

Petroglyphs and Lithic Scatters

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PETROGLYPHS AND LITHIC SCATTERS: MANAGEMENT PRESCRIPTIONS FOR HISTORICAL, CULTURAL, AND ARCHEOLOGICAL RESOURCES

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§ 3.01. INTRODUCTION, HISTORICAL PERSPECTIVE, AND SCOPE.

Federal cultural and historic resources management and preservation policies play an important role in the planning processes associated with public lands development.⁽¹⁾ This article will examine the role federal cultural resources management statutes play in the planning and implementation of resources development projects on the public lands.⁽²⁾ While the terms "cultural resource" and "historic resource" are defined in various statutes and regulations,⁽³⁾ views differ as to whether a particular site or object is, or should be, subject to the protection of a particular management scheme. The late Justice Potter Stewart's views about obscenity may be equally applicable to the identification of cultural resources: "I could never succeed in intelligibly [defining pornography]. But I know it when I see it. . . ."⁽⁴⁾

The ultimate identification of a resource worthy of protection varies substantially from person to person, and from interest group to interest group. To some, the stray potsherd or obsidian chip may represent insights into a native civilization, necessitating preservation or at least consideration under historic preservation laws to permit study of the interrelationship between the object and other objects or sites in the vicinity.⁽⁵⁾ To others, the suggestion that a few flakes of chert or a single arrowhead trigger cultural resource management protection is anathema.⁽⁶⁾ Some may argue that historic mine workings are cultural resources worthy of protection,⁽⁷⁾ while others would contend the workings are a scar that should be reclaimed. The broad variance in views presents management difficulties, but counsels federal agencies and developers to consider seriously the cultural resource issues that will arise inevitably in a project, and to work in close consultation with all interested persons, including Indian tribes, and other entities involved in the development planning process.

This article examines the key statutes and regulations which impose cultural resources management requirements on public land development projects.⁽⁸⁾ Cultural resources management first emerged as a public lands issue with passage of the Antiquities Act in 1906.⁽⁹⁾ Since then, Congress enacted a number of statutes designed to increase the protection afforded historic and cultural resources, culminating in the enactment, and subsequent amendment, of the National Historic Preservation Act (NHPA).⁽¹⁰⁾

This article discusses the National Historic Preservation Act, the Native American Graves Protection and Repatriation Act, the First Amendment to the Constitution and related statutes concerning Native American religious freedom, and the other key statutory and regulatory schemes affecting or implementing cultural resources management schemes on the public lands.⁽¹¹⁾ Through this discussion this article

seeks to provide a practical analysis of the planning requirements and cultural resources management obligations imposed on federal agencies and project proponents.⁽¹²⁾

§ 3.02 THE NATIONAL HISTORIC PRESERVATION ACT MANDATES PROCEDURAL PROTECTION FOR HISTORIC AND CULTURAL RESOURCE PROPERTIES.

[1] Operation and Scope of the NHPA.

"The purpose of the National Historic Preservation Act (NHPA) is the preservation of historic resources."⁽¹³⁾ Enacted in 1966, and amended significantly in 1980 to codify additional preservation policies reflected in Executive Order No. 11593,⁽¹⁴⁾ the NHPA was implemented "to encourage the preservation and protection of America's historic and cultural resources."⁽¹⁵⁾ The NHPA was amended again in 1992 to provide, among other things, enhanced opportunities for Indian tribes to manage federal cultural resources programs on Indian lands, and to participate more actively during the planning process for projects on public lands. While preceded by several federal cultural and historic preservation schemes,⁽¹⁶⁾ the NHPA represents the cornerstone of federal historic and cultural preservation policy. "Congress, in enacting NHPA, took the key step of protecting not only 'nationally significant' properties but also properties of 'historical, architectural, or cultural significance at the community, State or regional level . . . against the force of the wrecking ball.'"⁽¹⁷⁾

To achieve the basic goal of historic and cultural resource preservation, Congress identified three principal purposes for the NHPA: (1) strengthen and broaden the process of inventorying historic and cultural sites, and establish a National Register of sites significant in state, local, regional, and national history, culture, architecture, or archaeology; (2) enhance and encourage national, state, local, and tribal interest in historic preservation; and (3) establish the Advisory Council on Historic Preservation (ACHP) to oversee matters relating to preservation of historic properties, to coordinate preservation efforts, and to promulgate regulations to outline federal, state, and now tribal obligations regarding consideration of sites that may be affected by federal, or federally-controlled, activities.⁽¹⁸⁾

For activities on the public lands, sections 106 and 110 are the two most significant parts of the NHPA.⁽¹⁹⁾ Section 106 and its implementing regulations⁽²⁰⁾ describe the step-by-step procedural obligations imposed on federal agencies prior to permitting any on-the-ground activity -- for example, a timber sale, an Application for Permit to Drill (APD) on a federal oil and gas lease, or a mine plan -- that may affect cultural or historic properties.

Section 110 represents the codification of portions of President Nixon's Executive Order No. 11593, and imposes the following obligations on federal agencies:

(1) The heads of all Federal agencies shall assume responsibility for the preservation of historic properties which are owned or controlled by such agency.⁽²¹⁾

(2) Each agency shall undertake, consistent with the preservation of such properties and the mission of the agency . . . , any preservation, as may be necessary to carry out this section.⁽²²⁾

(3) [Each] Federal agency shall establish a program to locate, inventory, and nominate to the Secretary [of the Interior] all properties under the agency's ownership or control . . . , that appear to qualify for inclusion on the National Register. . . .⁽²³⁾

(4) Consistent with the agency's missions and mandates, all Federal agencies shall carry out agency programs and projects (including those under which any Federal assistance is provided or any Federal license, permit, or other approval is required) in accordance with the purposes of [the Act]⁽²⁴⁾

Under the 1992 NHPA amendments, these federal agency preservation-related activities are to be "carried out in consultation with other Federal, State, and local agencies, [and] Indian tribes" ⁽²⁵⁾ The key state official involved in this consultation effort is the State Historic Preservation Officer (SHPO).⁽²⁶⁾

The 1992 NHPA amendments, among other things, permit tribes to assume responsibilities formerly reserved to State Historic Preservation Officers or SHPOs concerning "tribal lands." "Tribal lands" are defined in the NHPA to include "all lands within the exterior boundaries of any Indian reservation" and "all dependent Indian communities."⁽²⁷⁾ Tribal assumption of such authority is conditioned on approval by the Secretary of the Interior of a tribal plan which demonstrates the tribe is capable of performing the functions and responsibilities of a historic preservation program.⁽²⁸⁾ Because tribes may assume a variety of roles relating to lands outside reservation boundaries, public lands developers should consider whether their project may fall within the geographic scope of a tribe's authority or interest under the NHPA. Even if a tribe has no authority to assume duties performed by a SHPO, that tribe may have interests sufficient to require that it be afforded participation in the section 106 process.

NHPA implementation and obligations may vary from region to region, state to state, and agency to agency. There is a paucity of reported decisions under NHPA addressing public lands management questions.⁽²⁹⁾ And, federal agencies have a certain amount of discretion in their implementation of the NHPA.⁽³⁰⁾ Accordingly, federal agency officials and developers should communicate early to develop an understanding of their respective approaches to NHPA planning.

[2] "Historic Properties" as Defined in the NHPA.

Properties subject to NHPA protection are sites or objects either included in, or eligible for listing on, the National Register of Historic Places.⁽³¹⁾ Generally, sites of state, local regional, or national significance over 50 years old possessing "integrity of location, design, setting, materials, workmanship, feeling, and association," and which are distinctive or are associated with important events or people, may be eligible.⁽³²⁾ The National Park Service publishes a series of pamphlets which provide significant and detailed analyses of the type of properties that are National Register-eligible, and how to assess eligibility.⁽³³⁾ While debates may rage over whether objects or sites with physical manifestations of various activities or cultures are worthy of protection, a related debate simmers over the protection which should be afforded properties with cultural significance, but which may not reveal any physical evidence of human habitation.⁽³⁴⁾ Under applicable regulations, these "traditional cultural properties" (TCPs) may be eligible for inclusion in the National Register.⁽³⁵⁾ Accordingly, TCPs are subject to consideration under the NHPA.

National Register Bulletin No. 38 announces "Guidelines for Evaluating and Documenting Traditional Cultural Properties." Under Bulletin No. 38, natural objects or landscapes "associated with the traditional beliefs of a Native American group about its origins, its cultural history, or the nature of the world" may be National Register-eligible, and subject to NHPA protection.⁽³⁶⁾ Properties falling within this category include: Mt. Shasta, a 14,162' volcanic peak in northern California;⁽³⁷⁾ sandbars in the Rio Grande in New Mexico used for certain Pueblo Indian rituals;⁽³⁸⁾ and Cannonball Island off the coast of Washington state, which is used as a navigational marker by Makah Indian fishermen.⁽³⁹⁾ Thus, those facing NHPA compliance obligations must address not only those sites or objects which have some physical evidence of human habitation or presence, but also sites with no such evidence. That challenge reflects the critical role that the NHPA's consultation requirements play in NHPA section 106 compliance. Project proponents and federal agency officials must be certain to involve state, local and tribal interests in the section 106 process to insure comprehensive analysis of historic properties in the vicinity of a project.

[3] NHPA Theoretically Imposes Only Procedural Obligations.

Courts and commentators uniformly view the NHPA as a procedural statute.⁽⁴⁰⁾ In *Morris County Trust for Historic Preservation v. Pierce*,⁽⁴¹⁾ the U.S. Court of Appeals for the Third Circuit stated: "NHPA, like NEPA, is primarily a procedural statute, designed to ensure that Federal agencies take into account the effect of Federal or Federally-assisted programs on historic places as part of the planning process for those properties."⁽⁴²⁾ Similarly, the Ninth and District of Columbia Circuits have stated that the NHPA is a "stop, look, and listen" statute.⁽⁴³⁾ Thus, the NHPA is not a substantive action-forcing statute, but rather is a statutory mandate imposing only procedural requirements on federal agencies to promote the preservation of "the historical and cultural foundations of the nations"⁽⁴⁴⁾

Professor George Coggins acknowledges the procedural nature of NHPA requirements.⁽⁴⁵⁾ "Federal agencies cannot approve projects that would affect [cultural] properties without complying with certain procedures The Act does not contain an enforceable substantive mandate, however. The federal agency need only take into account the effect of an action on a . . . site."⁽⁴⁶⁾ Accordingly, the NHPA appears to impose only procedural requirements on federal agencies.⁽⁴⁷⁾

While the "letter of the law" demonstrates that NHPA's requirements are only procedural, those requirements are "mandatory."⁽⁴⁸⁾ Failure to follow strictly the NHPA process will render a project vulnerable to judicial challenge.⁽⁴⁹⁾

Moreover, the NHPA and its implementing regulations provide agencies with ample opportunity to reach agreements with state officials and other interested parties to provide substantive protection for National Register and eligible properties.⁽⁵⁰⁾ In practice, federal agency officials are likely to seek ways to avoid any historic properties, and move the development activity away from those sites, where possible. Where a development activity cannot be moved to avoid a site, agency officials likely will seek to impose measures to mitigate damage to the site. Such steps may be taken even before any analysis is performed concerning National Register-eligibility. Applicants for federal permits, leases, or other federal approvals should maintain good communications with involved federal officials to determine whether substantive agreements or mitigation measures are contemplated. Further,

developers should consider negotiating for the protection of sites if such protection is warranted, and if the negotiations will permit the project to move forward unfettered by further NHPA procedural hurdles. Such an approach may engender support for the project, or help allay the concerns of potential opposition.

[4] The Procedural Obligations Apply to All "Undertakings" as the Term is Defined in the NHPA.

Section 106 obligations apply to any "proposed Federal or federally assisted undertaking," and must be completed "prior to the approval of the expenditure of any Federal funds . . . or prior to the issuance of any license. . . ." ⁽⁵¹⁾ An "undertaking" is defined under the 1992 NHPA Amendments as:

[a] project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including:

(A) those carried out by or on behalf of the agency;

(B) those carried out with Federal financial assistance;

(C) those requiring a Federal permit, license, or approval; and

(D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency. ⁽⁵²⁾

This statutory definition appears broader than the current ACHP regulatory definition. ⁽⁵³⁾ The following discussion addresses authority arising under the existing regulatory definition, which has yet to be revised. ⁽⁵⁴⁾

"Undertakings" may include, without limitation: (a) approval of an application for permit to drill on an oil and gas lease; ⁽⁵⁵⁾ (b) approval of a mine plan on federal lands; ⁽⁵⁶⁾ (c) grants of rights-of-way across public lands; ⁽⁵⁷⁾ (d) on-the-ground activities carried out pursuant to a federal permit, lease or license, such as a timber sale; ⁽⁵⁸⁾ and (e) development of management plans. ⁽⁵⁹⁾ In essence, any ground-disturbing activity under the jurisdiction or control of any federal agency, including the U.S. Forest Service and the Bureau of Land Management, constitutes an "undertaking" triggering NHPA § 106 compliance requirements. ⁽⁶⁰⁾

Generally, the level of federal involvement necessary to trigger NHPA compliance obligations is a minimal threshold. "[W]here the federal agency's role is so insignificant as to allow no more than a recommendation," the NHPA "is plainly inapplicable." ⁽⁶¹⁾ However, in most other circumstances, NHPA requirements apply. For actors on public lands, this authority translates into an obligation, in most circumstances, to meet NHPA compliance standards. ⁽⁶²⁾

[5] NHPA and NEPA Compliance Obligations Compared.

Questions arise as to whether NEPA's environmental impact statement (EIS) obligations coincide with NHPA section 106 compliance requirements. While no unanimous opinion has developed, the better reasoned view is that different thresholds exist for triggering NHPA and NEPA EIS obligations. An EIS is required

under NEPA for "major Federal actions significantly affecting the quality of the human environment,"⁽⁶³⁾ while the NHPA applies to "any Federal or federally assisted undertaking."⁽⁶⁴⁾ Further, the NHPA provides that it should not "be construed to require the preparation of an environmental impact statement where such a statement would not otherwise be required" under NEPA.⁽⁶⁵⁾ However, for most "undertakings," certain NEPA compliance work, such as preparation of an Environmental Assessment (EA) will be required, unless the project is subject to a categorical exclusion.⁽⁶⁶⁾

Compliance with NEPA will not necessarily translate into NHPA compliance;⁽⁶⁷⁾ and, compliance with NHPA requirements does not necessarily equate to NEPA compliance.⁽⁶⁸⁾ Accordingly, independent analysis of NEPA and NHPA compliance obligations is required.⁽⁶⁹⁾ Of course, many federal actions will require compliance with both statutes.⁽⁷⁰⁾

Despite the differing standards of the NHPA and NEPA,⁽⁷¹⁾ federal agencies may comply with both statutes in a single document.⁽⁷²⁾ Current NEPA and NHPA regulations "envision that both statutes may be applied simultaneously"⁽⁷³⁾ Simultaneous compliance with NEPA and NHPA makes sense not only from a cost-efficiency standpoint, but also from the standpoint of the policies expressed in NEPA. Section 101(b) of NEPA provides that federal agencies coordinate plans and programs, consistent with other policy considerations, in a manner to "preserve important historic, cultural, and natural aspects of our national heritage"⁽⁷⁴⁾ And, NEPA's implementing regulations demonstrate a commitment to consideration of cultural resources.⁽⁷⁵⁾

[6] Section 106 Procedures for Cultural Resources Management Compliance for an NHPA "Undertaking."

The section 106 procedures to be followed to insure NHPA compliance for any "undertaking" can be time consuming and somewhat frustrating, unless the work is initiated early in the planning process.⁽⁷⁶⁾ Even then, developers should be flexible in their planning to accommodate cultural and historic resources management requirements. This section of the paper reviews the procedural steps one must follow once a determination has been made that a project constitutes an "undertaking" under section 106.

Section 106 of the NHPA provides in pertinent part:

The head of any Federal agency having direct or indirect jurisdiction over a proposed . . . undertaking shall, . . . prior to the issuance of any license . . . take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i to 470v of this title a reasonable opportunity to comment with regard to such undertaking.⁽⁷⁷⁾

As provided by the NHPA,⁽⁷⁸⁾ the Advisory Council on Historic Preservation (ACHP) promulgated regulations implementing this provision.⁽⁷⁹⁾ Unless states or federal agencies have executed agreements with the ACHP, 36 C.F.R. pt. 800 controls the section 106 clearance process.⁽⁸⁰⁾ "The process is designed to foster communication and consultation between agency officials, the SHPO, and other interested parties

such as Indian tribes, local governments, and the general public."⁽⁸¹⁾ At the outset, the ACHP regulations grant flexibility to the land management agency: "[t]he Council recognizes that . . . these regulations may be implemented . . . in a flexible manner reflecting [sic] differing program requirements, as long as the purposes of section 106 of the Act and these regulations are met."⁽⁸²⁾ However, the section 106 process must be completed prior to the initiation of any ground-disturbing activities.⁽⁸³⁾ And, the process may need to be completed before any license or permit is issued, or before final approval of any federal funding expenditures.⁽⁸⁴⁾ However, any agency may authorize "non-destructive planning activities preparatory to an undertaking" before the section 106 process is complete.⁽⁸⁵⁾

Following a discussion of two cases which highlight some of the key issues arising in the section 106 process, this paper reviews the section 106 process in detail. *National Indian Youth Council v. Andrus*,⁽⁸⁶⁾ a case addressing a coal mine project on Indian lands, is instructive of certain aspects of the section 106 process. The coal lease at issue, negotiated between the Navajo Tribe of Indians and a venture including El Paso Natural Gas Company and Consolidation Coal Company ("Con Paso"), was executed in 1976.⁽⁸⁷⁾ As required by statutes governing the leasing of Indian lands, the Secretary of the Interior approved the lease on August 31, 1977.⁽⁸⁸⁾ Notwithstanding that governing regulations required the submittal and approval of a mining plan before any on-the-ground activities could take place under the lease,⁽⁸⁹⁾ the Youth Council challenged the Secretary's approval of the lease and argued that the NHPA required a complete inventory and analysis of all historic properties within the 40,286 acre leasehold prior to secretarial approval.⁽⁹⁰⁾ The federal defendants and Con Paso argued that completion of NHPA section 106 compliance was not required until the mining plan received final approval. Until the mine plan was approved, Con Paso could not perform any ground-disturbing activity. Defendants also argued that compliance "may be accomplished in phases as long as compliance for each particular phase is completed prior to any land-disturbing activity in that area."⁽⁹¹⁾

In upholding the defendants' position, the district court stated that to require a complete inventory and analysis of all historic properties in the leased area, without any assurance a lease would be granted and with other procedural impediments still to be removed before any on-the-ground activities would begin, "would be unreasonable and wasteful."⁽⁹²⁾ While concluding that "a mining project entered into pursuant to a federally-approved lease" is an "undertaking,"⁽⁹³⁾ the court held the mining plan approval to be the "'license' which required prior compliance with section 106"⁽⁹⁴⁾ The court also held that section 106 clearance procedures could be employed on a phased basis as mining activity progressed through the leased area.⁽⁹⁵⁾ The approach approved by the district court was affirmed by the Tenth Circuit.⁽⁹⁶⁾

In the oil and gas development context, the Interior Board of Land Appeals (IBLA) considered a challenge to the NHPA section 106 process relating to the development of coalbed methane wells in southwestern Colorado, *San Juan Citizens Alliance, et al.*⁽⁹⁷⁾ The Alliance contended that BLM failed to assess properly the impact of additional wells on historic sites when the BLM approved a drilling program based on 160 acre spacing.⁽⁹⁸⁾ The IBLA rejected the Alliance's arguments, stating that the Environmental Assessments prepared by the BLM addressed the impact of the development on archaeological resources. The IBLA stated also that appropriate cultural resources surveys were performed on proposed and alternate well locations

and pipeline locations, and that the necessary consultations were performed. Finally, the BLM provided, in its approval papers, for "identification and protection of archaeological resources during drilling."⁽⁹⁹⁾ Accordingly, there were no section 106 violations.

These cases illustrate generally some of the key aspects of the section 106 process: The process should be completed before ground-disturbing activities commence, section 106 clearance may be phased, the NHPA compliance effort may be coordinated with NEPA obligations, surveys and consultations with appropriate officials are required, and federal officials can impose substantive mitigation requirements on developers. A detailed description of the section 106 process follows.

[a] Literature search and initial consultation.

Once a project is identified as constituting an NHPA "undertaking," the federal agency has specific regulatory obligations:⁽¹⁰⁰⁾ First, the agency "shall": (a) review all existing information on cultural or "historic properties" that potentially may be affected by the undertaking;⁽¹⁰¹⁾ (b) consult with the State Historic Preservation Officer (SHPO) to identify information, literature, and any further work that may be necessary to identify historic properties in the area;⁽¹⁰²⁾ and (c) consult with local governments, tribes, or organizations "likely to have knowledge of or concerns with historic properties in the area."⁽¹⁰³⁾ The literature search should include a review of materials in the purview of the SHPO and/or affected tribe. In any split estate situations, with federal minerals and fee surface, the agency should consider the information and opinions held by surface owners.⁽¹⁰⁴⁾ Once this initial literature review and consultation process is complete, the agency also should determine whether further field surveys or other action is necessary to identify historic properties.⁽¹⁰⁵⁾

[b] Inventory requirements and eligibility determinations.

In consultation with the SHPO, the agency must make a "reasonable and good faith effort to identify historic properties that may be affected by the undertaking."⁽¹⁰⁶⁾ The "effort" required will vary depending on the area involved, and the potential presence of historic properties. The "reasonable and good faith effort" standard requires the agency to "gather sufficient information to evaluate the eligibility of these properties for the National Register."⁽¹⁰⁷⁾ Once the inventory process is complete, the ACHP regulations require the agency and the SHPO to apply the National Register criteria for eligibility "to properties that may be affected"⁽¹⁰⁸⁾ Even properties previously evaluated may have to be reevaluated because the "passage of time or changing perceptions of significance may justify reevaluation"⁽¹⁰⁹⁾ If the agency and SHPO agree on eligibility or ineligibility of the property, the section 106 process moves on to the next step.⁽¹¹⁰⁾ If the agency and SHPO disagree, or the ACHP or Secretary of the Interior (Secretary) request, the agency must submit the matter to the Secretary for an eligibility determination.⁽¹¹¹⁾

If no "historic properties" are found through the inventory and consultation process described, the agency may conclude its investigation. Its only remaining duty in the section 106 process is to notify the SHPO and any interested parties of the situation.⁽¹¹²⁾ Not surprisingly, if "historic properties" are found, the section 106 process moves on to the next phase.⁽¹¹³⁾

[c] Determinations of an undertaking's "effect" and "adverse effect" on properties.

Recalling that previous steps in the section 106 process consider all "historic properties" that may be affected, the process now assesses the "effect" of the "undertaking" on these properties.⁽¹¹⁴⁾ Again, hand in hand with the SHPO and in consultation with any "interested persons," the federal agency applies "effect" and "adverse effect" criteria to each property.⁽¹¹⁵⁾ An undertaking has an "effect" when it "may alter characteristics of the property that may qualify the property for inclusion in the National Register."⁽¹¹⁶⁾ Alteration of the setting, location, or use of the property may be relevant to determining whether the "undertaking" has an "effect."⁽¹¹⁷⁾

An undertaking has an "adverse effect" when it "may diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association."⁽¹¹⁸⁾ "Adverse effect" determinations include, but are not limited to: (a) physical destruction, damage, or alteration; (b) isolation of the property from its setting or alteration of the setting when the setting contributes to the property's character and qualification for National Register listing; and (c) "[i]ntroduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting."⁽¹¹⁹⁾

Where the agency finds no "effect," federal officials must notify the SHPO and any interested persons, and make the supporting documentation available.⁽¹²⁰⁾ If no one objects within 15 days, the section 106 process is complete.⁽¹²¹⁾

Where the federal official finds an "effect," or if the SHPO objects to an agency finding of "no effect," the section 106 process continues.⁽¹²²⁾ When the agency discovers the undertaking will have an "effect," the "adverse effect" evaluation must be made.⁽¹²³⁾ If the agency finds no adverse effect, the federal official shall either: (a) obtain SHPO or tribal concurrence and forward the documentation to the ACHP; or (b) submit the finding to the ACHP for a 30-day review and notify the SHPO.⁽¹²⁴⁾ If the ACHP does not object, the section 106 process is complete.⁽¹²⁵⁾ In the event the ACHP disagrees, the effect is considered "adverse" and the section 106 process continues as described below.

[d] The "adverse effect" consultation process.

When the federal official finds an "adverse effect," it "shall" notify the ACHP and "shall" consult the SHPO and others "to seek ways to avoid or reduce the effects on historic properties."⁽¹²⁶⁾ The agency is to provide participants in the consultation process with documentation regarding the properties at issue and the potential effects of the undertaking.⁽¹²⁷⁾ The agency must also afford the "public" the opportunity to comment.⁽¹²⁸⁾

If, as a result of the consultation process, the agency and SHPO agree on "how the effects will be taken into account, they shall execute a Memorandum of Agreement."⁽¹²⁹⁾ Others may be parties to the agreement, but the project proponent is not required to be a party under the regulations.⁽¹³⁰⁾ Once the ACHP approves the Memorandum of Agreement, the agency's section 106 obligations are fulfilled.⁽¹³¹⁾ The Memorandum of Agreement represents a powerful tool that agencies may use to provide substantive protection for historic properties affected by undertakings.

If no Memorandum of Agreement can be reached through consultation, the agency or SHPO "may state that further consultation will not be productive and thereby terminate the consultation process."⁽¹³²⁾ At that point, the agency must request ACHP input and notify interested parties of the request. Following agency submittal to the ACHP of documentation regarding the properties at issue and the proposed undertaking, together with notice that no agreement has been reached, the ACHP must provide comments within 60 days of receipt of the information.⁽¹³³⁾ ACHP comments are to be delivered to the agency head, SHPO and other interested parties.⁽¹³⁴⁾ The agency then is required to "consider" the ACHP comments "in reaching a final decision on the proposed undertaking."⁽¹³⁵⁾ Once the agency makes a decision, it must notify the ACHP, preferably prior to initiating the undertaking.⁽¹³⁶⁾ At that point, the agency may make its decision, issue the lease, approve the mine plan, or take any course of action it chooses. Under the 1992 NHPA Amendments, however, the head of the federal agency involved has a non-delegable duty to "document any decision" under section 106 "which adversely affects any property included in or eligible for inclusion in the National Register, and for which . . . [the] agency has not entered into an agreement with the [ACHP]."⁽¹³⁷⁾

[e] Special provisions regarding Section 106 clearance procedures.

[i] Properties discovered following initiation of undertaking.

The ACHP regulations address how to deal with historic properties discovered after ground-disturbing activity is underway.⁽¹³⁸⁾ First, the agency "is encouraged" to anticipate such an event and to develop a plan to address such contingencies.⁽¹³⁹⁾ The plan may be incorporated in any Memorandum of Agreement reached with the SHPO. When plans to address newly discovered properties are developed, the agency must follow the plan in order to maintain compliance with the section 106 process.⁽¹⁴⁰⁾

If no plan was drafted in advance to address undiscovered properties, the agency must, upon a discovery, provide the ACHP an opportunity to comment or, if the property has principally archaeological value, comply with the requirements of the Historic and Archaeological Data Preservation Act (HADPA).^{(141),(142)} Absent a plan as described above (or pursuit of the HADPA process), the ACHP regulations do not require the agency to stop work on the undertaking in the event of a discovery during work.⁽¹⁴³⁾ However, the regulations suggest the federal official should take steps to avoid or minimize harm to the property until the ACHP consultation process is completed.⁽¹⁴⁴⁾ If the ACHP comment process is pursued, the ACHP comments are due promptly, to be consistent with whatever schedule the agency official may have.⁽¹⁴⁵⁾ The agency may also seek agreement with the SHPO on an approach to address the newly discovered property.⁽¹⁴⁶⁾

[ii] Programmatic Agreements between states and federal agencies.

Agencies, SHPOs and the ACHP may develop "Programmatic Agreements" to fulfill and perhaps streamline section 106 obligations for a specified undertaking or series of undertakings.⁽¹⁴⁷⁾ In certain circumstances, Programmatic Agreements can simplify the NHPA section 106 process.⁽¹⁴⁸⁾ Developers should consider recommending this approach in appropriate circumstances. Of course, one should determine whether the regulating or permitting agency has any applicable Programmatic Agreements which might govern a planned project already.

[f] Planning for NHPA compliance.

As the foregoing discussion reflects, the NHPA and its regulations impose procedural obligations on the agency. There is no obligation on the agency actually to preserve or mitigate damage to any historic property arising from the statute or regulations.⁽¹⁴⁹⁾ However, as discussed above, the regulations provide an opportunity for agency officials to impose substantive protective measures through a Memorandum of Agreement. Agencies also may use Programmatic Agreements or other Memoranda of Understanding to develop substantive protection. In addition, as discussed below, agencies may impose stipulations or conditions of approval on a development project to obtain a measure of protection for historic resources.⁽¹⁵⁰⁾

Even without any substantive protection arising from the section 106 process, the procedural obligations can be time consuming, and possibly disruptive to the development schedule. Accordingly, project proponents should consider whether it is productive to work with the agency, the SHPO, and interested parties to develop acceptable mitigation provisions to protect any cultural and historic sites within the area affected by the undertaking. While this may be unpalatable to some at first blush, because it puts teeth into what might otherwise be a procedural scheme, the benefits of time-savings may outweigh the costs of any such agreement. One may also be able to use such an agreement to accommodate the concerns of parties which otherwise might oppose a project. Moreover, as indicated, the agency and SHPO may negotiate substantive protections anyway. So, there are benefits to being an active participant from the outset.

[7] NHPA and Federal Regulation of Oil and Gas Operations and Rights-of-Way.

[a] Oil and gas leasing.

Oil and gas leasing regulations and directives under the Mineral Leasing Act of 1920⁽¹⁵¹⁾ impose cultural and historic resource protection requirements consistent with the NHPA.⁽¹⁵²⁾ On-shore Oil and Gas Order No. 1 describes the duties of oil and gas lessees or operators relative to cultural resource protection measures.⁽¹⁵³⁾ Prior to submission of an Application for Permit to Drill (APD) or a Notice of Staking (NOS), the operator should contact the applicable regulatory authority "to determine whether any actions are necessary to locate and identify historic and cultural resources."⁽¹⁵⁴⁾ Survey work by the operator may be required if the agency believes National Register-eligible or listed properties are present in the area of potential effect.⁽¹⁵⁵⁾ And, survey work will be required even if the surface is privately owned.⁽¹⁵⁶⁾ Finally, operations plans may be subject to substantive modification by the agency as may be necessary to protect surface resources, such as historic properties.⁽¹⁵⁷⁾

Oftentimes, "Conditions of Approval" are imposed by the agency when a development project is approved. For example, most BLM Area Offices have developed a series of "Standard Conditions of Approval," among which are conditions addressing the protection or avoidance of historic properties during drilling and development activities. Those conditions or stipulations also can include requirements that: activities cease upon the discovery of historic properties, the operator inform appropriate officials, mitigate any damage, and pay the costs of any mitigation. Project developers are advised to review any Conditions of Approval

carefully.⁽¹⁵⁸⁾ If the Conditions are unacceptable, any appeal should be filed promptly.

[b] Rights-of-way grants.

Rights-of-way across public lands also trigger NHPA compliance requirements.⁽¹⁵⁹⁾ Moreover, right-of-way regulations permit federal officials to impose substantive conditions or stipulations on rights-of-way "designed to control or prevent damage to . . . cultural and environmental values"⁽¹⁶⁰⁾ A question arises whether section 106 survey requirements apply to adjacent private lands across which a right-of-way runs. In *Western Slope Gas Co.*,⁽¹⁶¹⁾ the Interior Board of Land Appeals held that the inventory process applied, as a mandatory matter, only to those portions of a right-of-way to be used by an intrastate pipeline regulated by the State of Colorado that crossed federal lands.⁽¹⁶²⁾ Shortly thereafter, the Deputy Solicitor at Interior issued an opinion that the IBLA decision was wrong, and that in certain circumstances the NHPA requires the survey of private lands for cultural resources properties.⁽¹⁶³⁾ According to the Solicitor's office, the survey of private lands is even necessary where an "undertaking" is exclusively on adjacent public lands, but an "effect" may occur on the fee property.⁽¹⁶⁴⁾

[8] Developers are Liable for NHPA Compliance Costs.

The NHPA permits federal agencies to charge NHPA compliance costs associated with an undertaking to the permit applicant.⁽¹⁶⁵⁾ No court has explored the scope of this feature of the NHPA. The BLM generally asserts that NHPA compliance and mitigation costs are chargeable to the developer.⁽¹⁶⁶⁾ However, there is little or no guidance as to whether NHPA costs may be imposed absent some explicit condition or stipulation imposed on the developer. Nevertheless, permit applicants should incorporate the anticipated costs associated with NHPA compliance into their project budget.⁽¹⁶⁷⁾

[9] Judicial Review of Agency NHPA Compliance and Decision-Making.

As noted, failure to comply with the procedural requirements of the NHPA and its implementing regulations subjects the offending agency, together with the permit applicant, to the threat of an injunction.⁽¹⁶⁸⁾ In *Attakai v. United States*,⁽¹⁶⁹⁾ the U.S. District Court in Arizona enjoined a range management project in the area used jointly by the Hopi and Navajo Tribes for failure to follow the ACHP's section 106 procedures.⁽¹⁷⁰⁾ In *Attakai*, the Bureau of Indian Affairs (BIA) followed its "standard practice" to identify historic properties potentially affected by a fence construction project: it completed a 100% field survey, consisting of "a walkover of the entire project line . . . to inspect the area for cultural and archaeological remains which lie in the project line, or sufficiently close that incidental impact might be expected."⁽¹⁷¹⁾ The surveys were completed prior to clearance and final approval of the project.⁽¹⁷²⁾ Each survey disclosed historic properties, and the survey teams, not always including an archaeologist or anthropologist, recommended realignment of the project to avoid potential impacts on the sites.⁽¹⁷³⁾ The realignments were adopted and, following the determination by the BIA Area Archaeologist that the project would have no effect on historic properties, an archaeological clearance was issued.⁽¹⁷⁴⁾

Because the BIA failed to consult with the Arizona SHPO, the district court concluded the BIA violated a fundamental requirement of the NHPA, and issued an injunction mandating compliance with section 106.⁽¹⁷⁵⁾ The court rejected the BIA's arguments

that its action met the spirit of section 106 and the regulations, and that the regulations themselves expressly permit flexible implementation. According to the court, the regulations "rely on consultation, particularly with the SHPO, as the principal means of protecting historical resources."⁽¹⁷⁶⁾ The court also stated that the BIA is required to consult with Indian tribes,⁽¹⁷⁷⁾ and the failure to do so constituted an additional basis for injunctive relief.⁽¹⁷⁸⁾ In short, injunctive relief is available against federal agencies which attempt to shortcut the NHPA process.⁽¹⁷⁹⁾ The courts may apply the same standards to NHPA injunction cases as have been applied in the NEPA context.⁽¹⁸⁰⁾ Accordingly, agencies and developers should ensure careful compliance with NHPA requirements.⁽¹⁸¹⁾

[10] The Interrelationship Between NHPA Compliance Obligations and Federal Land Use Planning Statutory Requirements.

[a] The Federal Land Policy and Management Act.

The Federal Land Policy and Management Act (FLPMA)⁽¹⁸²⁾ provides a framework for NHPA implementation and cultural resources management on public domain lands.⁽¹⁸³⁾ Congress' policy declaration in FLPMA provides that "public lands be managed in a manner that will protect the quality of . . . historical . . . and archaeological values."⁽¹⁸⁴⁾

The FLPMA land use planning process requires consideration of cultural and historic properties.⁽¹⁸⁵⁾ Resource Management Plans developed under FLPMA invariably contain a cultural resources management component. And, FLPMA regulations incorporate NHPA compliance measures.⁽¹⁸⁶⁾ Land use authorizations under these regulations require terms and conditions which shall "[m]inimize damage to scenic, cultural and aesthetic values . . . and otherwise protect the environment"⁽¹⁸⁷⁾

[b] The National Forest Management Act.

The National Forest Management Act (NFMA) and related statutes address cultural resources management matters on National Forest lands.⁽¹⁸⁸⁾ NFMA's implementing regulations require that forest planning include the identification, protection and "management of significant cultural resources" in association with other forest resource management goals.⁽¹⁸⁹⁾ Thus, developers should consult appropriate land management planning documents in the early stages of project planning to identify specific land use prescriptions that may be applicable.

§ 3.03 THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT: SPECIFIC MANAGEMENT PRESCRIPTIONS FOR NATIVE AMERICAN BURIAL REMAINS AND CULTURAL OBJECTS.

In 1854, Chief Seattle, a tribal leader of the Duwamish people, stated: "we will not be denied the privilege, without molestation, of visiting at will the graves of our ancestors and friends."⁽¹⁹⁰⁾ Almost 150 years later, the Native American Graves Protection and Repatriation Act (NAGPRA)⁽¹⁹¹⁾ now specifically protects Native American graves and certain cultural artifacts on federal and tribal lands from uncontrolled disturbance. NAGPRA is intended to ensure that "human remains must at all times be treated with dignity and respect"⁽¹⁹²⁾ and to protect Native American rights of possession to objects needed to preserve or renew traditional culture and religion.⁽¹⁹³⁾ NAGPRA also accords to living descendants or culturally related tribes

certain rights to ownership and control of burial remains and cultural items discovered on federal or Indian lands.⁽¹⁹⁴⁾ Unlike other cultural resources management statutory schemes discussed in this paper, NAGPRA prescribes substantive protection for certain cultural artifacts.

NAGPRA likely will affect federal public lands activities in several ways that are distinct from NHPA protections. First, it separates out for specific protection certain Native American burial remains and cultural items,⁽¹⁹⁵⁾ and it establishes a hierarchy of ownership interests in protected remains and artifacts discovered on public or Indian lands.⁽¹⁹⁶⁾ Second, it prescribes procedures applicable when cultural items are inadvertently discovered during implementation of a project,⁽¹⁹⁷⁾ and provides for excavation or removal of cultural items from federal or tribal lands.⁽¹⁹⁸⁾ Third, NAGPRA also defines interrelationships between its provisions and other applicable statutes that suggest avenues to minimize delay or interruption of a project through early planning.⁽¹⁹⁹⁾

[1] The Reach of NAGPRA.

NAGPRA's land management prescriptions apply to inadvertent discovery and to intentional excavation and removal of Native American human remains and "cultural items" on federal and Indian lands.⁽²⁰⁰⁾ "Federal lands" are defined to include "any land 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. . . ." ⁽²⁰¹⁾ "Tribal land" includes "all lands within the exterior boundaries of any Indian reservation" and "all dependent Indian communities."⁽²⁰²⁾ These definitions suggest that federal public lands and private lands, which are not administered for the benefit of tribes, may be deemed tribal lands under NAGPRA, if they lie within reservation boundaries or in areas that may be considered "dependent Indian communities." The burial remains and cultural artifacts of all Native American tribes, bands, or groups are covered, and there is no prerequisite that the remains or cultural items be associated with a tribe, band, or group that is now federally recognized. This section of the paper will focus on NAGPRA provisions affecting on-the-ground activities.

[2] Cultural Items Defined.

NAGPRA defines four classes of Native American cultural items: "human remains," "funerary objects," "sacred objects," and "objects of cultural patrimony."⁽²⁰³⁾ These are described in turn below.

[a] "Human remains"

NAGPRA itself does not define "human remains." However, the NAGPRA regulations define the term as "the physical remains of a human body of a person of Native American ancestry."⁽²⁰⁴⁾ Any Native American human remains, whether found in a burial site or as isolated bones not associated with a burial site, are subject to NAGPRA protection.⁽²⁰⁵⁾

[b] "Funerary objects"

Funerary objects are objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed intentionally with or near individual human remains.⁽²⁰⁶⁾ Funerary objects may be either "associated" or "unassociated." Associated funerary objects "still retain their association with human remains that can be located."⁽²⁰⁷⁾ "Unassociated funerary objects," conversely, are items reasonably believed to have been part of a burial site but that "can no longer be associated with the human remains of a specific burial."⁽²⁰⁸⁾ Consequently, all objects that were part of, or were intended to be part of, a burial site at or near the time of burial are either associated funerary objects or unassociated funerary objects.

[c] "Sacred objects"

"Sacred objects" refer to "specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religion by their present-day adherents."⁽²⁰⁹⁾ The operative test is not whether they are considered sacred in the eyes of an individual, but whether the objects "were devoted to a traditional Native American religious ceremony or ritual and which have religious significance or function in the continued observance or renewal of such ceremony."⁽²¹⁰⁾

[d] "Objects of cultural patrimony"

Objects of cultural patrimony are objects "having ongoing historical, traditional or cultural importance central to the Native American group or culture itself."⁽²¹¹⁾ They must be objects that may not be alienated or appropriated by any individual group member. Cultural patrimony objects would include items central to the preservation of a group culture, such as the Zuni War Gods and the Confederacy Wampum Belts of the Iroquois.⁽²¹²⁾

These definitions may be of little help to the operator of heavy equipment building a logging road or drill pad. This practical problem counsels in favor of conducting good cultural resources surveys, with well informed consultants, before breaking ground.⁽²¹³⁾ While those studies may not reveal all sites, they will minimize the risk that NAGPRA objects (or other historic properties) will be uncovered inadvertently during development activities. Despite such precautions, in the event of a discovery during operations, the prudent course would be to consider any human remains in an area that may contain Native American burial sites, or any Native American artifacts, as potentially subject to NAGPRA.

[3] Native American Ownership or Control of Cultural Items.

NAGPRA proclaims that Native American cultural items discovered on federal or tribal land shall be owned and controlled by the Indians or Indian tribes having the closest relationship to the cultural items. NAGPRA's ownership scheme is important to public lands developers because it determines the tribe or tribes which are entitled to notice and consultation with respect to cultural items inadvertently discovered and that must be excavated or removed from a project area.⁽²¹⁴⁾

Ownership of and right to notice concerning newly discovered human remains and associated funerary objects is vested in the lineal descendants of the deceased Native American whose remains or burial items are found.⁽²¹⁵⁾ In cases where lineal

descendants cannot be ascertained, and with respect to unassociated funerary objects, sacred objects, and objects of cultural patrimony, NAGPRA specifies that ownership and control is:

(A) in the Indian tribe . . . on whose tribal land such objects or remains were discovered;

(B) in the Indian tribe . . . which has the closest cultural affiliation with such remains or objects and which, upon notice, states a claim for such remains or objects; or

(C) if the cultural affiliation of the objects cannot be reasonably ascertained and if the objects were discovered on federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of some Indian tribe--

1. the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered, if upon notice, such tribe states a claim for such remains or objects, or

2. if it can be shown . . . that a different tribe has a stronger cultural relationship with the remains or objects . . . , in the Indian tribe that has the strongest demonstrated relationship, if upon notice, such tribe states a claim for such remains or objects.⁽²¹⁶⁾

With respect to cultural items on federal lands, "cultural affiliation" likely will be the most common determinant of the tribe entitled to ownership. NAGPRA's legislative history suggests that evidence bearing on cultural affiliation may include "geographical, kinship, biological, archaeological, anthropological, linguistic, oral tradition, or historical evidence or other relevant information or expert opinion."⁽²¹⁷⁾ While NAGPRA incorporates a "requirement of continuity between present day Indian tribes and materials from historic or prehistoric Indian tribes . . . ," a claim "should not be precluded solely because of gaps in the record."⁽²¹⁸⁾ NAGPRA also provides a mechanism to resolve disputes between tribes over priority of right to ownership of NAGPRA cultural items and unclaimed cultural items.⁽²¹⁹⁾

[4] Procedures Governing Inadvertent Discovery of Cultural Items.

NAGPRA is most likely to affect natural resource development on public lands through its procedures governing inadvertent discovery of cultural items.⁽²²⁰⁾ NAGPRA specifies ostensibly straightforward requirements when "any person . . . knows, or has reason to know, that such person has discovered Native American cultural items on Federal or tribal lands"⁽²²¹⁾ In the event of a discovery, the person making the discovery must notify, by telephone and in writing, the Secretary of the Interior or other federal agency head having primary jurisdiction over the federal lands involved. With respect to tribal lands, if known or readily ascertainable, notice also must be given to the appropriate Indian tribe.⁽²²²⁾

If the discovery occurs in connection with an on-going activity, "including (but not limited to) construction, mining, logging, and agriculture," the discoverer also must: "cease activity in the area of the discovery, [and] make a reasonable effort to protect the items discovered before resuming such activity"⁽²²³⁾ Thereafter,

project activity may resume 30 days after notification has been received and "certified" by the appropriate federal or tribal official under NAGPRA, if the resumption of activity is otherwise lawful.⁽²²⁴⁾

The statutory 30-day moratorium on projects runs from the date of "certification by the Secretary [or other agency head] or the appropriate Indian tribe"⁽²²⁵⁾ Consequently, to avoid unanticipated delays, the person discovering cultural items should immediately notify at least the appropriate federal agency head by a method that ensures certification of receipt. Even on federal lands, an inadvertent discoverer also should consider sending notice in the same manner to any tribe which may claim ownership of the artifacts.

Under the 1995 NAGPRA regulations, project activity may resume as provided under NAGPRA following any inadvertent discovery "if the resumption" is otherwise lawful.⁽²²⁶⁾ Alternatively, project activity may resume "at any time that a written, binding agreement is executed" between the necessary parties "that adopt[s] a recovery plan for the excavation or removal," of the human remains or cultural items in accordance with their ownership.⁽²²⁷⁾ On federal lands, any plan which would involve excavation or removal must be developed in consultation with the appropriate tribe.⁽²²⁸⁾ Although it is not stated, I presume that project activities could resume under such an agreement even if less than 30 days has passed from the date of notification.⁽²²⁹⁾ Nevertheless, implementation of any recovery plan could result in further project delays.

Doubtless, there will be public lands development situations where the 30 day moratorium may be inadequate to identify the appropriate tribe, decide upon a plan for the excavation, and effect the removal and disposition of the items or remains. The appropriate tribe or tribes to be notified may not be readily ascertainable.⁽²³⁰⁾ And, more than one tribe may claim ownership, raising a question as to who can authorize the appropriate disposition of discovered cultural artifacts. Actual excavation will take additional time. Careful project planning and close coordination with the applicable agency and appropriate tribe will be necessary to minimize delays.

[5] Provisions Applicable on Tribal Lands.

With respect to tribal lands, NAGPRA extends greater control to tribes, as compared to "federal lands," over excavation and removal of cultural items found on all lands within reservation boundaries or in "dependent Indian communities." Indian reservations, particularly those open to settlement and entry under the allotment acts of the late 19th century, often include within the exterior boundaries of the reservation, substantial acreage in which the tribe has no beneficial interest.⁽²³¹⁾ Similarly, "dependent Indian communities," located outside reservation boundaries, may reflect a hodgepodge of land titles including federal and state public lands and private fee lands, but which include predominantly Indian population and land ownership.⁽²³²⁾

If lands are "tribal," rather than "federal," upon discovery of NAGPRA cultural items, NAGPRA requires notice to the appropriate Indian tribe, "if known or readily ascertainable."⁽²³³⁾ Before cultural items can be excavated or removed from tribal lands, and after consultation with the appropriate tribe, the person discovering the cultural items must obtain the "consent of the appropriate (if any) Indian tribe"

and provide "proof" of such consent.⁽²³⁴⁾ NAGPRA does not specify the effect of a tribe's refusing to consent to excavation or removal.⁽²³⁵⁾

[6] Excavation and Removal of Cultural Items.

NAGPRA specifies procedures governing the excavation and removal of cultural items from federal or tribal lands. These statutory and regulatory steps would be set in motion either when the NHPA cultural resource inventory is prepared during initial stages of the project or when NAGPRA-protected cultural items are discovered during project activities. NAGPRA requires the following steps to be completed before cultural items may be excavated:

(a) A permit must be issued under the Archaeological Resources Protection Act (ARPA),⁽²³⁶⁾ "which shall be consistent with [NAGPRA];"

(b) The items may not be excavated or removed until "after consultation with or, in the case of tribal lands consent of the appropriate (if any) Indian tribe . . ."; and

(c) Proof of tribal consultation or consent must be shown.⁽²³⁷⁾

In addition, although it is not clear whether this step needs to be complete prior to excavation, the ownership and control of disposition shall be as provided in 25 U.S.C. § 3002(a) and (b) and the 1995 NAGPRA regulations.⁽²³⁸⁾

[7] Planning for NAGPRA Compliance.

The project applicant and federal agency can minimize project delay and disruption by effective planning during early stages. Cultural resources in a proposed project area should be evaluated carefully under NEPA and the NHPA. NAGPRA-protected cultural resources also should be evaluated in the reviews under these statutes, and the project proponent should seek to reach agreements concerning NAGPRA compliance as part of a coordinated consultation process.⁽²³⁹⁾

Cultural resources inventories prepared under NHPA at the project proposal stage should directly address NAGPRA-protected cultural items. Impacts on NAGPRA-protected sites or cultural items should be considered in environmental assessments or environmental impact statements under NEPA⁽²⁴⁰⁾ and may be pertinent to "adverse effect" determinations under NHPA.⁽²⁴¹⁾ The notice and consultation processes under NAGPRA and NHPA also should be coordinated where possible.⁽²⁴²⁾

NAGPRA compliance will be facilitated if, early in project planning, the project developer and agency seek to identify and consult with tribes or groups that may own or control cultural items under NAGPRA. Identification of potentially interested tribes at an early stage also will facilitate prompt decisions over disposition or removal of cultural items inadvertently discovered during the project. The consultation participants should aim for agreements between developer, agency, and affected tribes over ownership and control of cultural items, excavation or removal methods, and custody of cultural items immediately following removal. Such agreements will help effectuate NAGPRA's requirement that projects not be delayed more than thirty (30) days by an inadvertent discovery of cultural items.

§ 3.04 THE HISTORIC AND ARCHAEOLOGICAL DATA PROTECTION ACT OF 1974 AND RESERVOIR SALVAGE ACT OF 1960.

The Historic and Archaeological Data Protection Act (HADPA)⁽²⁴³⁾ and Reservoir Salvage Act (RSA)⁽²⁴⁴⁾ combine to authorize collection and preservation of historic and cultural resource data and remains discovered following initiation of any ground-disturbing activities on public and Indian lands.⁽²⁴⁵⁾ These statutes are not a significant factor in public and Indian lands development,⁽²⁴⁶⁾ presumably because NHPA compliance obligations nearly always disclose historic properties, and appropriate mitigation measures generally are taken before initiation of a project.⁽²⁴⁷⁾

HADPA and RSA provide that a federal agency must notify the Secretary if it discovers or is notified by appropriate authorities of the existence of significant historic data that may be irrevocably lost or destroyed as the result of a project.⁽²⁴⁸⁾ If the Secretary agrees, he or she must survey or investigate the area, and recover or preserve the data which should, in the public interest, be recovered.⁽²⁴⁹⁾ The survey or recovery work must be initiated within 60 days of notice to the Secretary,⁽²⁵⁰⁾ and the Secretary is required, absent an agreement to the contrary, to "compensate any person . . . damaged as a result of delays in construction or as a result of the temporary loss of the use of private or nonfederally owned land."⁽²⁵¹⁾ The Secretary's data recovery work is intended to cause "as little disruption or delay as possible."⁽²⁵²⁾ Notwithstanding the potential for some compensation, the disruption and expense potentially caused by discovery of sites after initiation of the construction phase of a project counsel in favor of insuring the agency undertakes and completes its NHPA compliance work comprehensively. Moreover, under HADPA, recovery work may be charged as project costs, and billed to the permittee.⁽²⁵³⁾

§ 3.05 THE HISTORIC SITES ACT OF 1935.

The Historic Sites Act of 1935 (HSA)⁽²⁵⁴⁾ is designed to protect a narrow class of historic resources: sites, buildings, and objects of national significance.⁽²⁵⁵⁾ The Act declared a "national policy to preserve for public use historic sites . . . of national significance for the inspiration and benefit of the people"⁽²⁵⁶⁾ The other statutes discussed to this point have a broader scope, being designed to protect sites of local, regional and national significance.⁽²⁵⁷⁾

The HSA delegates to the Secretary the authority to survey historic and archaeological sites, buildings and objects to determine which possess "exceptional value as commemorating or illustrating the history of the United States."⁽²⁵⁸⁾ The Secretary also is authorized to acquire nationally significant properties, and to contract with states or others to protect such properties.⁽²⁵⁹⁾ If a National Historic Site is in the vicinity of a public lands development project, NHPA compliance procedures will apply.

§ 3.06 THE ANTIQUITIES ACT OF 1906 AND THE ARCHAEOLOGICAL RESOURCES PROTECTION ACT OF 1979.

The Antiquities Act of 1906⁽²⁶⁰⁾ and the Archaeological Resources Protection Act of 1979 (ARPA)⁽²⁶¹⁾ work in tandem to protect and preserve historic and cultural properties through a permit system authorizing scholarly study and excavation of cultural properties, and a severe penalty provision for unauthorized use, removal, or damage to any archaeological resource.⁽²⁶²⁾ Generally speaking, these statutes do

not impose conditions on development projects.⁽²⁶³⁾ For example, the district court in *Attakai v. United States* rejected arguments that the range improvement projects there required ARPA permits: "ARPA is not applicable to the projects and construction activities in this case . . . the Act is clearly intended to apply specifically to purposeful excavation and removal of archaeological resources, not excavations which may, or inadvertently do, uncover such resources."⁽²⁶⁴⁾ ARPA, however, will come into play in circumstances where archaeological resources are uncovered during project execution, which must be excavated or removed.⁽²⁶⁵⁾ ARPA also will govern the qualifications of personnel involved in excavation and the methods used.⁽²⁶⁶⁾

Project planning, therefore, must accommodate ARPA requirements that apply to excavation and removal of historic properties and NAGPRA-protected cultural items.⁽²⁶⁷⁾ ARPA covers excavation of historic properties and "graves" and "human skeletal materials" and requires notice of proposals to excavate cultural or religious sites to tribes which may consider the site important.⁽²⁶⁸⁾ ARPA regulations also require that applicable tribes be notified 30 days before issuance of an ARPA permit and contemplate consultation between agency and tribes upon tribal request.⁽²⁶⁹⁾ The project proponent should coordinate any necessary ARPA permitting at an early stage in the project, with agencies and tribes.

§ 3.07 THE AMERICAN INDIAN RELIGIOUS FREEDOM ACT AND THE FREE EXERCISE CLAUSE: PUBLIC LANDS MANAGEMENT AND NATIVE AMERICAN RELIGION.

Federal Indian policy regarding traditional Native American religions has waxed and waned from indifference to hostility to protectionism.⁽²⁷⁰⁾ The American Indian Religious Freedom Act of 1978 (AIRFA)⁽²⁷¹⁾ is the generally applicable federal statute reflecting current policy. In a single, broadly phrased section, AIRFA proclaims:

. . . 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 . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonial and traditional rites.⁽²⁷²⁾

AIRFA vests no substantive rights in Native Americans; rather, it requires consideration of effects of public lands development on Indian religion.⁽²⁷³⁾ Consideration of effects on Native American religion may also be necessary under other planning or management statutes.⁽²⁷⁴⁾ Substantive protection of Native American religious uses of public lands would exist, if at all, under the Free Exercise Clause of the First Amendment.⁽²⁷⁵⁾ Early identification and consideration of potentially significant sites is the best approach for accommodating AIRFA-protected interests.⁽²⁷⁶⁾

[1] AIRFA Rights and Duties Under *Lyng*.

Any discussion of AIRFA's effect on activities on the public land must begin with *Lyng v. Northwest Indian Cemetery Protective Association*.⁽²⁷⁷⁾ In *Lyng*, the U.S. Forest Service planned to upgrade and pave a road through a remote, high country area known as the Chimney Rock section of the Six Rivers National Forest.⁽²⁷⁸⁾ Individual Indians and Indian organizations challenged the plan under AIRFA and the Free

Exercise Clause, among other grounds. It was undisputed that the Chimney Rock area was central to the Indian peoples' traditional religion, and the increased use of the area that would follow completion of the road would be incompatible with historic religious uses.⁽²⁷⁹⁾ While the Forest Service considered substantial evidence of the effects the road would have on religious practices, it decided to build the road.⁽²⁸⁰⁾

The United States Supreme Court rejected Native American claims under both the Free Exercise Clause and AIRFA. *Lyng* holds that AIRFA creates no new or additional substantive rights and raises questions as to whether AIRFA creates any procedural rights or duties.⁽²⁸¹⁾ Justice O'Connor's majority opinion found legislative history to support that the absence of action-forcing statutory language reflected a Congressional intention not to create enforceable rights. In other terms, the law "has no teeth in it."⁽²⁸²⁾

Whether AIRFA creates enforceable procedural rights that survive the *Lyng* decision is perhaps a close question. *Lyng* quotes legislative history supporting that federal agencies should not impede Indian religions practices "without a clear decision on the part of the Congress or the administrators that such religious practices must yield to some higher consideration."⁽²⁸³⁾ However, *Lyng* and cases applying it suggest that enforcement of procedural rights to require agencies to consider impacts on traditional religion will have to be asserted under NEPA or other land management or planning statutes.⁽²⁸⁴⁾ At least one court has held that AIRFA created no procedural duties or cause of action with respect to specific federal actions.⁽²⁸⁵⁾

[2] Consideration of Impacts on Native American Religion Under NEPA.

After *Lyng*, claims to require procedural consideration of impacts of a federal action on Indian religion may be asserted under NEPA.⁽²⁸⁶⁾ Federal land managers likely have discretion to consider impacts on native religions, but the consequences of a failure to address such impacts in NEPA documents are unclear.⁽²⁸⁷⁾

[3] Free Exercise of Traditional Native American Religions.

After *Lyng*, any claim to restrict federally authorized use of public lands to accommodate Indian religious uses appears untenable. Over a strongly worded dissent, the *Lyng* majority rejected the proposition that federal lands should be subject to a "religious servitude" to accommodate even the most central religious practices of a tribe.⁽²⁸⁸⁾ The *Lyng* majority gleaned from prior Free Exercise decisions a two-pronged test to govern Free Exercise claims: (1) the government action must "coerce" affected individuals into "violating their religious beliefs;" or (2) it must "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens."⁽²⁸⁹⁾ Courts applying *Lyng* have rejected Free Exercise claims to a protected religious use of public lands.⁽²⁹⁰⁾ Following *Lyng*, even "extremely grave" impacts on Native American religion cannot foreclose federally authorized uses of public lands.⁽²⁹¹⁾

The enactment of the Religious Freedom Restoration Act of 1993 (RFRA)⁽²⁹²⁾ may affect this analysis. In RFRA, Congress sought to restore recognized standards protecting Free Exercise of religion that were "virtually eliminated" in the U.S. Supreme Court decision, *Oregon Employment Division v. Smith*.⁽²⁹³⁾ Section 3 of RFRA provides:

(a) IN GENERAL.-Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) EXCEPTION.-Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person.

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.⁽²⁹⁴⁾

It is not clear whether this legislation will have any impact on the *Lyng* analysis of the Free Exercise clause as it affects public lands development.⁽²⁹⁵⁾

[4] Planning to Accommodate Native American Religious Uses.

Public lands developers should strive to identify areas of Indian religious significance at an early stage. Consultation with tribal officials or traditional religious leaders may lead to minor project modifications that resolve potential disputes and avoid delays. Attention to the NEPA process within the agency and to the content of NEPA documents prepared with respect to the project also may avoid delays resulting from NEPA litigation.

§ 3.08 CONCLUSION.

Compliance with cultural and historical resource management laws involves an understanding of several different and interrelated regulatory schemes. Efficient and cost-effective compliance requires that same understanding, coupled with knowledge of how cultural resource management prescriptions fit with other public lands management programs and with NEPA compliance. Careful planning of cultural resource compliance is a must.

Federal land managers and developers alike should undertake cultural resource management compliance obligations as early as possible in the planning process. Failure to do so can result in delay and waste. Those involved in public land use and management must plan sufficiently far in advance to meet historic resource obligations and permit efficient use of natural resources. Moreover, those involved in the control of public land development, including federal agencies, environmental groups, Indian tribes, developers, and others should seek to work together to provide for the reasonable needs of today's society without sacrificing the past that is reflected in the historic and cultural resources located on public lands.

ENDNOTES

1. *See generally* L.H. Slade and W.E. Stern, "Effects of Historic and Cultural Resources and Indian Religious Freedom on Public Lands Development: A Practical Primer," 35 *Natural Resources Journal* 135 (1995); G.E. Glasier, "Cultural Resource Preservation: A Consideration before Mineral Development," 28 *Rocky Mtn. Min. L. Inst.* 636 (1982).

2. This paper borrow heavily from: W.E. Stern, "Potsherds and Petroglyphs: Effects of Cultural Resources Management on Public Lands Development," 41 Rocky Mtn. Min. L. Inst. 14-1 (1995). I focus primarily on National Forest and public domain lands managed by the U.S. Forest Service, Department of Agriculture, and the U.S. Bureau of Land Management, Department of the Interior, respectively. Much of the paper, however, is applicable to other contexts and lands, including Indian lands. Project planners and government officials should review definitional terms in various statutes to understand the proper geographic applicability of a statute.
3. See, e.g., National Historic Preservation Act, 16 U.S.C. § 470w(5) (1988 & Supp. 1992).
4. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).
5. See K.O. Rogers, "An Overview of the Law & Dilemmas in its Application," 5 *NRLI News* No. 1, p. 6 (Jan. 1994).
6. Notwithstanding these potential differences, U.S. Bureau of Land Management (BLM) sources estimate 3 to 5 million cultural resources properties are present on the public domain. See J. Muhn and H.R. Stuart, *Opportunity and Challenges: The Story of BLM*, 203 (September 1988), citing John G. Douglas, BIA, Washington, D.C. This estimate is somewhat dated, and is probably low.
7. The National Register of Historic Places includes old mines, and the National Park Service is developing guidelines for the evaluation of mining properties for National Register eligibility. See J. Townsend, *Evaluating and Documenting Traditional Cultural Properties* 19 (N.P.S. 1992).
8. The article does not address, to any significant degree, the extent to which various planning statutes incorporate cultural resources management into their schemes. However, the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1783 (1988), and the National Forest Management Act, 16 U.S.C. §§ 1600-1614 (1988), both provide a planning framework for cultural resources management on public domain and National Forest lands, respectively. See 43 U.S.C. § 1701(a)(8); 36 C.F.R. § 219.27 (1994); Part 16.02[10], *infra*.
9. 16 U.S.C. §§ 431-433 (1988).
10. See Part 16.02, *infra*.
11. Examination of state law cultural resources management schemes is beyond the scope of this article. However, state laws should be considered as they may be applicable to federal lands. See 16 U.S.C. § 470a(B)(3) (1988); cf. California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 580 (1987).
12. In considering the materials provided here, the reader should be mindful of the context of the project and their responsibilities. For example, in the context of a timber sale, the Forest Service should have completed the NHPA Section 106 process before advertising the sale. So, both agency and operator personnel have a great deal more information than in other situations. In contrast, more responsibility for cultural resources compliance falls on the oil and gas or mining proponent.

13. National Indian Youth Council v. Watt, 664 F.2d 220, 226 (10th Cir. 1981); *see also* Lee v. Thornburgh, 877 F.2d 1053, 1055 (D.C. Cir. 1989) (NHPA "encourages historic preservation"); Attakai v. United States, 746 F. Supp. 1395, 1405 (D. Ariz. 1990).
14. 36 Fed. Reg. 8921 (May 13, 1971) (President Richard M. Nixon).
15. Indiana Coal Council, Inc. v. Lujan, 774 F. Supp. 1385, 1387 (D.D.C. 1991).
16. *See, e.g.*, Parts 3.04, 3.05 and 3.06, *infra*.
17. WATCH v. Harris, 603 F.2d 310, 321 (2d Cir.), *cert. denied*, 444 U.S. 995 (1979) (*quoting* H.R. Reg. No. 1916, 89th Cong., 2d Sess., 1966 U.S. Code Cong. & Admin. News, 3307, 3309).
18. *See* 16 U.S.C. §§ 470-470w-6 (1988 & Supp. IV 1992); H.R. Rep. No. 1916, U.S. Code Cong. & Admin. News 3307-08.
19. 16 U.S.C. §§ 470f and 470h-2 (1988 & Supp. IV 1992), respectively.
20. 36 C.F.R. Part 800 (1994). The ACHP promulgated these regulations pursuant to 16 U.S.C. 470s (1982 & Supp. IV 1992).
21. 16 U.S.C. § 470h-2(a)(1) (1988 & Supp. IV 1992). "Historic property" is defined as "any prehistoric or historic district, site, building, or object included in, or eligible for inclusion on the National Register; such term includes artifacts, records, and remains which are related to such a district, site, building, structure, or object." 16 U.S.C. § 470w(5) (1988 & Supp. IV 1992).
22. 16 U.S.C. § 470h-2(a)(1) (1988 & Supp. IV 1992).
23. *Id.* at § 470h-2(a)(2) (1988 & Supp. IV 1992).
24. *Id.* at § 470h-2(d). Unfortunately, the NHPA provides little guidance as to how its historic preservation policies are to be balanced with the pre-existing "missions and mandates" of a federal agency. The "missions and mandates" provision is not defined in the statute or regulations, and has not been the subject of reported judicial decisions. Presumably, the Forest Service's and BLM's "missions and mandates" are those spelled out in the agencies' respective organic acts and other legislation. *See, e.g.*, Multiple Use - Sustained Yield Act, 16 U.S.C. §§ 528-531 (1982); National Forest Management Act, 16 U.S.C. §§ 1600-1614 (1982); Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1783 (1982).
25. *See* 16 U.S.C. § 470h-2(a)(2)(D) (1988 & Supp. IV 1992).
26. SHPO responsibilities are discussed at Part 3.02[5], *infra*.
27. 16 U.S.C. § 470w(14)(A),(B). While a discussion of this definition is beyond the scope of this paper, suffice it to say that "dependent Indian communities" may include lands outside recognized reservation boundaries. *See* 18 U.S.C. § 1151 (1988) and accompanying case law.

28. 16 U.S.C. § 470a(d)(2) (1988 & Supp. IV 1992). Under this provision, tribes may assume some or all of the functions served by the applicable SHPO. The division of responsibility between tribe and SHPO, if the tribe assumes less than all of the SHPO's duties, must be spelled out carefully.

29. G.C. Coggins, Public Natural Resources Law § 15.04[5][e] (1992).

30. See Indiana Coal Council, Inc. v. Lujan, 774 F. Supp. 1385, 1393 (D.D.C. 1991) (procedures are mandatory; decisions made are discretionary); see also McMillan Park Comm. v. National Capital Planning Comm'n, 759 F. Supp. 908, 914 (D.D.C. 1991), *rev'd on other grounds*, 968 F.2d 1283 (D.C. Cir. 1992). However, discretion is not unfettered. "Discretion does not include the right to act perfunctorily or arbitrarily. The agency must not only observe the prescribed procedural requirements and actually take account of the factors specified, but it must also make a sufficiently detailed disclosure." Ely v. Velde, 451 F.2d 1130, 1138 (4th Cir. 1971), *quoted in* McMillan Park Comm., 759 F. Supp. at 914.

31. See 16 U.S.C. § 470w(5); see also 36 C.F.R. § 800.2(e), (l) (1994); 36 C.F.R. pt. 60 (1994).

32. See 36 C.F.R. § 60.4 (1994).

33. See *National Register Bulletin* No. 15, "How to Apply the National Register Criteria for Evaluation" (1991); *National Register Bulletin* No. 16, "How to Complete the National Register Registration Form" (1991).

34. See 36 C.F.R. § 60.4 (1994); *National Register Bulletin* No. 38, "Guidelines for Evaluating and Documenting Traditional Cultural Properties."

35. See *Id.*

36. *National Register Bulletin* No. 38, p. 1; but see The Blackfeet Tribe, 103 IBLA 228, 231-32, 235 (1988) (Sweet Grass Hills in Montana are not National Register-eligible). As is true with all "historic properties," National Register-eligibility determinations are fact specific.

37. See November 18, 1994 Letter Decision of Jerry L. Rogers, Keeper of the National Register.

38. *National Register Bulletin* No. 38, p. 3.

39. *Id.* at 10.

40. See, e.g., Pueblo of Sandia v. United States, 50 F.3d 856, 859 (10th Cir. 1995) (while not explicit, the court's discussion indicates recognition of the procedural nature of the statute); Abenaki Nation of Mississquoi, 805 F. Supp. 234, 249 (D. Vt. 1992), *aff'd*, 990 F.2d 729 (2d Cir. 1993). But see S.G. Holloway, "Archeological Review Requirements Expected to Grow," *AMC Journal*, 19 (Dec. 1994).

41. 714 F.2d 271 (3d Cir. 1983).

42. 714 F.2d at 278-79.

43. Apache Survival Coalition v. United States, 21 F.3d 895, 906 (9th Cir. 1994); Illinois Commerce Comm'n v. ICC, 848 F.2d 1246, 1261 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1004 (1989).

44. 16 U.S.C. 470(b)(2) (1988). *See also* United States v. 162.20 Acres of Land, 639 F.2d 299, 302, 304 (5th Cir.), *cert. denied*, 454 U.S. 828 (1981) (NHPA does not forbid destruction of historic sites; while assertion of NHPA non-compliance as a defense in a condemnation action may seem to "promote the purposes of the NHPA by creating a means of enforcement to give it `teeth,' it is manifestly apparent that only Congress can make such a judgment"); Paulina Lake Historic Cabin Owners Ass'n v. U.S.D.A. Forest Service, 577 F. Supp. 1188, 1192 and n.1 (D. Ore. 1983); Hough v. Marsh, 557 F. Supp. 74, 87 (D. Mass. 1982); Evans v. Train, 460 F. Supp. 237, 245-46 (S.D. Ohio 1978); Pennsylvania v. Morton, 381 F. Supp. 293, 299 (D.D.C. 1974).

45. *See* G.C. Coggins, Public Natural Resources Law, 15.04[4] (1992).

46. *Id.*, *citing* 16 U.S.C. 470f.

47. *See also* Holt, "Archeological Preservation on Indian Lands: Conflicts and Dilemmas in Applying the National Historic Preservation Act," 15 *Envtl. L.* 413, 425 (Winter 1985).

48. *See* United States v. 162.20 Acres of Land, 639 F.2d 299, 302 (5th Cir.), *cert. denied*, 454 U.S. 828 (1981) ("While the act may seem to be no more than a `command to consider,' it must be noted that the language is mandatory . . .").

49. *See, e.g.*, Apache Survival Coalition v. United States, 21 F.3d 895 (9th Cir. 1994); Attakai v. United States, 746 F. Supp. 1395, 1405-09 (D. Ariz. 1990); Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425 (C.D. Cal. 1985); *cf.* Warm Springs Dam Task Force v. Gribble, 378 F. Supp. 240, 251 (N.D. Calif. 1974), *aff'd*, 621 F.2d 1017 (9th Cir. 1980); *see also* Part 3.02[9], *infra*.

50. *See* Part 3.02[5], *infra*.

51. 16 U.S.C. § 470f (1988).

52. 16 U.S.C. § 470w(7) (1988 & Supp. IV 1992).

53. 36 C.F.R. § 800.2(o) (1994) defines "undertaking" as:

[A]ny project, activity, or program that can result in changes in the character or use of historic properties, if any such historic properties are located in the area of potential effects. The project, activity, or program must be under the direct or indirect jurisdiction of a Federal agency or licensed or assisted by a Federal agency. Undertakings include new and continuing projects, activities, or programs and any of their elements not previously considered under section 106.

54. The ACHP circulated draft regulations in October, 1994, see 59 Fed. Reg. 50396 (October 3, 1994). Given the hundreds of critical comments the ACHP received, the regulations likely will be issued again in draft or proposed form.

55. Solicitor's Opinion, "Legal Responsibilities of BLM for Oil and Gas Leasing and Operations on Split Estate Lands," 4 (April 1988). For oil and gas development activities, the approval of an application for permit to drill ("APD") is the triggering event for NHPA clearance matters. *Id.* Issuance of an oil and gas lease may not be an "undertaking" where further approvals are required before on-the-ground activities may be initiated.

56. National Indian Youth Council, Inc. v. Andrus, 501 F. Supp. 649, 675-78 (D.N.M. 1980), *aff'd* 664 F.2d 220 (10th Cir. 1981).

57. Solicitor's Opinion, "The Extent to Which the National Historic Preservation Act Requires Cultural Resources to be Identified and Considered in the Grant of a Federal Right-of-Way," No. M-36917, 87 I.D. 27 (December 6, 1979). The Opinion concludes also that section 106 clearance requirements apply to non-federal lands traversed by the right-of-way. 87 I.D. at 28-34; see also Central Valley Electric Cooperative, Inc., 128 IBLA 126, 128 (1993).

58. 36 C.F.R. § 800.2(o) (1993); see also Colorado River Indian Tribes, 605 F. Supp. at 1434 n.6 (placement of rip-rap in the Colorado River was an NHPA "undertaking;" activity was subject to Army Corps of Engineers dredge and fill permit requirements); Lee v. Thornburgh, 877 F.2d 1053, 1056 (D.C. Cir. 1989); but see National Indian Youth Council v. Andrus, 501 F. Supp. 649, 675-678 (D.N.M. 1980), *aff'd*, 664 F.2d 220 (10th Cir. 1981) (approval of an Indian lands lease, requiring subsequent federal approval of a mining plan, does not trigger the detailed NHPA compliance work that may be required at the mine plan stage).

59. See McMillan Park Comm. v. National Capital Planning Comm'n, 759 F. Supp. 908, 913-915 (D.D.C. 1991), *rev'd on other grounds*, 968 F.2d 1283 (D.C. Cir. 1992). However, modifications to management plans that lessen the adverse impacts on historic resources do not trigger NHPA compliance review. See Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 604 (N.D. Cal. 1983), *aff'd in part, vacated in part*, 764 F.2d 581 (9th Cir. 1985), *rev'd on other grounds*, 485 U.S. 439 (1988).

60. See, e.g., Wilson v. Block, 708 F.2d 735, 738-39, 753-756 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983), *cert. denied*, 464 U.S. 1056 (1984); Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425, 1434-35 (C.D. Cal. 1985); cf. City of Grapevine, Tex. v. United States Dep't of Transp., 17 F.3d 1502, 1509 (D.C. Cir. 1994).

61. Indiana Coal Council, 774 F. Supp. at 1401, *citing* Techworld Dev. Corp. v. D.C. Preservation League, 648 F. Supp. 106, 117 (D.D.C. 1986). Moreover, *de minimis* federal involvement will not trigger the NHPA. For example, a contribution of federal funds for the planning and research of a highway bridge project is not a NHPA "undertaking." Los Ranchos de Albuquerque v. Barnhart, 906 F.2d 1477, 1482, 1484 (10th Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991) (where only federal funds utilized were part of a preliminary study, prior to any NEPA analysis, the project was not under the "direct or indirect jurisdiction" of a federal agency).

62. Of course, technically, the compliance obligations apply to the federal agency, not the developer. See 36 C.F.R. pt. 800 (1994). However, the permit applicant must anticipate the time commitments and planning associated with NHPA compliance. Moreover, as discussed at Part 3.02[7] and [8], *infra*, the permittee likely will foot the bill for NHPA compliance. See 16 U.S.C. § 470h-2(g) (1988).

63. 42 U.S.C. § 4332(2)(C) (1988). A "major federal action" is one "with effects that may be major." See 40 C.F.R. § 1508.18 (1992).

64. 16 U.S.C. § 470f (1988). This section applies to any activity that affects historic properties. See *id.*

65. 16 U.S.C. § 470h-2(i) (1988).

66. See 40 C.F.R. § 1508.4 (1994) (NEPA definition of "categorical exclusion"); 40 C.F.R. § 1507.3 (1994); see also Sugarloaf Citizens Ass'n v. FERC, 959 F.2d 508, 515 (4th Cir. 1992).

67. See Warm Springs Dam Task Force v. Gribble, 378 F. Supp. 240 (N.D. Cal. 1974); cf. Stop H-3 Ass'n v. Coleman, 533 F.2d 434, 444-45 (9th Cir.), *cert. denied*, 429 U.S. 999 (1976).

68. See Goodman Group, Inc. v. Dishroom, 679 F.2d 182, 186 (9th Cir. 1982); Preservation Coalition, Inc. v. Pierce, 667 F.2d 851, 858-59 (9th Cir. 1982) (NEPA and NHPA "each mandate separate and distinct procedures, both of which must be complied with when historic buildings are affected").

69. See Indiana Coal Council, Inc. v. Lujan, 774 F. Supp. at 1402 n.13.

70. Mandelker, *NEPA Law and Litigation*, 2.20 (1984); see, e.g., National Indian Youth Council v. Watt, 664 F.2d 220 (10th Cir. 1981).

71. Interestingly, federal defendants in two cases conceded that NHPA and NEPA obligations derive from equivalent standards. See Ringsred v. City of Duluth, Minn., 828 F.2d 1305, 1309 (8th Cir. 1987); McMillan Park Comm. v. National Capital Planning Comm'n, 759 F. Supp. 908, 915 (D.D.C. 1991), *rev'd on other grounds*, 968 F.2d 1283 (D.C. Cir. 1992). The concessions may have derived from the federal nature of the projects, rather than their significance.

72. See, e.g., Morris County Trust for Historic Preservation v. Pierce, 714 F.2d 271, 282 (3d Cir. 1983).

73. *Id.*

74. 42 U.S.C. § 4331(b)(4) (1988).

75. See 40 C.F.R. § 1502.16(g) and § 1508.27(b)(8) (1994); see also Abenaki Nation of Mississquoi v. Hughes, 805 F. Supp. 234, 245 (D. Vt. 1992), *aff'd*, 990 F.2d 729 (2d Cir. 1993).

76. In McMillan Park Comm. v. National Capital Planning Comm'n, 759 F. Supp. 908, 916 (D.D.C. 1991), *rev'd on other grounds*, 968 F.2d 1283 (D.C. Cir. 1992), the district court described the Section 106 process as "not an expensive or an unduly cumbersome process, and it allows for an informed decision to be made." With thoughtful planning, the court's statements can apply.

77. 16 U.S.C. § 470f (1988).

78. 16 U.S.C. § 470s (1988 & Supp. IV 1992).

79. *See* 36 C.F.R. pt. 800 (1994).

80. *See* 36 C.F.R. §§ 800.3, 800.7 (states), 800.13 (1994) (federal agencies). *See* Part 3.02[6][e], *infra*.

81. Pueblo of Sandia v. United States, 50 F.3d 856, 859 (10th Cir. 1995).

82. 36 C.F.R. § 800.3(b) (1994); *see* Abenaki Nation of Mississquoi, 805 F. Supp. at 251. It is not clear what this regulatory language means. In Attakai v. United States, 746 F. Supp. 1395, 1405 (D. Ariz. 1990), the district court stated the regulations are "designed to accommodate historic preservation concerns and the needs of federal undertakings" However, the court applied the regulations with little apparent flexibility. *See id.* While the courts may be "flexible" with respect to certain elements of the section 106 process, they likely will insist upon effective consultation throughout.

83. 36 C.F.R. § 800.3(c) (1994); *see* McMillan Park Comm. v. National Capital Planning Comm'n, 759 F. Supp. 908, 910 (D.D.C. 1991), *rev'd on other grounds*, 968 F.2d 1283 (D.C. Cir. 1992).

84. 36 C.F.R. § 800.3(c) (1994).

85. *Id.*

86. 501 F. Supp. 649 (D.N.M. 1980), *aff'd*, 664 F.2d 220 (10th Cir. 1981).

87. *Id.* at 653.

88. *Id.* at 654.

89. *See Id.* at 653, *citing* 25 C.F.R. Part 117 (now codified at 25 C.F.R. Part 216 (1994)).

90. 501 F. Supp. at 674. Plaintiffs also argued NHPA requires dual compliance: once before the lease was approved, and again before the mine plan was approved. *Id.* at 675 n.53.

91. *Id.* at 674.

92. *Id.* at 676.

93. *Id.*

94. *Id.*

95. *Id.* at 676-78.

96. National Indian Youth Council v. Watt, 664 F.2d 220 (10th Cir. 1981). The Tenth Circuit found a technical defect in NHPA compliance, but excused the error inasmuch as the ACHP believed the NHPA compliance obligations were met and the court found no substantive effect on historic properties arising from the technicality. *Id.*

97. 129 IBLA 1 (March 14, 1994).

98. 129 IBLA at 2, 13.

99. *Id.* at 13, *citing* the BLM EA, Appendix C ("General Well Site Stipulations").

100. These obligations are designed first to determine whether the undertaking may affect historically significant properties. See McMillan Park Comm., 759 F. Supp. at 914.

101. "Area of potential effects" is defined to mean "the geographic area or areas within which an undertaking may cause changes in the character or use of historic properties, if any such properties exist." 36 C.F.R. § 800.2(c) (1994). Of course, this "area" will vary from project to project. For rights-of-way, the "rule of thumb" will consider the "area" to be 50 feet on each side of the right-of-way centerline. For oil and gas drill sites, the "area" may be in the neighborhood of 10 acres.

102. Under the NHPA, each state is to appoint a State Historic Preservation Officer to administer the state's Historic Preservation Program. 16 U.S.C. § 470a (1988). The SHPO's duties are prescribed generally in 16 U.S.C. § 470a(b)(3) (1988). Those duties include, without limitation, the conduct of statewide historic property inventories and maintenance of that information, development of a statewide management plan, and the identification and nomination of eligible properties to the National Register of Historic Places. While regulations are not yet promulgated under the 1992 NHPA Amendments, the SHPO's responsibilities may be supplanted by a tribal preservation officer on tribal lands, as discussed at Part 3.02[1], *supra*. However, the ACHP also must determine that the tribal program will provide Section 106 consideration equivalent to the ACHP regulatory scheme. 16 U.S.C. § 470a(d)(5) (1988).

103. 36 C.F.R. § 800.4(a)(iii) (1994); see Attakai v. United States, 746 F. Supp. 1395, 1408-09 (D. Ariz. 1990) (members of Navajo Tribe entitled to participate as "interested persons" in identification of historic properties).

104. See Solicitor's Opinion, "Legal Responsibilities of BLM for Oil and Gas Leasing and Operations on Split Estate Lands," 6 (April 1988). As noted above, a cultural resource survey and evaluation must be undertaken on such private lands also. *Id.* at 8-9.

105. Given the potential for delays that might arise later in project development if properties are discovered, one should consider whether a 100% on-the-ground survey makes sense at the outset. The additional, incremental expense may save time and money in the long run. Of course, even 100% surveys may not disclose buried sites.

106. 36 C.F.R. § 800.4(b) (1994); *see also* Pueblo of Sandia v. United States, 50 F.3d 856, 859 (10th Cir. 1995). This process likely will involve on-the-ground survey work. *See, e.g.,* Wilson v. Block, 708 F.2d 735, 754 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983) (100% surveys may not be required; in certain circumstances, partial surveys are sufficient); Romero-Barcelo v. Brown, 643 F.2d 835, 860 (1st Cir. 1981), *rev'd on other grounds*, 456 U.S. 305 (1982).

107. *Id.*

108. 36 C.F.R. § 800.4(c)(1) (1994) (emphasis added). All properties within the area of the undertaking's potential environmental impact must be identified. That area is defined as the "geographic area or areas within which an undertaking may cause changes" in the qualities and characteristics of the site. 36 C.F.R. § 800.2(c) (1994). *See also* Pueblo of Sandia v. United States, 50 F.3d at 859; Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425, 1435 (C.D. Cal. 1985) (discussion of entire section 106 process).

109. *Id.*

110. 36 C.F.R. § 800.4(c)(2), (3) (1994).

111. 36 C.F.R. § 800.4(c)(4) (1994). As noted above, this eligibility evaluation often is not pursued to conclusion. Rather, the site is assumed to be eligible and the process continues based on that assumption.

112. 36 C.F.R. § 800.4(d) (1994).

113. 36 C.F.R. § 800.4(e) (1994).

114. *See* 36 C.F.R. § 800.5, 800.9 (1994).

115. *Id.*

116. 36 C.F.R. § 800.9(a) (1994); Wilson v. Block, 708 F.2d 735, 755-56 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 956 (1983) (court rejected contention that ski development would have "effect" to trigger further Section 106 procedures because the "effect" had no bearing on the characteristics of the property which made it eligible for National Register status.)

117. 36 C.F.R. § 800.9(a) (1994).

118. 36 C.F.R. § 800.9(b) (1994).

119. 36 C.F.R. § 800.9(b)(3) (1994).

120. 36 C.F.R. § 800.5(b) (1994).

121. *Id.*

122. *Id.* The regulations are not clear of the effect of someone objecting other than the SHPO.

123. 36 C.F.R. § 800.5(c) (1994).

124. 36 C.F.R. § 800.5(d) (1994).

125. *Id.* The regulations are silent on the procedure to follow if the SHPO objects, but the ACHP does not.

126. 36 C.F.R. § 800.5(e) (1994). Local government and tribal representatives are to be invited to participate in the consultation process, along with the permit applicant. *Id.*

127. *Id.*; *see also* 36 C.F.R. § 800.8(b) (1994).

128. 36 C.F.R. § 800.5(e)(3) (1994).

129. 36 C.F.R. § 800.5(e)(4) (1994) According to one court, "[I]n most cases where adverse effects are found, the [ACHP] has been successful at bringing the agency, the developer . . . and other interested parties together in order to draft the Memorandum Agreement." McMillan Park Comm., 759 F. Supp. at 911. A good example of an NHPA Memorandum of Agreement is discussed in National Indian Youth Council, 501 F. Supp. at 676-78.

130. *Id.* If the ACHP is not a party, the ACHP has an opportunity to comment, approve, or disapprove. *See* 36 C.F.R. § 800.6(a) (1994). If the developer is a party, it may wish to address directly the treatment of costs associated with historic resources protection. *See* Parts 3.02[7], [8] *infra*.

131. 36 C.F.R. § 800.6(c) (1994). Of course, the Memorandum of Agreement is binding on the parties to it. *See* McMillan Park Comm., 759 F. Supp. at 911.

132. 36 C.F.R. § 800.5(e)(6) (1994).

133. 36 C.F.R. § 800.6(b) (1994).

134. *Id.*

135. 36 C.F.R. § 800.6(c)(2) (1994).

136. *Id.*

137. 16 U.S.C. § 470h-2(l) (Supp. IV 1992).

138. *See* 36 C.F.R. § 800.11 (1994).

139. *Id.*

140. 36 C.F.R. § 800.11(b) (1994).

141. *See* 36 C.F.R. § 800.11(b)(2) (1994).

142. 16 U.S.C. §§ 469-469c-2 (1988). As discussed in Part 3.04, *infra*, the Historic and Archaeological Data Preservation Act (HADPA) contemplates survey and collection work which may delay the project.

143. 36 C.F.R. § 800.11(b)(3) (1994).

144. *Id.*

145. 36 C.F.R. § 800.11(c) (1994).

146. *Id.*

147. *See* 36 C.F.R. § 800.13 (1994). This section spells out the requirements for developing Programmatic Agreements. *See also* Walsh v. United States Army Corps of Eng'rs, 757 F. Supp. 781, 786-89 (W.D. Tex. 1990); National Center for Preservation Law v. Landrieu, 496 F. Supp. 716, 738-42 (D.S.C.), *aff'd*, 635 F.2d 324 (4th Cir. 1980). Presumably, "tribes" will appear in the revision to this regulation following the 1992 NHPA Amendments.

148. Programmatic Agreements ("PA") are not uncommon. For example, the Forest Service, Pacific Northwest Region (Region 6) executed a PA with the ACHP and the Oregon SHPO in early 1995 for a three year period. Entities operating on National Forest lands in the Region should obtain and review a copy of the PA.

149. Programmatic Agreements or other agreements may commit agencies to substantive protection measures. A developer should ferret out any such agreements.

150. *See* Part 3.02[7], *infra*.

151. 30 U.S.C. § 181-263 (1988).

152. *See, e.g.*, 43 C.F.R. § 3101.1-2 (1994) (authorizing lease stipulations and imposing restrictions on lessees "deriving from specific, nondiscretionary statutes"), 3162.1(a) (subjecting operators to applicable laws, On-Shore Oil and Gas Orders, and Notices to Lessees (NTL) that control operation and protect other natural resources and environmental quality), 3164.1, 3164.2, 3162.5-1(a) (1994).

Other BLM regulations also require mining operators to "take such action as may be needed to avoid, minimize or repair . . . [d]amages to . . . historical [and archaeological resources] . . ." values of the lands. 43 C.F.R. § 3591.1(b) (1994); 43 C.F.R. § 3802.1-5(d)(3), (f) (1994); 43 C.F.R. § 3802.3-2(b) (1994).

153. 48 Fed. Reg. 48916, 56226 (effective November 21, 1983). Revisions to this Order are presently under consideration by the BLM. See 57 Fed. Reg. 32756 (July 23, 1992).

154. *Id.* Lease stipulations to this effect are usually incorporated into lease terms or Conditions of Approval. See BLM Instruction Memorandum No. 83-333; see also, e.g., Robert and Frances Kunkel, 84 IBLA 140, 143 (1984). The Cultural Resource Protection Stipulation in Kunkel speaks in mandatory terms regarding contact with BLM officials of the need for a survey. See *id.*

155. See n.101, *supra*. Presumably, although the Order does not state so specifically, the agency would initiate the proper consultation process with the SHPO and any consulting parties to comply with the NHPA Section 106 process. The operator should ensure the agency complies with the NHPA, lest one wishes to risk an injunction such as that issued in Attakai v. United States, discussed *supra*.

156. See, e.g., General Crude Oil Co., 28 IBLA 214, 83 I.D. 666 (1976) (oil and gas lease); Cominco American, Inc., 26 IBLA 328 (1976) (phosphate lease); see generally Solicitor's Opinion, "Legal Responsibilities of BLM for Oil and Gas Leasing and Operations on Split Estate Lands," 4-6 (April 1988).

157. See NTL-6, 41 Fed. Reg. 18116, 18118 (April 30, 1976). Operations plans are required under 43 C.F.R. § 3162.3-1 (1994).

158. See, e.g., Beartooth Oil and Gas Co., 85 IBLA 11 (1985) (IBLA read a condition of approval as requiring the company to pay for mitigation arising from vandalism of a historic property by third parties).

159. See generally 43 C.F.R. Part 2800 (1994).

160. 43 C.F.R. § 2801.2(b)(3) (1994).

161. 40 IBLA 280, *reconsideration denied*, 43 IBLA 259 (1979).

162. 40 IBLA at 288-90. BLM, however, has discretion to require inventory on private lands, as long as the obligation is just an unreasonable burden. *Id.* at 290-91, *citing* Grindstone Butter Project, 24 IBLA 49 (1976).

163. 87 I.D. 27, 28 (December 6, 1979) (suggesting a "rule of reason" regarding the scope of any such survey of private lands); see also Central Valley Elec. Coop., Inc., 128 IBLA 126 (1993). The Solicitor's Opinion relies on Hall County Historical Soc'y v. Georgia Dep't of Transp., 447 F. Supp. 741, 752 (N.D. Ga. 1978), and Thompson v. Fugate, 347 F. Supp. 120, 124-125 (E.D. Va. 1972), addressing primarily federally-funded highways. See 87 I.D. at 30.

164. *Id.*; see also Solicitor's Opinion, "Legal Responsibilities of BLM for Oil and Gas Leasing and Operations on Split Estate Lands," (April 1988). In those circumstances, project proponents may be forced to obtain judicial relief if a private landowner refuses access. See *Id.* at 9; Pacific Gas Transmission Co. v. Richardson's Recreational Ranch, Ltd., 9 F.3d 1394 (9th Cir. 1993).

165. See 16 U.S.C. § 470h-2(g) (1988).

166. See Central Valley Electric Cooperative, Inc., 128 IBLA 126, 128 (1993); Old Ben Coal Co. v. OSM, 109 IBLA 362, 370-73 (1989); Beartooth Oil and Gas Co., 85 IBLA 11 (1985).

167. For a discussion of chargeable project costs under the Federal Land Policy and Management Act and other land management statutes, see K. Clark, "Public Land Rights-of-Way: Who Pays for the Environmental Studies," 2 *Natural Resources & Environment* 3 (Spring 1986).

168. I do not address the issue of standing to sue under the NHPA. Standing questions under the NHPA will be controlled, in all likelihood, by Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990), and Sierra Club v. Morton, 405 U.S. 727 (1972).

169. 746 F. Supp. 1395 (D. Ariz. 1990).

170. *Id.* at 1406, 1413.

171. *Id.* at 1406.

172. *Id.*

173. *Id.* at 1406-07.

174. *Id.* at 1407.

175. *Id.* at 1408, 1413. The court reached this conclusion despite the testimony of the Arizona SHPO that the BIA action probably constituted "proper avoidance of historic propert[ies]." *Id.* at 1407.

176. *Id.* at 1408, *citing* 36 C.F.R. § 800.1(b); see also Pueblo of Sandia v. United States, 50 F.3d 856, 862 (10th Cir. 1995).

177. 746 F. Supp. at 1408, *citing* 36 C.F.R. § 800.1(c)(2)(iii) (for undertakings on non-Indian lands that may affect properties of historic value to a neighboring tribe, the tribe is an interested party; if an undertaking is on Indian land, the tribe is a consulting party). Consulting parties may participate in any Memorandum of Agreement executed, while interested parties generally may not. See 36 C.F.R. § 800.5(e)(4) (1994).

178. 746 F. Supp. at 1409.

179. See also Colorado River Indian Tribes, 605 F. Supp. at 1441.

180. See, e.g., Apache Survival Coalition v. United States, 21 F.3d 895, 906 (9th Cir. 1994).

181. However, not surprisingly, even careful compliance work may not immunize a project from challenge. See, e.g., Apache Survival Coalition v. United States, 21 F.3d

895, 906 (9th Cir. 1994). In Apache Survival, largely because of careful compliance with NHPA consultation requirements, the Ninth Circuit found that a technical NHPA challenge should be dismissed for inexcusable delay in presenting a claim. *Id.* at 907-912.

182. 43 U.S.C. §§ 1701-1783 (1988).

183. "Public lands" is defined in FLPMA as lands administered by the BLM except Outer Continental Shelf lands and lands held for the benefit of Indian tribes. *See* 43 U.S.C. § 1702(e). FLPMA also authorizes regulation of National Forest lands in conformity with the purposes of FLPMA. *See* 43 U.S.C. § 1740.

184. 43 U.S.C. § 1701(a)(8).

185. *See generally* 43 C.F.R. Part 1600 (1991); 1601.0-5(a), (k).

186. *See, e.g.,* 43 C.F.R. §§ 2920.0-1, 2920.5-2 (1994); *see generally*, 43 C.F.R. Part 2920 (1994).

187. 43 C.F.R. § 2920.7 (1991). BLM Manual Part 8100 includes extensive provisions concerning implementation of cultural resource management statutes. Parts 8100 and 8130 of the BLM Manual provide procedures for including a cultural resources management component in overall resource management and other plans developed under FLPMA. Manual provisions also implement ARPA, NHPA, HADPA and other statutes governing cultural resources management. In addition to considering Manual provisions, one should also determine whether the agency has any "Instruction Memoranda," which the BLM issues from time to time, that may shed further light on the administrative interpretation of cultural resources protection requirements.

188. 16 U.S.C. §§ 1600-1614 (1988). *See also* Multiple Use-Sustained Yield Act of 1960, 16 U.S.C. § 528-531 (1988).

189. 36 C.F.R. 219.27 (1991). As with the BLM, one should refer not only to Forest Service regulations, but also to the Forest Service Manual. *See, e.g.,* Forest Service Manual Part 2360, 2361.03 (1990). Section 2361.31 of the Manual provides a step-by-step flow chart for NHPA Section 106 compliance.

190. Wilson, "What Chief Seattle Said," 22 *Lewis & Clark Environmental Law* 1451 (1992).

191. 25 U.S.C. § 3001-3013 (Supp. III 1991 & Supp. IV 1992).

192. S. Rep. No. 473, 101st Cong., 2d Sess. at 9.

193. *Id.* at 7.

194. "Indian tribes" for purposes of NAGPRA are a broader group as compared with "tribes" as defined under the NHPA. *See* Abenaki Nation of Mississquoi v. Hughes, 805 F. Supp. at 249-251; *compare* 25 U.S.C. § 3001(7) *with* 36 C.F.R. § 800.2(g).

195. 25 U.S.C. § 3002(a) (Supp. III 1991); *see* Part 3.03[1] and [2], *infra*.
196. *Id.*; *see* Part 3.03[3], *infra*.
197. 25 U.S.C. § 3002(d) (Supp. III 1991); *see* Part 3.03[4], *infra*.
198. 25 U.S.C. § 3002(c) (Supp. III 1991); *see* Part 3.03[5], *infra*.
199. *See* Part 3.03[7], *infra*.
200. The Department of the Interior issued final regulations on December 4, 1995. See 60 Fed. Reg. 62134-69. Those regulations are codified in 43 C.F.R. Part 10.
201. 25 U.S.C. § 3001(5) (Supp. III 1991).
202. 25 U.S.C. § 3001(15) (Supp. III 1991); *see also* 43 C.F.R. § 10.2(f)(2). "Dependent Indian communities" are defined in cases arising under 18 U.S.C. § 1151 (1988). Actions "authorized or required" under the NAGPRA regulations "will not apply to tribal lands to the extent that any action would result in a taking of property without compensation within the meaning of the Fifth Amendment...." 43 C.F.R. § 10.2(f)(2)(iv). This language was added to address the fact that private lands fall within the definition of "tribal lands." *See* Part 3.03[5], *infra*.
203. *See* 60 Fed. Reg. at 62159 (December 4, 1995), 43 C.F.R. § 10.2(d).
204. 60 Fed. Reg. at 62159, 43 C.F.R. § 10.2(d)(1).
205. Memorandum, Departmental Consulting Archaeologist, National Park Service, October 30, 1991 ("Departmental Consulting Archaeologist Memorandum"). The NPS Departmental Consulting Archaeologist is the Interior Department official having lead responsibility for coordinating Interior Department policies and actions to protect historic and archaeological properties and objects. Prior to issuance of the NAGPRA regulations in 1995, this Memorandum was the only agency guidance on NAGPRA Compliance.
206. 25 U.S.C. § 3001(3)(A) and (B) (Supp. III 1991); 60 Fed. Reg. at 62159, 43 C.F.R. § 10.2(d)(2).
207. Departmental Consulting Archaeologist Memorandum, 11. *See* 25 U.S.C. § 3001(3)(A) (Supp. III 1991); 60 Fed. Reg. at 62159, 43 C.F.R. § 10.2(d)(2).
208. Departmental Consulting Archaeologist Memorandum, at 11. *See* 25 U.S.C. § 3001(3)(A); 60 Fed. Reg. at 62159, 43 C.F.R. § 10.2(d)(2).
209. 25 U.S.C. § 3001(3)(C) (Supp. III 1991); *see also* 60 Fed. Reg. at 62159-60, 43 C.F.R. § 10.2(d)(3).
210. 60 Fed. Reg. at 62160, 43 C.F.R. § 10.2(d)(3); Departmental Consulting Archaeologist Memorandum, 5.

211. 25 U.S.C. § 3001(3)(D) (Supp. III 1991); *see also* 60 Fed. Reg. at 62160, 43 C.F.R. § 10.2(d)(4).

212. S. Rep. No. 473 at 8, 101st Cong., 2d Sess. (1990); *see also* 60 Fed. Reg. at 62160, 43 C.F.R. § 10.2(d)(4).

213. Project developers are advised to consult with federal officials, the SHPO, tribal officials, and local universities or archaeological societies to identify good quality and experienced consultants. Experienced and ethical archaeologists who have the trust of local interest groups, tribes and government officials are likely to be the best choice for field consultants.

214. On tribal lands, even greater tribal participation is required. *See* Part 3.03[5], *infra*.

215. 25 U.S.C. § 3002(a)(1). "Lineal descendant" is not defined. The December 4, 1995 regulations provide criteria and procedures for determining lineal descent and cultural affiliation. *See* 43 C.F.R. § 10.14. Further, the Departmental Consulting Archaeologist Memorandum interprets "lineal descendent" to mean "a direct genetic or familial tie reasonably established between generations of an extended family, clan, or lineage." Departmental Consulting Archaeologist Memorandum, 5.

216. 25 U.S.C. § 3002(2); *see also* 43 C.F.R. §§ 10.3(c)(1), 10.4(d)(iii), and 10.6(a).

217. S. Rep. No. 473, 101st Cong., 2d Sess. at 9; *see also* Departmental Consulting Archaeologist Memorandum, 5-6.

218. S. Rep. No. 473, 101st Cong., 2d Sess. at 9.

219. Conflicting claims between two or more tribes to the same cultural item may be considered by the Review Committee created by NAGPRA. 25 U.S.C. § 3006 (Supp. III 1991). The Review Committee shall, upon the request of any affected party, review and make findings related to the identity or cultural affiliation of cultural items or the return of such items and facilitate the resolution of disputes among tribes, lineal descendants, and federal agencies, "including convening the parties to the dispute if deemed desirable." *Id.* Jurisdiction lies in the United States district courts over any action brought by any person alleging a violation of this Act and vests the court with authority to issue orders necessary to enforce NAGPRA. 25 U.S.C. § 3013 (Supp. III 1991).

220. Presumably, the NAGPRA provisions governing inadvertent discovery in connection with an ongoing activity would include discoveries made during an NHPA Section 106 survey.

221. 25 U.S.C. § 3002(d) (Supp. III 1991).

222. 25 U.S.C. § 3002(d)(1); *see also* 43 C.F.R. § 10.4(b). Under the 1995 regulations, it is not clear whether notice of discoveries on tribal lands must be given to the appropriate tribal official only or to both tribal and federal officials. *See Id.* Therefore, one is well advised to give notice to both.

223. 25 U.S.C. § 3002(d)(1); *see also* 43 C.F.R. § 10.4(c). Under the 1995 NAGPRA regulations, steps must be taken to secure and stabilize the site to protect the discovery. *See Id.*

224. *See* 43 C.F.R. § 10.4(d)(2).

225. 25 U.S.C. § 3002(d) (Supp. III 1991). The 30 day notification period is intended to provide Indian tribes "an opportunity to intervene in development activity on Federal lands in order to safeguard and to provide for appropriate disposition of culturally affiliated items found on Federal lands."). *See* Senate debates, Remarks of Sen. McCain, 136 Cong. Rec., at S17176 (daily ed. Oct. 26, 1990).

226. 60 Fed. Reg. at 62161, 43 C.F.R. § 10.4(d)(2).

227. *Id.*

228. *Id.*; *see also* 25 U.S.C. § 3002(c).

229. However, Senator McCain, a principal NAGPRA sponsor, admonished that:

Development of the site could continue 30 days after such notice has been received by the Secretary. This section of the bill is not intended as a bar to the development of Federal or tribal lands on which cultural items are found. Nor is this bill intended to significantly interrupt or impair development activities on Federal or tribal lands.

16 Cong. Rec. S17176 (daily ed. Oct. 26, 1990); *see also* Sen. Rep. No. 473, 101 Cong., 2d Sess. at 16 ("the activity may resume 30 days after certification that the notice provided for under this section has been received.")

230. *See* Part 3.03[3], *infra*.

231. *See, e.g.,* Solem v. Bartlett, 465 U.S. 463 (1984); Seymour v. Superintendent, 368 U.S. 351 (1962).

232. *See* Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387 (10th Cir.), *cert. denied*, 498 U.S. 1012 (1990), *after remand*, 1995 WL 231635 (April 19, 1995); United States v. Martine, 442 F.2d 1022 (10th Cir. 1971).

233. 25 U.S.C. § 3002(d) (Supp. III 1991).

234. 25 U.S.C. § 3002(c) (Supp. III 1991).

235. NAGPRA's legislative history provides: "the Committee does not intend this section to operate as a bar to development of Federal or tribal lands on which human remains or objects are found. Nor does the Committee intend this section to significantly interrupt or impair development activities on Federal or tribal lands." Sen. Rep. No. 473, 101st Cong., 2d Sess. at 10

236. *See* Archaeological Resources Protection Act, 1979, 16 U.S.C. § 470aa-II (1988); 16 U.S.C. § 470cc (1988); *see* Part 3.05, *infra*.

237. 25 U.S.C. § 3002(c) (Supp. III 1991); *see also* 43 C.F.R. § 10.3.
238. 25 U.S.C. § 3002(c)(3); *see also* 43 C.F.R. § 10.3.
239. *See* 36 C.F.R. § 800.4(b) (1994); *see also* Part 3.02[6][d], *supra*.
240. *See* Part 3.02[5], *supra*.
241. *See* Part 3.02[6], *supra*.
242. *See* Part 3.02[6][d], *supra*.
243. P.L. 93-291, 88 Stat. 174, 16 U.S.C. §§ 469-469c (1988). This statute broadened the applicability of the preexisting Reservoir Salvage Act.
244. P.L. 86-523, 74 Stat. 220, 16 U.S.C. §§ 469-469C (1988).
245. 16 U.S.C. § 469-469a-3; *see also* Attakai v. United States, 746 F. Supp. at 1410; National Indian Youth Council v. Andrus, 501 F. Supp. at 675 n.53, 680.
246. *See* G.C. Coggins, Public Natural Resources Law, 15.04[4] (1992).
247. *But see* Sierra Club v. Morton, 431 F. Supp. 11, 20 (S.D. Tex. 1975) (if properties eligible for inclusion in the National Register are discovered in dam construction activities, construction work would be stopped until salvage work is done).
248. 16 U.S.C. § 469a-1 (1988); Attakai v. United States, 746 F. Supp. at 1410.
249. 16 U.S.C. § 469a-2 (1988); Attakai, 746 F. Supp. at 1410.
250. 16 U.S.C. § 469a-2(c) (1988).
251. *Id.* at § 469a-2(d) (1988).
252. *Id.* at § 469a-3(a) (1988).
253. *Id.* at § 469c-2 (1988). Other regulatory schemes may treat recovery or mitigation costs differently. *See, e.g.*, 43 C.F.R. § 3802.1-5(f), 3809.2-2 (1994).
254. 16 U.S.C. § 461-467 (1988 & Supp. IV 1992).
255. 16 U.S.C. § 461. National Historic Sites include places such as Bent's Old Fort in Colorado, Golden Spike National Historic Site near Promontory Point, Utah, and Hubbell Trading Post in Ganado, Arizona. *See* 16 U.S.C. § 461, Historical and Statutory Notes.
256. *Id.* Regulations implementing the HSA are found at 36 C.F.R. Part 65 (1991). NHPA regulations also provide special protection for National Landmarks. *See* 36 C.F.R. § 800.10 (1994).

257. See Parts 3.02 and 3.03, *supra*.
258. 16 U.S.C. § 462(b) (1988).
259. *Id.* at § 462(d), (e).
260. 16 U.S.C. §§ 431-433 (1988 & Supp. IV 1992).
261. Pub. L. 96-95, 93 Stat. 721, 16 U.S.C. § 470aa - 470ll (1988).
262. 16 U.S.C. §§ 432-33, 470cc; *see also* Kemrer, "The Protection of American Antiquities," 21 *Nat. Res. J.* 935 (1981); 43 C.F.R. Parts 3 and 7 (1991) (Department of Interior); 36 C.F.R. Part 296 (1991) (Department of Agriculture); 25 C.F.R. Part 262 (1993) (Bureau of Indian Affairs regulations specific to "Indian lands"). As noted, revisions to these regulations were published at 60 Fed. Reg. 5256 (January 26, 1995). Federal land managers must notify any Tribe "which may consider [a site to be excavated or studied] as having religious or cultural importance." 16 U.S.C. § 470cc(c).
263. 16 U.S.C. § 470kk. However, ARPA has been used to help defeat development projects on federal lands. As part of NHPA compliance procedures, an applicant for a federal license to construct a hydroelectric power project in Montana sought an ARPA permit to conduct test excavations of historic properties on National Forest lands. Pursuant to regulations, the Forest Service notified affected tribes of its intent to issue the permit. The tribes objected, and the Forest Service denied the ARPA permit. The tribes then argued that NHPA compliance was impossible and the power license should not be issued. For a variety of reasons, the project ultimately died. *See generally* Northern Lights, Inc., 27 FERC (CCH) 63,024, 65,080-85 (1984); FERC, Dept. of Energy, Final Environmental Impact Statement, Kootenai River Hydroelectric Project No. 2752 - Montana (1981).
264. 746 F. Supp. at 1410. The court stated NHPA and HADPA address inadvertent discoveries. *Id.*; *see also* 43 C.F.R. § 7.5(c) (1994). However, an ARPA permit may be required to conduct NEPA compliance work. *See* 16 U.S.C. § 470cc (1988).
265. *See* Part 16.03[7], *infra*. This may be true even if discoveries occur on private lands. *See* United States v. Gerber, 20 Ind. L. Rep. 2127 (7th Cir. 1993).
266. *See* 43 C.F.R. § 7.1-7.37 (1994). Careful compliance with ARPA regulations is necessary. ARPA is specifically applicable under the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3002(c).
267. *See* 16 U.S.C. § 470bb, cc (1988).
268. 16 U.S.C. § 470cc (1988); 43 C.F.R. § 7.7 (1994). On January 26, 1995, the Departments of Interior, Agriculture, and Defense, and the Tennessee Valley Authority promulgated revisions to the uniform regulations implementing ARPA. *See* 60 Fed. Reg. 5256 (January 26, 1995).
269. *See* 43 C.F.R. § 7.7 (1994). For excavation on "Indian lands," ARPA requires written consent from Indian landowners and the Indian tribe having jurisdiction over

the lands. 43 C.F.R. § 7.8 (a)(5) (1994); *see also* 25 U.S.C. pt. 262 (1994). ARPA defines "Indian lands" more narrowly than does NAGPRA, as lands of Indian tribes or individuals held by the United States in trust or subject to federal restraints or alienation. 43 C.F.R. § 7.3(e) (1994).

270. *See* Note: "Respect for the Living and Respect for the Dead: Return of Indian and Other Native American Burial Remains," 39 *J. Urban & Contemp. L.* 195, 213-21 (1991).

271. 92 Stat. 469, 42 U.S.C. § 1996 (1988).

272. *Id.*

273. *See* Part 3.07[1], *infra*.

274. *See* Part 3.07[2], *infra*.

275. *See* Part 3.07[3], *infra*.

276. *See* Part 3.07[4], *infra*.

277. 485 U.S. 439 (1988); *see also* Hester, "Protection of Sacred Sites and Cultural Resources: An Obstacle to Mineral Development in Indian Country," *Institute on Mineral Development on Indian Lands* (Rocky Mtn. Min. L. Fdn. 1989).

278. 485 U.S. at 442-43.

279. *Id.* at 447-48.

280. *See Id.* at 454-55.

281. 485 U.S. at 455 ("Nowhere in the law is there so much as a hint of any intent to create a cause of action or any judicially enforceable rights.").

282. *Id.*; *quoting* Representative Udall, 124 Cong. Rec. 21444-45 (1978).

283. *Id.*

284. *Id.*; *see, e.g.*, Havasupai Tribe v. United States, 752 F. Supp. 1471, 1485-86 (D. Ariz. 1990), *aff'd*, 943 F.2d 32 (9th Cir. 1991), *cert. denied*, 503 U.S. 959 (1992) (AIRFA creates no enforceable rights; but the court performed a full review of the environmental impact statement concerning the proper consideration of impacts on traditional religion.)

285. Lockhart v. Kenops, 927 F.2d 1028, 1036 (8th Cir.), *cert. denied*, 502 U.S. 863 (1991) (rejecting claims that agency violated AIRFA by not consulting with Indian religious leaders over land exchange).

286. *Compare* Havasupai Tribe v. United States, 752 F. Supp. 1471, 1485-1500 (D. Ariz. 1990), *aff'd*, 943 F.2d 32 (9th Cir. 1991), *cert. denied*, 503 U.S. 959 (1992);

Goodman Group, Inc. v. Dishroom, 679 F.2d 182, 184-85 (9th Cir. 1982) (impact on "cultural environmental" theoretically may require preparation of EIS); Sierra Club v. Adams, 578 F.2d 389, 396 (D.C. Cir. 1978) (cultural impact on Indians discussed in FEIS); *with* Lockhart v. Kenops, 927 F.2d 1028, 1036-37 (8th Cir.), *cert. denied*, 502 U.S. 863 (1991) (NEPA "does not mandate consideration of a proposal's possible impact on [Indian] religious sites or observances.").

287. Consideration of impacts on Native American religion or culture may also be necessary under other land management or planning statutes. See United States v. Means, 627 F. Supp. 247 (D.S.D. 1985), *rev'd*, 858 F.2d 404 (8th Cir. 1988), *cert. denied*, 492 U.S. 910 (1989).

288. 485 U.S. at 452-453 ("No disrespect for these practices is implied when one notes that such beliefs could easily require *de facto* [Indian] beneficial ownership of some rather spacious tracts of public property").

289. *Id.* at 449.

290. Lockhart v. Kenops, 927 F.2d at 1036; United States v. Means, 858 F.2d 404 (8th Cir. 1988), *cert. denied*, 492 U.S. 910 (1989); Havasupai Tribe v. United States, 752 F. Supp. at 1485 (Free Exercise clause claim rejected though proposed mine will allegedly "destroy" traditional religion).

291. 485 U.S. at 451.

292. 42 U.S.C. §§ 2000bb-2000bb-4 (1988).

293. 42 U.S.C. § 2000bb (1988). *Smith* was an employment discrimination case involving regulation of peyote use.

294. *Id.* at 2000bb-1 (1988).

295. See Werner v. McCotter, 49 F.3d 1476 (10th Cir. 1995); Thiry v. Carlson, 887 F. Supp. 1407, 1412-13 (D. Kan. 1995); *aff'd*, Tenth Circuit Cause No. 95-3178 (March 15, 1996).