information or existing opinion").

[174] 25 U.S.C. § 3002(a)(1),(2).

[175] 25 U.S.C. §§ 3006, 3013.

[176] 25 U.S.C. § 3002(d)(1).

[177] 43 C.F.R. §§ 10.4(d), 10.5.

[178] 25 U.S.C. § 3002(d)(1); 43 C.F.R. § 10.4(d)(2), (e)(2).

[179] 25 U.S.C. § 3002(c)(3),(4).

[180] 25 U.S.C. § 3002(c); 43 C.F.R. § 10.4(d)(v), (e)(iii).

[181] 25 U.S.C. § 3002(d); 43 C.F.R. § 10.4. Federal permits are required to include a requirement for notification. *See* 43 C.F.R. § 10.4(g).

[182] 25 U.S.C. § 3002(c)(2).

[183] 25 U.S.C. § 3013.

VI. "Sacred Sites" and Religious Freedom Protections

A. American Indian Religious Freedom Act of 1978 – *Lyng, Snowbowl* and Sacred Sites

An important consideration in proposing development on tribal or federal lands is the presence of sacred sites. Sacred sites encompass those special areas important to traditional Indian religions and burial areas. These sites may include springs, areas where culturally important plants are grown, significant landscapes such as mountains, tree groves and caves that are the location of mythic events important to a tribe's sense of identity and connection to their ancestors.[184] Like all religions, Indian traditional religions share a belief in the supernatural, that is, religion as a means to make sense of the universe, religion as a moral guide and as a means to hold together a community through ritual.[185] In general, Indian religions depend on specific "holy places" or sacred sites for the practice of their religion.[186] From the perspective of Indian religions, alteration of a sacred landscape can bring adverse consequences to not only the tribe, but the entire world. The history of respect for, and consideration of, Indian religious beliefs has been fraught since the earliest days of contact and the history of consideration of sacred sites is no different.

A full discussion of First Amendment jurisprudence is beyond the scope of this paper, but some background in these constitutional principles is necessary to appreciate the significance of several rulings on Indian religious freedom and the protection of sacred sites. The First Amendment addresses the balance between the government and religion, providing: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[187] The *establishment* clause prevents the government from sanctioning or promoting a particular religion or promoting one religion over another. *Free exercise* doctrine makes a distinction between freedom of belief–which is absolute–and freedom of religious action or practice, which may be restricted in the interest of the government.[188] The First Amendment protects the individual from governmental actions that substantially burden religious practice unless justified by a compelling governmental interest, achieved by means narrowly tailored to meet that interest.[189] As discussed below, the First Amendment has protected the right of Indians

---

[184] UNITED STATES FEDERAL AGENCIES TASK FORCE, AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT: P.L. 95-341 52 (1979); *but see Snowbowl*, 535 F.3d at 1097-98 (Fletcher, J. dissenting) ((discussing Indian testimony concerning the distinction between sacred sites, which are due honor and respect, and "Holy places" that carry greater religious significance: "[t]he term ["sacred"] does not capture the various degrees in which the Indians hold land to be sacred...." The dissent quotes Dianna Uqualla, sub chief of the Havasupai, who explained "[t]he whole reservation is sacred to us, but the mountains are more sacred. . . . The San Francisco Peaks would be like our tabernacle, our altar to the west").

[185] *See generally*, Rebecca W. Watson, *Sacred Sites, Cultural Resources and Land Management in the West*, ROCKY MTN. MIN. L. INST., Vol. 1997, No. 6, Paper 10 (1997) (quoting NANCY BONVILLAIN, NATIVE AMERICAN RELIGION (1996)); *see also* ECHO-HAWK, *supra* note 1 at 281-295 (discussion of Indian religion), 329-333 (discussion of "holy places").

[186] VINE DELORIA, JR., GOD IS RED: A NATIVE VIEW OF RELIGION (Fulcrum Rev. 1994).

[187] U.S. CONST. amend I.

[188] *Reynolds v. United States*, 98 U.S. 145 (1879).

[189] This balancing test of "substantial burden" on religious practice versus "compelling governmental interest" is generally referenced as the *Sherbert* balancing test from *Sherbert v. Verner*, 374 U. S. 398, 403-04 (1963) (a Seventh Day Adventist refused to work on her Sabbath, was fired and did not receive unemployment compensation, the Court held this unconstitutionally forced her "to choose between following the precepts of her

to access to sacred sites for religious practices, but has not protected the sites from alteration or destruction.

B. American Indian Religious Freedom Act of 1978 – *Lyng* and Sacred Sites

AIRFA declares it to be the national policy to protect and preserve religious freedom for American Indians and recognizes this includes access to sacred places.[190] The preamble to the Act recognized that the "lack of a clear, comprehensive and consistent Federal policy has often resulted in the abridgement of religious freedom for traditional American Indians."[191] AIRFA, however, has no process to require federal agencies to conform their actions to the demands of the statute–it has "no teeth."[192] This has been amply illustrated in a series of unfavorable rulings culminating in *Lyng v. Northwest Indian Cemetery Protective Association.*[193] In *Lyng*, the U.S. Supreme Court weighed AIRFA and the Free Exercise and Establishment Clauses of the First Amendment in the context of a challenge brought by the Yurok, Karok and Tolowa peoples to the construction of a logging road to the "high country" (center of the spiritual world) in the Siskiyou Mountains. The area was an "integral and indispensible part" of the tribes' religious practices, and a Forest Service study concluded the construction "would cause serious and irreparable damage to the sacred areas."[194] The Court agreed that the proposed federal action

---

religion and forfeiting benefits . . ."); *see also Wisconsin v. Yoder*, 406 U. S. 205, 207,220 (1972) (Amish parents were criminally convicted under Wisconsin law for failing to send their child to school until age 16; the Court found the Wisconsin law "unduly burden[ed]" the exercise of their religion in violation of the Free Exercise Clause); *but see Bowen v. Roy*, 476 U.S. 693, 696, 699-70 (1986) (Indian parents brought a challenge to the requirement to obtain a Social Security Number for their child's receipt of welfare benefits out of a concern it would "prevent her from attaining greater spiritual power"; in rejecting the challenge, the Court held, "The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens . . . [t]he Free Exercise clause is written in terms of what the government cannot not do to the individual, not in terms of what the individual can extract from the government.").

[190] 42 U.S.C. § 1996 (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 . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."); *see also* Exec. Order No. 13007, Indian Sacred Sites, 61 Fed. Reg. 26771 (May 24, 1996).

[191] S. REP. NO. 95-709, at 2 (1978).

[192] *See Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (noting floor statement by congressional sponsor, Senator Udall). This case and its negative consequences is cited and extensively discussed in ECHO-HAWK, *supra* note 1, at 325-356.

[193] *See, e.g., Sequoyah v. TVA*, 620 F. 2d 1159 (6th Cir. 1980) (challenge to flooding of Little Tennessee Valley for Tellico dam failed due to factual conflict on the "centrality" of the land to the Cherokee religion), *cert, denied*, 449 U.S. 953 (1980); *Bandini v. Higginson*, 638 F. 2d 172 (10th Cir. 1980) (challenge to Bureau of Reclamation management of Lake Powell to reduce access to tourists negatively impacting Navajo sacred site failed due to the "compelling interest" in the government in dam operation), *cert. denied*, 452 U.S. 954 (1981); (*Wilson v. Block*, 708 F. 2d 735 (D.C. Cir. 1983) (Navajo and Hopi challenge to expansion of ski area on San Francisco Peaks, an area sacred to both tribe's religions, denied despite the "spiritual disquiet" that would result because the court found there were alternative places to perform the religious practices. AIRFA requires agencies to "consider, but not necessarily to defer to, Indian religious values, at 747), *cert denied*, 464 U.S. 956 (1983); *Fools Crow v. Gullet*, 706 F.2d 856 (8th Cir.) (Lakota and Tsistsistas tribes challenge to impacts from tourists on their worship were denied in the interest of the government in protecting the welfare of the tourists), *cert. denied*, 464 U.S. 977 (1983).

[194] *Lyng*, 485 U.S. at 442; *see also id.* at 477 (Brennan, J. dissenting) (finding it difficult "to imagine conduct more insensitive to religious needs than the Government's determination to build a marginally useful road in the face of uncontradicted evidence that the road will render the practice of the respondents' religion impossible").

would "virtually destroy the Indian's ability to practice their religion."[195] Nonetheless, the Court determined that the proposed government action did not impose a substantial heavy enough burden on religious practice to violate the Free Exercise Clause,[196] and thus, declined to reach the compelling governmental interest prong of the *Sherbert* balancing test.[197] The Court definitively ruled that AIRFA created no substantive protection for sacred sites or religious practices, stating "[n]owhere in the law is there so much as a hint of any intent to create a cause of action or any judicially enforceable rights."[198] That said, NEPA, NHPA and ARPA each require a level of AIRFA consideration of religious and cultural values.[199]

C. Religious Freedom Restoration Act – *Smith* and *Snowbowl*

On the heels of the *Lyng* decision, in 1990, in *Employment Division Department of Human Resources of Oregon v. Smith,* the Court decided a significant Indian Free Exercise case that relied on the *Lyng* rational to prohibit certain religious practices that were otherwise unlawful under criminal drug laws.[200] The Court again declined to find a "substantial burden" on religious practice and did not use the compelling governmental interest balancing test in the context of the application of a criminal law that is otherwise "neutral" to religion. The Court found that Indian religious practitioners who used peyote in their rituals were not entitled by the First Amendment to violate a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[201] The negative reaction to *Smith* by the larger religious community was swift and in 1993 Congress enacted the RFRA to restore the application of the *Sherbert* and *Yoder* "substantial burden" and compelling governmental interest balancing test to laws neutral to religion.[202] With RFRA, Congress created a cause of action for persons whose exercise of religion is substantially burdened by a government action, whether or not the law is of general applicability.[203] In a later decision, the Court held that RFRA exceeded congressional authority as applied to state and

---

[195] *Id.* at 451-52.

[196] *Id.* at 447-49(plaintiffs were not "coerced by the Government's action into violating their religious beliefs" nor did the "governmental action penalize religious activity by denying [the plaintiffs] an equal share of the rights, benefits, and privileges enjoyed by other citizens").

[197] *Id.* at 450; *see* discussion of *Sherbert, supra* at Section VI A, n. 189.

[198] *Id.* at 452-453, 455.

[199] *Havasupai Tribe v. United States*, 732 F.Supp. 1471, 1485-86 (D. Ariz. 1990) *aff'd*, 943 F.2d 32 (9th Cir. 1991); *see also Red Thunder, Inc.*, 124 IBLA 267, 286-87 (November 3, 1992) ("BLM will be deemed in compliance with AIRFA if, during the decision-making process, it obtains and considers the Tribe's views, and if, in project implementation, it avoids unnecessary interference with Indian religious practices"); *Goodman Group, Inc. v. Dishroom*, 679 F.2d 182, 184-85 (9th Cir. 1982) (impacts on "cultural environment" could require an EIS); *but see Lockhart v. Kenops*, 927 F.2d 1028, 1036-37 (8th Cir. 1991) ("NEPA does not mandate consideration of a proposal's possible impact on [Indian] religious sites or observances.").

[200] *Smith*, 494 U.S. 872; *see also* ECHO-HAWK, *supra* note 1, at 273-322 (discussion of Indian religion, the role of plants in that religion and why *Smith* made his the "top ten worst" list of Indian law decisions).

[201] *Smith,* 494 U.S. at 879.

[202] 42 U.S.C. §§ 2000bb-2000bb-4. Congress found that *Smith*, "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral to religion," 42 U.S.C. § 2000bb(a)(4), and that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise," 42 U.S.C. § 2000bb(a)(2).

[203] 42 U.S.C.§2000bb(b)(1), (2) (RFRA's stated purpose is to, "restore the compelling interest test as set forth in *Sherbert* [*citation omitted*] and *Yoder* [*citation omitted*] and to guarantee its application in all cases where free exercise of religion is substantially burdened").

local governments,[204] and Congress again responded, in 2000, by enacting a new statute, the Religious Land Use and Institutionalized Persons Act (RLUIPA) that prohibits state and local governments from applying regulations that govern land use (or prisoners) to impose a "substantial burden" on the exercise of religion.[205] RLUIPA also amended RFRA to expand the definition of "exercise of religion" from beyond the First Amendment's protection of "central tenets" to "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[206]

In a 2008 *en banc* ruling, the Ninth Circuit examined the application of RFRA and *Lyng* to a challenge brought by several southwestern tribes (including the Navajo, White Mountain Apache, Hopi, Hualapai and Havasupai) against the use of recycled waste water for snowmaking on the Snowbowl ski area in the San Francisco Peaks as a violation of the exercise of their religion.[207] The Ninth Circuit held that a successful challenge under RFRA must establish two elements: 1) the activities burdened by the government action must be an "exercise of religion"; and 2) the government action must "substantially burden" the exercise of the religion. Both elements must be proved.[208] As to the first prong, the district court and the Ninth Circuit agreed that the Indian Plaintiffs' religious beliefs concerning the significance of the Peaks and the impact of the proposed action to those beliefs were sincere.[209] As to the second prong, the *en banc* panel agreed with the district court that Plaintiffs had failed to prove that the action would substantially burden the exercise of their religion.[210]

> The district court also found, however, that there are no plants, springs, natural resources, shrines with religious significance, or religious ceremonies that would be physically affected by the use of artificial snow.... The Plaintiffs continue to have virtually unlimited access to the mountain, including the ski area, for religious and cultural purposes. On the mountain, they continue to pray, conduct their religious ceremonies, and collect plants for religious use. Thus, the sole effect of the artificial snow is on the Plaintiffs' subjective spiritual experience.[211]

The Ninth Circuit concluded, "a government action that decreases the spirituality, the fervor, or the satisfaction with which a believer practices his religion is not what Congress has labeled a 'substantial burden' . . . on the free exercise of religion."[212] The Ninth Circuit found no "substantial burden" and, thus, no violation of RFRA, nor any need to weigh the "compelling governmental interest" in the balance.

---

[204] *City of Boerne v. Flores*, 521 U.S. 507 (1997).

[205] Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc *et seq.*

[206] 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A).

[207] *Snowbowl,* 553 F.3d 1058. Interestingly, this was the same ski area whose expansion was unsuccessfully challenged in the earlier case of *Wilson v. Block,* 708 F. 2d 735, discussed *supra* note 90; *see also* STERN, *supra* note 1, at 15A-29-15A-32.

[208] *Snowbowl* 553 F.3d at 1068.

[209] *Id.* at 1058.

[210] *Id,*

[211] *Id.*

[212] *Id.* at 1059 ("where there is no showing the government has coerced the Plaintiffs...or conditioned a government benefit...there is no 'substantial burden' on the exercise of their religion."); *see also id.* at 1070 ("Nevertheless, under Supreme Court precedent, the diminishment of spiritual fulfillment-- serious though it may be-- is not a "substantial burden" on the free exercise of religion.").

D. "Accommodation," Sacred Sites and Environmental Justice

In *Lyng*, the Court added that, "[n]othing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen. The Government's right to the use of its own land. . . need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents."[213] Particularly in the Clinton administration, several steps were taken to define how the government could accommodate the exercise of Indian religions.

In April 1994, in the wake of the judicial setbacks to the practice of Indian religion, the Clinton administration held an historic meeting with Indians and President Clinton pledged "to continue my efforts to protect your right to fully exercise your faith as you wish . . . ."[214] Two years later, President Clinton issued an Executive Order on Indian sacred sites "to protect and preserve Indian religious practices."[215] Federal land managers are directed to accommodate the sacred sites of recognized tribes in the management of federal lands to "the extent practicable," "permitted by law" and "not clearly inconsistent with essential agency functions."[216] Sacred sites are defined as "any specific, discrete, narrowly defined location on Federal land that is identified . . . as sacred by virtue of the established religious significance to, or ceremonial use by, an Indian religion."[217] A tribe must inform the agency of the site, and the agency in turn must accommodate access to the site, ensure avoidance of adverse effects to the "physical integrity" of the site and protect the confidentiality of the site, "where appropriate." [218] The agency is also required to ensure reasonable notice is provided of proposed actions that "may restrict future access to, or ceremonial use of, or adversely affect the physical integrity of, sacred sites."[219] Significantly, the Executive Order makes clear it does not provide authority to impair "enforceable rights to use of Federal lands that have been granted to third parties through final agency action."[220] Nonetheless, "accommodation" at the Department of Interior led to a decision to deny the Glammis gold mine permit under the Federal Land Policy Management Act's "unnecessary and undue degradation" provision because the mine would impact a TCP held sacred by the Quechan Tribe.[221]

---

[213] *Lyng*, 485 U.S. at 453.

[214] Remarks to American Indians and Alaska Native Tribal Leaders, 30 Pub. Papers 941, 942, 944 (April 29, 1994).

[215] Exec. Order 13007, "Indian Sacred Sites," 61 Fed. Reg. 26771, Preamble (May 24, 1996), .

[216] *Id.*; *see also, e.g.,* U.S. DEPARTMENT OF THE INTERIOR, DEPARTMENT MANUAL, DEPARTMENTAL RESPONSIBILITIES FOR PROTECTING/ACCOMMODATING ACCESS TO INDIAN SACRED SITE, Part 512, Chapter 3, ""; *see also, e.g.,* Prohibitions in Areas Designated by Order; Closure of National Forest System Lands to Protect Privacy of Tribal Activities, 76 Fed. Reg. 3015 (January 19, 2011).

[217] Executive Order 13007, *supra* note 217, § 1(iii).

[218] *Id.* § 1.

[219] *Id.* § 2(a).

[220] *Id.* § 3.

[221] Office of the Solicitor, Memorandum M-36999 "Regulation of Hardrock Mining," 6 (December 27, 1999). This decision was subsequently overturned, by a new Solicitor in Memorandum M-37007, "Surface Mining Provisions for Hardrock Mining," (October 2001), but as a result of a California law, the project never went forward.

As part of the Clinton Administration's outreach to tribal interests, the administration also issued an Executive Order on "*environmental justice*" in early 1995 directing all federal agencies to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority populations and low-income populations . . .."[222] The Environmental Justice Order specifically directed the Department of the Interior "to coordinate steps. . . that address Federally-recognized Indian Tribes" after consultation with the tribal leaders.[223] The Environmental Justice Order does not "create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity . . . against the United States."[224] Nonetheless, environmental justice is an issue to recognize and include in consultations under NEPA.[225]

VII. CONCLUSION

Compliance with the several cultural resource statutes is complicated because of their overlapping provisions and detailed bureaucratic processes. Communication, planning and experienced consultants are essential to successfully navigate the requirements of these laws. Using NEPA, together with NHPA, as the umbrella process, while carefully considering and including the requirements of other applicable laws as appropriate, should provide a usable navigation tool for successful compliance with cultural resource protection laws.

---

[222] Exec. Order No.12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations," 59 Fed. Reg. 7629 (February 11, 1994).

[223] *Id.* § 6-606.

[224] *Id.* § 6-609.

[225] *See, e.g., Hualapai and Fort Mojave Indian Tribes*, 180 IBLA at 169-170 (although there is no right of the public to enforce BLM's failure to consider the Environmental Justice Order, *supra* note 224, in analyzing a proposed shooting range, IBLA found it is an appropriate area of inquiry in agency decisions).