SACRED SITES AND CULTURAL RESOURCE PROTECTION: IMPLICATIONS FOR MINERAL DEVELOPMENT ON – AND OFF – INDIAN LANDS

Carla Mattix and Stan N. Harris*

I. Introduction

"Cultural resources" – also known as cultural property and heritage resources, among other terms – have been broadly defined as "the tangible and intangible effects of an individual or group of people that define their existence, and place them temporally and geographically in relation to their belief systems and their familial and political groups, providing meaning to their lives."[1] Over the past fifty years, a growing recognition of the importance of these resources to the history and fabric of the American people has led to enactment of various laws attempting to preserve and protect the nation's cultural heritage.

However, many of America's cultural resources exist on federal lands that also contain other valuable resources. For example, Native American cultural resources – which can include pre-historic Indian ruins, historic Indian sites, and sacred sites of continuing cultural and religious importance to specific Indian tribes – are often found on federally-owned or administered lands that are also rich in commercially valuable mineral resources. As such, development of mineral resources on federal lands is often tempered by federal laws protecting cultural resources. Likewise, state and tribal cultural resource laws often impact mineral development on state, tribal, and even private lands.

As with so many areas of resource development, however, there is no single law that deals comprehensively with cultural resources. Instead, a patchwork of federal, state, and tribal laws addresses various aspects of cultural resource protection, through various means. Although this paper is not an exhaustive treatment of all laws concerning the protection of cultural resources,[2] it does outline and describe some of the more important

---

* Ms. Mattix is an attorney-advisor in the Office of the Solicitor, Division of Parks and Wildlife, Washington, D.C. Mr. Harris is a shareholder in the Albuquerque, New Mexico, office of Modrall, Sperling Roehl, Harris & Sisk. The statements made herein represent solely the views of the individual authors and do not necessarily reflect the views of the United States Department of the Interior, the Office of the Solicitor, the clients represented by the authors, or any other public or private entity.

[1] See Sherry Hutt, et al., Cultural Property Law: A Practitioner's Guide to the Management, Protection, and Preservation of Heritage Resources (2004), at xi.

[2] For other Rocky Mountain Mineral Law Institute papers addressing cultural resources issues, see, e.g., Walter E. Stern, *Potesherds and Petroglyphs: Effects of Cultural Resources Management on Public Lands Development*, 41 Rocky Mt. Min. L. Inst. 14-1 to 14-50 (1995); Sandra B. Zellmer, *Cultural and Historic Resources, Sacred Sites, and Land Management in the West,* Public Land Law, Regulation, and Management, Paper 3 (RMMLF Seminar June 3, 2003). For a more comprehensive treatment of cultural resource protection law, see Sherry Hutt, et al., Cultural Property Law: A Practitioner's Guide to the Management, Protection, and Preservation of Heritage Resources (2004).

federal, state, and tribal laws affecting cultural properties that, in turn, may impact mineral development on and off Indian lands.

II. The National Historic Preservation Act ("NHPA").

a. Background

The National Historic Preservation Act of 1966 ("NHPA")[3] is the perhaps the most important – and is certainly the most litigated – federal statute pertaining to cultural resource issues. As Congress made clear in its findings for the NHPA, "the preservation of [the Nation's] irreplaceable [historic and cultural] heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans . . . ."[4]

In so doing, Congress created a procedural mechanism whereby relevant federal agencies are required to consult with interested parties to identify historic properties, assess the adverse affects of federally funded or permitted undertakings on such historic properties, and attempt to mitigate any such adverse effects on those historic properties. Congress provided an important role in the process for the states through State Historic Preservation Officers ("SHPOs.").[5]

Moreover, with regard to Native Americans in particular, Congress amended the NHPA in 1992 to recognize that cultural and traditional properties important to tribes may be eligible for consideration under the NHPA's consultation scheme. As important, the 1992 NHPA amendments created opportunities for federally recognized Indian tribes to assume formal responsibility for the preservation of significant historic properties on tribal lands.[6] Section 101(d)(2) gives tribes the ability to perform any or all of the functions of a SHPO with respect to tribal lands. There are currently 39 Indian tribes that have established Tribal Historic Preservation Offices ("THPOs").[7]

Federal agencies must consult with the THPOs in lieu of the SHPO for undertakings occurring on, or affecting historic properties on, tribal lands.[8] Tribes have the option to participate in the program, and it is solely their decision. The NHPA amendments creating THPOs called for the Secretary of Interior to establish the requirements for an Indian tribe to assume SHPO duties.[9] The National Park Service is the agency the Secretary of the Interior has designated to administer NHPA programs delegated to it by the statute. NPS is developing a rule to establish the formal process by which a tribe may secure the Secretary of the Interior's approval to assume SHPO duties

---

[3] 16 U.S.C. §§ 470 to 470w-6.
[4] 16 U.S.C. § 470(b)(4).
[5] 16 U.S.C. § 470a(c).
[6] 16 U.S.C. § 470a(d)(2).
[7] As of 8/13/03. See NPS website, www.cr.nps.gov/hps/tribal/tribaloffices.htm.
[8] See the Advisory Council on Historic Preservation's guidance at www.achp.gov/thpo.html.
[9] 16 U.S.C. § 470a(d)(1)(A).

on tribal land.[10] In the absence of final regulations, NPS reviews tribal proposals to date in accordance with the existing statutory and regulatory requirements for SHPOs.[11]

b. Section 106 Consultation

The Advisory Council on Historic Preservation ("ACHP") is the entity charged to promulgate regulations implementing the consultation section of the NHPA, codified at 16 U.S.C. Section 470f, but more commonly known as "Section 106."[12] The ACHP's most recent comprehensive rulemaking was issued in 2000, which regulations incorporated the requirements of the 1992 amendments.[13] Also, in 2004 the ACHP issued limited revisions to the Section 106 regulations in response to federal court decisions invalidating certain of the 2000 regulations.[14] Although the NHPA is essentially a procedural statute, requiring no particular substantive result,[15] failure to follow the NHPA's procedural requirements when applicable can result in an injuction of the undertaking.[16] In this regard, the NHPA is similar in effect to the National Environmental Policy Act.[17]

Section 106 is both the heart and the hammer of the NHPA. Specifically, Section 106 mandates that any federal agency having jurisdiction over any proposed federal or federally assisted "undertaking" shall, prior to the approval of the expenditure of any funds or issuance of any license for the undertaking, (1) "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," and (2) "afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking." Broadly speaking, therefore, Section 106, when applicable, requires federal agencies to consult with appropriate consulting parties[18] before undertaking actions that might affect certain cultural properties.

In this regard, the Section 106 regulations state that such consultation should be coordinated with other statutes, as applicable, such as the National Environmental Policy

---

[10] See Proposed Rule, Procedures for State, Tribal and Local Government Historic Preservation Programs, 67 Fed. Reg. 52532 (Aug. 12, 2002).

[11] See www.cr.nps.gov/hps/tribal/ which contains a link to an application for THPOs. The application contains detailed explanations of terms in the statute and regulations.

[12] See 16 U.S.C. § 470f.

[13] See 36 C.F.R. Part 800, §§ 800.1 to 800.16.

[14] See 69 Fed. Reg. 40544 to 40555 (July 6, 2004); see also National Mining Ass'n v. Fowler, 324 F.3d 752 (D.C. Cir. 2003); National Mining Ass'n v. Slater, 167 F. Supp. 2d 265 (D.D.C. 2001).

[15] See, e.g., Valley Community Preservation Commission, 373 F.3d 1078, 1085 (10th Cir. 2004) ("Section 106 is essentially a procedural statute and does not impose a substantive mandate on [federal agencies]").

[16] See, e.g., Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 802 (9th Cir. 1999). But see Abenaki Nation of Missisquoi v. Hughes, 805 F. Supp. 234, 251 (D. Ver. 1992), aff'd, 990 F.2d 729 (2d Cir. 1993) (technical violation of NHPA procedures not fatal in certain circumstances "given the NHPA's permission that its regulation 'may be implemented in a flexible manner'") (quoting 36 C.F.R. § 800.3(b)).

[17] See text to footnotes 66 to 67, below.

[18] "Consulting parties" include the SHPH/THPO, and the NHPA regulations also refer to local governments and applicants, Indian and Native Hawaiian tribes (which, if they request it, shall be consulting parties), and individuals and organizations as potential consulting parties. *See* 36 C.F.R. § 800.3(f).

Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, and the Archaeological Resources Protection Act (which statutes are also discussed in greater detail below).[19] Further, although the regulations establish several potential steps in conducting such consultations (which steps are discussed below), consultation can be expedited by addressing multiple steps when the agency and the SHPO/TPHO agree it is appropriate.[20]

i. Step 1: Is the action an "undertaking?"

The first step of the Section 106 process is determining whether a proposed action is an "undertaking." In *National Mining Association v. Fowler,*[21] the federal appeals court with direct jurisdiction over the ACHP ruled that a definition of a Section 106 "undertaking" that included activities subject to state or local regulation administered pursuant to a delegation or approval by a federal agency was invalid because Section 106 "'applies by its terms only to *federally funded* or *federally licensed* undertakings.'"[22] The ACHP accordingly revised its rule, which now defines a Section 106 undertaking as:

> a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.[23]

The important consideration, therefore, is whether any federal funds will be used, or any federal permit, license, or other approval required, for the project. Thus, for example, state mining permits issued pursuant to a delegation by the Federal government are arguably not "undertakings" because they are neither federally funded nor issued by the federal government.[24]

ii. Step 2: Consult to determine if the undertaking affects eligible historic properties.

If there is no undertaking, Section 106 does not apply, no consultation is required, and the analysis is at an end. If, however, there is an undertaking, the next step is for the relevant federal agency to determine if the undertaking could affect properties listed or eligible to be listed on the National Register of Historic Properties (more commonly referred to as "historic properties").[25] Generally, a property can be eligible for the National Register if it is more than 50 years old and it (1) is associated with events that

---

[19] Id. § 800.2(a)(4).
[20] Id. § 800.3(g).
[21] 324 F.3d 752 (D.C. Cir. 2003)
[22] See id. at 760 (D.C. Cir. 2003) (quoting Sheridan Kalorama Historical Ass'n v. Christopher, 49 F.3d 750, 755 (D.C. Cir. 1995) (emphasis in Fowler and Sheridan Kalorama).
[23] 69 Fed. Reg. at 40555. But note 16 U.S.C. § 470w(7) (defining "undertaking" as including, inter alia, projects "subject to State or local regulation administered to a delegation or approval by a Federal agency"). The Fowler court did not agree that this definition applies to Section 106 "undertakings."
[24] See Fowler, 324 F.2d. at 756.
[25] 16 U.S.C. § 470f.

have made a significant contribution to the broad patterns of history; (2) is associated with the lives of significant persons of our past; (3) embodies distinctive characteristics of a type, period, or method, or possesses high artistic value, or represents the work of a master; or (4) has yielded or may be likely to yield information important in history or prehistory.[26] Importantly for Native American considerations, although properties used for religious purposes ordinarily shall not be considered for the National Register, such a property may be eligibile if it is "[a] religious property deriving primary significance from architectural or artistic distinction or historical importance."[27]

Determining whether an undertaking could affect historic properties involves two sub-analyses: (1) determining the undertaking's area of potential effect (or "APE"); and (2) identifying whether any eligible historic properties exist within the APE. An undertaking's APE is defined by regulation as "the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist."[28] The federal agency must review existing information regarding historic properties within the APE, and must seek information as appropriate from consulting and knowledgeable parties to identify historic properties.[29] Moreover, the regulations make clear that in determining the APE the agency shall "[g]ather information from any Indian tribe or Native Hawaiian organization identified [as consulting parties pursuant to 36 C.F.R. § 800.3(f)] to assist in identifying properties, including those located off tribal lands, which may be of religious and cultural significance to them and may be eligible for the National Register, recognizing that an Indian tribe or Native Hawaiian organization may be reluctant to divulge specific information regarding the location, nature, and activities associated with such sites."[30] Due to the expertise required in establishing APEs, an agency's determination of an APE is given a substantial amount of discretion.[31]

Based on this accumulated information, the agency must then, in consultation with the SHPO/TPHO and any affected Indian tribe, take the steps necessary to identify historic properties within the APE. In so doing, the agency must "make a reasonable and good faith effort to carry out appropriate identification efforts . . ."[32] It is at this point that some of the thornier issues involving the NHPA and Native American cultural properties come into play.

In particular, and as is acknowledged by the NHPA regulations themselves, because of cultural and religious considerations, tribes are often loathe to divulge detailed information regarding sites that they consider to be historically significant.[33] The agency

---

[26] 36 C.F.R. § 60.4
[27] Id.
[28] 36 C.F.R. § 800.16(d).
[29] Id. § 800.4(a)(2), (3).
[30] Id. § 800.4(a)(4).
[31] See, e.g., Valley Community Preservation Comm'n v. Mineta, 373 F.3d 1078, 1091 (10th Cir. 2004).
[32] 36 C.F.R. § 800.4(b)(1).
[33] See id. § 800.4(a)(4); see also Patricia L. Parker & Thomas F. King, "Documenting Traditional Cultural Properties: General Consideration," National Park Service, National Register Bulletin 38, Guidelines for

must nevertheless make a "reasonable and good faith effort" to identify such sites as part of its Section 106 analysis. This tension often presents great difficulties for both sides.

For example, in *Pueblo of Sandia v. United States,*[34] the Forest Service selected a management strategy for La Huerta Canyon, located within the Cibola National Forest in New Mexico. Members of the nearby Sandia Pueblo complained that the strategy would adversely impact the pueblo's traditional cultural properties and practices within the canyon. As part of its Section 106 consultation, the Forest Service mailed letters requesting detailed site information to local tribes, including the Sandia Pueblo, and to individual tribal members known to be familiar with traditional properties. None of the tribes or individuals provided the requested information, and the Forest Service concluded that there was no evidence of traditional cultural properties in the canyon.[35] Nevertheless, the *Sandia* court held that "a mere request for information is not necessarily sufficient to constitute the 'reasonable effort' section 106 requires."[36] Further, the court concluded that "the information the tribes did communicate to the agency was sufficient to require the Forest Service to engage in further investigations, especially in light of regulations warning that tribes might be hesitant to divulge the type of information sought."[37] This, in combination with the Forest's Service's withholding of this information from the SHPO when conducting its consultation, led the court to conclude that the Forest Service had not made a reasonable and good faith effort in its Section 106 evaluation of the canyon.[38] It is arguable that the holding in *Sandia* is somewhat confined to its facts.[39] Further, at least one court has indicated that a generalized identification of a site is insufficient to make it a "site" for NHPA purposes.[40] Nevertheless, *Sandia* does demonstrate that an agency may have to do more than simply ask a potentially affected tribe for the information necessary to identify a claimed tribal historic property.[41]

If the agency ultimately finds that there are no historic properties or that the undertaking will have no effect on them, the agency shall document this finding, and give all consulting parties, including relevant Indian tribes, 30 days' notice to object.[42] If no objections are received from the consulting parties (or the ACPH if it has entered the

---

Evaluating and Documenting Traditional Cultural Properties (1998 rev.), available at hhtp://www.cr.nps.gov/nr/publications/bulletins/nrb38 (last visited Sept. 20, 2005).

[34] 50 F.3d 856 (10th Cir. 1995).

[35] Id. at 856, 860.

[36] Id. at 860.

[37] Id. at 860. This information included a pueblo leader's affidavit listing long-standing religious practices and alluding to sites in the canyon, and an anthropologist's ethnographic overview of the pueblo's religious and cultural connections to the canyon. Id. at 860-61.

[38] Id. at 862-63.

[39] See, e.g., Narrangansett Indian Tribe v. Warwick Sewer Authority, 334 F.3d 161, 168 (1st Cir. 2003) (distinguishing Sandia's facts); Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 806-07 (9th Cir. 1999) (same); Pitt River Tribe v. Bureau of Land Management, 306 F. Supp. 2d 929, 944-45 (E.D. Cal. 2004) (same).

[40] See Hoonah Indian Ass'n v. Morrison, 170 F.3d 1223, 1232 (9th Cir. 1999) (rejecting a tribe's inconclusive location of the trail of a historic tribal march, and holding "[t]hat important things happened in a general area is not enough to make the area a 'site.'").

[41] See also text to footnotes 77 to 80, below.

[42] See 69 Fed. Reg. at 40553 (revised 36 C.F.R. § 800.4(d)(1)).

consultation process), the agency's responsibilities are over.[43] If, however, the undertaking might affect historic properties, the agency must identify the consulting parties, invite their view on the effects, and assess adverse effects, if any.[44]

iii. Step 3: Assess adverse effects of the undertaking.

Pursuant to regulation, 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."[45] Examples of adverse effects include physical destruction or damage of the property; alteration of a property; removal of the property from its historic location; change in the character of the property's use; as well as others.[46] An agency, in consultation with the SHPO/THPO, can make a finding of no adverse effect on the property when the undertaking's effects do not fit the criteria of the regulation, or if the undertaking is modified to avoid adverse effects.[47] The consulting parties must be given 30 days' notice of a proposed finding of no adverse effect; if the SHPO/THPO agrees or does not respond, and if no other consulting party objects, and if the ACHP does not review the finding, the process is over.[48] If a consulting party disagrees with the finding within that time, the agency shall either consult with the party to resolve the disagreement, or request that the ACHP review the findings.[49] If a finding is submitted to the ACHP, the ACHP shall review the finding and, if the issue warrants it, notify the agency whether the finding was made according to correctly-applied criteria.[50] If, however, an adverse effect is found, the agency must proceed with further consultations to resolve the adverse effect.[51]

iv. Step 4: Resolve an undertaking's adverse effects.

If it is found that an undertaking will have an adverse effect on an historic property, the agency shall consult with all consulting parties to seek ways to avoid, minimize, or mitigate the adverse effect.[52] If the agency and the SHPO/THPO agree on how the adverse effects will be resolved, they are to execute a memorandum of agreement ("MOA") on the matter.[53] If they fail to reach a resolution, however, the agency shall invite the ACHP to participate in the consultation, and if it does and the parties then agree on resolution of the adverse effects, those parties shall execute an

[43] See id.
[44] See (revised 36 C.F.R. § 800.4(d)(2)).
[45] Id. § 800.5(a)(1).
[46] Id. § 800.5(a)(2).
[47] Id. § 800.5(b).
[48] See 69 Fed. Reg. 40553 (revised § 800.5(c)(1)).
[49] See id. at 40553 to 40554 (revised§ 800.5(c)(2)).
[50] See id. at 40554 (revised § 800.5(c)(3).
[51] 36 C.F.R. § 800.5(d)(2)
[52] Id. § 800.6(a), (b).
[53] Id. § 800.6(b)(iv).

MOA.[54] Other consulting parties may concur in the MOA, but their non-concurrence will not invalidate the MOA.[55]

If the adverse effects remain unresolved, the agency, SHPO/THPO, or ACHP may determine that further consultations will not be productive and terminate consultations.[56] If the agency terminates consultation, it shall ask the ACHP to comment. The agency may then reach a final decision on the undertaking, but only after the head of the agency documents this decision by preparing a summary of the decision, providing a copy of the summary to all consulting parties, and notifying the public and making the record available for public inspection.[57]

c. National Historic Landmarks

Section 110 of the NHPA directs federal agencies to assume responsibility for the preservation of historic properties which are owned or controlled by such agencies.[58] To this end, Section 110 requires each agency to establish a program to ensure that:

> such properties under the jurisdiction or control of the agency as are listed in or may be eligible for the National Register are managed and maintained in a way that considers the preservation of their historic, archaeological, architectural, and cultural values in compliance with [Section 106] and gives special consideration to the preservation of such values in the case of properties designated as having National significance.[59]

Moreover, pursuant to Section 110 National Historic Landmarks ("NHL's) – which are defined in part as possessing "exceptional value or quality in illustrating or interpreting the heritage of the United States in history, architecture, archaeology, engineering, and culture"[60] – are owed a greater standard of preservation than other historic properties. Thus, prior to the approval of an undertaking that may directly and adversely affect NHLs, the head of the action agency "shall, to the maximum extent possible," undertake such planning and actions as may be necessary to minimize harm to the NHL.[61] At least one federal district court, however, has indicated that the requirements of Section 110 do not require agencies to spend resources to maintain, or plan for preservation of, historic properties under their jurisdiction in the absence of an undertaking.[62]

---

[54] Id. § 800.6(b)(2).
[55] Id. § 800.6(c)(3).
[56] Id. § 800.7(a).
[57] Id. § 800.7(c)(4).
[58] 16 U.S.C. § 470h-2(a)(1).
[59] Id. § 470h-2(a)(2)(B).
[60] See 36 C.F.R. § 65.4(a).
[61] 16 U.S.C. § 470h-2(f).
[62] See National Trust for Historic Preservation v. Blanck, 938 F. Supp. 908, 925 (D.D.C. 1996), aff'd 203 F.3d 53 (1999).

III. The National Environmental Policy Act ("NEPA")

Another important federal law dealing with cultural heritage issues is the National Environmental Policy Act of 1969 ("NEPA"). NEPA has been the subject of countless books, articles, and commentaries, and no attempt will be made here to explain the law's many intricacies. With regard to cultural property issues in particular, however, NEPA expressly states that the "it is the continuing responsibility of the Federal Government to use all practical means" to, among other things, "preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice . . . ."[63] To this end, NEPA establishes a specific process by which federal agencies evaluate the potential impacts of proposed actions on the environment. One such method of evaluation is through the development of a document commonly known as an "environmental impact statement" ("EIS"), which must be included in every federal agency's recommendation or report on "major Federal actions significantly affecting the quality of the human environment . . . ."[64] An EIS, in turn, must be prepared in accordance with detailed regulations promulgated by the Council on Environmental Quality, and which require, among other things, public comment and consultation regarding the proposed action.[65] In practice, the EIS process can be – and often is -- long, expensive, and excruciating.

As with the NHPA, NEPA is purely a procedural statute requiring no specific substantive outcome. For example, in *Pitt River Tribe v. Bureau of Land Management*,[66] an Indian tribe challenged the validity of an EIS approving a geothermal power plant sited within the tribe's ancestral homeland, arguing that the plant would adversely impact the tribe's spiritual and cultural practices. The *Pitt River* court, however, noted that the EIS included a discussion of the unavoidable significant effects the project would have on traditional cultural values. The court therefore held that the EIS:

> adequately discloses the negative effect of development on Indian spirituality in return for 50 megawats of electrical power generation. In the plaintiffs' view, this trade-off cannot justify the decision to approve the project. But that is not a procedural deficiency under the [Administrative Procedures Act] and NEPA; rather, it is a disagreement on policy outside the scope of appropriate judicial review.[67]

Possible significant effects on historic and cultural resources resulting from a proposed major federal action can, by themselves, trigger NEPA's EIS requirement.[68]

---

[63] 42 U.S.C. § 4331(b)(4).
[64] 42 U.S.C. § 4332(c).
[65] See generally 40 C.F.R. §§ 1500 to 1517.
[66] 306 F. Supp. 2d 929 (E.D. Cal. 2004)
[67] Id. at 939.
[68] See, e.g., Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425, 1429-30 (C.D. Cal. 1985). Compare Environmental Coalition of Ojai v. Brown, 72 F.3d 1411, 1417 (9th Cir. 1995), cert. denied, 517 U.S. 1245 (1996) (affirming agency's issuance of less-extensive environmental assessment ("EA") because, inter alia, the agency had addressed the affects of the action on the area's historic, cultural, and archaeological sites, and various organizations had issued letters finding no significant historic, cultural, or

Although rarer than NHPA challenges, NEPA challenges based on cultural resource grounds have been made, and have involved tribal challenges to proposed mining activities in particular. For example, in *Havasupai Tribe v. United States*,[69] an energy company submitted a plan of operations to the Forest Service proposing to develop a uranium mine on an unpatented mining claim in Arizona's Kaibab National Forest. The mine site was located in an area once encompassed by the Havasupai Tribe's aboriginal lands. The Forest Service prepared an EIS, and issued a record of decision (or "ROD") approving a modified plan of operations for the mine. The Havasupai Tribe appealed the decision to federal court, arguing in part that the EIS failed to give adequate consideration under NEPA to the tribe's religious and cultural interests in the mine site. Specifically, the tribe contended that traditional tribal camps and burial sites were located within the mine site, and that the mine site lay in the path of sacred trails and a sacred tribal guardian.[70] In so doing, however, the tribe refused to identify or provide the location of the specific sites they claimed were threatened, indicating that to do so risked "religious sacrilege and interference with and disruption of the present and future practice" of the tribe's religion.[71]

After noting that "NEPA requires that the environment considered by the federal agency includes not only such traditional environmental concerns as water and air quality, but also the historic cultural and natural aspects of our national heritage,"[72] the district court went on to detail the many efforts the Forest Service had in fact engaged in to consider the tribe's cultural concerns. The court also reviewed the tribe's failure to identify specific cultural sites, as well as its general failure to participate meaningfully in the EIS process.[73] The court ultimately held that the Forest Service had acted reasonably in drafting the EIS, and that it had taken appropriate action under NEPA to investigate and consider the tribe's cultural heritage claims.[74]

Havasupai, therefore, contains several practical lessons with regard to the effect of tribal cultural heritage issues on mining operations. First, it indicates that federal agencies must comply with NEPA when a proposed major federal action might significantly affect tribal cultural property, even when that property is off-reservation. As important, however, *Havasupai* shows the tension (also recognized by the NHPA) that tribes can face between invoking the requirements of the law and protecting information about their culture that they consider sacred. In *Havasupai,* "[t]he court recognize[d] that the nature of the Havasupai religion is inherently a personal and secret issue," but

---

archaeological impact due to the action). But see also Lockhart v. Kenops, 927 F.2d 1028, 1036-37 (8th Cir.), cert. denied, 502 U.S. 863 (1991) ("NEPA, however, does not mandate consideration of a proposal's possible impact on [Indian] religious sites or observances.").

[69] 752 F. Supp. 1471 (D. Ariz. 1990), aff'd 943 F.2d 32 (9th Cir. 1991), cert. denied, 503 U.S. 959 (1992).

[70] Id. at 1471.

[71] Id. at 1499.

[72] Id. at 1493.

[73] Id. at 1493-1500. The Forest Service attempted on numerous occasions to elicit information regarding the specific location of the claimed sites, but the tribe refused to provide it. In addition, the Service solicited the comments of a scholar with thirty years' experience working with and studying the Havasupai, and the Service reviewed the available literature; neither avenue was able to confirm the tribe's claims. See id. at 1497-98.

[74] Id. at 1500.

ultimately held that "the law requires revelation in exchange for further recognition, consideration, and mitigation."[75]

In this same regard, because NEPA and the NHPA are sufficiently similar that NHPA's regulations provide that "[f]ederal agencies are encouraged to coordinate compliance with section 106 [of the NHPA] and the procedures in this part with steps taken to meet the requirements of the [NEPA.],"[76] it is perhaps useful to contrast *Havasupai* with the Tenth Circuit's ruling in *Pueblo of Sandia v. United States*.[77] Again, in *Sandia* the appeals court concluded that the Forest Service had not made a reasonable and good faith effort under the NHPA in its evaluation of claimed traditional cultural properties, even though it had sent form letters soliciting detailed information regarding such sites to the pueblo and other knowledgeable sources.[78] The rulings in *Havasupai* and *Sandia* might be reconciled, however, by noting that, unlike the multiple avenues of investigation attempted in *Havasupai*, in *Sandia* the Forest Service did not further investigate the claims made regarding the traditional sites, and the court indicated the Service had in fact withheld that the area contained traditional cultural properties.[79] Thus, the two cases could be seen as a study in contrasts, with *Havasupai* indicating an appropriate method of dealing with the lack of information often inherent in consulting with tribes on traditional cultural issues, and the *Sandia* case showing an inappropriate one.[80]

IV. The Archaeological Resources Protection Act ("ARPA")

Another important federal statute protecting Native American cultural property both on and off Indian lands is the Archaeological Resources Protection Act of 1979 ("ARPA").[81] ARPA is, in large measure, a permitting statute.

Specifically, ARPA provides that "no person" (defined to include corporations and governmental instrumentalities)[82] "may excavate, remove, damage, or otherwise alter or deface, or attempt to excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands or Indian lands."[83] Likewise, ARPA prohibits the trafficking in archaeological resources removed from public lands or Indian

---

[75] 752 F. Supp. at 1500.
[76] 36 C.F.R. §800.8(a)(1).
[77] 50 F.3d 856 (10th Cir. 1995).
[78] Id. at 861; see also text to footnotes 34 to 41, above.
[79] See 50 F.3d at 861-62.
[80] See also Narrangansett Indian Tribe v. Warwick Sewer Authority, 334 F.3d 161, 168 (1st Cir. 2003) (distinguishing Sandia's facts); Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 806-07 (9th Cir. 1999) (same); Pitt River Tribe v. Bureau of Land Management, 306 F. Supp. 929, 944-45 (E.D. Cal. 2004) (same).
[81] 16 U.S.C. §§ 470aa to 470ll.
[82] *Id.* § 470bb(6).
[83] "Archeological resources" under ARPA are defined as "any material remains of past human or life activities which are of archaeological interest, as determined by uniform regulations promulgated pursuant to this chapter," and which are "at least 100 years of age." *Id.* § 470bb(1). ARPA's regulations are found at 43 C.F.R. §§ 7.1 to 7.37.

lands in violation of ARPA or federal law,[84] and prohibits the interstate trafficking of archeological resources excavated, removed, sold, purchased, etc. in violation of any state or local law.[85]

"Public lands" under ARPA are defined as lands owned and administered by the United States as part of the national park system, national wildlife refuge system, or national forest system, and all other lands (with some exceptions) the fee title to which is held by the United States.[86] "Indian lands" are defined as "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 any subsurface interests in lands now owned or controlled by an Indian tribe or an Indian individual."[87]

Permits for the covered activities can be obtained from relevant federal land managers pursuant uniform regulations.[88] However, if such a permit "may result in harm to, or destruction of, any religious or cultural site," the land manager "shall notify any Indian tribe which may consider the site as having religious or cultural importance."[89] Further, in cases involving the excavation or removal of any archaeological resource on Indian lands, the permit may only be granted after obtaining the consent of the tribe owning or having jurisdiction over the lands, and the permit shall include such terms and conditions as may be requested by the tribe.[90]

Moreover, if the issuance of a permit may result in harm to any Indian tribal religious or cultural site on public lands, as determined by the federal land manager, at 30 days notice must be given by the land manager to "any Indian tribe which may consider the site as having important religious or cultural importance" before the permit may be issued."[91] During this time, the land manager may meet with tribal officials to discuss their interests and means of mitigating or avoiding the harm, and "[a]ny mitigation measures which are adopted shall be incorporated" into the permit.[92]

ARPA provides for both civil and criminal penalties for its violation. Civil penalties may be assessed by the relevant federal land manager, with the amount of the penalty determined pursuant to ARPA's regulations.[93] Criminal penalties for knowing violations of certain portions of ARPA can, upon conviction, result in fines of up to

---

[84] 16 U.S.C.. § 470ee(b).

[85] Id. § 470ee(c). In this regard, at least one federal court has held that section 470ee(c) of ARPA applies to and forbids transactions in interstate commerce of archaeological resources excavated in violation of state and local law, even when that excavation is performed on private land. See United States v. Gerber, 999 F.2d 1112, 1115-16 (7th Cir. 1993), cert. denied, 510 U.S. 1071 (1994) (upholding conviction under ARPA of defendant who trespassed and stole archeological resources from another's private property in violation of state law, and then transported those stolen artifacts in interstate commerce).

[86] Id. § 470bb(3).

[87] Id. § 470bb(4).

[88] Id. § 470cc(a).

[89] Id. § 470cc(c).

[90] Id. § 470cc(g)(1).

[91] 43 C.F.R. § 7.7(a).

[92] Id. § 7.7(a)(3).

[93] Id. § 470ff(a); see also 43 C.F.R. §§ 7.15 to 7.16

$100,000 and/or imprisonment of up to five years.[94] Further, the violation of certain portions of ARPA can result in the forfeiture to the United States (or, if occurring on Indian lands, to the relevant tribe) of the archaeological resources at issue, as well as all vehicles and equipment used in connection with the violation.[95]

Significantly for activities such as mining operations, however, ARPA contains a savings clause that provides that "[n]othing in this chapter shall be construed to repeal, modify, or impose additional restrictions on the activities permitted under existing laws and authorities relating to mining, mineral leasing, reclamation, and other multiple uses of the public lands."[96] Additionally, ARPA's regulations provide that no permit is required for persons conducting activities on public lands under other permits "when those activities are exclusively for purposes other than excavation and/or removal of archaeological resources, even though those activities might incidentally result in the disturbance of archaeological resources,"[97] and that "[g]eneral earth-moving excavation conducted under a permit or other authorization shall not be construed to mean excavation and/or removal as used in this part."[98] These provisions have been interpreted by at least one federal court as meaning that no ARPA permit is required for activities that "are not intentional excavation and removal of human remains," even when tribal items and human remains would be damaged by those activities, because "Defendants [sic] activities are covered by the savings clause."[99]

V. The Native American Graves Protection and Repatriation Act ("NAGPRA")

Enacted in 1990, the Native American Graves Protection and Repatriation Act[100] addressed inequities in the handling and disposition of Native American human remains and other cultural property. For decades, Native Americans sought fair and respectful treatment of their ancestors and funerary and religious objects. Estimates of the number of deceased Native people dug up from graves for display or research by government agencies, museums and scientific institutions ranged from 100,000 to two million at the time of NAGPRA's passage.[101] Since 1990, approximately 29,500 human remains and 673,000 funerary, sacred and cultural patrimony objects have been returned to Native Americans under NAGPRA.[102]

---

[94] 16 U.S.C. § 470ee(d).
[95] Id. § 470gg(b), (c).
[96] 16 U.S.C. § 470kk(a).
[97] 43 C.F.R. § 7.5(b)(1).
[98] Id.
[99] See San Carlos Apache Tribe v. United States., 272 F. Supp. 2d 860, 888-89 (D. Ariz. 2003); see also Attakai v. United States, 746 F. Supp. 1395, 1410 (D. Ariz. 1990) (holding that ARPA "is clearly intended to apply specifically to purposeful excavation and removal of archaeological resources, not excavations which may, or in fact inadvertently do, uncover such resources").
[100] 25 U.S.C. § 3001-3013 (2000).
[101] See Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 Ariz. St. L.J. 35 (1992) (citing David J. Harris, Note, *Respect for the Living and Respect for the Dead: Return of Indian and Other Native American Burial Remains*, 39 Wash. U. J. Urb. & Contemp. L. 195 (1991)).
[102] See National NAGPRA FY04 Final Report, published by the National Park Service at http://www.cr.nps.gov/nagpra/DOCUMENTS/INDEX.htm. The Report provides statistics on the number

a. Overview of NAGPRA

NAGPRA establishes two main requirements. The first provides for disposition of NAGPRA cultural items[103] from Federal or tribal lands. The ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after November 16, 1990 is determined by a custody hierarchy set out in the statute.[104] The second important provision of the Act requires federal agencies and institutions that receive federal funds to inventory and repatriate Native American cultural items in their collections upon the request of lineal descendants or culturally affiliated Indian tribes or Native Hawaiian organizations (NHO).[105] Additional provisions of the statute include criminal penalties for trafficking in Native American cultural items,[106] the establishment of an advisory committee to advise the Secretary of Interior and provide informal dispute resolution,[107] and a private right of action.[108]

NAGPRA directs the Secretary of the Interior to promulgate regulations for the implementation of the statute by federal agencies, museums and other affected parties.[109] The Department of the Interior (DOI) issued regulations in 1995 that cover the majority of requirements under NAGPRA.[110] Additional regulations were developed in 1997 to address the civil penalty provisions in the Act for museums violating inventory requirements.[111]

b. Scope of Coverage

i. Cultural Items

NAGPRA applies to four specific categories of items: human remains, funerary objects, sacred objects, and objects of cultural patrimony.[112] With the exception of "human remains," these terms are defined in the statute. The implementing regulations provide further interpretation of these terms.[113]

---

of human remains and other cultural items that are eligible for repatriation and disposition under NAGPRA. The FY04 Report listed 29,284 human remains; 578,553 associated funerary objects; 91,901 unassociated funerary objects; 1,222 sacred objects; 274 objects of cultural patrimony; and 657 sacred objects/objects of cultural patrimony as eligible for repatriation. The FY04 Report listed 175 human remains; 775+ funerary objects; and 5 objects of cultural patrimony as eligible for disposition.

[103] NAGPRA cultural items mean human remains, funerary objects, sacred objects and objects of cultural patrimony. 25 U.S.C. § 3001(3).

[104] 25 U.S.C. § 3002(a).

[105] Id. at §§ 3003-3008.

[106] 18 U.S.C. § 1170.

[107] 25 U.S.C. § 3006.

[108] 25 U.S.C. § 3013. See Bonnichsen v. U.S., 969 F.Supp. 614 (D. Or. 1997). NAGPRA establishes private right of action to obtain declaratory and injunctive relief.

[109] 25 U.S.C. § 3012.

[110] See 43 C.F.R. Part 10.

[111] 43 C.F.R. 10.12.

[112] 25 U.S.C. § 3001(3).

[113] 43 C.F.R. 10.2(d).

NAGPRA regulations define "human remains" as the physical remains of a human body of a person of Native American ancestry.[114] The term does not include remains or portions of remains that may reasonably be determined to have been freely given or naturally shed by the individual from whose body they were obtained, such as hair made into ropes or nets.[115]

"Funerary objects" are items that, as part of the death rite or ceremony of a culture, are reasonably believed to have been placed intentionally at the time of death or later with or near individual human remains.[116] The term "burial site" means any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which as part of the death rite or ceremony of a culture, individual human remains were deposited.[117] The term includes rock cairns or pyres which do no fall within the ordinary definition of grave site.[118]

"Sacred objects" are specific ceremonial objects which are needed by traditional Native American religious leaders[119] for the practice of traditional Native American religions by the present day adherents.[120] Sacred objects may be owned by individuals or a group. While many items, from ancient pottery sherds to arrowheads, might be imbued with sacredness in the eyes of an individual, NAGPRA limits sacred objects to those that were devoted to a traditional Native American religious ceremony or ritual. Sacred objects must have religious significance or function in the continued observance or renewal of such ceremonies.[121]

"Objects of cultural patrimony" are items having ongoing historical, traditional, or cultural importance central to the Indian tribe or NHO itself, rather than property owned by an individual Native American.[122] These objects are of such central importance that they may not be alienated, appropriated, or conveyed by any individual tribal or organization member.[123] Such objects must have been considered inalienable by the

---

[114] 43 C.F.R. 10.2(d)(1).
[115] Id.
[116] 43 C.F.R. 10.2(d)(2). Funerary objects are broken into two additional categories, associated and unassociated. See 43 C.F.R. 10.2(d)(2)(i-ii). This distinction is primarily relevant for NAGPRA's inventory requirements of existing collections. Associated funerary objects are those for which both the related human remains and objects are presently in the possession or control of a Federal agency or museum. Unassociated funerary objects are those for with the Federal agency or museum has possession or control of the objects but not the related human remains.
[117] 43 C.F.R. 10.2(d)(2).
[118] Id.
[119] Traditional religious leader means a person who is recognized by members of an Indian tribe or Native Hawaiian organization as: (i) Being responsible for performing cultural duties relating to the ceremonial or religious traditions of that group, or (ii) Exercising a leadership role in an Indian tribe or Native Hawaiian organization based on the tribe or organization's cultural, ceremonial, or religious practices. 43 C.F.R. 10.2(d)(3).
[120] 25 U.S.C. § 3001(3)(C).
[121] 43 C.F.R. 10.2(d)(3).
[122] 25 U.S.C. § 3001(3)(D).
[123] Id.

Indian tribe or NHO at the time the object was separated from the group.[124] Objects of cultural patrimony include items such as Zuni War Gods, the Confederacy Wampum Belts of the Iroquois, and jish prayer bundles.[125]

ii. "Native American" and "Native Hawaiian"

In addition to meeting the specifications described above, NAGPRA cultural items must also be "Native American."[126] Whether remains or other cultural items are Native American is the threshold inquiry to trigger the terms of the statute. This term, while seemingly obvious in many cases, has recently been the subject of intense scrutiny for very old human remains.[127]

Under NAGPRA, human remains are "Native American" if they are of or relating to, a tribe, people or culture that is indigenous to the United States.[128] Until recently, DOI interpreted this term to include remains that belong to a culture that predates historically documented European exploration, whether or not the remains are related to an existing Indian tribe. The case *Bonnichsen v. United States,* popularly known as the "Kennewick Man" case, has somewhat changed this analysis.

In 1996, remains of an individual over 9,000 years old were found on lands managed by the Army Corps of Engineers (Corps) in Washington state. The Corps initially made a determination to repatriate the remains under NAGPRA. This decision was challenged by a group of scientists who wished to study the remains.[129] The District Court vacated and remanded the decision to the Corps for further review.[130] The Corps requested assistance from DOI to make appropriate determinations under NAGPRA, as allowed by the statute.[131] In 2000, after conducting numerous studies of the remains, DOI determined that the remains were Native American and culturally affiliated with five tribes who had made a claim.[132] Based on this decision, the Corps denied the plaintiffs' request to study the remains.

The plaintiffs moved for judicial review of these decisions.[133] The district court issued a decision rejecting the DOI's findings and ordered the Corps to allow plaintiff scientists to study the Kennewick remains pursuant to the Archaeological Resources

---

[124] Id.

[125] 43 C.F.R. 10.2(d)4). See United States v. Corrow, 119 F.3d 796 (10th Cir. 1997), cert. denied, 118 S.Ct. 1089 (1998). A dealer in Navajo items was convicted in New Mexico of knowingly selling an object of cultural patrimony obtained in violation of the statute. On appeal, Corrow challenged the definition of cultural patrimony as being unconstitutionally vague. The Tenth Circuit upheld the constitutionality of the definition and affirmed Corrow's conviction. See infra note 182 for a discussion about the issues in Corrow relevant to NAGPRA's provisions involving Indian lands.

[126] See 25 U.S.C. §§ 3002, 3003-3005 and 43 C.F.R. 10.2(d).

[127] Bonnichsen v. United States, 357 F.3d 962 (9th Cir. 2004).

[128] 25 U.S.C. § 3001(9).

[129] Bonnichsen v. United States, 969 F. Supp. 628 (D. Or. 1997).

[130] Id.

[131] 25 U.S.C. §§ 3002(d)(3).

[132] Bonnichsen v. United States, 217 F. Supp. 2d 1116, 1130 (D. Or. 2002).

[133] Id.

Protection Act.[134] Among other holdings, the court found that the DOI's interpretation that Native American under was erroneous and the court substituted its own definition of Native American which "requires, at a minimum, a cultural relationship between remains or other cultural items and a *present* day tribe, people or culture indigenous to the United States." [135]

The United States appealed the court's holding regarding the definition of "Native American." The Ninth Circuit held that the Secretary's interpretation of "Native American" was contrary to the plain language of the statute and Congress' intent, and that the regulation reflecting the Secretary's interpretation is invalid.[136] The court further held that human remains must bear a significant relationship to a *presently existing* tribe, people or culture to be considered Native American under NAGPRA, and that this inquiry is more general than the one required for the subsequent determination of cultural affiliation.[137] The court appears to have rendered a test to determine what constitutes a "significant relationship," which is "some special or significant genetic or cultural relationship to any presently existing indigenous tribe, people, or culture."[138] This test will be particularly relevant to ancient remains and challenging to apply, where it is often difficult, without considerable testing and study, to determine a link to a presently existing tribe, people or culture.

"Native Hawaiians" are defined as any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.[139] This definition does not extend to Pacific Islanders.

iii. Responsible Parties

NAGPRA's provisions primarily extend to federal agencies, museums, Indian tribes and Native Hawaiian organizations. Individuals or entities engaged in business with the federal government or Indian tribes may also have responsibilities under the statute. Activities occurring on federal or tribal lands may require involvement of the Advisory Council on Historic Preservation and State and Tribal Historic Preservation Officers. Coordination of the requirements of NAGPRA, ARPA and NHPA and participation by the appropriate parties will facilitate project planning and implementation.

Under NAGPRA, "federal agency" means any department, agency, or instrumentality of the United States, excluding the Smithsonian Institution.[140] Federal agencies play a role in both the excavation/discovery provisions and the museum

[134] Id. at 1167.
[135] Id.
[136] Bonnichsen, 357 F.3d at 975.
[137] Id.
[138] Id. at 976.
[139] 25 U.S.C. § 3001(10).
[140] 25 U.S.C. § 3001(4). Native American remains and cultural items held by the Smithsonian Institution are covered under the National Museum of the American Indian Act of 1989, 20 U.S.C. § 80q.

collection inventory provisions of NAGPRA. NAGPRA responsibilities for federal agencies are carried out by the "Federal agency official," an individual authorized by delegation of authority within a Federal agency to perform the duties relating to NAGPRA.[141] The title of this individual varies from agency to agency and within agencies. In the National Park Service (NPS), the federal agency official may be a park superintendent, an archeologist or a curator, depending on the park unit or program. The Bureau of Land Management (BLM) may designate a state director or local office BLM employee to handle NAGPRA issues. The District Engineer or a Federal Preservation Officer (FPO) may handle NAGPRA duties for the Corps of Engineers.

"Indian tribe" means any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act[142]), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.[143] A list of such "federally recognized tribes" is published by the Bureau of Indian Affairs.[144] Based on this definition, the statute does not clearly provide for repatriations to non-federally recognized tribes, which may include state recognized tribes, or other bands or groups. Nevertheless, cultural items associated with these non-federally recognized groups may still qualify as "Native American" and be subject to the Act.[145]

"Native Hawaiian organization" is defined as any organization which (a) serves and represents the interests of Native Hawaiians, (b) has as a primary and stated purpose the provision of services to Native Hawaiians, and (c) has expertise in Native Hawaiian Affairs.[146] The statute specifically designates at least two NHOs: the Office of Hawaiian Affairs and Hui Malama I Na Kupuna O Hawai'I Nei.[147] Because NHOs are self identifying and a list analogous to the BIA list for federally recognized tribes does not exist, agencies have had some difficulty identifying NHOs for consultation purposes. Congress considered more specific definitions, including one requiring a membership consisting of a majority of Native Hawaiians, but these were ultimately rejected in the final draft of the statute.[148]

An "Indian tribe official" is the principal leader of an Indian tribe or NHO or the individual officially designated by the governing body of an Indian tribe or NHO or as otherwise provided by tribal code, policy, or established procedure as responsible for matters relating to NAGPRA.[149]

---

[141] 43 C.F.R. § 10.2(a)(2).
[142] 43 U.S.C. § 1601 et seq.
[143] 25 U.S.C. § 3001(7).
[144] See www.cr.nps.gov/nagpra/ to access BIA's published list of federally recognized Indian tribes.
[145] Regulations to address this category of items that are Native American but not subject to repatriation due to the tribes federal recognition status are in development. See infra section d.
[146] 25 U.S.C. § 3001(11).
[147] Id.
[148] See 60 Fed. Reg. 62136.
[149] 43 C.F.R. § 10.2(b)(4).

"Museum" under NAGPRA means any institution or State or local government agency, including any institution of higher learning, that receives Federal funds and has possession of, or control over, Native American cultural items.[150] The phrase "receives Federal funds" means the receipt of funds by a museum after November 16, 1990, from a Federal agency through any grant, loan, contract (other than a procurement contract), or other arrangement by which a Federal agency makes or made available to a museum aid in the form of funds.[151] Museum NAGPRA responsibilities generally fall under the collection inventory provisions, and generally do not have a role in tribal land development issues.

Any "person", including an individual, partnership, corporation, trust, institution, association, any other private entity, or any official, employee, agent, department or instrumentality of the United States, or of any Indian tribe or NHO, or of any State or political subdivision has a responsibility under NAGPRA to report the discovery of any cultural items on Federal or tribal lands after November 16, 1990.[152] Permittees, lessees, contractors, and visitors all assume this duty when carrying out activities on Federal or tribal lands.[153]

iv. Federal and tribal lands

NAGPRA is triggered when development activities result in inadvertent discoveries of cultural items on Federal or tribal lands. Under the statute, "Federal lands" are any lands other than tribal lands which are controlled or owned by the United States, including lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act.[154] United States "control," as used in this definition, refers to those lands not owned by the United States but in which the United States has a legal interest sufficient to permit it to apply the Act without abrogating the otherwise existing legal rights of a person.[155] Generally, a Federal agency will only have sufficient legal interest to control lands it does not own when it has some other form of property interest in the land, such as a lease or easement.[156]

"Tribal lands," for purposes of NAGPRA, means all lands which:

(i) Are within the exterior boundaries of any Indian reservation including, but not limited to, allotments held in trust or subject to a restriction on alienation by the United States; or

---

[150] 25 U.S.C. § 3001(8).
[151] 43 C.F.R. § 10.2(a)(3)(iii).
[152] 25 U.S.C. § 3002(d).
[153] 43 C.F.R. § 10.4(g). All Federal authorizations to carry out land use activities on Federal or tribal lands, including all leases and permits, must include a requirement for the holder of the authorization to notify the appropriate Federal or tribal official immediately upon the discovery of cultural items.
[154] 25 U.S.C. § 3001(5).
[155] 43 C.F.R. § 10.2(f)(1).
[156] See Romero v. Becken, 256 F.3d 349 (5th Cir. 2001). The fact that the U.S. Army Corps of Engineers was involved in a supervisory role with the Texas Antiquities Commission does not convert the land into "federal land" within the meaning of the statute.

(ii) Comprise dependent Indian communities as recognized pursuant to 18 U.S.C. 1151[157]; or

(iii) Are administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act of 1920 and section 4 of the Hawaiian Statehood Admission Act.[158]

Private or lands not owned by or held in trust for a tribe within the exterior boundaries of any Indian reservation are, as a threshold matter, included within the scope of NAGPRA.[159] However, application of NAGPRA to such lands may be limited to the extent that any action would result in a taking of property without compensation within the meaning of the Fifth Amendment of the U.S. Constitution.[160]

Lands outside the exterior boundary of an Indian reservation that are held in trust by the United States for an Indian tribe do no meet the statutory definition of tribal lands. These lands are under Federal control, and the provisions for intentional excavations and inadvertent discovery on Federal lands apply. The statute also does not apply to lands outside the boundaries of a reservation that are owned by an Indian tribe and have not been accepted into trust by the United States.[161]

c. Specific Provisions for Tribal Lands

i. Inadvertent Discoveries

Inadvertent discoveries of Native American human remains or other cultural items that occur on Federal or tribal lands must follow the procedures outlined in the statute and further detailed in the regulations.[162] Generally, on both Federal and tribal lands, any "person"[163] who knows or has reason to know that they have inadvertently discovered NAGPRA cultural items must provide immediate telephone notification of the discovery, with written confirmation, to the responsible Federal agency official with respect to Federal lands, and, to the responsible Indian tribe official, with respect to tribal lands.[164] If the inadvertent discovery occurs in connection with an on-going activity on Federal or tribal lands, the person must stop the activity in the area of the discovery and make a reasonable effort to protect the human remains or other items.[165]

All Federal authorizations to carry out land use activities on Federal or tribal lands, including all leases and permits, must include a requirement for the holder of the

---

[157] As defined in 25 U.S.C. § 1151(b), dependent Indian communities include those Indian communities under Federal protection that were neither "reserved" formally, nor designated specifically as a reservation.
[158] 25 U.S.C. § 3001(15); 43 C.F.R. § 10.2(f)(2). Hawaiian Statehood Admission Act, Pub. L. 86-3, 73 Stat. 6.
[159] 25 U.S.C. § 3001(15).
[160] 43 C.F.R. § 10.2(f)(2)(iv) and 60 Fed. Reg. 62139 (Dec. 4, 1995).
[161] 60 Fed. Reg. 62142 (Dec. 4, 1995).
[162] 25 U.S.C. § 3002(d); 43 C.F.R. § 10.4.
[163] See supra note 152.
[164] 43 C.F.R. § 10.4(b).
[165] 43 C.F.R. § 10.4(c).

authorization to notify the appropriate Federal or tribal official immediately upon discovery NAGPRA cultural items.[166] Failure to do so could be grounds for refusal for future leases or permits.

After notification and cessation of activity, the procedures for discoveries on tribal lands vary slightly from those on Federal lands.[167] As soon as possible, but no later than three working days after the Indian tribe official receives written confirmation of the inadvertent discovery notification, the official may:

a) Certify receipt of the notification;
b) Take immediate steps, if necessary, to further secure and protect inadvertently discovered cultural items, including, as appropriate, stabilization or covering;
c) If the cultural items must be excavated or removed, follow the requirements of the NAGPRA regulations for these activities; and
d) Ensure that disposition of all inadvertently discovered cultural items are carried out pursuant to the statute and regulations.[168]

The activity that resulted in the inadvertent discovery may resume, if otherwise lawful, after thirty days of the certification of the receipt of notification by the Indian tribe or NHO.[169] Despite the thirty day provision, a case involving Federal lands and the Army Corps of Engineers (Corps) highlights the length of time and costs that may be involved after an inadvertent discovery. In *Yankton Sioux v. United States*,[170] the Corps discovered Native American human remains at Lake Francis Case which is behind the Fort Randall Dam in South Dakota in December 1999. The water levels of the Lake are managed by the Corps, and the remains were discovered in a portion of the Lake that is exposed several months a year. While some consultation about appropriate removal methods occurred between the Corps and the tribe, the tribe did not agree with the Corps' proposal and requested a preliminary injunction to prevent the Corps from raising the water level of the lake before the remains could be removed. A witness for the Corps testified that delay would cost the government $3.8 million over two months from anticipated power produced by the dam and purchased from other sources.[171]

The court issued the injunction and held that the discoverer of remains has a statutory duty to make a reasonable effort to protect them, and the federal agency managing the site must further secure and protect inadvertently discovered human remains.[172] The court also held that the duty the Act imposes to protect human remains takes precedence over its provision for a limited thirty-day cessation in activity.[173]

---

[166] 43 C.F.R. § 10.4(g).
[167] Procedures for Federal lands are at 43 C.F.R. § 10.4(d).
[168] 43 C.F.R. § 10.4(e)(1).
[169] 43 C.F.R. § 10.4(e)(2).
[170] 83 F. Supp. 2d 1047 (D. S.D. 2000).
[171] Id. at 1050.
[172] Id. at 1057.
[173] Id. at 1059.

Intentional Excavations and Removal of Cultural Items

An inadvertent discovery or pre-project planning may lead to a conclusion that a planned excavation is necessary before the project or activity can continue. NAGPRA permits intentional excavation of cultural items from tribal lands only if:

a) The objects are excavated or removed following the requirements of ARPA;
b) The objects are excavated after the consent of the appropriate Indian tribe or NHO;
c) The disposition of the objects is consistent with the custody provisions of the statute; and
d) Proof of consent by the Indian tribe can be shown.[174]

Under ARPA, if the lands involved in a permit application are Indian lands, the consent of the appropriate Indian tribal authority and, if applicable, individual Indian landowner is required by the Act.[175] For private lands within the exterior boundaries of any Indian reservation, the Bureau of Indian Affairs serves as the issuing agency for any ARPA permits required under NAGPRA.[176] Any permits required for lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act of 1920 and Pub. L. 86-3 will be issued by the Department of Hawaiian Home Lands.[177]

Once an Indian tribe receives notification of a planned activity that requires excavation or removal, the tribe may ensure that the cultural items are excavated or removed in accordance with the statutory requirements, and make certain that disposition of the items is carried out in accordance with NAGPRA and its regulations.[178] For excavations on tribal lands, the Indian tribe official has the authority to decide what, if any, steps to take.

ii. Disposition of Cultural Items Excavated or Removed from Tribal Lands

For cultural items removed from Federal or tribal lands, NAGPRA establishes five categories of descending rights of ownership or control.[179] Objects from tribal lands will almost always fall within the first two categories: 1) In the case of Native American human remains and associated funerary objects, in the lineal descendants of the Native American; or 2) In any case in which such lineal descendants cannot be ascertained, and in the case of unassociated funerary objects, sacred objects, and objects of cultural

---

[174] 43 C.F.R. § 10.3(b).
[175] 43 C.F.R. § 7.35.
[176] 43 C.F.R. § 10.3(b)(1).
[177] Id. The provisions of ARPA do not apply to Hawaiian Home Lands. However, NAGPRA regulations state that procedures and requirements for issuing permits will be consistent with those required by ARPA and its implementing regulations.
[178] 43 C.F.R. § 10.3(c)(4).
[179] 25 U.S.C. § 3002(a). A sixth category exists for "unclaimed Native American human remains and objects." 25 U.S.C. § 3002(b).

patrimony, in the Indian tribe or NHO on whose tribal land such objects or remains were discovered.[180]

Thus, ownership of removed cultural items is frequently with the tribe that is the beneficial owner of the tribal lands. Removal of cultural items from tribal lands without permission of the tribe is a violation of NAGPRA, subject to judicial enforcement, including NAGPRA's illegal trafficking provisions.[181] In *United States v. Corrow*, a dealer in Navajo items was convicted of obtaining an object of cultural patrimony from the Navajo reservation and selling it in violation of NAGPRA.[182] Although an individual tribal member purported to sell the object, since it was an object of cultural patrimony, it was not alienable by a single member.[183] Corrow did not obtain a permit or the consent of the tribe for its removal.[184]

d. Future Developments

Since the passage of NAGPRA in 1990, a number of amendments have been unsuccessfully introduced. Proposed provisions include written consent of lineal descendants or Indian tribes prior to excavation or removal of cultural items found on Federal land purposes of study,[185] expanding NAGPRA Review Committee responsibilities, [186] enforcement incentives,[187] and additional study provisions.[188] Most recently, a bill was proposed to amend the definition of Native American to restore it to the Department of Interior's interpretation prior to the *Bonnichsen v. U.S.* holding by the 9th Circuit.[189]

Finally, the Department of Interior is developing regulations to complete the reserved sections of 43 C.F.R. Part 10. These include procedures to repatriate unclaimed and unidentifiable human remains[190] and future applicability provisions for new or unreported collections.[191]

VI. Religious Freedom and Accommodation on Indian Lands

Economic development of natural resources is critical for many tribes to achieve independence and alleviate poverty. In Indian Country, such development often becomes controversial when religious and environmental concerns conflict with development

---

[180] 25 U.S.C. § 3002(a)(1)-(a)(2)(A).
[181] 25 U.S.C. § 3013; 18 U.S.C. § 1170.
[182] 941 F. Supp. 1553 (D. N.M. 1996); 119 F. 3d 796 (10th Cir. 1997).
[183] 941 F. Supp. at 1565.
[184] Id. at 1159. Corrow was sentenced to 5 years probation and 100 hours of community service.
[185] H.R. 749, 104th Cong. (2d Sess. 1996).
[186] Id.
[187] H.R. 110, 105th Cong. (1st Sess. 1997).
[188] H.R. 2893, 105th Cong. (1st Sess. 1997).
[189] S. 536, 109th Cong. (1st Sess. 2005). See supra note 127.
[190] 43 C.F.R. §§ 10.7, 10.11.
[191] 43 C.F.R. § 10.13.

goals. For many Native Americans, religion and traditional values are difficult to separate from natural resources and their environment.

The procedural framework for the development of Indian land differs considerably from that associated with federal or public lands. The title for the majority of Indian lands is held in trust by the United States. Such lands and resources may not be sold, conveyed or otherwise encumbered without express federal approval. Leasing and permitting mechanisms have been instituted to allow development of Indian lands. The federal-tribal trust relationship adds an additional layer of federal involvement when the federal government or tribes contemplate economic development of tribal lands. Federal involvement in activities on tribal lands may lead to issues concerning the effect of development on the deeply held traditional, religious and cultural values of the tribe, and implicating the Free Exercise and Establishment Clauses of the U.S. Constitution.

a. Supreme Court Tests

The First Amendment of the U.S. Constitution says "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[192] The Supreme Court has developed a number of tests to determine the boundaries of these limitations. Their guidance attempts to discern when the government is impermissibly prohibiting the free exercise of an individual's religion and when the government is too extensively involved in the establishment of religion.

i. The Free Exercise Clause – What the Government May Not Do

Early cases involving the Free Exercise Clause focused on a test that distinguished between belief and conduct. The Court emphasized that the First Amendment protected belief, but not conduct, and conduct threatening the civil order could be regulated by the government.[193] The Court began to modify the belief and conduct test by inserting a compelling interest component into the analysis.[194] Government actions that burden religious practice are prohibited unless justified by a compelling governmental interest.[195] The compelling interest test was further refined in later cases in which the Court reasoned that even where a compelling interest exists, the restricting government action must be achieved by means narrowly tailored to address that interest.[196]

The Court began a retreat from the compelling interest test,[197] which clearly manifested in their decisions in *Lyng v. Northwest Indian Cemetery Protective Association*,[198] as discussed below, and *Employment Div., Dept. of Human Resources of*

[192] U.S. Const. amend. I.
[193] Reynolds v. United States, 98 U.S. 145 (1879).
[194] West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).
[195] Id.
[196] Sherbert v. Verner, 374 U.S. 398, 403 (1963); Wisconsin v. Yoder, 406 U.S. 205, 220 (1972).
[197] See Bowen v. Roy, 476 U.S. 693 (1986).
[198] 485 U.S. 439 (1989).

Oregon v. Smith.[199] In *Smith*, a case involving an Oregon employment law that prohibited employees from using peyote, two members of the Native American Church were fired and later denied unemployment benefits for using peyote for religious purposes. They challenged the state's denial as an infringement on their free exercise rights. The Supreme Court held that even where religious practice is substantially burdened, neutral, generally applicable laws need not be justified by a compelling governmental interest.[200]

Responding to *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA).[201] RFRA prohibits government from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.[202] Universal in its coverage, RFRA applied to all Federal and State law,[203] but notably lacked a Commerce Clause underpinning or a Spending Clause limitation to recipients of federal funds. In *City of Boerne*, this Court invalidated RFRA as applied to States and their subdivisions, holding that the Act exceeded Congress' remedial powers under the Fourteenth Amendment.[204]

ii. The Establishment Clause – What the Government May Do

The Supreme Court has held that the Establishment Clause generally prohibits the government from singling out religious organizations for special, preferred treatment, whether in the form of a direct benefit or an exemption from a government requirement.[205] At the same time, however, the Court has long recognized that the government may, and sometimes must, accommodate religious practices and that it may do so without violating the Establishment Clause.[206] The accommodation doctrine permits the government to single out religion for special treatment under certain circumstances, usually when a generally applicable regulation interferes with the exercise of religion.

Traditional Establishment Clause principles are embodied in a test derived from *Lemon v. Kurtzman.*[207] Under the *Lemon* test, the government must demonstrate that a law implicating the Establishment Clause: (1) has a secular legislative purpose; (2) has a principal or primary effect that neither advances nor inhibits religion; and (3) does not

---

[199] 494 U.S. 872 (1990).
[200] Id. at 886.
[201] 107 Stat. 1488, 42 U.S.C. § 2000bb.
[202] 42 U.S.C. § 2000bb-1.
[203] Former 42 U.S.C. § 2000bb-3(a).
[204] City of Boerne v. Flores, 521 U.S. 507, 515-516 (1997).
[205] See Board of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687 (1994). The government must pursue "a course of 'neutrality' toward religion favoring neither one religion over others nor religious adherents collectively over nonadherents."
[206] Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334 (1987).
[207] 403 U.S. 602, 612-13 (1971).

foster excessive governmental entanglement with religion.[208] The Supreme Court has veered away from rigid application of the Lemon framework, but has declined to overrule it.[209] One of the most significant departures is the endorsement test.[210] In this modification, the *Lemon* analysis of purposes and effects is refined by inquiring whether the government intends to convey a message of endorsement or disapproval of religion.

Even where religious accommodations satisfy all there Lemon prongs, the Establishment Clause still might be implicated where the accommodation is for the benefit of some denominations and not others. Government actions that discriminate among religions typically are subject to strict scrutiny.[211]

b. The American Indian Religious Freedom Act

Although freedom of religion for all U.S. citizens is an inherent right, guaranteed by the First Amendment of the U.S. Constitution, the lack of a clear, comprehensive and consistent Federal policy often resulted in the abridgement of religious freedom for traditional American Indians.[212] In 1978, Congress sought to rectify this infringement by enacting the American Indian Religious Freedom Act (AIRFA).[213]

AIRFA states that "it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, 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 ceremonials and traditional rites.[214]

The statute lacks any enforcement provisions and, in practice, has not fared well. A number of court decisions, in particular, *Lyng*,[215] discussed below, have held that AIRFA did not create any substantive rights.[216] Efforts to bolster the statute, in the early 1990s, in response to *Lyng* and *Smith*, were considered by Congress and ultimately rejected.[217] Despite its apparent shortcomings, AIRFA remains the Federal government's

---

[208] Id.

[209] See Lamb's Chapel v. Center Moriches Union Free School District, 508U.S. 384 (1993). Justice White stated, "Lemon, however frightening it might be to some, has not been overruled."

[210] See Lynch v. Donnelly, 465 U.S. 668, 687 (1984); Allegheny County v. ACLU, 492 U.S. 573 (1989).

[211] Larson v. Valente, 456 U.S. 228, 246, (1982).

[212] American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469, 42 U.S.C. § 1996 (1978).

[213] Id.

[214] Id.

[215] Lyng, 485 U.S. 439.

[216] See Wilson v. Block, 708 F.2d 735 (D.C. Cir.), cert. denied, 464 U.S. 956 (1983). Court found that AIRFA merely required the federal agencies to consider but not necessarily to defer to, Indian religious values.

[217] See Draft Senate bill entitled "American Indian Religious Freedom Act of 1993, 103rd Cong. (1st Sess. 1993); S. 1021, 103rd Cong. (2nd Sess.) entitled "Native American Free Exercise of Religion Act;" H.R. 4155, 103rd Cong. (2nd Sess.) entitled "American Indian Religious Freedom Act Amendments of 1994. H.R. 4230, 103rd Cong. (2nd Sess.) was introduced to amend AIRFA to provide for the traditional use of peyote by Indians for religious purposes, and for other purposes. This bill passed and the provision is codified at 42 U.S.C. § 1996a.

policy with respect to Native American religion and agencies should consider it when formulating decisions affecting Native Americans.[218]

c. Free Exercise Issues Affecting Indian Lands – *Lyng* and its Aftermath

Native Americans pursuing religious protections were not only disappointed with AIRFA. The courts also dealt serious blows to their free exercise challenges. In a series of cases throughout the '80s, First Amendment lawsuits brought by Indian tribes alleging interference with their religious practice at sacred sites, primarily on Federal lands, were decided against the tribes.[219]

This line of cases culminated in *Lyng*, a Supreme Court case involving the U.S. Forest Service's plans to permit timber harvesting and road construction in a national forest area traditionally used for religious purposes by members of three northwestern California Indian tribes. The tribes contended that the burden on their religious practices due to the road construction was heavy enough to violate the Free Exercise Clause. The Court declined to apply the compelling interest test. Instead, the Court reasoned that incidental effects of government programs, which may interfere with the practice of certain religion, but which have no tendency to coerce individuals into acting contrary to their religious beliefs, do not require government to bring forward a compelling justification for its otherwise lawful actions.[220] Here, governmental action did not penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.[221]

Lyng effectively foreclosed future Free Exercise claims by tribes seeking access and protection of Indian lands for religious reasons. In *Attakai v. U.S.*,[222] a Federal district court case involving Hopi reservation land,[223] Navajo tribal members sought to prevent the Bureau of Indian Affairs from funding the construction of fences and watering facilities on Hopi reservation land. The plaintiffs alleged that these activities violated the First Amendment by interfering with their ability to practice their religion. The court found that *Lyng* spoke directly to the issues and stated that "the fact that a person's ability to practice their religion will be virtually destroyed by a governmental program does not allow them to impose a religious servitude on the property of the

---

[218] See Lyng, 485 U.S. at 454; New Mexico Navajo Ranchers Association, v. United States, 850 F.3d 729, 733 (D.C. Cir. 1988).

[219] See Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980) (Court held that agency's decision did not violate the Free Exercise Clause because the Navajo still had access to Rainbow Bridge, despite raised water levels.) Sequoyah v. Tennessee Valley Authority, 620 F.2d 1159 (6th Cir. 1980) (Flooding of Cherokee sacred sites was not an abridgement of free exercise where tribe failed to offer sufficient evidence of the centrality or indispensability of site to their religious observance.); Wilson, 708 F.2d at 740 (D.C. Circuit held that agency's decision to permit development did not violate the First Amendment because the agency did not deny the tribes access to their sacred sites.).

[220] Lyng, 485 U.S. at 450.

[221] Id. at 449.

[222] 746 F. Supp. 1395 (D. Ariz. 1990).

[223] Navajo tribal members continued to use portions of land partitioned to the Hopi due to a long standing dispute over the title and interest in reservation lands in northeastern Arizona. 746 F. Supp. at 1399.

government, much less property which the government holds in trust for another sovereign Indian tribe."[224]

Very few additional attempts to pursue such Free Exercise claims have been made by Indian tribes. Those that have attempted since *Lyng* have failed.[225] The equivalent of a Free Exercise challenge may still be viable under RFRA. RFRA, courts of appeals have held, remains operative as to the Federal Government and federal territories and possessions.[226] In *United States v. Hardman*, a Native American from a non-federally recognized tribe was unable to retrieve eagle feathers seized from him under the Bald and Golden Eagle Protection Act (BGEPA).[227] He challenged the seizure, basing his claims on the BGEPA, RFRA, and the Free Exercise Clause. The court determined that while the government could show a compelling interest, it could not clearly show that the permitting scheme of BGEPA was the least restrictive means of advancing its interest.[228] The court declined to address the Free Exercise claim because they could reach a conclusion based on the statutory grounds of RFRA.[229]

d. Sacred Sites – Protection and Access Provided by the Government

While *Lyng* may have curtailed Free Exercise challenges, it simultaneously opened the door to additional Establishment Clause considerations. The *Lyng* Court noted that the government's rights to the use of its own land need not and should not discourage it from accommodating religious practices such as those engaged by the Indian respondents.[230] The Court lauded the Forest Service's efforts to mitigate disturbance to sacred sites.[231]

Since *Lyng*, several developments have afforded greater consideration and protection of Native American sacred sites. Shortly after Lyng and Smith, Congress amended the NHPA and ARPA to allow for greater participation by Indian tribes in planning processes[232] and to promote public awareness of native sites and artifacts.[233] Congress also passed RFRA, discussed earlier. The Executive Branch responded to the direction of the Supreme Court and Congress by implementing policy that promoted protection of and access by Native Americans to sacred sites. In a reversal from the Free

---

[224] Id. at 1403.

[225] See Havasupai Tribe v. United States, 752 F. Supp. 1471 (D. Ariz. 1990), aff'd, 943 F.2d 32 (9th Cir. 1991); Lockhart v. Kenops, 927 F.2d 1028 (8th Cir. 1991).

[226] See, O'Bryan v. Bureau of Prisons, 349 F.3d 399, 400-401 (CA7 2003); Guam v. Guerrero, 290 F.3d 1210, 1220-1222 (CA9 2002); Kikumura v. Hurley, 242 F.3d 950, 958-960 (CA10 2001); In re Young, 141 F.3d 854, 858-863 (CA8 1998).

[227] 297 F.3d 1116 (9th Cir. 2002).

[228] Id. at 1134.

[229] Id. at 1136.

[230] *Lyng*, 485 U.S. at 454.

[231] Id. The Court noted that "Except for abandoning the project entirely, ..., it is difficult to see how the Government could have been more solicitous."

[232] National Historic Preservation Act Amendments of 1992, Pub. L. No. 102-575, tit. XL, 106 Stat. 4600, 4753-65 (amending 16 U.S.C. §§ 470-470x-6).

[233] Amendments to Archeological Resources Protection Act of 1979, Pub. L. No. 100-588, 1(d), 102 Stat. 2983, (amending 16 U.S.C. §§ 470aa-470mm).

Exercise cases, recent litigation has been targeted against the Government in the form of Establishment Clause challenges. Thus far, the agencies, and as a result, the tribes, have generally prevailed in defending accommodation measures from claims of impermissible establishment of Indian religion.

i. Sacred Sites Executive Order

In 1996, President Clinton issued Executive Order 13007 which directed federal agencies in managing Federal lands to (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites.[234] "Sacred site" is defined as any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion.[235]

The Executive Order does not create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States.[236] Nevertheless, Federal land managing agencies have integrated the principles embodied in the directive into their day to day management and planning activities.[237]

Although the Executive Order is not applicable to Indian trust lands,[238] Indian tribes generally have greater control over access to sovereign lands and trust resources.[239] Furthermore, Federal agencies are not precluded from extending the provisions to areas broader than that defined or government decisions affecting Indian lands, where applicable and not in violation of the law.

Individual tribal members may encounter additional obstacles when seeking protection for sacred sites on tribal land. In *Kescoli v. Babbitt*, a member of the Navajo Nation a permit entered into among a mining company, the Office of Surface Mining and the Navajo Nation. The individual member challenged the permit as not providing adequate protection to sacred sites. The case was dismissed because the Navajo Nation was determined to be a necessary and indispensable party and would not waive their sovereign immunity by intervening in the proceeding.[240]

ii. Establishment Clause Prohibitions May Not Apply

---

[234] Exec. Order No. 13007, 61 Fed. Reg. 26,771 (1996).
[235] Id. at Sec. 1(b)(iii).
[236] Id. at Sec. 4.
[237] See Department of the Interior Departmental Manual, 512 DM 3 (establishes the policy, responsibility, and procedures to implement E.O. 13007). National Park Service Management Policies 2001, Chap. 5.3.5.3.2 (guidance regarding sacred sites consistent with E.O. 13007).
[238] Exec. Order No. 13007, Sec. 1(b)(i).
[239] See Royster, Judith, "*Mineral Development in Indian Country: The Evolution of Tribal Control Over Mineral Resources,*" 29 Tulsa L.J. 541 (Summer 1994).
[240] 101 F.3d 1304 (9th Cir. 1996).

The general prohibitions associated with the Establishment Clause may not apply to government actions that accommodate the religious practices of federally recognized Indian tribes. In *Morton v. Mancari*,[241] the Supreme Court held that preferences for federally recognized Indian tribes are subject to less exacting scrutiny under the Equal Protection Clause than racial or ethnic preferences because of the historical guardian-ward relationship between those tribes and the Federal government. In upholding an employment preference provision, the Court stated that the preference was not racial in nature because it favored a quasi-sovereign or political group consisting of federal recognized Indian tribes, rather than a discrete racial group consisting of Native Americans.[242]

The logic of *Morton* has been extended to the Establishment Clause context. The Fifth Circuit has upheld statutory exemptions for the Native American Church from federal and state laws prohibiting peyote possession.[243] The court construed the exemptions as political classifications rather than as religious classifications. The First Circuit also applied the rational basis test in lieu of strict scrutiny when considering an exemption for federally recognized tribes from the federal criminal prohibition on the possession of eagle feathers.[244] The court found that such treatment is uniquely supported by the legislative history and congressional findings underlying AIRFA.[245]

iii. Establishment Clause Issues Affecting Indian Lands

Although other Circuits have not clearly extended the considerations of *Morton* to Establishment Clause jurisprudence, they have upheld the efforts of agencies to accommodate Indian religious practices on culturally important land based on traditional Constitutional considerations. Here, too, the cases have focused on Federal lands, rather than Indian lands where tribes exercise greater control in approving activities and have the ability to avoid adverse effects on sacred and cultural sites.

In the early 1990s, the National Park Service took steps to accommodate Native American requests to perform historic summer solstice ceremonies in greater peace and solitude at Devil's Tower National Monument. As part of a Final Climbing Management Plan, NPS discontinued the issuance of commercial climbing licenses for the month of June and encouraged recreational climbers to refrain from climbing during this period of cultural importance to Indian tribes. This plan was challenged by commercial and private rock climbing interests, alleging that such actions constituted an excessive entanglement with religion, and violated the Establishment Clause.[246]

In a motion for a preliminary injunction, the district court ruled that the plaintiffs were likely to succeed in arguing that the mandatory prohibition of commercial guides

---

[241] 417 U.S. 535 (1974).
[242] Id. at 554.
[243] Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991).
[244] Rupert v. Director, U.S. Fish and Wildlife Serv., 957 F.2d 32 (1st Cir. 1992).
[245] Id. at 35.
[246] Bear Lodge Multiple Use Ass'n v. Babbitt, 96-CV-063-D (D. Wyo. June 8, 1996)

violated the Establishment Clause. NPS responded by revoking the commercial ban and instituting the voluntary ban for all climbers. In 1998, the court reached the merits of the voluntary ban.[247] In dismissing the plaintiffs' Establishment claims, the court relied on the *Lemon* and endorsement tests.[248] The decision was not based on the unique relationship between the Federal government and Indian tribes. However, the court stated that a government policy benefiting Native American tribes did not constitute excessive entanglement with religion because they are not solely religious organizations, but also represent a common heritage and culture.[249] Plaintiffs appealed the decision to the Tenth Circuit.[250] The circuit court found that the climbers lacked standing with respect to all of their challenges and did not reach the Establishment Clause issues.[251]

Another NPS case involving voluntary accommodation measures arose at Rainbow Bridge National Monument.[252] The park's general management plan included a policy to encourage visitors to voluntarily refrain from walking underneath or near the monument's base out of respect for Native Americans, for whom the monument was a sacred site. As in *Bear Lodge*, the court, here, found that the majority of plaintiffs lacked standing.[253] The district court used traditional Establishment Clause tests and found that the plan had a secular purpose to educate the public, its effect was informational, and there was no excessive entanglement with the Native American religion.[254] The court also noted, in its excessive entanglement discussion, that it was incumbent upon the Park Service to consult with the tribes to fulfill its trust responsibility and AIRFA policies.[255]

The Ninth Circuit recently considered an Establishment Clause challenge involving a site of religious significance to Native Americans on private land.[256] The owners of a portion of Woodruff Butte, in Arizona, mined material primarily for road construction and sold the material to the Arizona Department of Transportation (ADOT) pursuant to a commercial source number issued by the state. The Hopi Tribe, Zuni Pueblo and Navajo Nation passed resolutions against the mining because of Woodruff Butte's religious, cultural, and historical significance to these groups. New regulations subsequently adopted by the state required an environmental assessment for commercial source numbers. The owners were denied a new commercial source number due to the projected adverse effects on historic property and they filed suit alleging an Establishment Clause violation.

The court employed *Lemon* and the endorsement test and concluded that the Establishment Clause does not bar the government from protecting a historically and culturally important site simply because the site's importance derives at least in part from

---

[247] Bear Lodge Multiple Use Ass'n v. Babbitt, 2 F.Supp.2d 1448 (D. Wyo. 1998)
[248] Id. at 1454.
[249] Id. 1456.
[250] Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814 (10th Cir. 1999).
[251] Id. at 822.
[252] Natural Arch & Bridge Society v. Alston, 209 F. Supp. 2d 1207 (D. Utah 2002).
[253] Id.
[254] Id.
[255] Id.
[256] Cholla Ready Mix v. Civish, 382 F.3d 969 (9th Cir. 2004).

its sacredness to certain groups. Rather than apply a more flexible standard based on Native Americans' political status, the court, as in *Bear Lodge*, focused on the historical, ethnic and cultural character of Indian tribes and the important role that plays in U.S. history.[257]

Thus, in sacred site accommodation cases, the courts appear to rely on standing issues and the historical importance of sites to all Americans, not just Native Americans. The courts seem generally reluctant to relax Establishment Clause standards based on notions of political classification. However, the Free Exercise difficulties faced by Indian tribes in cases such as *Lyng* have been reversed since the early 1990s due to the Federal government's policy of encouraging accommodation in a manner consistent with the Establishment Clause.

VII. Additional Policy and Consultation Requirements

In addition to the specific consultation requirements of the cultural resource (ARPA, NHPA, NAGPRA) and environmental (NEPA) statutes discussed above, Federal agencies must comply with administrative guidance when taking actions affecting Indian interests.

In April, 1994, President Clinton stressed the importance of respecting sovereign tribal governments by providing guidance to executive departments and agencies for government-to-government relationships.[258] The Memorandum directs federal agencies to consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments. Federal agencies must assess the impact of Federal Government plans, projects, programs, and activities on tribal trust resources and assure that tribal government rights and concerns are considered during such development.[259]

Building on the principles of the 1994 Memorandum, the White House issued Executive Order 13084 on May 14, 1988.[260] This directive contained a consultation provision that required agencies to have an effective process to permit Indian tribal governments to provide meaningful and timely input in the development of regulatory policies on matters significantly or uniquely affecting their communities.[261]

Executive Order 13175 superseded Executive Order 13084 and was issued to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications.[262] "Policies that have tribal implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on Indian tribes, on

---

[257] Id. at 976.
[258] 59 Fed. Reg. 22951 (May 4, 1994).
[259] Id.
[260] 63 Fed. Reg. 27655 (May 19, 1998), superseded by Exec. Or. 13175.
[261] Id.
[262] 65 Fed. Reg. 67249 (Nov. 9, 2000).

the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and tribes.[263] When implementing such policies, agencies shall consult with tribal officials as to the need for Federal standards and any alternatives that limits their scope or otherwise preserves the prerogatives and authority of Indian tribes.

Federal agencies must also comply with individual Department guidance. The Interior Department, which has an enhanced role with respect to Indian trust resources, is, periodically, subject to further guidance in Secretarial Orders. Secretarial Order 3175[264] required bureaus and offices to consult with the recognized tribal government with jurisdiction over the trust property that a proposal may affect.

VIII. State and Tribal Laws Affecting Cultural Resources

In addition to federal protections, many states and tribes have enacted laws protecting cultural resources that might impact activities such as mining.

a. State laws

As a general matter, cultural resources located on state or private land are outside the scope of federal jurisdiction. Individual state laws, therefore, should be consulted to determine what, if any, state protections are afforded to such resources.

Many states, for example, have established statutory procedures regulating the excavation and disposition of cultural resources on state lands, often through agency-administered permitting systems. New Mexico, through its Cultural Properties Act, [265] is an example of a state with a detailed permitting program for such activities. More generally, many state health and safety statutes provide protections against the excavation of human remains, and Native American remains in particular.[266]

With regard to industry activities in particular, several states have enacted laws in which effects on historical and/or archaeological resources must be considered prior to the issuance of mining and drilling permits.[267] Similarly, some states have enacted statutes prohibiting or restricting the siting of power plants and facilities that might affect historical or archaeological resources.[268]

---

[263] Id.

[264] Department of Interior, Order No. 3175, "Department Responsibility for Indian Trust Resources" (Nov. 8, 1993).

[265] N.M. Stat. Ann. §§ 18-6-1 to -23 (2002).

[266] *See, e.g.,* Ala. Code § 41-3-1 (2003); Colo. Rev. Stat. Ann. § 24-80-13-2 (West 2002); Ga. Code Ann. § 31-21-6 (2002); Idaho Code § 27-503 (2002); Neb. Rev. Stat. Ann. §§ 12-1201 to -1212 (Michie 2002); Nev. Rev. Stat. Ann 383.170 (Michie 2002); Tenn. Code Ann. § 11-6-116 (2002); Wis. Stat. Ann. § 157.70 (West 2003).

[267] See, e.g., Ind. Code § 14-34-18-3(a)(3) (2002); Mich. Comp. Laws § 324.64103(1)(g) (2002); Miss. Code Ann. § 53-7-49 (2002); Mont. Code Ann. § 82-4-228(2)(b)(ii) (2002); N.D. Cent. Code § 38-14.1-05(2)(b) (2001); 58 Pa. Cons. Stat. Ann. § 601.205(c)(5)(2002); Wyo. Stat. Ann. § 35-11-406(m)(iv) (2002).

[268] See, e.g., Cal. Pub. Res. Code § 25527 (West 2003); N.Y. Pub. Serv. Law § 146 (McKinney 2003).

It should be noted, moreover, that the above listings and examples are illustrative and not exhaustive, and the practitioner should therefore carefully review the laws of the relevant jurisdiction when dealing with these issues.[269]

b. Tribal laws

Additionally, individual tribes also often enact their own laws and codes to protect cultural resources within their lands.

For example, one particularly detailed tribal cultural resources code is Navajo Nation's Cultural Resources Protection Act, enacted in 1988.[270] The act's findings state that it is being enacted in part because the Nation's former cultural resources protection programs were inadequate "[i]n the face of ever increasing energy development . . . ."[271] The act then goes on to describe a program for protecting Navajo "cultural property," which is defined as "any cultural resource deemed to be important enough to warrant listing in the Navajo Register [of Cultural Properties]."[272] The act prohibits all persons (except enrolled members of the Nation or Nation employees engaged in official activities)[273] from, for example, visiting or investigating cultural property on non-public Navajo lands, destroying or removing cultural properties on Navajo lands, and selling or transporting cultural resources on Navajo lands.[274] The act also creates a permitting process to allow some of these activities to occur.[275] The act also provides for criminal penalties (for "[a]ny Indian person")[276] and civil penalties (for "individuals")[277] who violate the act.

Again, the individual practitioner will want to ensure that the relevant tribes' laws are also consulted in determining what cultural resources protections may be applicable.

IX. Paleontological Resources

To many, paleontological specimens are considered natural and scientific resources. Others have attached cultural and historical significance to fossils. In a report commissioned at the request of Congress, the Department of the Interior concluded that fossils on federal lands are a part of America's Heritage.[278] Some Native Americans associate fossils with traditional and cultural practices and sacred sites.[279]

---

[269] See also generally, Sherry Hutt et al., Cultural Property Law: A Practitioner's Guide to the Management, Protection, and Preservation of Heritage Resources, at 75-93 (2004).
[270] 19 N.N.C. §§ 1001 to 1061.
[271] Id. § 1001(A)(5).
[272] Id. § 1003(C), (J).
[273] Id. § 1033(A).
[274] Id. § 1031.
[275] Id. §§ 1032, 1034-36.
[276] Id. § 1037.
[277] Id. § 1038.
[278] Report of the Secretary of the Interior, Fossils on Federal & Indian Lands, May 2000, p. 8.
[279] S. 263 (see note 283) and other proposed legislation to protect fossils specifically excluded, in the definition of paleontological resources, fossils that were associated with human sites or considered to be

On Federal lands, fossils are protected by a hodgepodge of federal laws, including the Antiquities Act[280], ARPA, and general theft and trespass provisions.[281] Federal agencies have varying degrees of protection and inconsistent management policies when it comes to these resources. In recent years, after a number of highly publicized sales of fossils[282], attempts have been made to enact legislation that protects paleontological resources and provides clear and consistent management direction to the land managing agencies. Thus far, the bills, which have been titled, "Paleontological Resources Preservation Act," have not passed.[283]

On Indian lands, fossils that have commercial value have been found to be trust resources.[284] The Bureau of Indian Affairs manages trust resources by approving leases of Indian lands or contractual agreements between Indian landowners and third parties for the extraction of fossils. BIA's determinations to enter into such arrangements are contingent upon an economic benefit to the Indian landowner. These arrangements are subject to review under NEPA and NHPA.

X. Conclusion

As the above discussion demonstrates, proposed mineral development can be significantly impacted by the existence of Indian cultural resources within the development area. As is also shown above, there are a number of often over-lapping federal, state, and tribal laws addressing such cultural resources, any one of which may potentially derail the proposed development. In addition to the other myriad laws regulating the mining industry, therefore, the practitioner dealing with such mineral development must also become familiar with these cultural resources protections, and federal land managers and developers should plan for, recognize, and address cultural heritage issues in the earliest stages of development.

K:\dox\client\53004\004\W0509490.DOC

NAGPRA cultural items, as ARPA and NAGPRA already provide protection for those categories of paleontological resources.

[280] Act of June 8, 1906, codified at 16 U.S.C. §§ 431-433. The application of the Antiquities Act to paleontological resources has been the subject of considerable debate, and there is some question as to its constitutionality as a basis of criminal prohibitions and penalties. See United States v. Diaz, 499 F. 2d 113 (9th Cir. 1974).

[281] See Lazerwitz, David, "Bones of Contention: The Regulation of Paleontological Resources on the Federal Public Lands," 69 Ind. L.J. 601 (Spring, 1994).

[282] A Tyrannosaurus rex skeleton found on an Indian allotment was acquired in 1998 by The Field Museum for over $8million. See infra note 284.

[283] S. 546, 108th Cong. (1st Sess. 2003); S. 2727, 108th Cong. (2nd Sess 2004); S. 263, 109th Cong. (1st Sess. 2005).

[284] See Black Hills Institute of Geological Research v. United States, 12 F.3d 737 (8th Cir. 1993). Fossil of a T-rex found on land held in trust for an individual Indian by the United States was "land" rather than "personal property."