



National Trust *for*  
Historic Preservation  
*Save the past. Enrich the future.*

# Preserving Native American Places

A Guide to Federal Laws and Policies that Help  
Protect Cultural Resources and Sacred Sites

By William J. Cook

National Trust for Historic Preservation



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**AUTHOR'S NOTE** As an attorney at the National Trust for Historic Preservation, I have had the great privilege of fighting to save historic places across the United States. Many of these places have strong associations with Native American communities, such as the Nantucket Sound or Mount Taylor in New Mexico. And although they are some of the oldest and most sacred sites in America, their continued preservation is not secure. My experience has shown me that notwithstanding their significance, Native American places often face some of the most intense pressures of any historic resource on the preservation spectrum. Complicated laws, federal and state mining rights, conflicting ownership claims, regulation of public lands, and an unfortunate lack of understanding by the broader population of the importance of Native American places are examples of these pressures. After reading this publication, which builds on the excellent earlier work and research of former National Trust attorneys Julia Miller and Anita Canovas and legal fellow, Honor Keeler, I hope that you will be inspired to take a new look at the places that matter to your community, and continue the good work of protecting them. Although there is no substitute for legal counsel because of the complexity of the laws discussed within this guide, it is nevertheless intended to give examples of laws that communities everywhere can use to protect their history, culture, and places that they value. Illustrations of successes and failures will help show how these laws work in a practical, real-world way. Special thanks, too, for the advice and suggestions of Jack Trope, Executive Director of the Association on American Indian Affairs; Bambi Kraus, Executive Director of the National Alliance of Tribal Historic Preservation Officers; and Jeff Durbin, National Historic Preservation Act Section 106 Compliance Manager, National Park Service, Washington Office.



The National Trust for Historic Preservation is grateful to the Indian Land Tenure Foundation for the grant funding it provided to make this publication possible.

### ON THE COVER

**Upper Left:** Tribal ceremony at Chimney Rock National Monument, Colorado.

Credit: Chimney Rock Interpretive Association

**Upper Right:** Tongue River Valley, Montana

Credit: Montana Preservation Alliance

**Lower Left:** Mt. Taylor, New Mexico.

Credit: Theresa Pasqual

**Lower Right:** Medicine Wheel, Wyoming.

Credit: [www.crossingworlds.com](http://www.crossingworlds.com)

<sup>1</sup>Unless otherwise noted, use of the terms “historic property,” “historic site,” or “historic resources” is intended to include cultural resources whenever possible. In addition, the term “Native American” is used generally throughout the text to embrace members of indigenous communities. Certain laws, regulations, or executive orders, however, may refer specifically to Indian tribes, Native Hawaiians, or Alaska Native villages or corporations. Therefore, care should be taken to verify the exact wording of the laws referenced herein.

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## INTRODUCTION

*Preserving Native American Places* is intended to serve as a general layperson's guide to the principal federal laws and regulations that govern the protection of Native American historic and cultural resources. Using a "Question and Answer" format, it is organized in four parts, and uses representative illustrations. Part 1 focuses on the National Historic Preservation Act and other laws that require federal agencies to address the effects of government actions that could harm Native American historic sites, including traditional cultural properties. Part 2 explores the Native American Graves Protection and Repatriation Act and National Museum of the American Indian Act. Part 3 discusses protections available under the Archaeological Resources Protection Act, the Antiquities Act of 1906, and other permitting and enforcement laws. Part 4 highlights the role of the United States Constitution in protecting religious freedoms and federal statutes that could augment that protection.

Although this publication does not specifically address state laws that could come into play, it is important to keep in mind that states may afford specific protection for Native American resources,

such as New Mexico's Cultural Properties Protection Act. Many states have adopted burial protection laws, cemetery laws, archeological resource protection laws, and laws patterned after the National Historic Preservation Act and the National Environmental Policy Act, which similarly require state officials to consult with Native Americans regarding the effects of governmental undertakings and the impact they may have on cultural resources. In addition, insofar as inscriptions of sites on the World Heritage List—an important international program of the United Nations Educational, Scientific, and Cultural Organization (UNESCO) World Heritage Committee designed to recognize places of universal value—do not place any restrictions or regulations on private property or private property owners in the United States, we have not included analysis about listing protocols for purposes of this publication.

Finally, to improve readability, Appendix A contains common acronyms used in preservation law. Appendix B contains citations to commonly referenced cases, statutes, regulations, and executive orders.



## PART 1:

# Native American Cultural Resources and Federal Agency Actions

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**THE U.S. GOVERNMENT** has adopted a range of statutes and regulations that establish official policies and requirements pertaining to the protection of environmental and cultural resources and require consideration of the impact governmental activities may have on these resources. Three of these laws, the National Historic Preservation Act (NHPA), the National Environmental Policy Act (NEPA), and Section 4(f) of the Department of Transportation Act, require consideration of how federal agency actions will affect historic and cultural resources, whether privately or publicly owned.

Because these laws apply to a broad range of federal agency activities affecting historic and cultural resources across the United States, they have been useful in protecting, minimizing, or mitigating harmful effects of federal action on Native American resources. For example, compliance with these statutes may be required in connection with a proposed road construction project through a traditional cultural site.

On the other hand, the NHPA and NEPA do not require any specific result. Instead, they establish a process for the federal government to consider the effects of their undertakings on historic and cultural resources and to seek ways to avoid, minimize, or mitigate harmful effects identified through a consultation process. For example, these statutes could be used to identify the effects of a

proposed uranium mine on nearby Native American historic sites and result in an agreement to relocate the mine so that the most harmful effects could be avoided. Protection of the resource is never guaranteed.

By contrast, Section 4(f) applies only to transportation projects and programs. As with NEPA and NHPA, Section 4(f) does not mandate a specific result, but can be used to deny approval of a project or program that potentially harms historic or cultural resources if there is a “feasible and prudent” way to avoid the harm after “all possible planning” to minimize it. In this way, Section 4(f) imposes a greater burden on the federal government than either NHPA or NEPA and can result in a “veto” of a project in limited circumstances.

## NANTUCKET SOUND, MASSACHUSETTS



Artist's representation of the Hy-Line Cruises Eco-Tour of Cape Wind

The Cape Wind Farm litigation highlights the need for early consultation. In April 2010, the Secretary of the Interior approved a \$2.5 billion plan by Cape Wind Associates to install an offshore wind energy facility on Horseshoe Shoal in Nantucket Sound off Cape Cod, Massachusetts. The project design includes 130 wind turbines, each 400 feet tall, arrayed in a grid pattern in parallel rows, a buried submarine transmission cable system, an electric service platform, and 25 miles of power lines connecting the turbines to the mainland power grid. The total project area is approximately 25 square miles. If the project proceeds, it would be the nation's first offshore wind energy project in United States coastal waters. Opponents of

the project have argued that it would adversely affect 34 historic properties, including 16 historic districts, 12 individually significant historic structures on Cape Cod, and six properties of religious and cultural significance to Native American tribes, including Nantucket Sound itself.

Although the U.S. Department of the Interior failed to make the requisite inquiries until almost ten months after issuing the Final Environmental Impact Statement, both the Massachusetts State Historic Preservation Officer and the Keeper of the National Register determined that Nantucket Sound is eligible for listing in the National Register as a Traditional Cultural Property significant to two Wampanoag Tribes (the Aquinnah and the

Mashpee). The visual intrusion of the turbines would disrupt ancient ceremonial practices of the Wampanoag Indians, known as the "People of the First Light." For these Tribes, unimpeded views of the rising sun across Nantucket Sound are a defining feature of tribal life and their cultural and spiritual identity. Other culturally important sites to the Aquinnah and Mashpee Tribes would be adversely affected by the project as well. To the Wampanoag Tribes, Cape Wind would amount to a direct physical intrusion and would adversely affect the overall integrity of Nantucket Sound. As of this writing, litigation to set aside the permit approvals for the wind farm is pending in the U.S. District Court for the District of Columbia.

## PART 1.1: NATIONAL HISTORIC PRESERVATION ACT

The National Historic Preservation Act, 16 U.S.C. §§ 470–470x-6, or NHPA, is the primary federal law governing the preservation of historic resources in the United States. The law establishes a national preservation program and a system of procedural protections, which encourage the identification and protection of historic resources of national, state, tribal, and local significance. Primary components of the NHPA include:

- Articulation of a national policy governing the protection of historic and cultural resources.
- Establishment of a comprehensive program for identifying historic and cultural resources for listing in the National Register of Historic Places.
- Creation of a federal-state/tribal-local partnership for implementing programs established by the act.
- Establishment of the Advisory Council on Historic Preservation, which oversees federal agency responsibilities governing the Section 106 review process.
- Requirement that federal agencies take into consideration actions that could adversely affect historic properties listed or eligible for listing in the National Register of Historic Places, including cultural and sacred sites (Section 106).
- Placement of specific stewardship responsibilities on federal agencies for historic properties owned or within their control (Section 110).

## What is the U.S. Government's policy on historic preservation?

The NHPA recognizes historic preservation as an important policy of the United States and emphasizes the importance of providing national leadership in advancing this policy. To that end, the NHPA directs the federal government to promote the preservation of historic and prehistoric resources by administering the national preservation program in partnership with state and local governments, Indian tribes, Native Hawaiian organizations, and Alaskan Natives, and by helping such entities expand and accelerate their historic programs and activities. In addition, the National Park Service has established and operates a Tribal Preservation Program to assist tribes in preserving their historic properties and cultural traditions, including dance, language, art, and the treatment of significant objects and sites through training and funding programs. This program originated in 1990, when Congress directed NPS to study and report on tribal preservation funding needs. The findings of that report, *Keepers of the Treasures—Protecting Historic Properties and Cultural Traditions on Indian Lands*, provided the foundation for this program and the establishment of grant programs funded by the Historic Preservation Fund.

The NHPA also recognizes the need to encourage and assist tribes in participating in the United States national preservation program in a manner that respects their cultural values and traditions and status as sovereign nations. Under the NHPA, a “federally recognized” tribe may assume full responsibility for carrying out activities on tribal lands previously assigned to a state. These duties are assumed by an individual tribe in its capacity as a Tribal Historic Preservation Office, or THPO.

## **How is the NHPA administered?**

The Secretary of the Department of the Interior, the Advisory Council on Historic Preservation, and individual federal agencies are charged with specific responsibilities under the NHPA.

The Secretary of the Interior, through the National Park Service, or NPS, maintains the National Register of Historic Places and oversees the establishment and operations of state, tribal, and certified local government programs under the NHPA. The NPS, on behalf of the Secretary, has established guidelines governing federal agency responsibilities and standards for the preservation of federally owned properties. It also provides technical assistance, administers an education and training program, and administers grants and loans.

## **What is the Advisory Council on Historic Preservation?**

The Advisory Council on Historic Preservation (ACHP) is a federal agency based in Washington, DC, which promotes the preservation and enhancement of the nation's historic resources, and advises the President and Congress on national historic preservation policy. The ACHP is the only entity with the legal responsibility to encourage federal agencies to factor historic preservation into federal project requirements. To this end, the ACHP promulgates regulations necessary to implement Section 106 of the NHPA, which established the ACHP in 1966. In addition, the ACHP provides advice and assistance to states, tribes, and local governments on historic preservation.

## **What is a SHPO?**

A State Historic Preservation Officer, or SHPO, plays a central role in the administration of NHPA programs and serves as the primary point of contact for individuals seeking assistance at the state level. The SHPO is responsible for reviewing and processing applications for nominations of historic

and cultural properties for listing in the National Register of Historic Places. The SHPO also assists federal agencies in meeting their obligations under Section 106 and assists local governments through the National Park Service's Certified Local Government Program. Local governments, upon certification by their state's SHPO, may participate in NHPA programs and are entitled to at least 10 percent of a state's allocation from the Historic Preservation Fund.

## **What is NCSHPO?**

The National Conference of State Historic Preservation Officers (NCSHPO) is the professional association of state government officials who carry out the national historic preservation program as delegates of the Secretary of the Interior pursuant to the National Historic Preservation Act. NCSHPO acts as a communications vehicle among the SHPOs and their staffs and represents them with federal agencies and national preservation organizations.

## **What is a THPO?**

A Tribal Historic Preservation Officer, or THPO, is the tribal counterpart of a SHPO in a federally recognized tribe, which has assumed the responsibilities of a SHPO with respect to tribal lands. This program was made possible by Section 101(d)(2) of the NHPA. For purposes of the NHPA, tribal lands include all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities. They do not include individual allotments held in trust outside existing reservation boundaries and lands outside a reservation owned by a tribe in fee simple. Tribal lands, however, do include lands held in trust for the benefit of a tribe outside an existing reservation. Tribes that do not have a THPO and other Native Americans may work with a SHPO in matters occurring on or affecting historic properties on or off their lands.



## **How does a tribe establish a THPO?**

Before a federally recognized tribe may establish a THPO, the tribe must submit a formal plan to the National Park Service from its chief governing authority, designate a tribal official to administer the tribal historic preservation program, and submit a plan describing how it will carry out any SHPO functions it has assumed. The National Park Service approves THPO requests based on a determination that the tribe is “fully capable of carrying out the functions specified in its plan.” As of May 2014, more than 140 THPOs have been approved. A list of THPOs is maintained by the National Park Service.

## **What is a THPO program plan?**

A THPO Program Plan sets forth information relating to the THPO’s administrative capabilities and the functions that the THPO will assume. The plan must include:

- Information on the size and total acreage of the tribal lands.
- Information on staffing and consulting arrangements that have been or will be made that will allow the THPO to meet the Secretary of the Interior’s professional qualification standards.
- A description of the THPO’s advisory board.
- A description of how participation in the program will occur among traditional cultural authorities, representatives of other tribes whose traditional lands fall within the tribe’s jurisdiction, and by the interested public.
- Acknowledgement that any non-tribal owners within tribal lands may request participation by the SHPO in addition to the THPO in decision affecting their property.

The THPO program plan must also include a list of SHPO functions the THPO proposes to assume, a

description of the tribe’s current historic preservation program, and a description of how the tribe will carry out the listed functions.

## **What is NATHPO?**

NATHPO, or National Association of Tribal Historic Preservation Officers, is a non-profit organization that provides technical support and assistance for tribal government officials implementing federal and tribal preservation laws. NATHPO also monitors federal and state activities that affect Native American tribes and tribal historic properties, provides a forum for discussion and dissemination of ideas for more effective cultural heritage preservation programs, and works to increase public awareness of the importance of the physical environment in the role and preservation of Native American traditions and culture.

## **What is the National Register of Historic Places?**

The National Register of Historic Places is the official list of historic properties in the United States. It includes districts, sites, buildings, landscapes, structures, and other objects that are significant in American history, architecture, archaeology, engineering, and culture. Over 80,000 properties are listed in the National Register, which includes more than 1.4 million resources. Listings include, for example, archeological sites of the Chaco Mesa Pueblo, the Ring Midden sites of the Guadalupe Mountains, and White Rock Canyon in New Mexico, where ancestral pueblo residents left behind numerous rock carvings.

## **What is a traditional cultural property?**

Because listing or eligibility for listing in the National Register serves as the benchmark for protecting Native American sites from potentially harmful federal agency actions, it is important to

understand that the National Register's scope is broad. The National Register includes not only buildings, but also traditional cultural properties, which are a wide range of historic places that reflect the ongoing practices of living communities, and which include the "traditions, beliefs, practices, lifeways, arts, crafts, and social institutions of any community." See *Guidelines for Evaluating and Documenting Traditional Cultural Properties*, NATIONAL REGISTER BULLETIN 38 (NPS 1990, rev. 1998). For example, a location or site associated with the traditional beliefs of Native Americans about their origins and cultural history is eligible for National Register listing. The site could be a mountaintop, sacred lake, or rock outcropping, just as readily as a building or object. It is important to note, however, that traditional cultural properties, or TCPs, are not a separate category for listing in the National Register, but provide a more inclusive way of applying existing nomination criteria.

### **How are properties listed in the National Register?**

The National Register is maintained by the Secretary of the Interior through the National Park Service. The Keeper of the National Register, a National Park Service official, is responsible for listing properties and making official determinations of eligibility for listing. The designation process, however, usually begins with a SHPO or THPO, who is charged under the NHPA to identify and nominate properties to the National Register and to administer applications for listing properties.

### **What are National Historic Landmarks?**

The National Register of Historic Places includes a special category of properties or places called National Historic Landmarks, or NHLs. These properties, approximately 2,500 in number, have received special recognition because of their exceptional importance to the nation as a whole.

NHLs are designated by the Secretary of the Interior upon review by the NPS Advisory Board. Many of the NHLs of importance to Native Americans, such as the Awatovi Ruins on the Hopi Reservation—have cultural or historical significance. An NHL may also be a pueblo, such as the Acoma and Taos Pueblos in New Mexico, a sacred site such as Medicine Wheel in Wyoming, or a building such as the Navajo Nation Council Chamber.

### **What is the Section 106 review process?**

Section 106 of the NHPA requires that federal agencies take into account the effects of their undertakings on properties listed or eligible for listing in the National Register of Historic Places and to provide the ACHP with a reasonable opportunity to comment on such undertakings.

Section 106 provides:

"The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment with regard to such undertaking."

Compliance with Section 106 can be complex. Federal agencies satisfy their Section 106 obligations by following procedures set forth by the ACHP, 36 C.F.R. Part 800; the procedures established under a "programmatic agreement"; or an alternate process adopted by an individual

agency that is consistent with the ACHP's regulations. A programmatic agreement is a special document adopted by a federal agency and the ACHP that applies to specific programs, such as the construction of cell towers nationwide.

The ACHP's procedures include: (1) determining whether Section 106 compliance is required; (2) identifying historic properties; (3) assessing effects on historic properties; (4) resolving adverse effects,

including consultation with the SHPO or THPO and adoption of a Memorandum of Agreement; and (5) the submission of a formal request for the ACHP's comments in the event that adverse effects were not resolved. Detailed information about the Section 106 Review Process is available through the ACHP's website at [www.achp.gov](http://www.achp.gov). Revised Section 106 regulations are available at 36 C.F.R. Part 800.

#### PROGRAMMATIC AGREEMENTS

Because tribal consultation with federal agencies occurs on a government-to-government level, such as when an undertaking would affect traditional or cultural places on tribal lands, it sometimes becomes necessary or prudent to develop special procedures to meeting Section 106 requirements. These procedures, which take into account specific tribal requirements and protocol, are typically adopted in the form of a "programmatic agreement." A programmatic agreement, or PA, should not undermine Section 106 core requirements, which include identification of historic, cultural, and religious sites, determinations of effect, and resolution of adverse affects through consultation and execution of a Memorandum of Agreement (MOA). However, the PA may streamline certain processes, and elaborate on notice and consultation requirements by, for example, establishing specific protocols for contacting tribal representatives.

If a PA applies to U.S. Government actions on tribal lands with a THPO, then it must be signed by the THPO, Indian tribe, or designated representative of the tribe. If a PA applies to U.S. Government actions on non-tribal lands, then it must be developed in consultation with affected Indian tribes. For example, a federal agency, in consultation with any tribes with an interest in a specific location, may develop a PA for notifying and consulting with specific tribes regarding undertakings that have the potential to affect places of religious and cultural importance. The agreement could, for example, identify potential consulting parties in advance; alter time periods to accommodate tribal procedures and customs; set forth agreed upon measures to avoid or resolve potential adverse effects, such as those pertaining to the treatment of burial sites, human remains, and funerary objects; prescribe measures to accommodate the need for access to a site for ceremonial use; and establish a protocol to protect Native American privacy and confidentiality concerns.

## When is Section 106 compliance required?

A federal agency is required to comply with Section 106 of the NHPA whenever it engages in an undertaking that could affect a property that is listed or eligible for listing in the National Register. The funding of projects, activities, and programs, including those carried out by or on behalf of a federal agency, and those carried out with federal financial assistance, is an undertaking. Funding may be for the entire project, or only a part of the project and the project may be under the direct or indirect jurisdiction of the federal agency. For example, Section 106 may be triggered by requests to fund a highway, airport, or other transportation project, or to finance oil exploration activities with federal funds.

Undertakings also consist of actions requiring a federal permit, license, or approval, and those subject to state or local regulation administered pursuant to a delegation or approval by a federal agency. For example, Section 106 compliance is often required in connection with requests for permits for activities on private land such as construction projects affecting streams and waterways (U.S. Army Corps of Engineers), a cell tower project (Federal Communications Commission), or the licensing of a hydroelectric projects and pipelines (Federal Energy Regulatory Commission).

### ACHP REVIEW AND PARTICIPATION

Indian tribes concerned about federal agency compliance with Sections 106 may request review of any finding, determination, or decision by the ACHP. For example, a tribe may seek ACHP review on the adequacy of an agency's failure to identify a sacred or cultural place or an agency's finding that no resources will be affected by an undertaking because it defined the area likely to be affected by the undertaking too narrowly. A tribe may also seek advice when it has questions concerning policy, interpretation, or precedent under Section 106. Finally, an Indian tribe may request ACHP participation in efforts to resolve adverse effects.



## BEST PRACTICES IN TRIBAL CONSULTATION\*

The National Association of Tribal Historic Preservation Officers (NATHPO) has identified “Model Protocol Steps” for consulting with Native Americans in its report, *Tribal Consultation: Best Practices in Historic Preservation*. These steps include the following:

<b>Step One: Planning Document</b>	The Agency early in the planning stage compiles a draft of the scope of the project, including area of potential effect.
<b>Step Two: Determining Consulting Partners</b>	<p>The Agency creates a Tribal Contacts List of Tribes potentially having an interest in the project area by:</p> <ol style="list-style-type: none"> <li>1. Contacting the THPO of the Tribes or Tribal Leader of the Tribes not having a THPO, in the geographic area: <ul style="list-style-type: none"> <li>• To determine if they have an interest</li> <li>• To determine if they know of other tribes that may have an interest.</li> </ul> </li> </ol> <p>AND</p> <ol style="list-style-type: none"> <li>2. Determining from state or regional intertribal organizations Tribes that may have an interest</li> </ol> <p>AND</p> <ol style="list-style-type: none"> <li>3. Consulting with identified Tribes on what other Tribes might be included.</li> </ol>
<b>Step Three: Initial Contact Consulting Partners</b>	The agency mails a copy of the Agency project plan, relevant information and a request for a consultation meeting to the THPO (for Tribes having a THPO) or Tribal Leader (for Tribes not having a THPO).
<b>Step Four: Arranging for Consultation Meetings</b>	<p>The agency arranges with the Tribal contacts a time, place, agenda, and travel funds for the meeting by:</p> <ol style="list-style-type: none"> <li>1. Letter to Tribes; and</li> <li>2. Follow-up by telephone to confirm receipt of documents.</li> <li>3. At this point, the Agency needs to determine if there are barriers to Tribal participation in consultation, such as timing, financing, and/or location.</li> <li>4. There is a discussion on whether there will be sensitivities regarding Sacred Sites and the need to include a religious leader.</li> <li>5. Establish meeting format.</li> <li>6. Establish goals.</li> <li>7. For example, goals could include Agency official and Tribal representatives sharing concerns and desires about the project, and the mitigation of impacts to Tribal cultural sites.</li> </ol>
<b>Step Five: Consultation Meetings</b>	<ol style="list-style-type: none"> <li>1. At start of meeting: Confirm meeting format, facilitator, and issues to be addressed.</li> <li>2. Discussion time.</li> <li>3. Throughout the meeting: Provide time for meeting participants to get to know each other.</li> <li>4. Conclude with plan for next meeting. Agenda/goal for next meeting, drafts of areas of agreement, and matters to be resolved.</li> </ol>
<b>Step Six</b>	Repeat Step 5, as necessary.
<b>Step Seven</b>	Memorandum of Agreement (MOA) or resolution or agreement on mitigation of impacts to Tribal cultural site reached.

\*Excerpt from NATHPO, TRIBAL CONSULTATION: BEST PRACTICES IN HISTORIC PRESERVATION (Wash., DC 2005), pp. 40-41.

### **What does “good faith consultation” entail?**

Good faith consultation between federal agencies and tribal officials is an essential and critical part of the Section 106 process. For Section 106 consultation to work effectively there must be a collaborative effort that is based on mutual respect and sensitivity to all parties involved. Federal agencies need to involve Native Americans early in the planning stages of the project and provide information on the project and its goals. Native Americans, in a manner consistent with their religious and cultural requirements, need to be forthcoming with their concerns so that appropriate measures can be taken to address them. The National Park Service’s *Guidelines for Evaluating and Documenting Cultural Properties*, NATIONAL REGISTER BULLETIN 38 (NPS 1990, rev. 1998), provides a framework for identifying traditional cultural places. NATHPO has also published a book, *TRIBAL CONSULTATION: BEST PRACTICES IN HISTORIC PRESERVATION* (2005), which provides helpful information on how to make Section 106 consultations successful.

### **What is the “area of potential effects”?**

The “area of potential effects,” or APE, is the area within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. In other words, it is the area that should be considered in identifying National Register or National Register-eligible properties that will likely be affected by the federal agency’s proposed action.

It is important to understand that the APE includes more than just physical contact—a “direct effect”—with a historic or cultural resource. The APE could also include “indirect effects”, such as those that are visual or audible in nature or the polluting of a waterway or stream that is critical to Native American spiritual practices.

### **What if no historic or traditional cultural sites are identified?**

If no historic or traditional cultural sites are identified within an APE, then the agency must make an official finding that no historic properties are present or that no historic properties will be affected by the undertaking. Documentation of that finding must be submitted to the SHPO or THPO and be made available to the public. In addition, notice must be provided to all relevant Indian tribes. The agency may proceed with its undertaking unless the SHPO, THPO, or ACHP objects within 30 days. A SHPO or THPO, for example, may disagree with a determination that a resource is not eligible for listing in the National Register of Historic Places or object to a federal agency’s delineation of the boundaries of the resource or the “area of potential effects” of its undertaking. A SHPO or THPO could also conclude that a federal agency erroneously determined that the impact of the undertaking on the resource would be *de minimus* (or too minor to merit further consideration).

### **What if a tribal representative disagrees with an agency’s or SHPO’s determination of National Register eligibility?**

In cases where there is no THPO, the concurrence of a tribal representative and the SHPO is required with respect to agency determinations of National Register eligibility or ineligibility on properties located on tribal lands. In the event a disagreement arises between a tribe and SHPO, the agency must seek a formal determination of eligibility from the Keeper of the National Register of Historic Places. If the resource is located off tribal lands, then the agency is not required to seek a formal determination of eligibility, even if an Indian tribe disputes the finding. However, under the ACHP’s regulations, a tribe may ask the ACHP to request that the federal agency official obtain a determination of eligibility from the Keeper of the National Register if the eligibility determination involves a property with religious and cultural significance.

**What if a federal agency determines that an undertaking will affect National Register or National Register-eligible properties?**

Once the agency or the Keeper of the National Register identifies properties that are listed or eligible for listing in the National Register of Historic Places, then the agency must determine whether the effect of its undertaking on those properties will be adverse. This determination is made by applying the Criteria of Adverse Effects and must be made in consultation with the SHPO, THPO, or tribal representative if the resource is located on tribal lands or the relevant Indian tribes if the resource is located off tribal lands, and in consideration of the views of the public.

**What if the undertaking will occur on tribal lands?**

With respect to Section 106, federal agencies are required to provide an Indian tribe with the ability to concur or object to agency findings and determinations, such as a determination of eligibility for listing in the National Register of Historic Places or a Finding of No Adverse Effect. Federal agencies must invite tribes to sign a Memorandum of Agreement. If the tribe withholds its signature, then the Memorandum of Agreement cannot be executed.

**What if a tribe does not have a THPO?**

If there is no THPO, then a federal agency will consult with the tribal representative and the SHPO, unless the SHPO withdraws from consultation. Tribal participation occurs through the tribe's official governmental structure, in accordance with tribal law. Individual tribal members may participate in the Section 106 process as members of the general public, but not as an official consulting party, unless agreed to by the federal agency.

**What if a tribe is affected by an undertaking on another tribe's lands?**

A federal agency must consult with any Indian tribes that may have an interest in its project whenever an undertaking may affect sites listed in or eligible for listing in the National Register. This requires making a good faith effort to identify tribes that may attach religious and cultural significance to places on another tribe's lands, as well as places located off tribal lands. Stated another way, a federal agency must be careful to identify tribes that may have an interest in an undertaking, beyond the most proximate THPO. For example, on the Navajo reservation, there are places of religious or cultural significance to the Hopi as well the Navajo. Indeed, the THPO for the Navajo Nation has developed a programmatic agreement that identifies several tribes that may have an interest in cultural resources on Navajo tribal lands. In this way, the presence of traditional cultural properties provides enhanced standing to affected tribes. Keep in mind that the NHPA only requires consultation with federally recognized tribes. The views of non-recognized tribes are considered as views of the public through the Section 106 process.

**What if a non-tribal person owns property within the boundaries of a reservation?**

A non-tribal owner of property within the exterior boundaries of a reservation may request SHPO participation, even if a THPO has assumed the SHPO's duties.

### **What if the undertaking affects historic and cultural sites of importance to Native Americans, but outside tribal lands?**

If an undertaking will affect historic and cultural sites outside of tribal lands, then the agency must consult with the SHPO, as well as any relevant Indian tribes.

### **What are the “Criteria of Adverse Effect”?**

Section 800.5 of the ACHP’s regulations set forth the Criteria of Adverse Effect:

“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. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property’s eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be removed in distance, or be cumulative.”

An adverse effect can be more than physical damage to property or cultural resources associated with that property. It may involve, for example, a change in the physical features of a property’s setting such as a visual, atmospheric, or audible intrusion caused by the construction of a nearby cell tower or hydroelectric power plant, logging or mining of natural resources, exploratory drilling, and even increases in the use of roads by trucks to haul logs, or conduct exploratory drilling. Adverse effects can result from the transfer, lease, or sale of a property out of federal ownership or control

without adequate protections for Native American sites; alteration to a historically significant building that is inconsistent with the Secretary of the Interior’s Standards for Rehabilitation; a change of use; or neglect resulting in deterioration, so long as deterioration is not consistent with the inherent qualities of those properties and religious and cultural practices. Adverse effects may also include reasonably foreseeable effects that may occur later in time, such as increased development resulting from a road construction project, or impacts that are cumulative, such as increased pollution and noise.

As with the identification of historic properties, when identifying adverse effects, federal agencies must consult with a THPO or tribal representative, if there is not THPO and the federal undertaking is on tribal lands.

### **What if the agency makes a “Finding of No Adverse Effect”?**

A federal agency may issue a “Finding of No Adverse Effect” if it determines upon consultation with a THPO, SHPO, or tribal representative that historic properties will not be adversely affected, or a “Finding of Conditional No Adverse Effect” if the agency agrees with the THPO, SHPO, or tribal representative on measures that will eliminate the adverse effect.

### **What if an Indian tribe disagrees with the agency’s finding of “no adverse effect”?**

Under the ACHP’s regulations, agency officials are directed to seek the concurrence of any Indian tribe that has made known to the agency official that it attaches religious and cultural significance to a historic property subject to the finding of “no adverse effect.” If an Indian tribe disagrees with the finding, it may, within the 30-day review period, specify the reasons for disagreeing with the finding and request that the ACHP review the agency’s determination.



### **What if the agency determines that a historic resource will be adversely affected?**

Once a federal agency determines that a property listed or eligible for listing in the National Register will be adversely affected by the proposed undertaking, then it must consult with (1) the THPO, or SHPO and tribal representative, if the undertaking is located on or affects a resource on tribal lands, or (2) the SHPO and interested Indian tribes (which may include THPOs), if the undertaking is located off tribal lands, in addition to any other named consulting parties. The ACHP may also participate at the request of any consulting party.

### **What purpose does consultation serve?**

Consultation is often referred to as the “heart” of the Section 106 process. It involves “seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the Section 106 review process.” Agreements may include alternatives or modifications to the proposed undertaking that would avoid, minimize, or mitigate the adverse effects. For example, the parties could agree to relocate a proposed road or restrict access to it in an area where National Register-properties are located, or construct visual barriers so that a road is less visible.

### **How is consultation accomplished?**

Consultation must occur “at the earliest stages of project planning” to ensure that historic properties and sites are identified and that the widest range of solutions to potential adverse effects can be considered. Federal agencies generally initiate the consultation process with Native Americans by sending out letters to tribes that may have an interest in the project, to be followed by telephone and, if necessary, in-person contacts. Once a tribe has been contacted by a federal agency, protocols

for consultation may be developed through informal discussions and formal meetings with the agency. Consultation should not be viewed as a one-time event. Rather, it should be viewed as an ongoing activity that develops into a relationship based on mutual respect and trust.

### **What happens if consulting parties reach agreement?**

If the federal agency and consulting parties reach agreement, the terms of the agreement—namely how the adverse effects will be addressed—are set forth in a Memorandum of Agreement, or MOA. As a consulting party, a THPO or tribal representative may seek to amend or terminate the agreement at any time. Consulting parties may include a THPO, SHPO, and affected Indian tribes, and other interested parties depending upon a number of factors, such as whether the undertaking and affected resources are located on or off tribal lands. Affected tribes need not be a signatory to the agreement, although they may be invited to sign or concur in the agreement at the agency’s discretion.

### **What if consulting parties fail to reach agreement?**

If the undertaking is located on tribal land or it affects tribal lands, then the federal agency must invite the ACHP to participate in the consultation. A THPO or tribal representative may, at its discretion, terminate the process if it determines further negotiation would not be productive.

If the undertaking is located off tribal lands, then the federal agency, SHPO, or the ACHP, if participating, may terminate the consultation process. Affected Indian tribes, even if conferred consulting party status, may not terminate consultation.

#### TREATMENT OF BURIAL SITES, HUMAN REMAINS, AND FUNERARY OBJECTS UNDER THE NHPA

Federal agencies, in some instances, may encounter burial sites, human remains, and funerary objects during the course of meeting their Section 106 obligations. If these properties are located on federal or tribal lands, then the agency is required to follow the procedures governing inadvertent discoveries under section 3(c) of the Native American Graves and Repatriation Act (NAGPRA). *See also* Section 110 of the NHPA, 16 U.S.C. 470h-2(a)(E)(iii).

In some situations, however, burial sites, human remains, and funerary objects may be discovered on privately owned or state-owned property. If state or local burial laws do not control the treatment of these items, then resolution of potential disputes may be addressed through the Section 106 process.

On February 23, 2007, the ACHP voted unanimously to issue a revised “Policy Statement Regarding the Treatment of Burial Sites, Human Remains and Funerary Objects.” This directive applies to all federal agencies whose undertakings are subject to Section 106, including those on federal and tribal lands, but does not supplant any other requirements that may apply. Consistent with Section 106, the ACHP’s policy does not mandate a specific result. However, it strongly advocates avoidance or preservation in place, encouraging agencies to develop plans, at the earliest point possible, to ensure that such sites are not disturbed. If disturbance is necessary, the ACHP urges agencies to minimize such disturbance. Removal should be considered only when alternatives that leave the remains in place cannot be reasonably implemented. At all times, federal agencies should treat the site with dignity and respect; consult with those who have a potential interest in the burial site, human remains, and funerary objects; and strive to seek a mutually satisfactory outcome. *See* ACHP’s Revised “Policy Statement Regarding Treatment of Burial Sites, Human Remains and Funerary Objects” (adopted Feb. 23, 2007).

#### **What if a historic resource or traditional cultural or religious site is owned by the United States government?**

Section 110 of the National Historic Preservation Act imposes additional obligations on federal agencies. It requires that federal agencies “undertake, consistent with the preservation of such properties and the mission of the agency, and the professional standards set forth [under the act] ...

any preservation, as may be necessary to carry out this act.” It also requires that each agency establish a preservation program, in consultation with the Secretary of the Interior, which

- Uses historic properties available to the agency, to the maximum extent possible.
- Establishes a preservation program that provides for the identification, evaluation, and nomination

to the National Register of Historic Places, and protection of historic properties.

- Ensures that its properties are managed and maintained in a way that takes into consideration the preservation of their historic, archeological, architectural, and cultural values.
- Gives “full consideration in planning” to historic properties affected by its actions, but not under its ownership or control.
- Ensures that its preservation-related activities are carried out in consultation with other federal, state, and local agencies; Indian tribes, Native Hawaiian organizations, and Alaskan Natives carrying out historic preservation planning activities; and with the private sector.
- Complies with Section 106 of the NHPA under a process that includes consultation and the development of agreements with Indian tribes to address adverse effects.
- Provides for the disposition of Native American cultural items from federal or tribal land in a manner consistent with NAGPRA.

### **How does Section 110 protect Native American cultural sites?**

Section 110 provides substantive protection for National Historic Landmarks, which may include Native American cultural sites. Federal agencies, to the maximum extent possible, must undertake planning and actions as necessary to minimize harm to the landmark, and must afford the ACHP a reasonable opportunity to comment on the undertaking. In addition, Section 110 requires that federal agencies consult with Indian tribes in conducting preservation-related activities and in complying with Section 106. Section 110 also clarifies that NAGPRA governs the disposition of Native American cultural items excavated or discovered on federal or tribal lands. Section 110

works in tandem with regulations issued pursuant to Section 106 of the NHPA, which require agency officials—to the maximum extent possible—to undertake planning and other actions necessary to minimize harm to any National Historic Landmark; to notify the Secretary of the Interior of any consultation and to invite the Secretary to participate in the consultation where there may be an adverse effect; and that allows the ACHP to request a report from the Secretary to assist in the consultation.

### **How is the NHPA enforced?**

The NHPA includes specific measures that hold federal agencies accountable for their actions. For example, it requires that federal agencies document, in writing, all decisions where an undertaking will adversely affect historic properties. It also states that any executed Memorandum of Agreement must be followed. Nonetheless, primary compliance with the statute depends upon citizen enforcement through litigation. Organizations, interested persons, and tribes have successfully sued federal agencies for NHPA violations since the law’s enactment in 1966. The ACHP publishes a summary of these cases, available online at [www.achp.gov](http://www.achp.gov). Successful litigants are entitled to attorney fees.

**THE SECRETARY OF THE INTERIOR'S STANDARDS AND GUIDELINES FOR FEDERAL AGENCY  
HISTORIC PRESERVATION PROGRAMS PURSUANT TO THE NATIONAL HISTORIC PRESERVATION ACT**

**Section 110 of the National Historic Preservation Act**

Standard 5. An agency consults with knowledgeable and concerned parties outside the agency about its historic preservation related activities.

Guidelines:

Consultation with Native Americans

(g) inclusion of Indian tribes and Native Hawaiian organizations in the consultation process is imperative and is specifically mandated by the Act:

- (1) properties with traditional religious and cultural importance to Native American and Native Hawaiian groups may be eligible for the National Register; such properties must be considered, and the appropriate Native American and/or Native Hawaiian groups must be consulted in project and program planning through the section 106 review process;
- (2) Section 101(d)(2) of the Act provides that Indian tribes may assume State Historic Preservation Officer responsibilities on tribal lands, when approved to do so by the Secretary of the Interior. In those cases where a tribe has assumed such responsibilities on tribal lands, a Federal agency must consult with the tribe instead of the SHPO, in order to meet agency responsibilities for consultation pursuant to the Act;
- (3) the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA) establishes consultation requirements that may affect or be affected by consultation pursuant to section 106 of the NHPA concerning activities on Federal and Tribal lands that could affect human remains and cultural items. The Archaeological Resources Protection Act of 1979 and its uniform regulations also require consultation with tribes and provide a formal process of notification;
- (4) Section 110 requires that an agency's efforts to comply with section 106 must also be consistent with the requirements of section 3(c) of NAGPRA concerning the disposition of human remains and Native American cultural items from Federal and tribal lands.

(h) Where those consulted do not routinely or customarily participate in traditional governmental means of consultation (*e.g.*, through public meetings, exchanges of correspondence), reasonable efforts should be made to accommodate their cultural values and modes of communication.



## PART I.2: NATIONAL ENVIRONMENTAL POLICY ACT

The National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370h [Note: See Appendix B for this], provides an opportunity for Native Americans to affect U.S. Government decision-making that could harm the environment, including historic, sacred, cultural, and natural aspects of our national heritage. Federal agency actions affecting such resources must undergo an environmental review process that requires consideration of alternatives to the agency's proposed actions that would avoid or have a less harmful impact. As with Section 106 of the NHPA, NEPA does not insist on protection in every instance. However, it does require that federal agencies consult with and consider the views of Native American tribes. NEPA regulations are set forth at 36 C.F.R. Part 1500.

### What does NEPA require generally?

NEPA establishes environmental protection as an official policy of the United States Government. It requires federal agencies to "use all practical means, consistent with other essential considerations of national policy" to improve and coordinate Federal plans, functions, programs and resources" so as to protect the natural and physical environment, including "important historic, cultural, and natural aspects of our national heritage." In addition, federal agencies are directed, wherever possible, to maintain "an environment which supports diversity, and variety of individual choice."

As with Section 106 of the NHPA, NEPA is a procedural statute; therefore, NEPA does not require a specific result. Instead, NEPA requires that the federal government take a "hard look" at

the environmental impact of its action through its decision making process. Unless a statutory exemption applies, this requirement includes the preparation of a "detailed statement" on "every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment." Each statement, known as an Environmental Impact Statement (EIS), must set forth a baseline assessment of the environment and address:

- the environmental impact of the proposed action, including direct, indirect, and cumulative impacts,
- any adverse environmental effects that cannot be avoided if the proposal is implemented,
- alternatives to the proposed action,
- the relationship between local short-term uses of man's environment and the maintenance, and enhancement of long-term productivity, and
- any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Federal agencies cannot consider the impacts of their actions in a vacuum. Rather, they must obtain and consider the comments of other federal agencies with jurisdiction over the action at issue, state and local governments, and Native American tribal representatives if effects of the agency's actions may be experienced on a reservation. They must also provide public notice of meetings and hearings and make its environmental documents and comments received available for the public to review. Solicitation of public input must occur early in the process to ensure meaningful input and informed decisionmaking.

## **How can Native Americans participate in NEPA specifically?**

Regulations issued by the Council on Environmental Quality (CEQ) require that federal agencies invite Native Americans to participate in NEPA's scoping process, and to provide notice and invite tribes to comment on an action when the effects of the agency's action occur on a reservation. In addition, an agency may ask a tribe to participate as a "cooperating agency" if the environmental effects of an agency's actions will occur on a reservation. The CEQ, however, has issued guidelines encouraging federal agencies to invite Native American tribes to participate as cooperating agencies upon request, in recognition of their special expertise, even if the effects of an agency's action will occur off a reservation. See "Memorandum for Heads of Federal Agencies: Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act" (Jan. 30, 2002).

## **Is there a difference between NEPA and NHPA?**

NEPA and NHPA are similar in many respects. Neither statute mandates a particular outcome. Rather, they seek to ensure that environmental, historic, and cultural concerns are considered through prescribed procedures that include consultation with tribes, other governments, organizations, interested individuals, and members of the public. In many cases, the review process for the two statutes is combined. See COUNCIL ON ENVIRONMENTAL QUALITY, EXECUTIVE OFFICE OF THE PRESIDENT, AND THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, *NEPA AND NHPA: A HANDBOOK FOR INTEGRATING NEPA AND SECTION 106* (March 2013).

Nevertheless, the two statutes have distinct requirements. Section 106 of the NHPA is triggered by any "federal undertakings," while NEPA only applies to "major federal actions." Section 106 focuses only on undertakings affecting historic properties, while NEPA applies to a broader range of impacts. The NHPA is triggered by any effect on properties listed or eligible for listing in the National Register of Historic Places, while NEPA requires that agency actions have a "significant effect on the quality of the human environment."

Most importantly, the Section 106 review process requires consultation which is defined as "the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them." The objective of consultation is executing a "Memorandum of Agreement" that spells out agreed-upon measures to avoid or mitigate adverse effects on historic properties. By contrast, NEPA seeks public input, but does not require consultation. Unless a statutory exemption applies, NEPA requires the preparation of an Environmental Impact Statement or Environmental Assessment that identifies and documents an agency's environmental review process. Although tribal participation is an important part of this process, especially when actions occur on tribal lands, NEPA relies heavily upon the public hearing and commenting process for input on environmental impacts.

Because NEPA does not require input from State Historic Preservation Officers, and others with special expertise in historic preservation, the likelihood of a successful outcome under the statute—from a tribal perspective—will depend upon the degree to which sacred sites and historic places are identified and comment and public input opportunities made available. Moreover, in some cases, NEPA review can involve input from a wide

range of interest groups, resulting in the development of multiple volumes of environmental documents that cover detailed analysis of potential impacts on air and water quality, endangered species, and other environmental impacts. Therefore, in some cases, consideration of cultural impacts can amount to only a small part of an extremely complex analysis.

### **Who administers NEPA?**

NEPA is administered by individual federal agencies. However, the CEQ is charged with overseeing federal agency implementation of NEPA and coordinating agency reviews. In addition, the CEQ, a three-member council of the Executive Office of the President, is responsible for the development of environmental policies and initiatives.

The CEQ has issued regulations and guidelines governing NEPA. 40 C.F.R. Parts 1500-1508. In addition, some federal agencies like the Federal Highway Administration have issued their own NEPA regulations, which have been approved by the CEQ as consistent with its own regulations.

### **When is an Environmental Impact Statement Required under NEPA?**

NEPA requires that an Environmental Impact Statement (EIS) be prepared whenever there is a “major federal action significantly affecting the quality of the human environment.” Examples of major federal actions include the funding of highway projects or decisions to allow road building on public lands; decisions to sell public lands or buildings; the construction of a dam or bridge; licensing of oil and gas development; the adoption of new policies or plans involving trust lands. A major federal action may also result from a failure to act.

Actions that involve “ministerial functions” or involve minimal federal involvement may not require NEPA compliance. For example, in *Sac and Fox Nation of Missouri v. Babbitt*, 92 F. Supp. 2d 1124 (D. Kan. 2000), a federal court ruled that the decision of the Secretary of the Interior to take 0.52 acres of land into trust on behalf of the Wyandotte Indian Tribe of Oklahoma was not a “major federal action” under NEPA because the decision involved the performance of a non-discretionary duty that amounted to a “merely ministerial role.”

Private, state, and local actions do not require NEPA compliance unless federal funding or permitting or licensing activity is involved. These activities, however, may trigger state environmental review statutes. Housing and road construction projects are examples.

### **How does the NEPA process work?**

Unless a statutory exemption applies, Federal agencies initiate their NEPA responsibilities by preparing an “Environmental Assessment,” or EA, early in the decisionmaking process to determine whether an Environmental Impact Statement (EIS) is necessary. An EA is a “concise public document” that serves to:

- Provide sufficient evidence and analysis to determine whether to prepare an environmental impact statement or a finding of no significant impact (FONSI).
- Aid an agency’s compliance with NEPA when an EIS is not necessary.
- Facilitate preparation of an EIS when one is necessary.

The EA should include brief discussions of the need for the proposal, the environmental impacts of the proposed action, alternatives to the proposal, and a listing of agencies and persons consulted.

If a federal agency decides, after preparation of a draft and final EA, that the proposed action will not “significantly affect the quality of the human environment,” then the agency will issue a “Finding of No Significant Impact,” or FONSI, thereby concluding the NEPA process. At issue may be the degree and manner in which a proposed action affects historic or cultural sites that are listed or eligible for listing in the National Register of Historic Places. Will the impact be direct, such as the construction of a highway through a historic site, or indirect, such as the construction of a highway near a historic site? And do the impacts, although individually insignificant, rise to the level of a significant impact when considered together? Potentially minor impacts, such as visual intrusions, increased noise, and pollution may be identified as significant effect or “cumulative impacts” when viewed together.

Evaluation of project impacts is “evidence based.” Although federal agencies are supposed to recognize tribal practices and consultation approaches, vague or unspecific concerns regarding a sacred site may be insufficient to require an EIS. Thus, on a practical level, it is necessary to provide specific information about important sites and explain how the proposed action will harm them.

If a federal agency decides that its actions could affect the environment, then it will either decide to change the project to mitigate the impacts and issue a FONSI or initiate preparation of an EIS. Typically, preparation of an EIS starts with the publication of a “notice of intent” in the Federal Register. Then, a process called “scoping” begins in order to identify the environmental impacts to be addressed and the action and the range of alternatives to consider. Next, a Draft EIS or DEIS is prepared that describes the proposed action and discusses why it is necessary. The DEIS also discusses alternatives to the proposed action. Following an agency review and public comment period, the DEIS is revised in response to the

comments submitted. The final document, or Final EIS or FEIS, is issued along with a Record of Decision (ROD), concluding the NEPA process. The ROD provides notice to the public that the FEIS has been prepared. Typically, it includes a statement of the agency’s decision, identifies alternatives considered and the alternative which would have the least harmful impact, the factors it weighted in making its decision, and whether the agency adopted measures to minimize or mitigate the environmental impacts of the alternative selected.

### **Who prepares the EA or EIS?**

Federal agencies are responsible for the scope and contents of an EA or EIS. Native American tribes should be aware, however, that in many instances NEPA documents are prepared by independent contractors, paid for in part or in whole by the recipient of agency funds or approvals. When a contractor is used, the contractor must be selected by the lead federal agency to avoid potential conflicts-of-interest. Tribes may assume responsibility for preparing environmental documents under federal agency procedures, such as when a tribe is the recipient of federal funds.

### **What opportunities are there for public participation under NEPA?**

There are several. First, the public must be given the opportunity to comment on the scope of the EIS, including identification of the issues to be evaluated in preparing an EIS and alternative actions. This usually occurs following publication of a Notice of Intent in the Federal Register. Generally, federal agencies hold scoping meetings at which information on a proposed project is shared with the public. The public has an opportunity to participate then to present its views and concerns to the agency. Members of the public may also submit written comments during the agency’s “commenting period.”



Finally, NEPA requires that a public comment review period be held following the agency's publication of the "Notice of Availability" of a Draft EIS in the Federal Register. Agencies typically hold public hearing to present their findings and solicit public reaction. Agencies review the comments received at the hearings and through the agency's formal public comment period in preparing its Final EIS.

### **What is a Supplemental EIS?**

A federal agency may need to supplement its EIS to address information not previously considered, or to include additional analysis in areas not adequately addressed in the original document. For example, it may be necessary to address the impact of its proposed action on previously unidentified historic or cultural resources or to address alternatives to its proposed action not previously considered.

Under CEQ guidelines, a Supplemental EIS (SEIS) must be prepared if "(i) [t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." The SEIS process follows the same procedures as for the EIS, exclusive of scoping.

### **What is a Programmatic EIS?**

In certain cases, a federal agency may develop a Programmatic EIS (PEIS) to evaluate the impacts of broad agency actions such as the establishment of national policies or the development of nationwide programs. Under this approach, consideration of impacts on specific cultural, historic, and sacred resources is deferred until the policy or program is applied to a specific location. Emphasis is placed on the development of broadly applicable mitigation responses rather than the development of site-specific solutions through consultation or

avoidance. For example, the Bureau of Land Management has completed a Programmatic EIS for the establishment of a wind energy program for lands in the Western U.S.

Although a Programmatic EIS may be helpful to federal agencies in considering environmental impacts, it is no substitute for the type of analysis that must be performed under the EIS procedure, and project-specific NEPA compliance is then "tiered" from a PEIS. Consistent with NEPA, consideration of environmental impacts of federal agency actions should occur early in the planning process so that meaningful alternatives are not foreclosed by key planning decisions based on insufficient information. Some policies, such as decisions to open up public lands for leasing or drilling have far reaching consequences with the potential to affect numerous sacred and cultural sites. But to the extent that impacts cannot be fully understood without identification of the specific resources within the affected areas, more project-specific analysis will be needed. Because input by Native Americans is highly dependent upon project-driven consultation requirements, the probability that tribal interests will not be considered adequately under a programmatic approach is cause for concern.

Notwithstanding the shortcomings of a PEIS approach, federal agencies should be working on developing methods to ensure tribal participation on all levels. Pursuant to Executive Order 13175, federal agencies are required to work with Indian tribes on a government-to-government basis to "ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." In addition, the CEQ has established the Interagency Tribal NEPA Capacity Work Group to improve federal agency understanding of American Indian tribes, Alaska Native entities, and Native Hawaiian organizations and their cultures.

## How is NEPA enforced?

As with Section 106 of the NHPA, NEPA, enforcement is dependent upon citizen enforcement through litigation. For discussion on case law examples arising under NEPA, see “Protecting Native American Historic Places under Federal Law, 21 PRESERVATION LAW REPORTER 1043 (2002-03).

Some agencies, such as the U.S. Forest Service and the Bureau of Land Management, provide a formal administrative process to appeal decisions relating to EAs and the EIS. Judicial review may be precluded unless a tribe has first appealed agency decisions under the agency’s own appeal procedures. Time limits exist, however, for filing administrative appeals, and agency rules may require some minimum level of prior involvement in the case, such as filing comments, as a condition to participating in an appeal.

## CATEGORICAL EXCLUSIONS

Certain types of federal actions may be categorically excluded from NEPA review, meaning that an environmental assessment or environmental impact statement need not be prepared. Categories of actions that qualify for exclusion are those “which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations.” For example, decisions relating to personnel matters may be exempted from NEPA compliance.

Keep in mind that even though an action has been identified by an agency for categorical exclusion, additional NEPA compliance may be required in extraordinary situations. Under CEQ regulations, federal agencies are required to establish procedures to address situations where normally excluded actions could have a significant environmental effect. In addition, an agency action may not be categorically excluded if it violates a provision of tribal or state law.

Finally, note that even if a federal agency action has been categorically excluded, this does not mean that Section 106 review under the NHPA has also been precluded.

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## TRIBAL PARTICIPATION UNDER NEPA

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A tribal government may assume different roles when responding to proposed federal agency actions affecting Native American sacred sites and cultural resources. In recognition of its sovereign status, a tribal government may be invited or seek to participate in the NEPA process as a “joint lead agency” or as a “cooperating” or “consulting” agency. Alternatively, a tribe or individual members may provide comments under the statute’s regular hearing and commenting procedures.

It should be noted that, in addition to NEPA, federal agencies are independently obligated to consult with Native Americans by executive order and agency policy. Executive Order 13175, for example, mandates that the U.S. Government work with Indian tribes on a government-to-government basis, to among things, “ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” The actual terms of a consulting arrangement may be developed through mutual agreement—typically in the form of a Memorandum of Understanding, or MOU—respecting the needs and concerns of Native Americans.

Although participation is optional, it is important to realize that participation—in any capacity—provides the best opportunity to learn about the details and environmental consequences of proposed agency actions and to influence outcomes.

<b>Joint Lead Agency</b>	Under CEQ regulations, a local, state, or tribal government may act as a “joint lead agency” to prepare an EIS. For example, a tribe may assume joint agency status when it is obligated to perform substantially similar environmental reviews under a state statute or corresponding tribal law.
<b>Cooperating Agency</b>	<p>A tribal government may assume cooperating agency status when it has “jurisdiction by law” or “special expertise” that can contribute to the planning process and environmental analysis. A tribal government may have jurisdiction by law if it has authority to “approve, veto, or finance” all or part of the proposed agency’s action occurring on tribal lands.</p> <p>Even if a tribe does not have “jurisdiction by law,” it will have “special expertise” because of its particular knowledge of local custom and culture. Such knowledge is often critical to determining the scope and significance of potential environmental impacts—such as those affecting traditional cultural sites or the protection of medicinally important plants—both on and off tribal lands. Similarly, Native American expertise may be necessary to provide advice on archeological investigation techniques and to develop a plan for inadvertent discovery of human remains or artifacts.</p> <p>As a cooperating agency, a tribe can be directly involved in the NEPA process early on, thereby enabling it to exert greater influence over the outcome. Cooperating agencies can participate in meetings with other stakeholders, identify significant environmental issues, prepare environmental analysis to support the development of the EA/EIS, and otherwise provide direct input into the planning and environmental review process.</p>

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**TRIBAL PARTICIPATION UNDER NEPA (CONT.)**

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<b>Consulting Agency</b>	<p>Alternatively, tribal governments may participate in the NEPA process as a consulting agency. Federal agencies, under CEQ regulations, are required to invite comments from potentially affected tribes at various stages of the process, including tribes that may have aboriginal or historical ties to lands, either within or outside the boundaries of an Indian reservation. Under the consulting agency approach, tribal participation will occur on a less formal basis and will entail less direct involvement in the EA/EIS process. For example, consulting agencies do not enter into MOUs and do not participate in the internal review of documents, issues, or drafts. However, as a consulting agency, a tribe should be provided with the opportunity to meet with agency officials and provide comments on environmental impacts and alternative actions during the review process.</p>
<b>What's the difference?</b>	<p>In practice, the distinction between cooperating and consulting agency status is blurred. Although Native Americans often consult with federal agencies through informal consulting arrangements, an increasing number of tribal governments have opted to participate formally in the NEPA process as a cooperating agency because of the importance formal participation can have on protecting sacred places and other culturally significant sites. The reason for this is that the cooperative agency process is more collaborative than the consulting agency process, thus giving Native American tribes more leverage to help them avoid, minimize, or mitigate adverse effects of federal agency actions on the historic and cultural resources that they value.</p>
<b>General public</b>	<p>A tribe, including those that have not been officially recognized as such by the U.S. Government, and individual tribal members, may participate in the NEPA process as a member of the general public. NEPA requires that agencies provide the public with opportunities to comment on the EIS at different stages in the review process.</p>

### PART I.3: SECTION 4(F) OF THE DEPARTMENT OF TRANSPORTATION ACT

Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303, 23 U.S.C. § 138, and 23 C.F.R. Part 774, offers Native Americans the ability to protect historic and cultural resources from potentially adverse impacts of federal transportation projects. Actions of the Department of Transportation, (including the Federal Highway Administration (FHWA), the Coast Guard, the Federal Aviation Administration (FAA), and the Federal Transit Administration (FTA)), such as the construction of highways, expansion of airports, and changes to flight paths, come within the purview of Section 4(f). However, transportation projects approved by other federal agencies, such as logging roads approved by the U.S. Forest Service, or those funded only by state or local moneys, do not fall within the statute. In other words, the Department of Transportation must have jurisdiction over the project.

Although Section 4(f) applies to a narrower scope of actions than Section 106 of the NHPA or NEPA, the law provides substantive protection for historic resources, including traditional cultural sites. Specifically, the law states that any federally-assisted transportation projects may not “use” land from a historic site or park, among other environmentally-sensitive areas, unless:

- There is “no feasible and prudent alternative” to using the site; and
- The project includes “all possible planning” to minimize harm to the site.

The Supreme Court of the United States in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), interpreted Section 4(f) as imposing

important constraints on the Department of Transportation’s transportation programs. In construing the statute, the Court rejected the Secretary’s attempt to simply balance agency program objectives against the preservation of Overton Park in Memphis, Tennessee. Rather, the Court held that protecting parkland was of “paramount importance,” and therefore the Secretary could not “approve the destruction of parkland unless he finds that alternative routes present unique problems.” *Overton Park* thus serves as an important constraint on transportation projects and programs affecting parklands, historic properties, and other resources. Indeed, the Secretary of Transportation has incorporated language from the *Overton Park* court opinion in the agency’s regulations. The regulations provide:

“Supporting information must demonstrate that there are unique problems or unusual factors involved in the use of alternatives that avoid these properties or that the cost, social, economic, and environmental impacts, or community disruption resulting from such alternatives reach extraordinary magnitudes.”

#### How is Section 4(f) implemented?

The FHWA has adopted regulations establishing procedures for Section 4(f) compliance. As with Section 106 of the NHPA and NEPA, environmental reviews are to be conducted early in the planning stages of the project. Responsibility for preparing the review rests on the applicant for transportation funding or other approvals. The evaluation is then reviewed by federal agency official having jurisdiction over the project, including the Department of Transportation and the Department of the Interior and other agencies as appropriate.



### **What resources does Section 4(f) protect?**

Section 4(f) provides protection for land of a historic site, publicly owned parklands, and other areas such as wildlife and waterfowl refuges of national, state, or local significance.

### **What is a “historic site”?**

The term “historic site” includes properties of “national, State or local significance (as determined by Federal, State, or local officials having jurisdiction over the . . . site).” As with Section 106 of the NHPA, Section 4(f) protects properties listed or eligible for listing in the National Register of Historic Places, and in some cases, properties identified by state and local governments as historically significant. Traditional cultural properties, including cultural places and sacred sites, may be eligible for listing in the National Register and thus come within Section 4(f)’s purview. Similarly, Native American burial sites and associated funerary objects will be considered Section 4(f) resources if eligible for listing in the National Register.

Determinations of historical significance and delineations of the boundaries of a historic site are made by the Secretary of the Department of Transportation. However, such determinations must be made in consultation with the THPO, or with the SHPO and tribal representatives, and other state or local government officials.

Disagreement over a property’s eligibility for listing in the National Register or the appropriate boundary lines may be appealed to the Keeper of the National Register. If Section 4(f) is found not to apply, then the basis for that decision should be documented.

### **When are historic sites identified?**

As with Section 106 of the NHPA and NEPA, historic sites must be identified early in the

permitting process. Courts have generally rejected attempts to defer identifying sites until a project is underway. However, deferral may be appropriate in limited instances. For example, the deferral of Section 4(f) analysis for limited “ancillary” activities associated with highway construction, such as the identification of locations for burrow pits, was upheld in *City of Alexandria v. Slater*, 198 F.3d 962 (D.C. Cir. 1999).

### **What if the historic site is a National Historic Landmark?**

Treatment of National Historic Landmarks under Section 4(f) is essentially the same as that for other historic sites. However, the fact that a resource has heightened importance, by virtue of its designation as a NHL, should be addressed in Section 4(f) review. Note that Section 110 of the NHPA requires that agencies minimize harm to a NHL to the maximum extent possible.

### **Does Section 4(f) protect lands owned by Native American tribes or reservations?**

If land or resources owned by a tribe functions as a significant park, recreational area (open to the general public), a wildlife and waterfowl refuge, or is listed or eligible for listing in the National Register of Historic Places, then Section 4(f) applies.

### **What does “use” of land from a historic site mean?**

Section 4(f) applies to projects or programs that will “use” land from historic sites. The term “use” applies to more than just physical harm to such sites. It also protects against “constructive uses” or impacts if the use would “substantially impair the value of the property in terms of its use and enjoyment.” Thus, use of a historic site may include the demolition, removal, or disturbance of historic sites as well as impacts such as noise, pollution, and visual intrusions.

Note that Section 4(f) requirements may be deemed satisfied when the Secretary of Transportation determines that a transportation program or project will have a *de minimis* impact on historic properties. This means that a project or program would have no adverse effect on any historic site or there would be no historic properties affected by the project at all.

### **What are “feasible and prudent alternatives”?**

The regulations set forth at 23 C.F.R. § 774.17 set out factors to consider in determining whether an avoidance alternative is feasible and prudent:

- An alternative is not feasible if it cannot be built as a matter of sound engineering judgment.
- An alternative is not prudent if:
  - It compromises the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need;
  - It results in unacceptable safety or operational problems;
  - After reasonable mitigation, it still causes:
    - Severe social, economic, or environmental impacts;
    - Severe disruption to established communities;
    - Severe disproportionate impacts to minority or low income populations; or
    - Severe impacts to environmental resources protected under other federal statutes;
  - It results in additional construction, maintenance, or operational cost of an extraordinary magnitude;
  - It causes other unique problems\* or unusual factors; or
  - It involves multiple factors listed above, that while individually minor, cumulatively cause unique problems\* or impacts of extraordinary magnitude.

\*Examples of unique problems include unacceptable social, economic or environmental impacts; serious community disruption; unacceptable safety or geometric problems; or excessive construction costs.

An accumulation of these problems (as opposed to a single factor) may be a sufficient reason to use a Section 4(f) resource, but only if the problems are truly unique. Cost alone will not necessarily prevent an alternative from being considered prudent.

### **What if the Secretary determines that a historic site must be “used”?**

If the Secretary determines that there are “no prudent and feasible alternatives” to its proposed project or program, it may use the historic site. However, a project or program may not be approved unless the Secretary has engaged in “all possible planning” to minimize harm to the historic site.

### **What if there is a way to avoid using historic resources?**

Avoidance alternatives are those that entirely avoid the use of Section 4(f) properties. A key requirement of Section 4(f) compliance is an attempt to show whether a property can be completely avoided while meeting the stated transportation need. When the alternatives under consideration use land from one or more Section 4(f) properties, alternatives that avoid each of the properties must be evaluated. Avoidance alternatives should consider minor alignment shifts, reduced cross-sections, retaining structures, modifications to the project and so forth. Avoidance alternatives that are eliminated from detailed study should be discussed in the Section 4(f) Evaluation with a clear explanation of why they are not feasible and prudent. When selecting an alternative, the most important point to remember is if an avoidance alternative is determined to be feasible and prudent, it must be selected.

### **How is Section 4(f) enforced?**

As with Section 106 of the NHPA and NEPA, Section 4(f) of the Department of Transportation Act is dependent upon citizen enforcement through litigation.

## **PART I.4: OTHER LAWS & ORDERS**

In addition to the NHPA, NEPA, and Section 4(f) of the Department of Transportation Act, other statutes and executive orders impose additional requirements on federal agencies or otherwise affect the treatment of Native American heritage resources. Some of these laws govern the treatment of specific kinds of cultural resources or impose specific requirements on federal land managers with respect to the treatment of cultural resources and sacred sites. Others seek to protect specific aspects of the environment, while others merely establish policies that affect how other statutes, such as the NHPA and NEPA, are implemented.

For additional reference, cultural resource managers of the Washington Office of the National Park Service have prepared a series of useful legal reference tools, or “Quick Guides,” available at [http://www.nps.gov/tribes/Quick\\_Guides.htm](http://www.nps.gov/tribes/Quick_Guides.htm). “Quick Guides” have been prepared collaboratively to share information about NPS programs with American Indians, Alaska Natives and Native Hawaiians. “Quick Guides” offer core information on preserving Native American cultural resources. Specific guidance is available through the guides on topics including National Park Service Grants, the Native American Graves Protection and Repatriation Act (NAGPRA), Traditional Cultural Properties and the National Register of Historic Places, Tribal Historic Preservation Officers, and World Heritage Sites. In addition, the NPS’s “Quick Guides” offer useful illustrations, flow charts, and links that help explain the essential legal framework of the National Historic Preservation Program.

## **STATUTES**

### **American Indian Religious Freedom Act**

The American Indian Religious Freedom Act (AIRFA), 42 U.S.C. §§ 1996 and 1996a, acknowledges the First Amendment rights of Native Americans as guaranteed under the U.S. Constitution. It declares a policy of protecting the inherent and constitutional rights of Native Americans to believe, express, and exercise their traditional religions and requires that the U.S. Government, including “the various Federal departments, agencies, and other instrumentalities responsible for administering relevant laws to evaluate their policies and procedures in consultation with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices.”

Pursuant to AIRFA, federal land managers consult with Native American tribal and spiritual leaders in developing their land management plans. Although the Act encourages federal land managers to respect the traditional rights of Native Americans, the law does not require that federal land managers comply with the suggestions or comments provided by Native Americans. In other words, the law provides no rights beyond those guaranteed by the U.S. Constitution.

### **Archeological and Historic Preservation Act of 1974**

Originally known as the Reservoir Salvage Act, and sometimes referred to as the Moss-Bennett Act or the Archeological Recovery Act, this law provides “for the preservation of historic American sites, buildings, objects, and antiquities of national significance, and for other purposes,” by specifically

providing for the preservation of historical and archeological data (such as relics and specimens) which might otherwise be irreparably lost or destroyed as the result of”(1) flooding, the building of access roads, the erection of workmen’s communities, the relocation of railroads and highways, and other alterations of the terrain caused by the construction of a dam by any agency of the United States, or by any private person or corporation holding a license issued by any such agency or (2) any alteration of the terrain caused as a result of any Federal construction project or federally licensed activity or program.” It requires that federal agencies notify the Secretary of the Interior when its construction project or licensing activities may cause “loss or destruction of significant scientific, prehistorical, historical, or archeological data.” At the request of the agency, the Secretary of the Interior must “undertake the recovery, protection, and preservation of such data.”

### **Historic Sites Act of 1935**

The Historic Sites Act of 1935, 16 U.S.C. §§ 461-67, is a statute of primarily historical, rather than practical, significance. This statute expanded the role of the U.S. Government in preserving historic sites by establishing a national policy for the preservation of historic sites, buildings, and objects of national significance. The law conferred authority in the Secretary of the Interior to designate sites of historic significance and to acquire such sites, without special authorization from Congress. It also established the Historic American Buildings Survey and Historic American Engineering Record (HABS-HAER), which sets forth procedures and documentation standards for the recordation of historic sites, and the National Historic Landmarks program.

### **Other Environmental Protection Laws**

Other environmental statutes, including the Clean Air Act, the Clean Water Act, the Endangered Species Act, and the Migratory Bird Treaty Act may offer indirect protection for Native American cultural resources, and sacred places, in particular. Although these laws do not regulate traditional cultural sites specifically, they seek to improve air and water quality, maintain healthy ecosystems in rivers and estuaries, and protect native plants and animals, many of which are important to Native Americans, both spiritually and culturally. Enforcement is generally accomplished through administrative actions and citizen lawsuits. See Appendix B for citations to these statutes.

### **Federal Agency Land Management Laws**

Native Americans should be aware of certain statutes requiring federal land managers to develop land and resource management plans. The Federal Land Policy and Management Act, the National Forest Management Act, and the National Park Service Organic Act, each call for the development of management plans that, among other things, include consideration of historic, cultural, and scenic values, as well as consultation with Indian tribes on Indian sacred sites. For example, specific requirements governing agency procedure and Native American consultation requirements are set forth in Bureau of Land Management directives system through Manuals, Handbooks, Instruction Memoranda and Information Bulletins. The 8100 series in the Manual addresses “The Foundations for Managing Cultural Resources” and subsections of that manual and its related handbook address topics including “Tribal Consultation under Cultural Resource Authorities” (M-8120) and “Guidelines for Conducting Tribal Consultation” (H-8120). Other agencies have similar policy directions. See Appendix B for citations to these statutes.

## **Executive Orders**

Presidents of the United States have issued executive orders that address policy issues pertaining to Native Americans. These orders, although lacking the force of law, nonetheless influence how agencies meet their obligations under statutes such as the NHPA and NEPA. For example, President Clinton's memorandum and executive orders on government-to-government relations and consultation requirements have helped to ensure that agencies are proactive in their efforts to consult with tribes in the identification of cultural resources and sacred sites and to develop solutions that would avoid, minimize, or mitigate harm to these places.

## **Protection of Cultural Environment and Sacred Sites**

Two executive orders address U.S. policy towards or about cultural and sacred places. Executive Order 13007, entitled "Indian Sacred Sites," seeks to protect and preserve Indian religious practices by accommodating access to and ceremonial use of sacred sites on federal lands. Executive Order 11593, entitled "Protection and Enhancement of the Cultural Environment," establishes federal agency policy with respect to the treatment of historic, cultural, and archeological resources.

### **How are sacred sites protected under Executive Order 13007?**

In 1996, President Clinton issued an executive order pertaining to the treatment of sacred sites on federal lands. Executive Order 13007 directs federal land managers to "accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners," and to "avoid adversely affecting the physical integrity of such sacred sites."

To assure compliance, federal agencies are required to "promptly implement procedures" to carry out the order and to provide reasonable notice of proposed actions or land management policies that

may restrict access to or ceremonial use of sacred sites. Development of procedures and policies are to be accomplished in accordance with President Clinton's Memorandum on "Government-to-Government Relations with Native American Tribal Governments" (Apr. 29, 1994). Federal land managers, as appropriate, are also directed to maintain the confidentiality of sacred sites.

Executive Order 13007 places the burden on Native Americans to identify sacred sites. Therefore, notice to Native Americans of governmental actions and efforts to accommodate religious practice by Native Americans depends upon notification by tribes and spiritual leaders that a site is sacred.

Although Executive Order 13007 lacks enforcement capabilities, it has been influential in prompting federal land managers to work proactively in accommodating access to and use of sacred sites. Many federal land managers have revised their management plans to ensure compliance with Executive Order 13007. In addition, the order has been used to shape and enhance the treatment of sacred sites in the execution of cultural resource responsibilities under laws such as NHPA, NEPA, as well as ARPA and the Antiquities Act of 1906.

### **How does Executive Order 11593 protect cultural resources?**

Five years after the NHPA's enactment, President Nixon signed Executive Order 11593 on the "Protection and Enhancement of the Cultural Environment." This order complements Section 110 of the NHPA, which directs federal agencies to provide leadership in preserving, restoring, and maintaining the historic and cultural environment of the United States by administering its own cultural properties in a "spirit of stewardship" and by initiating measures to ensure that its policies, plans, and programs preserve, restore, and maintain federally owned sites, structures, and objects of historical, architectural, and archeological significance.



In executing this directive, federal agencies are required to identify properties for listing in the National Register of Historic Places and to take steps to assure that non-governmental properties listed in the National Register are properly recorded if harmed by agency actions.

In contrast to other executive orders, Executive Order 11593 contains no language expressly precluding judicial review and enforcement. Thus, this order has been relied upon in some cases to compel federal agencies to protect historic resources. For example, see *Barcelo v. Brown*, 478 F. Supp. 646 (D.P.R. 1979), *aff'd in part, rev'd in part*, 643 F.2d 835 (1st Cir. 1981), *rev'd on other grounds sub nom. Weinberger v. Barcelo*, 456 U.S. 305 (1982) (ruling that the Navy violated Executive Order 11593 by failing to nominate or seek eligibility determinations for archeological sites discovered on Puerto Rico); *Aluli v. Brown*, 437 F. Supp. 602 (D. Haw. 1977), *aff'd in part, rev'd in part*, 602 F.2d 876 (9th Cir. 1979) (relying on Executive Order 11593 to enjoin bombing activities on a Hawaiian island where cultural resources had not been identified).

### **Government-to-Government Relations and Consultation Requirements**

Executive Orders governing federal agency interaction with tribal governments also influence the degree and manner in which federal agencies consult with Native Americans on a wide range of issues affecting Native American interests. These include a Presidential Memorandum on “Government-to-Government Relations with Native American Tribal Governments,” adopted on April 29, 1994; and Executive Order 13175, on “Consultation and Coordination With Indian Tribal Governments.” A third order, Executive Order 13084, also entitled “Consultation and Coordination with Indian Tribal Governments,” was revoked by Executive Order 13175.

### **What are the specific requirements of Executive Order 13175?**

In recognition of the special government-to-government relationship between the U.S. Government and tribal governments, Executive Order 13175 underscores the ongoing responsibilities of federal agencies to consult and collaborate with tribal governments in the development of laws and policy statements affecting Indian tribes. Federal agencies are required to grant tribal governments the “maximum discretion allowed” in the administration of federal statutes and regulations (such as the NHPA); encourage Indian tribes to develop their own policies to achieve program objectives, and to defer to Indian tribes in establishing standards. In addition, they are required to establish procedures that ensure tribal input in the development of regulatory policies that have tribal implications and to provide the funding necessary to cover agency-imposed tribal compliance costs. Executive Order 13175 also supports increased flexibility in granting waivers of regulatory requirements and using “flexible policy approaches.”

Executive Order 13175 reaffirms and expands upon the policies established by President Clinton in his Presidential Memorandum, “Government-to-Government Relations with Native American Tribal Governments.” Adopted on April 29, 1994, this memorandum sets forth federal agency responsibilities in consulting or interacting with Native American tribal governments. Key directives include consulting with tribal officials before taking actions that affect tribes; assessing the impact of agency actions on tribal trust resources and assuring that tribal government rights and concerns are considered; and removing procedural impediments to working directly and effectively with tribal governments.

## Environmental Justice

As a matter of U.S. Government policy, federal agencies are required to make environmental justice a part of their mission. This involves the identification of “disproportionately high and adverse human health and environmental effects” resulting from agency programs, policies, and activities on minority populations, including Native Americans, and the development of effective solutions. See Executive Order 12898, entitled “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.” Implementation of this directive is to be accomplished, in part, through NEPA. A memorandum issued in conjunction with the executive order directs agencies to analyze the effects of their actions on minority populations when undergoing NEPA analyses and to address “significant and adverse effects” on communities “whenever feasible.”

### How does Executive Order 12898 help Native Americans?

In preparing an Environmental Assessment or Environmental Impact Statement under NEPA, agencies must consider both impacts on the natural and physical environment and related social, cultural, and economic impacts. This includes awareness, on the part of agencies, of interrelated social, cultural, and economic factors that may influence or amplify the environmental impacts agency actions can have on Native American populations, such as a particular sensitivity to particular impacts stemming from the religious or social structure of Native American tribes. For example, the protection of certain types of plants may be necessary to carry out religious practices.

Although Executive Order 12898 does little to provide Native Americans with the ability to compel federal agencies to address their environmental concerns, as with other executive orders, it establishes federal policy that promotes pro-environmental outcomes and to some extent, can be used to foster specific outcomes through negotiation. For example, the Indigenous Peoples Subcommittee of the National Environmental Justice Advisory Council, an advisory committee to the Environmental Protection Agency has developed a “Guide on Consultation and Collaboration with Indian Tribal Governments and the Public Participation of Indigenous Groups and Tribal Members in Environmental Decision Making,” to improve effective consultation and collaboration with tribal governments under NEPA and other environmental laws. For further information on Executive Order 12898, see Council on Environmental Quality, “Environmental Justice: Guidance under the National Environmental Policy Act,” Dec. 10, 1997.

## PART 2:

# Repatriation and Protection of Native American Remains and Cultural Items

## 2

**TWO FEDERAL LAWS ADDRESS THE DISPOSITION OF NATIVE AMERICAN REMAINS AND CULTURAL ITEMS** held or controlled by the U.S. Government, the Native American Graves Protection and Repatriation Act (NAGPRA) and the National Museum of the American Indian Act (NMAIA).

NAGPRA, 25 U.S.C. §§ 3001-3013, governs the disposition of Native American cultural items, including human remains and funerary items as well as sacred objects and objects of cultural patrimony (1) held by federal agencies and museums funded by the U.S. Government as of November 18, 1990, or (2) intentionally excavated or inadvertently discovered on federal or tribal lands after that date.

NMAIA, by comparison, governs the disposition of human remains and cultural objects held by the Smithsonian Institution, which is not subject to NAGPRA.

NAGPRA and NMAIA differ from the National Historic Preservation Act (NHPA), National Environmental Policy Act (NEPA), and other federal laws discussed herein because Native Americans are the specific beneficiaries of these laws. Furthermore, decisions on the treatment of protected resources governed by NAGPRA and NMAIA rest with Native Americans. NAGPRA, for example, focuses on rights of possession rather than curatorial responsibilities, and places the choice of repatriation and control over the disposition of newly discovered human remains and certain

cultural objects in the hands of lineal descendants and culturally affiliated tribes. These laws also differ in that while the NHPA and NEPA apply to a wider array of resources, they mandate a process and do not guarantee protection.

### **PART 2.1: NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT**

NAGPRA gives official recognition of the rights of federally recognized Native American tribes and Native Hawaiian organizations to human remains, funerary objects, sacred objects, and objects of cultural patrimony held by the U.S. Government and any museums that receive federal funding, other than the Smithsonian Institution. NAGPRA also establishes a process enabling those eligible to recover such items. Museums are required to identify and return human remains and objects within their collections when requested by lineal descendants or culturally affiliated Indian tribes. In addition, NAGPRA places ownership and control of any newly discovered or excavated cultural items found on U.S. or tribal lands in lineal descendants and Indian tribes, in accordance with an established hierarchy.

## REPATRIATION



Native American protest calling for the repatriation of remains and cultural objects

Many of the laws and regulations that address the repatriation and protection of Native American remains and cultural items are criminal in nature. Because few criminal cases in this area of the law reach the trial stage, reported case law is scarce. NAGPRA, for example, has been used successfully to secure criminal convictions against Indian artifact dealers. One of the most controversial cases to have arisen under this Act is known as the “Kennewick Man.” This matter concerned an 8,000-year-old skeleton that was discovered next to the Columbia River in Kennewick, Washington, and raised difficult questions about what should happen with prehistoric remains that do not have a clear link to an existing Native American tribe.

Repatriation is the process by which specific kinds of American Indian cultural items held in museum collections are returned to lineal descendants and culturally affiliated Indian tribes, Alaska Native clans or villages, and Native Hawaiian organizations. These items encompass sacred objects, objects associated with funereal rites, human remains, and other objects of cultural patrimony.

The National Museum of the American Indian plays a key role in repatriation, which Congress established in 1989 with the passage of the NMAIA. This Act transferred to the Smithsonian Institution stewardship of the more than 800,000 objects in the George Gustave Heye collection of the Museum of the American Indian

in New York City. In addition, the act required the Smithsonian to create and carry out an institutionwide repatriation policy regarding Native American human remains and certain cultural materials. Along with the efforts of the National Museum of the American Indian, the Repatriation Offices of other Smithsonian institutions work closely with Native peoples and communities as well as staff in other museum departments. Reports to Congress are made annually about these repatriation activities.

When applying NAGPRA, it is important to understand that many of the statute's terms have specialized meanings. For example, rights are conferred on "Indian tribes," which are defined as "any tribe, band, nation, or other organized group of community of Indians" that is "recognized as eligible for the special programs and services provided by the United States to Indians because of their special status as Indians."

Moreover, as with other federal laws, maintaining an ongoing dialogue among tribal representatives, federal agencies, and museums is critical to the property identification and cultural affiliation of items within the possession or control of a specific agency or museum. Without consultation, the cultural significance or rights to particular items may simply go undetected. To encourage dialogue, NAGPRA requires that federal agencies and museums consult with descendants and Indian tribes in the identification of objects and their cultural affiliations.

### **Which federal agencies and museums must comply with NAGPRA?**

NAGPRA applies to federal agencies, including any department, agency, or instrumentality of the United States, except for the Smithsonian Institution, which is governed specifically by the NMAIA. Each agency should have appointed a "federal agency official" to administer the agency's responsibilities relating to NAGPRA.

NAGPRA also applies to any museum other than the Smithsonian Institution that receives federal funds and has collections of Native American human remains and cultural property, including funerary objects, sacred objects, and objects of cultural patrimony. Funds may be received through any grant, loan, contract, or other arrangement in which a museum receives federal aid. Museums that

are part of a state government, a local government, or a private university which receives federal funds for any purpose are also subject to NAGPRA.

### **Who administers NAGPRA?**

Primary responsibility for NAGPRA compliance rests with federal agencies and museums receiving federal assistance. The Secretary of the Interior and National Park Service oversee the law through the National NAGPRA Program.

### **How does repatriation occur under NAGPRA?**

Federal agencies and museums are required to repatriate human remains and associated funerary objects within their possession and control and any unassociated funerary objects, sacred objects, or objects of cultural patrimony to lineal descendants or culturally affiliated tribes. According to statistics prepared by the National Park Service; over 30,000 individuals; nearly 600,000 associated funerary objects; 90 unassociated funerary objects; 1,200 sacred objects; 275 objects of cultural patrimony, and 650 objects that are considered sacred and patrimonial have been repatriated as of April 30, 2014.

## **PART 2.2: NATIONAL MUSEUM OF THE AMERICAN INDIAN ACT**

The National Museum of the American Indian Act (NMAIA), 20 U.S.C. § 80q, applies specifically to the disposition of human remains and cultural objects held by the Smithsonian Institution. The law is similar in scope to the NAGPRA. As a result of the NMAIA, the Secretary of the Smithsonian is required to inventory Indian and Native Hawaiian human remains and funerary objects under the museum's control and return them upon request by a descendant or culturally affiliated tribe or Native Hawaiian organization.



Although the NMAIA does not establish a consultation process and does not require that notice to lineal descendants or culturally affiliated tribes be given when inventories and summaries are completed, the Smithsonian follows many of the procedures set forth under NAGPRA and seeks to repatriate its human remains and cultural objects through a collaborative process with tribal members.

Similar to NAGPRA, the NMAIA establishes a “Smithsonian Repatriation Review Committee” and provides funding for Native Americans to support costs associated with the review of specific collections. The Review Committee is charged with monitoring and reviewing the Smithsonian’s repatriation process, reviewing repatriation applications, and resolving disputes between competing claims.

The Smithsonian’s largest collections of Native American objects are held by the National Museum of the American Indian and the National Museum of Natural History. Each museum has a Repatriation Office that is responsible for handling requests for repatriations.

## PART 3:

# Protecting Native American Cultural Resources Against the Harmful Acts of Private Individuals

## 3



**IN ADDITION TO THREATS POSED BY FEDERAL GOVERNMENT UNDERTAKINGS,** Native American resources can be harmed by the acts of individuals, intentionally or accidentally. The unprofessional excavation of artifacts, looting, pilfering or defacement of sacred or traditional cultural sites, and the sale of stolen cultural items contribute to this loss.

The primary laws governing the protection of archeological resources, including certain Native American cultural resources, are the Archaeological Resources Protection Act of 1979 (ARPA), 16 U.S.C. §§ 470aa-470mm and the Antiquities Act of 1906, 16 U.S.C. §§ 431-433. These laws protect archeological resources by helping to ensure that such resources are preserved and collected for scientific and public benefit and by deterring destructive activity. These laws require the use of permits to examine, study, or excavate any resources, and impose sanctions against specific illegal acts, such as looting, vandalism, and trafficking stolen items.

### **What resources does ARPA protect?**

ARPA protects archeological resources that are at least 100 years old and contain information on “past human life or activities” that are found on public or Indian lands. It applies to archeological resources that may be significant to Native Americans, such as pottery, basketry, bottles, weapons, portions of

structures, pit houses, rock paintings and rock carvings, as well as graves and human skeletal remains. There is no requirement of documented significance or designation such as listing in the National Register.

ARPA, however, offers no specific protection against acts that may adversely affect religious or cultural sites. The law only requires notification when the excavation or removal of archeological resources may affect such sites.

### **How does ARPA protect Native American resources?**

ARPA protects Native American resources on lands owned or controlled by the United States or on tribal lands through its permitting and enforcement procedures. Although it places direct control over archeological resources on tribal lands within the tribes themselves, individual tribal members and non-tribal members must obtain an ARPA permit before conducting excavation work—even if a tribe has consented to the work.

## NATIVE AMERICAN NATIONAL MONUMENTS



Credit: National Trust for Historic Preservation

**Aztec Ruin National Monument, New Mexico**

The Antiquities Act of 1906 recognized, for the first time in U.S. history, the need to protect cultural sites and artifacts and rejected the practice of digging sites for commercial gain. It also gives official recognition to the intrinsic value of archeological or cultural resources as important links to the past. A number of monuments have been established to protect Native American cultural sites, including Aztec Ruins, Bandelier, Canyon de Chelly, Canyons of the Ancients, Casa Grande, Chimney Rock, Effigy

Mounds, El Malpais, Gila Cliff Dwellings, Hohokam Pima, Hovenweep, Montezuma Castle, Navajo, Petroglyph, Pipe Spring, Pipestone, Papahanaumokuakea, Poverty Point, Rainbow Bridge, Salinas Pueblo Missions, Tonto, Tuzigoot, Walnut Canyon, Wupatki, and Yucca House. Most of the monuments are managed by the National Park Service, but others are managed by the Bureau of Land Management, the U.S. Forest Service and the U.S. Fish and Wildlife Service.

Specifically, ARPA protects archeological resources on:

- Lands owned and administered by the federal government such as National Parks, National Monuments, and parts of the National Wildlife Refuges system and the National Forest System;
- Lands belonging to Native American tribes or individuals, if such lands are held in trust by the United States or are subject to a restriction against alienation (transfer of ownership) by the United States; and
- State-owned or privately owned property, provided that there is a violation of a state or local law governing archeological resources and the resource is placed in interstate or international commerce. For example, an individual may be prosecuted under ARPA for removing cultural artifacts from private land and then transporting those artifacts across state lines.

### **What constitutes “Indian lands” and “Indian tribes” under ARPA?**

ARPA applies to activities on public lands, which are properties owned by the U.S. Government, and Indian lands. For purposes of ARPA, Indian lands mean “lands of Indian tribes, or Indian individuals, which are either held in trust by the United States or subject to a restriction against alienation imposed by the United States, except for subsurface interests not owned or controlled by an Indian tribe or Indian individual.”

An Indian tribe is defined as “any Indian tribe, band, nation, or other organized group or community, including any Alaska village or regional or village corporation as defined in, or established pursuant to, the Alaska Native Claims Settlement Act.”

For purposes of ARPA, an Indian tribe includes:

- Any tribal entity included in the annual list of recognized tribes published in the Federal Register by the Secretary of the Interior pursuant to 25 C.F.R. Part 54;

- Any other tribal entity acknowledged by the Secretary of the Interior pursuant to 25 C.F.R. Part 54 since the most recent publication of the annual list; and
- Any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, and any Alaska Native village or tribe recognized by the Secretary of the Interior as eligible for services provided by the Bureau of Indian Affairs.

### **How is the excavation and removal or archeological resources regulated?**

ARPA regulates the excavation and removal of archeological resources through a permitting process. No work may be performed on land owned by the United States or Indian lands without a permit. Permit recipients must meet specific professional qualifications and must have made arrangements to transfer any recovered items to a qualified institution. Note that although Native American human remains and certain cultural resources must be excavated in accordance with ARPA, the disposition of human remains and other items is governed by NAGPRA. A lineal descendant or culturally affiliated tribe may seek custody or decide to leave the remains or items in place.

### **What if the proposed work is to be performed on Indian or tribal lands?**

As with excavations on federal land, a U.S. government-issued permit is required to excavate or remove archeological resources, human remains, and cultural resources that are located on Indian or tribal lands. However, a tribal official must consent to the work and the permit must contain whatever terms and conditions are required by the individual or tribe. The disposition of any recovered items is governed by NAGPRA.

By contrast, if the work is to be performed by the tribal authority or tribal member, different rules apply. Tribal authorities may excavate or remove archeological resources, cultural resources, and human remains without an ARPA permit, provided the tribal authority has a permitting system in place.

### **How does one obtain an ARPA permit?**

Permits for the excavation and removal of archeological resources are obtained from the federal agency with primary management authority over the federal land at issue, unless that authority has been delegated to the U.S. Department of the Interior.

Information about specific procedures to secure a permit to excavate or remove archeological resources from Native American or United States lands can be obtained from the tribal authorities for the lands for which a permit is desired, or, the federal land manager of the bureau that administers the specific area of federal land.

If excavation work will be conducted on public lands where no federal agency has primary authority or on Indian lands, then the Secretary of the Interior is the permitting authority. Note that the Bureau of Indian Affairs (BIA), housed within the Department of the Interior, serves as the liaison for individual tribes and that permit applications are filed with the BIA in the area in which the land is located. The BIA, in turn, assumes responsibility for ensuring that consultation with the appropriate Indian tribal authority or individual Indian landowner occurs.

### **Who can obtain a permit?**

Any person may apply for a permit to excavate and remove any archeological resources on U.S. or tribal lands. However, permits may only be issued to applicants qualified to perform the work and the work must be undertaken to further “archeological

#### **ARPA EXCEPTIONS**

- ARPA does not apply to lands on the outer continental shelf, or lands under the jurisdiction of the Smithsonian.
- ARPA does not control mining activities or actions that could inadvertently harm an archeological resource, even if the excavation of land is involved, if such actions are conducted pursuant to otherwise legally issued permits, leases, or licenses. These actions, however, are likely to be governed by other statutes, such as the NHPA or NEPA.
- ARPA does not prohibit individuals from collecting rocks, coins, bullets, or minerals, provided that such items are collected for private purposes and do not qualify as an “archeological resource,” as defined by ARPA, and that collecting does not disturb any archeological resource.
- No permit is required under ARPA for the excavation or removal or any archeological resource located on Indian lands of such Indian tribe by any Indian tribe or member thereof so long as there is a tribal law regulating the excavation or removal or archeological resources. Non-tribal member are required to obtain a permit from the Bureau of Indian Affairs.
- No permit is required under ARPA to carry out archeological activities authorized pursuant to permits issued under the Antiquities Act of 1906.
- No permit is required for persons carrying out official agency duties under the direction of a federal land manager, provided that ARPA’s requirements are met by other documented means, and that any official duties that might result in harm to or destruction of any Indian tribal religious or cultural site, as determined by the federal land manager, have been considered following notification and consultation with Indian tribes.



knowledge in the public interest,” rather than personal gain, and be consistent with any applicable management plan. Moreover, any archeological resources removed from federal lands will remain the property of the United States (unless transferred to Native Americans under NAGPRA), and the resources and associated data and records must be preserved by a “suitable” university, museum, or other scientific or educational institution.

### **What standards govern the care of archeological resources under ARPA?**

The Secretary of the Interior has issued regulations governing the “Curation of Federally Owned and Administered Archeological Collections.”

### **Who owns the resource?**

Generally, archeological resources excavated or removed from public lands remain the property of the United States and archeological resources excavated or removed from Indian lands are controlled by the Indian or Indian tribe having rights of ownership over such resources. The disposition of Native American human remains and other cultural items that have been excavated, removed, or discovered on public lands are governed by the NAGPRA.

### **What if the requested work will harm or destroy sites having religious or cultural significance to Native American tribes?**

ARPA requires that federal agencies notify tribes of possible harm to or destruction of sites having religious or cultural significance on federal lands. “Religious and cultural significance” is defined as “a location which has traditionally been considered important by an Indian tribe because of a religious event which happened there; because it contains specific natural products which are of religious or cultural importance; because it is believed to be the dwelling place of the embodiment of, or a place

conducive to communication with spiritual beings; because it contains elements of life-cycle rituals, such as burials and associated materials; or because it has other specific and continuing significance in Indian religion or culture.”

### **How is notification accomplished?**

A federal land manager must notify the chief executive officer or designated tribal official of any Indian tribe which may consider the site as having religious or cultural importance at least 30 days before issuing a permit for excavation or removal work. The land manager may also notify other Native American groups known by the federal land manager to consider sites potentially affected as being of religious or cultural importance.

Official representatives of a Native American tribe or group may request to meet with a federal land manager to discuss their interests, including ways to avoid, minimize, or mitigate potential harm or destruction such as excluding sites from the permit area. Any mitigation measures agreed to by the manager must be incorporated into the terms and conditions of the issued permit.

ARPA does not require that the federal land manager consult with tribal representatives regarding cultural resource found on non-tribal lands, unlike NAGPRA and the NHPA. ARPA also does not impose any substantive obligations on federal land managers regarding religious and cultural sites.

### **How are religious and culturally significant sites identified?**

Because the location of religious and culturally significant sites is not always known to federal land managers, they must take specific steps to identify potential sites. Federal managers are required to (1) identify all Indian tribes having aboriginal or historic ties to the lands under the federal land manager’s jurisdiction; and (2) seek to determine,

from the chief executive officer or other designated official of any such tribe, the location and nature of specific sites of religious or cultural importance so that such information may be on file for land management purposes. The federal land manager may also contact members of non-tribal Native American groups regarding sites that they may consider to be of religious or cultural significance.

Tribes and other Native American groups may enter into formal agreements with a federal land manager regarding the locations for which they would like to receive notification or the kinds of situations where they would like to receive notification. For example, a tribe may request special notification when work is to be performed in a specific area or upon the discovery of human remains. To preserve the confidentiality of a site, information may be withheld from public disclosure, provided that the site is eligible for listing or listed in the National Register of Historic Places.

### **How does ARPA protect against illegal activities?**

ARPA protects against the unauthorized excavation and removal of archeological resources and other actions that may harm such resources in the following ways:

- ARPA authorizes the imposition of civil and criminal penalties for the unauthorized excavation, removal, damage, alteration, or defacement of archeological resources found on United States or Indian lands. Anyone who knowingly violates ARPA, or who knowingly counsels, procures, solicits, or employs others to violate the act may be subject to criminal penalties.
- ARPA authorizes the imposition of civil and criminal penalties for the illegal trafficking of archeological resources. This includes the sale, purchase, exchange, or transport of any resources removed from federal or Indian lands in violation

of ARPA, and other federal laws such as the Antiquities Act of 1906, or a state or local law that regulates archeological resources.

- ARPA authorizes a court or administrative law judge to require the forfeiture of not only the archeological resource, but also all vehicles and equipment used in connection with an ARPA violation.
- ARPA provides for public outreach and authorizes the issuance of awards of up to \$500 for information leading to criminal conviction or a finding of a civil violation.

### **What are the criminal penalties for violating ARPA?**

Any person found to be in violation of ARPA may be fined up to \$10,000 and imprisoned for up to one year. However, if the commercial or archeological value of the resource exceeds \$500, then a convicted person may be fined up to \$20,000 and imprisoned for up to two years. Repeat offenders may be fined up to \$100,000 and imprisoned for up to five years. Discretion on whether to seek criminal penalties rests with federal prosecutors.

### **What are the civil penalties for violating ARPA?**

The civil penalties for violating ARPA are established by individual agency regulations, taking into consideration the value of the resource and site involved and the cost of restoration and repair. The penalty may be doubled for second violations, but may not exceed “an amount equal to double the cost of restoration and repair of archeological resources and sites damaged and double the fair market value of resources destroyed or not recovered.” Discretion over the enforcement of violations and assessment of penalties rests with the federal agency and land manager who have jurisdiction over the site.

The standards and procedures for assessing civil penalties is set forth in the Secretary of the Interior's uniform regulations, published at 43 C.F.R. § 7. These regulations set forth the standards for valuing resources and costs of repair.

### **What if the penalty is assessed for a violation that affects a religious or cultural site?**

If the civil penalty is for a violation that may affect a known Indian tribal religious or cultural site on lands owned by the United States, the federal land manager is advised to consult with and consider the interests of the affected tribe or tribes before proposing to mitigate or remit the penalty. If the violation occurs on Indian lands, the federal land manager must consult with and consider the interest of the Indian landowner and the Indian tribe with jurisdiction over the Indian lands prior to proposing to mitigate or remit the penalty. All criminal and civil penalties collected and any item forfeited as a result of ARPA violations on Indian lands must be transferred to the appropriate Indian or Indian tribe.

### **ANTIQUITIES ACT OF 1906**

The Antiquities Act of 1906, 16 U.S.C. §§ 431-33, was enacted in the early 20th century in response to extensive looting of Native American sites in the Southwestern United States. It was the first U.S. law to provide general protection for any general kind of cultural or natural resource, and established the first national historic preservation policy in the United States. This law helps protect Native American cultural resources in two ways:

- It establishes important policies regarding the protection of “any historic or prehistoric ruin or monument, or any object of antiquity” on federal lands.

- It places authority in the President of the United States to establish National Monuments on federal or federally controlled lands for the purpose of protecting historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest.

### **What policies did the Antiquities Act establish?**

The Antiquities Act recognized the need to protect cultural sites and artifacts and rejected the practice of digging sites for commercial gain. It also gives official recognition to the intrinsic value of archeological or cultural resources as important links to the past.

### **How do National Monuments protect Native American cultural sites?**

Federal land managers have developed management plans to provide for the protection of important archeological, historic, and natural areas and to respect the concerns of present-day tribes. Creation and amendment of these plans involve consultation with tribal officials when cultural or sacred sites are present. For example, the management plan for Rainbow Bridge National Monument—a sacred site to a number of Native American tribes—was developed in consultation with the Navajo, Hopi, San Juan Southern Paiute, Kaibab Paiute, and White Mesa Ute Council of the Ute Mountain Ute. As a result of this consultation process, the management plan for the monument calls for a policy of requesting that visitors voluntarily refrain from walking under the Rainbow Bridge in an effort to respect the sacred status of the site. In Canyon de Chelly National Monument, located entirely on Navajo Tribal Trust Land, the National Park Service manages the monument in partnership with the Navajo Nation. The monument remains home to approximately 40 families who live on and within the canyon.

### **What are the permitting rules under the Antiquities Act?**

As with ARPA, the Antiquities Act establishes a permitting process for the examination of ruins, the excavation of archeological sites, and the gathering of objects of antiquity. In contrast to ARPA, however, the Antiquities Act applies to lands owned and controlled by the U.S. Government. The rules and procedures governing the issuance of permits under the Antiquities Act are set forth at 43 C.F.R. Part 3. To the extent that archeological resources are located on lands owned by the U.S. Government, the permitting procedures established under the Antiquities Act have been supplanted by ARPA.

### **How is the Antiquities Act enforced?**

Violators of the Antiquities Act of 1906 are subject to criminal enforcement, with fines up to \$5,000 and incarceration of up to 6 months. Regulations governing violations of the Antiquities Act

specifically authorize the U.S. Secretaries of Agriculture, Army, and the Interior to apprehend or cause to be arrested, any person or persons who appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity on lands under their supervision. In addition, any objects taken from lands owned or controlled by the U.S. Government without a permit, or contrary to the terms of the permit or the Antiquities Act may be seized. Keep in mind that trafficking of archeological resources may be prosecuted under ARPA.

Federal prosecutors may also use more general criminal statutes to charge persons who looted or injured archeological sites owned by the U.S. government. For example, such individuals may be charged for theft and injury to U.S. property generally, and for transporting or receiving stolen property transported in interstate commerce valued at \$5,000 or more. See 18 U.S.C. § 641 and 18 U.S.C. § 2314.

## PART 4:

# Constitutional Protections

## 4

**THE U.S. CONSTITUTION PLACES LIMITS ON THE ABILITY OF GOVERNMENT ENTITIES—** federal, state, and local—to affect the fundamental rights of individuals in the United States, including Native Americans. Under the Bill of Rights, the first ten amendments to the U.S. Constitution, individuals are guaranteed certain fundamental rights, including freedom of religion.

The First Amendment to the U.S. Constitution provides:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”

These two clauses—the first, pertaining to the establishment of religion, and the second, pertaining to the free exercise of religion—provide the basis for religious freedom in the United States. The Establishment Clause requires government neutrality towards religion. The Free Exercise Clause prohibits governmental actions that substantially burden religious exercise without a compelling governmental interest such as safety and public health. In other words, federal, state, and local governments cannot compel Native Americans to practice religions contrary to their own beliefs. Likewise, government cannot prohibit Native Americans from practicing their own religions. These constitutional restrictions apply to all Native Americans, regardless of whether they belong to a federally-recognized Native American tribe.

### **Are there any limitations on the right to religious freedom?**

Yes. Although the right to religious freedom is fundamental, courts have imposed boundaries on this right through judicial interpretation. The Supreme Court of the United States has imposed rules for analyzing whether a First Amendment violation has occurred.

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court fashioned a three-part inquiry for determining whether an Establishment Clause violation has occurred. Under the “Lemon Test,” the challenged governmental action must:

- Serve a secular governmental purpose
- Have a primary effect that neither advances nor inhibits religion
- Avoid fostering excessive state entanglement with religion.

This test has been compressed into a two-prong inquiry that asks whether government action had the purpose or effect of advancing or inhibiting religion. *Agostini v. Felton*, 521 U.S. 203 (1997).



## MEDICINE WHEEL NATIONAL HISTORIC LANDMARK, WYOMING



Credit: www.wyomingtourism.org

The Medicine Wheel National Historic Landmark, located in the Bighorn National Forest in north central Wyoming, was created in 1969 to preserve the Medicine Wheel, a traditional cultural property. The Medicine Wheel is a prehistoric stone circle about 80-feet in diameter, which was constructed by the aboriginal peoples of North America. The wheel includes a large cairn at the site's center, surrounded by 28 radiating spokes of rocks. Archeological estimates indicate that human presence in the area goes back for 7,500 years or more, although the exact age of the Medicine Wheel is unknown. A number of Native American tribes consider the Medicine Wheel to be sacred.

Litigation arose after Wyoming Sawmills, Inc., a logging corporation, sued the U.S. Forest Service after the Forest Service—as part of a Historic Preservation Plan—decided to close a portion of a forest development road that provided access to the landmark with an exemption for traditional religious practitioners. The decision to close the area was made, in part, after visitation by the public to the Medicine Wheel increased, thus raising concerns about the preservation of the site's features and artifacts. Nevertheless, Wyoming Sawmills argued that this exemption for traditional users violated the U.S. Constitution's Establishment Clause, which prohibits the

federal government from preferring or elevating one religion over another. Ultimately, the appellate court affirmed the decision of the lower court, which dismissed the lawsuit, on the basis that the logging corporation had not suffered any injury and therefore did not have standing to sue. The court also refused to second guess the Forest Service's exercise of discretion in deciding to close the road in response to the concerns of Native Americans and as a way of protecting the Medicine Wheel's traditional cultural use. *Wyoming Sawmills, Inc. v. U.S. Forest Service*, 383 F.3d 1241 (10th Cir. 2004), *cert. denied*, 2005 U.S. LEXIS 5504 (U.S., Oct. 3, 2005).

The leading free exercise case is *Employment Division v. Smith*, 494 U.S. 872 (1990). Under *Smith*, a government may not “substantially burden” the free exercise of religion, unless the burden is the “least restrictive means” of furthering a ‘compelling governmental interest.’ However, if the burden results from the application of a neutral law of general applicability, then the compelling interest test or “strict scrutiny” does not apply. Thus, even a substantial burden on the free exercise of religion may be upheld under the U.S. Constitution if the burden results from implementing a neutral, generally applicable law. For example, in *Employment Division v. Smith*, the Supreme Court upheld the denial of employment compensation for the use of peyote by a Native American, even though it had the effect of penalizing a religious practice, because the denial resulted from the application of a neutral, generally applicable law. However, in response to *Smith*, Congress carved out an exception from the Controlled Substances Act for Native American religious use of peyote.

### **How has the First Amendment been applied to Native Americans?**

Historically, the U.S. Government has discouraged, and in some instances, actively prohibited the exercise of tribal religions. See Jack F. Trope, *Protecting Native American Religious Freedom: The Legal, Historical, and Constitutional Basis for the Proposed Native American Free Exercise Act*, 20 N.Y.U. REV. L. & SOC. CHANGE 373 (1993). Even in more recent times, the Free Exercise Clause has failed to provide free exercise for Native Americans. Most notably, in *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), the Supreme Court ruled that the U.S. Forest Service’s decision to construct a road and harvest timber in an area that has been used traditionally for religious purposes by three Native American tribes in northwestern California did not violate the First

Amendment even though it was “undisputed that the Government’s proposed actions will have severe adverse effects on the practice of their religion.” In reaching its decision, the Court declined to read the Free Exercise Clause to mean that government must protect an individual’s right to practice religion. Rather, the court explained, the Constitution prohibits governmental actions that coerce individuals to act contrary to their religious beliefs.

Although the Free Exercise Clause, as interpreted by the Supreme Court in *Smith* and *Lyng*, offers Native Americans little protection against government actions that have severe, adverse effects on their ability to practice religion, this does not mean that the U.S. Government cannot accommodate the practice of traditional religious ceremonies and protect religious sacred sites. Note, for example, that the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996 and 1996a, officially recognizes the inherent right “to believe, express and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonies and traditional rights.” AIRFA also provides federal agencies and land managers with the authority to take action to protect Native American sacred sites. Similarly, Executive Order 13007 directs federal land managers to “accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners,” and to “avoid adversely affecting the physical integrity of such sacred sites.”

Significantly, recent challenges to governmental actions that seek to accommodate Native Americans in the exercise of religion and protect sacred sites under the Establishment Clause have been dismissed. See, e.g., *Wyoming Sawmills, Inc. v. U.S. Forest Service*, 383 F.3d 1241 (10th Cir. 2004)

(dismissing an Establishment Clause claim brought by a commercial timber company against the U.S. Forest Service for accommodating Native American Tribes in their ceremonial use of the Medicine Wheel National Landmark). In *Wyoming Sawmills, Inc.*, the court found that the timber company lacked standing because its injury was “purely economic.”

In another Establishment Clause case, *Natural Arch and Bridge Society v. Alston*, No. 024099, 98 Fed. Appx. 711, 2004 WL 569888 (10th Cir. Mar. 23, 2004), the court similarly dismissed an Establishment Clause challenge to the National Park Service’s management policy on visiting the Rainbow Bridge National Monument in Utah, which asked visitors to refrain voluntarily from walking under Rainbow Bridge, an important Native American sacred site, at certain times during the year. (The National Park Service had adopted a Programmatic Agreement with several Indian tribes who have cultural affiliations to Rainbow Bridge, which called for consultation with the tribes regarding the management of the Rainbow Bridge National Monument.) As in *Wyoming Sawmills, Inc.*, the court concluded that the plaintiffs lacked standing because they failed to show any specific injury as a result of the policy.

### **Are there any other protections for Native American religious freedoms?**

Yes. In addition to AIRFA and Executive Order 13007, which recognize the rights of Native Americans to practice their religions, there are two statutes, enacted chiefly in response to the U.S. Court’s decision in *Employment Division v. Smith*, 494 U.S. 872 (1990) (essentially eliminating the requirement that substantial burdens on religion be justified by a compelling government interest). The Religious Freedom Restoration Act applies broadly to any governmental action that substantially

burdens the free exercise of religion. The Religious Land Use and Institutionalized Persons Act applies to religious exercise in the context of land use actions and prisons.

### **What is the Religious Freedom Restoration Act?**

The Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4, provides that governments may not substantially burden a person’s free exercise of religion unless its actions are in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. In contrast to AIRFA, the law provides that any person who is substantially burdened by a government action may obtain relief by filing an action under the statute in court.

In 1997, the Supreme Court of the United States held in *City of Boerne v. Flores* that RFRA is unconstitutional as applied to states. However, the law is still applied to federal government actions. In *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct. 1211 (2006), ruled that members of the O Centro Espirita Beneficente Uniao Do Vegetal Church, who used hoasca—a tea brewed from plants unique to the Amazon Rainforest that contained a hallucinogen—could seek a preliminary injunction against the federal government from enforcing the Controlled Substances Act under RFRA. The Court determined that the federal government had not demonstrated a compelling interest to justify imposing a substantial burden on religion by prohibiting the sacramental use of hoasca, rejecting its reliance on broad categorical assertions of its interests. Rather, the Court explained that the invocation of the compelling interest test requires that the federal government establish the need to burden the specific religious practice at issue in the case.

### **What is the Religious Land Use and Institutionalized Persons Act?**

The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, or RLUIPA, prohibits governments from applying zoning or landmarking laws in a manner that substantially burdens the free exercise of religion unless such actions are in furtherance of a compelling governmental interest and are the least restrictive means of furthering that interest. Interference must be “substantial.” It also requires “equal treatment” of religious and non-religious entities and prohibits discrimination against religious institutions or assemblies. As with RFRA, successful claimants are entitled to attorney fees and possibly damages.

## MOUNT TAYLOR, NEW MEXICO



Credit: Theresa Pasqual

Located in the southwestern corner of New Mexico's San Mateo Mountains, Mount Taylor, with an elevation of nearly 12,000 feet, is a beautiful, sacred place. Visible from up to 100 miles away, the mountain has been a pilgrimage site for as many as 30 Native American tribes, with special significance for the Acoma people. Mount Taylor is rooted in Acoma's history and traditions, and is closely aligned with the tribe's cultural identity.

Mount Taylor sits atop one of the richest known reserves of uranium ore in the country. Current high demand for the ore has resulted in a renewed interest in mining the uranium deposits beneath Mount Taylor on federal, state, and private lands, as well as on other public and private lands in the area. Much of the area is governed by

the 1872 Mining Law, which permits mining regardless of its impact on cultural or natural resources. In addition to threats posed to the mountain itself, uranium mining may contaminate or impair the primary water source for Acoma Sky City, the oldest inhabited community in the United States.

In response to a lawsuit that sought to set aside the designation of Mount Taylor as a state cultural property, the New Mexico Supreme Court decided that Mount Taylor should remain designated as a cultural property under New Mexico state law. The reinstatement of the designation is important because it means that state agencies must consult with the New Mexico State Historic Preservation Officer before taking an action that could

adversely affect the Mount Taylor Cultural Property. The decision also reaffirms the important role the state plays in identifying and preserving New Mexico's cultural heritage.

For 17 months, justices debated whether the Cultural Properties Review Committee had properly designated about 400,000 acres (including Mount Taylor) on the basis of its cultural and historic significance to the Pueblos of Acoma, Laguna and Zuni, the Hopi Tribe, the Navajo Nation and other tribes.

Following the New Mexico Supreme Court's unanimous decision that reinstated Mt. Taylor's designation as a registered cultural property, the district court judge vacated the original order that set the designation aside. The district court's order is significant in that it officially brings to a close the contentious litigation over the designation's validity, and re-affirms the correctness of the decision by the New Mexico Cultural Properties Review Committee to place Mount Taylor on the state's official list of cultural properties on September 14, 2009.



## APPENDIX A

### COMMON ACRONYMS

<b>4(f)</b>	Section 4(f) of the Department of Transportation Act
<b>106</b>	Section 106 of the National Historic Preservation Act
<b>ACHP</b>	Advisory Council on Historic Preservation
<b>AIRFA</b>	American Indian Religious Freedom Act
<b>APE</b>	Area of Potential Effects
<b>ARPA</b>	Archaeological Resources Protection Act
<b>BIA</b>	Bureau of Indian Affairs
<b>BLM</b>	Bureau of Land Management
<b>CE or CX</b>	Categorical Exclusion
<b>CEQ</b>	Council on Environmental Quality
<b>DEIS</b>	Draft Environmental Impact Statement
<b>DOI</b>	Department of the Interior, U.S.
<b>DOTA</b>	Department of Transportation Act
<b>EA</b>	Environmental Assessment
<b>EIS</b>	Environmental Impact Statement
<b>FEIS</b>	Final Environmental Impact Statement
<b>FHWA</b>	Federal Highway Administration
<b>FLPMA</b>	Federal Land Policy and Management Act
<b>FONSI</b>	Finding of No Significant Impact
<b>HABS-HAER</b>	Historic American Buildings Survey-Historic American Engineering Record
<b>MBTA</b>	Migratory Bird Treaty Act
<b>MOA</b>	Memorandum of Agreement
<b>MOU</b>	Memorandum of Understanding
<b>NAGPRA</b>	Native American Graves Protection and Repatriation Act
<b>NATHPO</b>	National Association of Tribal Historic Preservation Officers
<b>NCSHPO</b>	National Conference of State Historic Preservation Officers
<b>NEPA</b>	National Environmental Protection Act
<b>NHL</b>	National Historic Landmark
<b>NHPA</b>	National Historic Preservation Act
<b>NMAIA</b>	National Museum of the American Indian Act
<b>NPS</b>	National Park Service
<b>PA</b>	Programmatic Agreement
<b>PEIS</b>	Programmatic Environmental Impact Statement
<b>RFRA</b>	Religious Freedom Restoration Act
<b>RLUIPA</b>	Religious Land Use and Institutionalized Persons Act
<b>ROD</b>	Record of Decision
<b>SEIS</b>	Supplemental Environmental Impact Statement
<b>SHPO</b>	State Historic Preservation Officer
<b>TCP</b>	Traditional Cultural Property
<b>THPO</b>	Tribal Historic Preservation Officer

## APPENDIX B

### CITATIONS TO LEGAL AUTHORITY

#### Cases

*Aluli v. Brown*, 437 F. Supp. 602 (D. Haw. 1977),  
*aff'd in part, rev'd in part*, 602 F.2d 876 (9th Cir. 1979)

*Agostini v. Felton*, 521 U.S. 203 (1997)

*Barcelo v. Brown*, 478 F. Supp. 646 (D.P.R. 1979), *aff'd in part, rev'd in part*, 643 F.2d 835 (1st Cir. 1981), *rev'd on other grounds sub nom. Weinberger v. Barcelo*, 456 U.S. 305 (1982)

*Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971)

*City of Alexandria v. Slater*, 198 F.3d 962 (D.C. Cir. 1999)

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

*Employment Division v. Smith*, 494 U.S. 872 (1990)

*Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct. 1211 (2006)

*Lemon v. Kurtzman*, 403 U.S. 602 (1971)

*Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988)

*Natural Arch & Bridge Society v. Alston*, No. 024099, 98 Fed. Appx. 711, 2004 WL 569888 (10th Cir. Mar. 23, 2004)

*Sac and Fox Nation of Missouri v. Babbitt*, 92 F. Supp. 2d 1124 (D. Kan. 2000)

*Wyoming Sawmills, Inc. v. U.S. Forest Service*, 383 F.3d 1241 (10th Cir. 2004)

#### Statutes

American Indian Religious Freedom Act, 42 U.S.C. §§ 1996-1996a

Antiquities Act of 1906, 16 U.S.C. §§ 431-433

Archaeological Resources Protection Act, 16 U.S.C. §§ 470aa-470mm

Archeological and Historic Preservation Act, 16 U.S.C. §§ 469-469c

Clean Air Act, 42 U.S.C. §§ 7401-7671q

Clean Water Act, 33 U.S.C. §§ 1251-1387

Endangered Species Act, 16 U.S.C. §§ 1531-1544

Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1784

Historic Sites Act of 1935, 16 U.S.C. §§ 461-467

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## **Executive Orders**

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