

Cultural Resources Management: Tribal Rights, Roles, Consultation, and Other Interests (A Developer's Perspective)¹

Walter E. Stern
Modrall, Sperling, Roehl, Harris, & Sisk, P.A.
Albuquerque, New Mexico

I. Introduction

Native American tribes, Pueblos and other groups (collectively referred to as “tribes”) are important stakeholders in any energy development project located near Indian reservations, Indian lands, and in or near aboriginal lands which were occupied by Native Americans prior to the treaty-making era.² This paper will examine primarily the roles that tribes may play in the development of projects on federal public lands. This paper will consider: (a) consultation with tribes, tribal groups, and tribal members under the National Environmental Policy Act (“NEPA”),³ the National Historic Preservation Act (“NHPA”) and its all important Section 106 process,⁴ the Native Graves Protection and Repatriation Act (“NAGPRA”)⁵ and related statutory schemes; (b) sacred sites and religious freedom considerations; and (c) some practical recommendations for working with tribes, including the benefits of early coordination with tribal stakeholders, including tribal governments and tribal non-governmental organizations. This paper does not consider more generalized consultation policies, including (i) government-to-government consultation not arising from specific statutory obligations, (ii) the Department of the Interior’s December, 2011 “Tribal Consultation Policy”,⁶ or (iii) state law-based consultation obligations. Please consider that state agencies that may be involved in permitting projects on federal lands may also have requirements concerning consultation with tribes or other tribal and Native American interests.

While a tribe’s interest and authority over a project on Indian lands or on that tribe’s reservation may be greater than a project to be located off-reservation on federal public lands, a tribe’s interest and role in an off-reservation project, particularly any project to be located near a tribe’s reservation or land base, should be an important consideration requiring a project developer’s careful attention.

¹ In the areas of federal Indian law and public land law, the author primarily represents non-Indian development interests.

² The treaty-making era began around 1789 (although the Constitution recognizes treaties executed before its adoption) and extended until 1871. F. Cohen, Handbook of Federal Indian Law, 62 (2005).

³ 42 U.S.C. §§ 4321 *et seq.* (2006).

⁴ 16 U.S.C. §§ 470a *et seq.* (2006). Section 106 of the NHPA is codified at 16 U.S.C. §470f, and its implementing regulations are found at 36 C.F.R. Part 800 (2008).

⁵ 25 U.S.C. §§ 3001-3013. (2006).

⁶ Secretarial Order No. 3317 (December 1, 2011); <http://www.doi.gov/news/pressreleases/Secretary-Salazar-Assistant-Secretary-Echo-Hawk-Launch-Comprehensive-Tribal-Consultation-Policy.cfm>

In this paper, the focus is on the rights, interests and concerns of federally recognized Indian tribes and related agencies, organizations and members. However, it is important to understand that there are other groups of Native Americans that are not recognized as tribes by the federal government. Some of those groups may be seeking federal recognition and some may not. In any event, while those unrecognized groups do not have the same consultation rights as recognized tribes, their interests should not be ignored. Appendix A to this paper is a summary table that outlines generally the tribal entities that should be consulted under the various statutes discussed in this paper. Of course, one should review applicable statutory and regulatory language to confirm consultation obligations.

II. Consultation with Tribes under NEPA, NHPA, and NAGPRA.

At the outset, in seeking to determine appropriate tribal consultation obligations that federal agencies may have, project proponents are encouraged to research applicable land management and permitting agency policies, manuals and handbooks, and consult with agency officials to ensure that proponents have access to not only the applicable laws and regulations, but also other policy guidance. For example, the U.S. Bureau of Land Management (“BLM”) has BLM Manual and Handbook materials guiding tribal consultation concerning NEPA compliance, cultural resources management, and other matters.⁷ Even though some of these materials may not be binding on a project proponent, it is important that all understand what policies applicable federal agencies will follow in pursuing their consultation obligations.

A. Tribal Consultation under the National Environmental Policy Act.

While NEPA’s reach extends far beyond cultural resources management considerations, it is important to recognize that NEPA requires consideration of such resources. Indian tribes are entitled to participate in the NEPA process, and federal permitting or land management agencies should invite tribes to participate early in project planning and NEPA scoping.⁸ As project proponents begin their discussions with applicable federal land management or permitting agencies concerning NEPA compliance and other permitting and regulatory requirements, consultation with Indian tribes should be high on the list of first steps. This is true even for off-Reservation projects, particularly those located close to reservation boundaries or to

⁷ See, e.g., BLM Manual Section 8120, “Tribal Consultation Under Cultural Resources Authorities” (December 4, 2004); BLM Manual Handbook H-8120-1, “Guidelines for Conducting Tribal Consultation” (December 4, 2004). These materials are available on the www.blm.gov website. BLM recently has been conducting listening sessions with Indian tribes to determine what further steps it may take to continue to improve its tribal consultation efforts. Those sessions may result in further revisions not only to these policy materials, but also to the BLM’s Programmatic Agreement with the Advisory Council on Historic Preservation concerning NHPA Section 106-related tribal consultation. See <http://www.achp.gov/news090210.html>.

⁸ A description of the NEPA process is beyond the scope of this paper. For an overview discussion concerning NEPA compliance, see Drake, “*The NEPA Process: What do we need to do and When?*” 43 Rocky Mountain Mineral Law Foundation Journal 117 (2006).

trust lands, given Indian tribes' wide-ranging relationships with lands outside current reservation boundaries.

NEPA's implementing regulations require federal agencies to invite Indian tribes to participate in the scoping process at the outset of the NEPA process, where a project may affect tribal interests.⁹ For projects on federal public lands, federal land managers should have a clear understanding of what tribes would have an interest in a proposed project or in particular areas by virtue of the land use management planning processes under the Federal Land Policy and Management Act ("FLPMA") for BLM, and under the National Forest Management Act ("NFMA") and related statutes for the U.S. Forest Service.¹⁰ Through their land use planning processes, BLM and the Forest Service would have gathered important information about tribal interests, and those agencies' land use plans can be useful resources for project proponents to review in order to begin to understand tribal rights and interests.

For any project being considered near an Indian reservation, near lands owned by an Indian tribe or its members, or in areas where an Indian tribe may have an aboriginal or other traditional or cultural connection, federal agency officials and project proponents are well advised to communicate early in the NEPA process with tribal representatives and other tribal interests. In referring to "other tribal interests", it is important to recognize that Indian tribes, as is true with other governments, do not always represent the full range of views held by tribal members. There may be local subdivisions of tribal government whose views, interests and concerns are different than those of the main tribal government. Similarly, there may be non-governmental organizations ("NGOs") representing the interests of tribal members which are also different than those of the tribal leadership.¹¹

While Indian tribes are not often referenced specifically in the Council on Environmental Quality's ("CEQ") NEPA implementing regulations, where tribes are participating in the NEPA process, beginning with scoping, it will be important to maintain ongoing communication and consultation with the tribe or tribes. Indian tribes can become "cooperating agencies" in the NEPA process "when the effects [of a project] are on a reservation" with the agreement of the lead federal agency.¹²

⁹ See 40 C.F.R. § 1501.7(a)(1); see also 40 C.F.R. § 1501.2(d)(providing that federal agencies should be prepared to consult "early with . . . Indian tribes . . . when [federal agency] involvement is reasonably foreseeable.").

¹⁰ FLPMA, 43 U.S.C. § 1712 (land use planning obligation); NFMA, 16 U.S.C. §§ 1600-1614 (same). BLM Instruction Memoranda address the federal government's commitment to government-to-governmental consultation with tribes in the land use planning process. See, e.g., Instruction Memorandum No. ID-2007-039, titled "Managing Natural Resources Consistent with Treaty and Trust Responsibilities" (March 26, 2007).

¹¹ An illustration of this range of organizations can be found on or near the Navajo Reservation. While the Navajo Nation's tribal government is headquartered in Window Rock Arizona, the Nation is divided into a series of geographically diverse "Chapters" each of which have a leadership structure and represent tribal members living in the boundaries of the Chapter. Further, NGOs such as Dine Citizens Against Ruining our Environment (Dine CARE) have been organized to represent environmental and other concerns held by some of the Navajo Nation's members.

¹² 40 C.F.R. § 1508.5; see also 40 C.F.R. § 1503.1(a)(2).

Under NEPA, cooperating agencies can play an important role. CEQ regulations provide that lead agencies “shall” (a) “request the participation of” cooperating agencies early in the NEPA process; (b) “[u]se the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency”; and (c) meet with cooperating agencies “at the latter’s request.”¹³ In turn, cooperating agencies have specified roles, including: (a) participating in the scoping process; (b) at the request of the lead agency, assuming responsibility for developing information and preparing environmental analyses for use in the NEPA documents; and (c) providing staff support at the lead agency’s request in order to enhance the lead agency’s “interdisciplinary capability”.¹⁴

In addition, at the stage where an EIS has been prepared in draft, the federal lead agency “shall” request comments from “Indian tribes, when the effects may be on a reservation.”¹⁵ Of course, off-reservation projects can often have on-reservation impacts, including air and water quality impacts, among others.

Beyond CEQ regulations, land management agencies and other federal permitting agencies have regulations, policies, handbooks and/or manuals to guide their NEPA compliance work.¹⁶ These materials often provide further guidance concerning appropriate tribal consultation obligations.

For example, in the context of scoping at the beginning of the NEPA process, the BLM NEPA Handbook states:

Tribal consultation centers on established government-to-government relationship, and it is important that you allow sufficient time and use the appropriate means of contacting tribes when conducting scoping.¹⁷

In addition, the BLM NEPA Handbook addresses the need to provide notice to tribes as part of any public notice and hearing effort.¹⁸ As the NEPA process unfolds, project proponents and agency officials should work together to insure both that tribes, tribal members, and tribal governmental and non-governmental organizations have been provided opportunities to participate and that those efforts to facilitate participation are effectively documented in the administrative record.

¹³ 40 C.F.R. § 1501.6(a).

¹⁴ 40 C.F.R. § 1501.6(b). Cooperating agencies may decline such responsibilities. See 40 C.F.R. § 1501.6(c).

¹⁵ 40 C.F.R. § 1503.1(a)(2).

¹⁶ See, e.g., BLM Manual Handbook H-1790-1, National Environmental Policy Act (January 2008) (“BLM NEPA Handbook”); U.S. Forest Service NEPA Regulations, 36 C.F.R. Part 220, 73 Fed. Reg. 43084-43099 (July 24, 2008).

¹⁷ BLM NEPA Handbook, § 6.3.2.

¹⁸ *Id.* § 6.9.

Recent litigation helps illustrate the importance of tribal consultation under NEPA. In *Navajo Nation v. United States Forest Service*,¹⁹ a Ninth Circuit panel considered a claim by the Hopi Tribe that the Final Environmental Impact Statement's ("FEIS") analysis of the social and cultural impacts of the proposed action -- the expansion of a ski area including the development of snowmaking facilities on San Francisco Peaks outside Flagstaff, Arizona -- on the Hopi Tribe was inadequate.²⁰ The panel noted that the FEIS acknowledged that "it is difficult to be precise in the analysis of the impact of the proposed [development] on the cultural and religious systems on the Peaks, as much of the information stems from oral histories and a deep, underlying belief system of the indigenous peoples involved."²¹ Despite the difficulty conducting such an analysis, the court approved of the Forest Service's effort to comply with NEPA because the Service discussed the effects of the proposed action, which included "drawing from existing literature and extensive consultation with the affected tribes," and "describ[ing] at length the religious beliefs and practices of the Hopi and the Navajo and the 'irretrievable impact' the proposal would likely have on those beliefs and practices."²² The panel suggested that, in situations where impacts on cultural properties and tribal religious practices may arise, a reasonable attempt by an agency to describe and assess the significance of cultural properties and religious practices from the tribal and tribal member perspectives should survive a legal challenge despite that assessing the impact on cultural properties and tribal religious practices is necessarily difficult.²³

Of course, in consulting with tribes under NEPA, the goal at the outset should not be simply to survive a NEPA challenge. Rather, the goal should be meaningful consultation with tribal interests to identify interests and concerns, and determine whether those concerns can be addressed in some fashion as project planning proceeds. In pursuing this consultation, federal agencies and project proponents should be certain to get the tribes' full range of interests on the table, recognizing that some subjects will be more sensitive than others. The range of considerations necessarily addressed in the NEPA process should assist in this consultation.

Tribes will likely have interests in environmental impacts, effects on cultural, historic,²⁴ and sacred sites, and the like. Further, tribes will have concerns about potential socio-economic impacts. All of these subjects are matters that are appropriately subject to consideration in the NEPA process. And, discussion of all of these matters may provide opportunities for tribes, federal agencies and project proponents to identify mitigation measures or other opportunities to help minimize the impacts of a project on the tribe or tribal interests. Moreover, this consultation

¹⁹ 479 F.3d 1024 (9th Cir. 2007). This case is also discussed in Part IV.B, *infra*, addressing the subject of management and consultation of cultural resources and sacred sites.

²⁰ 479 F.3d at 1058-59.

²¹ *Id.* at 1059.

²² *Id.*

²³ *Id.*

²⁴ As will be discussed in Part II.B., *infra*, the NEPA and NHPA Section 106 processes can be coordinated and combined in some circumstances.

may help the proponent shape its business model as it continues to fine tune the proposed project or development. For example, it is widely known that unemployment on or near many Indian Reservations is a significant concern for tribal leaders. While providing employment preferences for tribal members is problematic from the standpoint of federal law,²⁵ under Title VII of the Civil Rights Act of 1964, employers operating on or near reservations can provide employment preferences for “Indians” living on or near reservations as long as the employer follows certain procedures.²⁶ A willingness to provide such employment preferences may help address some of the socio-economic concerns of tribal leaders and other tribal interests.

In conclusion, as part of a central theme found throughout this paper, it is incumbent on agency officials and project proponents to work together to insure that tribes and tribal organizations have ample opportunity to participate in the NEPA process. Even if the first efforts to consult fail to result in the engagement of tribal officials, it is a good practice to “try, try again” so that, at a minimum, a clear record emerges to reflect efforts to consult.

B. Tribal Consultation under National Historic Preservation Act Section 106.

This section addresses federal agency compliance obligations under the National Historic Preservation Act (“NHPA”), particularly including Section 106 of that statute, 16 U.S.C. § 470f, relating to tribal consultation.²⁷ Specifically, questions arise concerning the scope of federal agency obligations to consult with tribes which “might attach religious and cultural significance” to historic or cultural properties, including traditional cultural properties, that are located within areas potentially affected by off-reservation projects.²⁸

1. Identifying interested tribes and providing an opportunity to participate.

²⁵ See *Dawavendewa v. Salt River Project*, 154 F.3d 1117 (9th Cir. 1998), where the Ninth Circuit concluded that an employment preference in favor of the members of one tribe over the members of another tribe violated federal law. The federal Equal Employment Opportunity Commission’s policies and interpretations are consistent with this conclusion. See generally Long and Stern, “*Labor and Employment Issues in Indian Country: A Non-Indian Business Perspective*”, Special Institute on Natural Resources Development on Indian Lands, Paper No. 15 (Rocky Mt. Min. L. Fdn. 2005).

²⁶ See 42 U.S.C. § 2000e-2(i). To take advantage of the Title VII “Indian” exception, employers may only provide the “Indian preference” pursuant to a publically announced policy. *Id.*

²⁷ Of course, NHPA Section 106 imposes other requirements beyond consultation with Indian tribes or groups. Although I do address some issues relating to SHPO consultation, other matters are beyond the scope of this paper, and are not analyzed here except in a general fashion.

²⁸ A question has arisen concerning whether tribes whose reservation may be adjacent to a proposed project would have standing to attack the Section 106 process. As an adjacent landowner, tribes presumably would have standing. See *Pye v. United States*, 269 F.3d 459 (4th Cir. 2001)(landowners have standing to bring action for violations of NHPA relating to the construction of a road on lands adjacent to the landowners). On the other hand, if an entity pursues claims based on interests that are not within the “zone of interests” the NHPA is intended to protect, then that entity should be denied standing. See *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031 (8th Cir. 2002).

At the outset, one might ask where to find information about what tribes claim an interest in any particular area. As a starting point, one should ask the federal agency officials and the State Historic Preservation Officer (“SHPO”) with whom you are dealing whether any tribes have requested consultation for any projects in the vicinity.²⁹ In addition, SHPOs may also maintain lists of tribes that have expressed interest in participating in consultation county-by-county. In New Mexico, for example, the SHPO’s website includes lists of tribes on a county-by-county basis identifying which tribes have expressed an interest in a particular area.³⁰ However, one should not rely exclusively on such lists. One should conduct independent research and review of existing research to ascertain which tribes may have an interest in a particular area. Use of the SHPO lists is helpful and may provide a basis to assert that the federal agency’s consultation efforts represent a good faith effort to pursue tribal consultations. However, using the list does not fully insulate the consultation process from some challenge that there was an insufficient effort to identify interested tribes. The New Mexico website states: “It is NOT a definitive list, and may change depending on the type and location of the proposed project.”³¹

Again, the emphasis here is on consultation with federally recognized tribes. However, at the outset of the Section 106 compliance effort, federal agencies, SHPOs, recognized tribes and project proponents should discuss the role, if any, of any unrecognized groups that may seek to participate in the process.

Under the NHPA regulations, agency officials are to provide tribes a “reasonable opportunity to identify concerns about historic properties, [and] . . . advise on the identification . . . of historic properties.”³² Other regulatory provisions utilize 30 day time periods for consultations with state officials, including the State Historic Preservation Officer (“SHPO”), suggesting that a 30 day time period may be reasonable to impose on tribes. See 36 C.F.R. § 800.3(c)(4), (d). However, as discussed below, a reviewing court may take the position that a longer period is appropriate.

2. Federal Agencies Have the Obligations Under NHPA Section 106.

NHPA Section 106 imposes procedural obligations on federal agencies to inventory historic properties in areas that may be affected by activities on federal lands or that are subject to federal permitting, and to consult with interested parties and the SHPO concerning those properties. Section 106 of the NHPA, 16 U.S.C. § 470f, provides in pertinent part:

²⁹ In contrast to projects on Indian Reservations where a federally recognized Tribal Historic Preservation Officer (“THPO”) can supplant the SHPO in the Section 106 compliance process, the SHPO plays the key consultation role with federal agencies for projects located off-Reservation. See 36 C.F.R. § 800.2(c).

³⁰ See http://www.nmhistoricpreservation.org/OUTREACH/outreach_pueblo.html.

³¹ *Id.* (Emphasis in original).

³² See 36 C.F.R. § 800.2(c)(2)(ii)(A).

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.

As provided by the NHPA, the Advisory Council on Historic Preservation (“ACHP”) promulgated regulations implementing this provision.³³ Unless states or federal agencies have executed agreements with the ACHP, 36 C.F.R. Part 800 controls the Section 106 clearance process. “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.”³⁴ 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.”³⁵ It is not clear what this regulatory language means. In *Attakai v. United States*,³⁶ 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.³⁷ While the courts may be “flexible” with respect to certain elements of the Section 106 process, they likely will insist upon effective consultation throughout.

Nonetheless, the Section 106 process must be completed prior to the initiation of any ground-disturbing activities. And, the process may need to be completed before any license or permit is issued, or before final approval of any federal funding expenditures.

These obligations may be undertaken in concert with agency obligations under NEPA.³⁸ As with NEPA, where there is more than one agency involved in permitting a project, federal agencies can designate a lead agency to coordinate NHPA compliance obligations.³⁹ Ordinarily, the federal agencies involved will document such an understanding in a Memorandum of Understanding or similar document.

³³ See 36 C.F.R. Part 800.

³⁴ *Pueblo of Sandia v. United States*, 50 F.3d 856, 859 (10th Cir. 1995)(emphasis added).

³⁵ 36 C.F.R. § 800.3(b); see *Abenaki Nation of Mississquoi*, 805 F. Supp. 234, 251 (D. Vt. 1992), *aff'd*, 990 F.2d 729 (2d Cir. 1993).

³⁶ 746 F. Supp. 1395, 1405 (D. Ariz. 1990).

³⁷ See *id.*

³⁸ This decision should be made early in the process to ensure that the alternative procedures available under the NHPA Section 106 regulations will apply. See 36 C.F.R. § 800.3(a)(2).

³⁹ See 36 C.F.R. § 800.2(a)(2).

36 C.F.R. § 800.3(b) provides in relevant part that “[w]here consistent with the procedures in this subpart, the agency official may use information developed for other reviews under Federal, State, or tribal law to meet the requirements of Section 106.” We are not aware of any judicial or administrative interpretation of this regulation; however, the regulation would seem to support the view that federal agencies could rely or “use” information developed by another agency in meeting its obligations under the NHPA. This would include information developed by Indian tribes, particularly those with cultural affiliations or historical connections to particular areas.

3. NHPA and Section 106 Obligations: A Brief Primer.

“The purpose of the [NHPA] is the preservation of historic resources.”⁴⁰ Enacted in 1966, and amended significantly in 1980 to codify additional preservation policies reflected in Executive Order No. 11593, the NHPA was implemented “to encourage the preservation and protection of America’s historic and cultural resources.”⁴¹ 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. 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.’”⁴² Through the NHPA, Congress established the 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.⁴³

Under the 1992 NHPA amendments, federal agency preservation-related activities are to be “carried out in consultation with other Federal, State, and local agencies, [and] Indian tribes”⁴⁴ The key state official involved in this consultation effort is the SHPO for activities on federal public lands.

Properties subject to NHPA protection are sites or objects either included in, or eligible for listing on, the National Register of Historic Places.⁴⁵ 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

⁴⁰ *National Indian Youth Council v. Watt*, 664 F.2d 220, 226 (10th Cir. 1981).

⁴¹ *Indiana Coal Council, Inc. v. Lujan*, 774 F. Supp. 1385, 1387 (D.D.C. 1991).

⁴² *WATCH v. Harris*, 603 F.2d 310, 321 (2d Cir. 1979), quoting H.R. Reg. No. 1916, 89th Cong., 2d Sess., 1966 U.S. Code. Cong. & Admin. News, 3307, 3309).

⁴³ See 16 U.S.C. §§ 470-470w-6.

⁴⁴ See 16 U.S.C. § 470h-2(a)(2)(D).

⁴⁵ See 16 U.S.C. § 470w(5); see also 36 C.F.R. § 800.2(e), (l); 36 C.F.R. Part 60 (2008).

eligible.⁴⁶ 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.⁴⁷

Of particular importance to Indian tribes is *National Register Bulletin* No. 38, "Guidelines for Evaluating and Documenting Traditional Cultural Properties," which provides that "traditional cultural properties" ("TCPs") may be eligible for inclusion in the National Register. 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. Properties falling within this category may include, for example, sandbars in the Rio Grande in New Mexico used for certain Pueblo Indian rituals and the San Francisco Peaks just north of Flagstaff, Arizona. Thus, agency official and project proponents must be prepared to consult with tribes to address not only those sites or objects which have some physical evidence of human habitation or presence, but also sites with no such evidence. This points out the importance of early consultation with tribes with any historic or cultural affiliation with an area since TCPs need not be manifested by evidence on the ground. Project proponents and federal agency officials must be certain to involve tribal interests in the Section 106 process to insure comprehensive analysis of historic properties that a proposed project may directly or indirectly impact.

Courts and commentators uniformly view the NHPA as a procedural statute.⁴⁸ In *Morris County Trust for Historic Preservation v. Pierce*,⁴⁹ 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." Similarly, the Ninth and District of Columbia Circuits have stated that the NHPA is a "stop, look, and listen" statute.⁵⁰

While procedural, the NHPA Section 106 and its implementing regulations provide federal agencies and project proponents with ample opportunity to reach agreements with tribal and state officials and other interested parties to provide substantive protection for National Register-eligible properties. In practice, federal agency officials are likely to seek ways to avoid, minimize or mitigate adverse effects on historic properties. Again, applicants for federal permits, leases, or other federal approvals should maintain good communications with involved federal officials and

⁴⁶ See 36 C.F.R. § 60.4.

⁴⁷ 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).

⁴⁸ 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).

⁴⁹ 714 F.2d 271, 278-79 (3d Cir. 1983)

⁵⁰ *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).

interested tribes to determine whether substantive agreements or mitigation measures may minimize or eliminate Native American concerns. Applicants may also 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.

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 “Undertakings” may include, without limitation: (a) grants of rights-of-way across public lands,⁵² and (b) on-the-ground activities carried out pursuant to a federal permit, lease or license.⁵³ In essence, any ground-disturbing activity under the jurisdiction or control of any federal agency, including the Corps and the BLM, constitutes an “undertaking” triggering NHPA § 106 compliance requirements and raising the potential (and likely) need for pursuing tribal consultation.

4. NHPA and NEPA Compliance Obligations Compared.

Compliance with NEPA and its tribal consultation obligations will not necessarily translate into NHPA compliance; and, compliance with NHPA requirements does not necessarily equate to NEPA compliance. Accordingly, independent analysis of NEPA and NHPA compliance obligations is required. Of course, many federal actions will require compliance with both statutes. Particularly in the arena of tribal consultation, these statutes and implementing regulations (as is true with other statutes such as NAGPRA, discussed *infra* in Part II.D) will either require or counsel in favor of consultation with different tribal or Indian representatives. For example, under NEPA, the consultation is ordinarily with tribal leaders, through government-to-government consultation, whereas under NHPA Section 106 consultation should be with both tribal leaders and with traditional cultural leaders and others with knowledge of historical, archaeological and traditional cultural resources.

Despite the differing standards of the NHPA and NEPA, federal agencies may comply with both statutes in a single document or process.⁵⁴ Current NEPA and NHPA regulations “envision that both statutes may be applied simultaneously”⁵⁵ Simultaneous compliance with NEPA and NHPA makes sense not only from a cost-

⁵¹ 16 U.S.C. § 470f.

⁵² See 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).

⁵³ See *Colorado River Indian Tribes v. Marsh*, 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).

⁵⁴ See 36 C.F.R. § 800.8.

⁵⁵ *Morris County Trust for Historic Preservation v. Pierce*, 714 F.2d 271, 282 (3d Cir. 1983).

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"⁵⁶ And, NEPA's implementing regulations demonstrate a commitment to consideration of cultural resources.⁵⁷

5. Newly Executed BLM, Advisory Council, National SHPOs NHPA Programmatic Agreement.

On February 9, 2012, BLM Director Bob Abbey executed a revision to the BLM's National Programmatic Agreement ("PA") further defining how BLM will consult with Indian Tribes and other consulting parties concerning undertakings that may affect historic properties. At the time, Director Abbey stated: "This revision reinforces the BLM's practice of respecting our unique relationship with Tribes and carefully considering their views and concerns through consultation. As the BLM examines proposals for activities on public lands, this revised PA will help us preserve the historical and cultural foundations that make the public lands special and vital."⁵⁸

The National PA was executed by the BLM, the ACHP, and the National Conference of State Historic Preservation Officers (NCSHPO). The PA now governs BLM's activities that may impact historic properties, including TCPs. The PA purports to facilitate efficient consultation between the BLM and State Historic Preservation Officers (SHPOs).

According to the BLM, the revised PA

emphasizes the requirement for the BLM to consult with Tribes in the context of an ongoing government-to-government relationship, to obtain their views on the potential impacts on resources of significance to Tribes, and encourages the development of tribe-specific consultation protocols. It authorizes the BLM to maintain protocols with SHPOs that establish a more efficient alternative Section 106 compliance process, but institutes a requirement for tribal consultation and public comment on BLM-SHPO protocol revisions. It also adds the BLM national tribal coordinator to the BLM Preservation Board. That board advises the BLM on policies and procedures for NHPA implementation.⁵⁹

⁵⁶ 42 U.S.C. § 4331(b)(4).

⁵⁷ See 40 C.F.R. § 1502.16(g) and § 1508.27(b)(8).

⁵⁸ http://www.blm.gov/wo/st/en/info/newsroom/2012/february/nr_02_09_2012.html

⁵⁹ *Id.*

While the revision enhances the consultation role of Tribes, it is important to know that it does not apply to Tribal lands.⁶⁰ The BLM announced the revision in December 2011.

6. *Pueblo of Sandia v. United States*: Important Tenth Circuit NHPA Authority Concerning Federal Agency NHPA Inventory and Consultation Obligations.

In 1995, the United States Court of Appeals issued its opinion in *Pueblo of Sandia v. United States*,⁶¹ an important decision concerning federal agency consultation obligations under NHPA Section 106. The case arose out of Forest Service environmental planning and decision-making concerning a proposed realignment and reconstruction of a road in Las Huertas Canyon in the Sandia Mountains north and east of Albuquerque, New Mexico. The Tenth Circuit reversed the decision of U.S. District Judge Mechem, which had upheld Forest Service decisions in the face of arguments by the Pueblo of Sandia (“Pueblo”) that the Forest Service had failed to comply with Section 106 requirements concerning identification of historic properties and consultation with Indian tribes and Pueblos.

According to the Court, the record showed that Pueblo members visited Las Huertas Canyon to gather evergreen boughs and to harvest herbs and plants which are important for traditional healing practices. Further, the canyon apparently contained shrines and ceremonial paths of religious and cultural significance to the Pueblo.⁶² Following issuance of a Draft EIS (which considered eight alternatives) and an extended comment period, the Forest Service selected a ninth alternative, which sought to address public comments.⁶³

The Pueblo filed an administrative appeal to the Regional Forester, claiming that the Forest Service plan would adversely impact traditional cultural properties and practices in the canyon.⁶⁴ The Deputy Regional Forester rejected the appeal, and the Chief of the Forest Service declined to review the matter. Thereafter, the Pueblo filed suit in federal court in Albuquerque, claiming NEPA and NHPA violations. The district court rejected both NEPA and NHPA claims, but the Pueblo appealed only the NHPA issues. Specifically, “the Pueblo alleged that the Forest Service failed to comply with section 106 of the NHPA when it refused to evaluate the [entire] canyon as a traditional cultural property eligible for inclusion on the National Register.”⁶⁵

According to the Tenth Circuit, the Forest Service had concluded that there were no TCPs in the canyon, and the New Mexico SHPO concurred (at least initially). Later, the SHPO, after obtaining additional information suggesting that TCPs existed in the area, withdrew its concurrence. The withdrawal of SHPO concurrence occurred

⁶⁰ *Id.*

⁶¹ 50 F.3d 856 (10th Cir. 1995).

⁶² 50 F.3d at 857.

⁶³ *Id.* at 857-58.

⁶⁴ *Id.* at 858.

⁶⁵ *Id.*

after the District Court entered its decision rejecting the Pueblo's claims.⁶⁶ The SHPO's withdrawal was based upon information Pueblo officials submitted to the Forest Service that the Forest Service had not shared initially with the SHPO. That information suggested that there might be TCPs in Las Huertas Canyon, given the ceremonial uses (described above) to which Pueblo members put certain areas in the Canyon. In withdrawing its concurrence, the SHPO recommended further ethnographic study of the Canyon to evaluate whether it contained TCPs.⁶⁷

After reviewing generally the Section 106 obligations of federal agencies, including the requirement that the agencies seek information from interested parties about historic properties in an area, the Tenth Circuit focused on the question whether the Forest Service made the requisite "reasonable and good faith effort to identify historic properties that may be affected by the undertaking and gather sufficient information to evaluate the eligibility of these properties for the National Register."⁶⁸ In essential terms, this regulatory obligation was carried forward in the revisions to the Part 800 regulations following the 1992 amendments to the NHPA. In addition, the current regulations provide that agencies consult with Indian tribes and other groups that "might attach religious and cultural significance to properties within the area of potential effects."⁶⁹

The court then agreed with the Pueblo that the Forest Service had not complied with the "reasonable and good faith effort" obligations under Section 106.⁷⁰ Specifically, the court stated:

Because communications from the tribes indicated the existence of traditional cultural properties and because the Forest Service should have known that tribal customs might restrict the ready disclosure of specific information, we hold that the agency did not reasonably pursue the information necessary to evaluate the canyon's eligibility for inclusion in the National Register.⁷¹

According to the court, in meetings and correspondence with the Forest Service, local tribes and Pueblos, and the All Indian Pueblo Council, Indian representatives provided some information that should have put the Forest Service on notice of the potential for TCPs in Las Huertas Canyon and that the information "was sufficient to require the Forest Service to engage in further investigations, especially in light of regulations warning that tribes might be hesitant to divulge the type of [property-specific] information sought."⁷² According to the court, representatives of Sandia and San

⁶⁶ *Id.*

⁶⁷ *Id.* at 859.

⁶⁸ *Id.*, quoting 36 C.F.R. § 800.4(b).

⁶⁹ 36 C.F.R. § 800.4(b).

⁷⁰ 50 F.3d at 860-63.

⁷¹ *Id.* at 860.

⁷² *Id.* The Sandia Pueblo Governor advised the Forest Service in 1987 that the canyon was "of great religious and traditional importance to the people of Sandia Pueblo." And, later, during

Felipe Pueblos told the Forest Service that Pueblo members did not want to disclose further details concerning specific site locations or activities.⁷³

Based on this, the court concluded that the Forest Service did not make a “reasonable effort” to identify historic properties.⁷⁴ Given the Pueblos’ reluctance to disclose further information, this holding may seem harsh, but the Court may be of the view that further investigation may provide sufficient information upon which to make a (better) reasoned determination whether any TCPs exist in the area.

Next, the court addressed whether the Forest Service made a “good faith” effort to identify TCPs in the Las Huertas Canyon.⁷⁵ The Pueblo argued that the Forest Service’s action in withholding information from the SHPO during the consultation process is evidence of a lack of good faith. The court concluded that informed consultation between the federal agency and the SHPO is an “integral part of the Section 106 process” and that the failure of the Forest Service to provide relevant information to the SHPO during the consultation was tantamount to a lack of good faith.⁷⁶

The Tenth Circuit’s opinion indicates the federal courts should provide strong judicial review of agency actions under NHPA Section 106, particularly insofar as inventory and tribal consultation requirements are concerned. Federal agencies must pursue effective and informed consultation with tribes, if there is some indication that a tribe or group “might” attach some cultural or religious significance to an area. That consultation obligation carries forward to consultation with the SHPO as well.

In the event that the tribal consultations disclose some indication that an area may include TCPs, the federal agency must follow up with further consultations and possibly studies. The Tenth Circuit opinion does not identify or describe what steps would be sufficient, unfortunately. However, it would appear from the court’s analysis that, if a tribe informs the federal agency that the project area includes properties of traditional or cultural significance, then longer delays will result from further consultations with that tribe.⁷⁷

the EIS comment period, the Sandia Pueblo explained its support for one of the alternatives under consideration as being the most likely “to permit the Sandia members to perform secret, traditional activities in more seclusion.” *See Id.* at 861.

⁷³ *Id.*

⁷⁴ *Id.* at 861-62.

⁷⁵ *Id.* at 862-63.

⁷⁶ *Id.*

⁷⁷ Recently, the Interior Board of Land Appeals has indicated that a single letter inquiring whether tribal consultation is desired may be sufficient to comply with the obligation to consult. *See Southern Utah Wilderness Alliance*, 177 IBLA 89, 95 (2009)(Board stated that a single letter was sent to a number of tribes and no tribes responded). However, I should note that it does not appear that SUWA claimed that a single letter was insufficient compliance. The tenor of the Tenth Circuit’s decision in *Sandia* raises a question whether that court might require a greater effort given the potential sensitivity to disclosure of traditional cultural properties.

C. The Tribal Consultation Role under the Native American Graves Protection and Repatriation Act.

This section of the paper summarizes compliance obligations under the federal Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (“NAGPRA”). 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.”⁷⁸ Almost 150 years later, the Native American Graves Protection and Repatriation Act (“NAGPRA”)⁷⁹ 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”⁸⁰ and to protect Native American rights of possession to objects needed to preserve or renew traditional culture and religion.⁸¹

Importantly for purposes of this discussion, NAGPRA accords to living descendants and culturally related tribes certain rights to ownership and control of burial remains and cultural items discovered on federal or Indian lands.⁸² Unlike NHPA and NEPA which mandate only procedural obligations, NAGPRA prescribes substantive protection for certain cultural artifacts.

Generally, NAGPRA applies to the handling of inadvertent discoveries and intentional excavations of Native American graves and associated objects or items. NAGPRA provides that Native American cultural items discovered on tribal land shall be owned and controlled by the Indians or Indian tribes having the closest relationship to the cultural items. Under NAGPRA, 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. 25 U.S.C. § 3002(a)(1). And, NAGPRA does not specify the effect of a tribe's refusing to consent to excavation or removal.⁸³

As is true with NHPA Section 106, most of the obligations for compliance with NAGPRA fall on the involved federal agencies. For example, 43 C.F.R. § 10.3(c) describes that federal officials are responsible for certain tribal and other Native American consultation, documentation, and related obligations.

⁷⁸ Wilson, “What Chief Seattle Said,” 22 Lewis and Clark Environmental Law Journal, 1451 (1992).

⁷⁹ 25 U.S.C. §§ 3001 - 3013.

⁸⁰ S. Rep. No. 473, 101st Cong., 2d Sess. 9.

⁸¹ *Id.* at 7.

⁸² “Indian tribes” for NAGPRA purposes is a broader group than is true for NHPA purposes. *See Abenaki Nation of Mississquoi v. Hughes*, 805 F.Supp. at 249; *compare* 25 U.S.C. § 3001(7) *with* 36 C.F.R. § 800.2(g).

⁸³ 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.” S. Rep. No. 473, 101st Cong., 2d Sess. at 10.

The key provision of NAGPRA requiring consideration here is 25 U.S.C. § 3002(c), it is titled “Intentional Excavation and Removal of Native American Human Remains and Objects”, and provides:

The intentional removal from or excavation of Native American cultural items [including human remains] from Federal or tribal lands for purposes of discovery, study or removal of such items is permitted only if -

- (1) such items are excavated or removed pursuant to a[n ARPA] permit issued under Section 470cc of Title 16 [of the United States Code] which shall be consistent with this Chapter;
- (2) such items are excavated or removed after consultation with or, in the case of tribal lands, consent of the appropriate (if any) Indian tribe or Native Hawaiian organization;
- (3) the ownership and right of control of the disposition of such items shall be as provided in subsections (a) and (b) of this section; and
- (4) proof of consultation or consent under paragraph (2) is shown.

Other sections of NAGPRA address inadvertent discoveries.⁸⁴

NAGPRA affects 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,⁸⁵ and it establishes a hierarchy of ownership interests in protected remains and artifacts discovered on public or Indian lands.⁸⁶ Second, it prescribes procedures applicable when cultural items are inadvertently discovered during implementation of a project,⁸⁷ and provides for excavation or removal of cultural items from federal or tribal lands.⁸⁸ 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.

1. NAGPRA’s Scope.

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.⁸⁹ “Federal lands” are defined to include “any land

⁸⁴ See 25 U.S.C. § 3002(d).

⁸⁵ 25 U.S.C. § 3002(a).

⁸⁶ *Id.*

⁸⁷ 25 U.S.C. § 3002(d).

⁸⁸ 25 U.S.C. § 3002(c).

⁸⁹ The Department of the Interior issued final regulations on December 4, 1995. See 60 Fed. Reg. 62,134 - 62,169. The regulations are codified at 43 C.F.R. Part 10 (2008).

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. . . .”⁹⁰ “Tribal land” includes “all lands within the exterior boundaries of any Indian reservation” and “all dependent Indian communities.”⁹¹ 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. NAGPRA’s Cultural Items.

NAGPRA defines four classes of Native American cultural items: “human remains,” “funerary objects,” “sacred objects,” and “objects of cultural patrimony.”⁹² 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.”⁹³ 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.⁹⁴

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.⁹⁵ Funerary objects may be either “associated” or “unassociated.” Associated funerary objects “still retain their association with human

⁹⁰ 25 U.S.C. § 3001(5).

⁹¹ 25 U.S.C. § 3001(15); *see also* 43 C.F.R. § 10.2(f)(2). “Dependent Indian communities” are defined in cases arising under 25 U.S.C. § 1151 (2006). *See, e.g., Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998). 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” under NAGPRA.

⁹² 43 C.F.R. § 10.2(d).

⁹³ 43 C.F.R. § 10.2(d)(1).

⁹⁴ Memorandum, Departmental Consulting Archaeologist, National Park Service, October 30, 1991 (“Departmental Consulting Archaeologist Memorandum”). The National Park Service (“NPS”) Departmental Consulting Archaeologist is the Department of the Interior official having lead responsibility for coordinating the Department’s 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.

⁹⁵ 25 U.S.C. § 3001(3)(A) and (B); 43 C.F.R. § 10.2(d)(2).

remains that can be located.”⁹⁶ “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.”⁹⁷ 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.”⁹⁸ 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.”⁹⁹

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.”¹⁰⁰ 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.¹⁰¹

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, and thoughtful tribal and Native American consultation well before breaking ground.¹⁰² While those studies and consultations 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

⁹⁶ Departmental Consulting Archaeologist Memorandum, 11; see 25 U.S.C. § 3001(3)(A); 43 C.F.R. § 10.2(d)(2).

⁹⁷ *Id.*

⁹⁸ 25 U.S.C. § 3001(3)(C); 43 C.F.R. § 10.2(d)(3).

⁹⁹ 43 C.F.R. § 10.2(d)(3); Departmental Consulting Archaeologist Memorandum, 5.

¹⁰⁰ 25 U.S.C. § 3001(3)(D); 43 C.F.R. § 10.2(d)(4).

¹⁰¹ S. Rep. No. 473, 101st Cong., 2d Sess. 8 (1990); 43 C.F.R. § 10.2(d)(4).

¹⁰² Project developers are advised to consult with federal officials, the SHPO, tribal officials, tribal elders or archaeologists, and local universities to identify good quality and experienced consultants. Experienced and ethical archaeologists who have the trust of local Native American communities and governmental officials are likely to be the best choice for field consultants.

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.¹⁰³

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.¹⁰⁴ 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.¹⁰⁵

¹⁰³ On tribal lands, even greater participation is required.

¹⁰⁴ 25 U.S.C. § 3002(a)(1). “Lineal descendant” is not defined, but 43 C.F.R. § 10.14 provides criteria for determining lineal descent and cultural affiliation.

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

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.”¹⁰⁶ 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.”¹⁰⁷ NAGPRA also provides a mechanism to resolve disputes between tribes over priority of right to ownership of NAGPRA cultural items and unclaimed cultural items.¹⁰⁸

4. Consultation 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.¹⁰⁹ 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”¹¹⁰ 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.¹¹¹

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”¹¹² 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.¹¹³

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

¹⁰⁶ S. Rep. No. 473, 101st Cong., 2d Sess. 9.

¹⁰⁷ *Id.*

¹⁰⁸ 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. The Review Committee shall, upon 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 with tribes, lineal descendants, and federal agencies. *Id.* Jurisdiction over disputes arising under NAGPRA lies in the federal courts. 25 U.S.C. § 3013.

¹⁰⁹ Presumably, NAGPRA provisions governing inadvertent discoveries occurring in connection with project development activities would include discoveries made during an NHPA Section 106 on-the-ground survey.

¹¹⁰ 25 U.S.C. § 3002(d).

¹¹¹ 25 U.S.C. § 3002(d)(1); *see also* 43 C.F.R. § 10.4(b).

¹¹² 25 U.S.C. § 3002(d)(1); *see also* 43 C.F.R. § 10.4(c).

¹¹³ *See* 43 C.F.R. § 10.4(d)(2).

. . . .”¹¹⁴ 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 NAGPRA regulations, project activity may resume as provided under NAGPRA following any inadvertent discovery “if the resumption” is otherwise lawful.¹¹⁵ 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.¹¹⁶ On federal lands, any plan which would involve excavation or removal must be developed in consultation with the appropriate tribe.¹¹⁷ 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.¹¹⁸ 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. 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. 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:

¹¹⁴ 25 U.S.C. § 3002(d). 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 the appropriate disposition of, culturally affiliated items found on those lands. See Remarks of Sen. McCain, 136 Cong. Rec. S17176 (Daily Ed., Oct. 26, 1990).

¹¹⁵ 43 C.F.R. § 10.4(d)(2).

¹¹⁶ *Id.*

¹¹⁷ *Id.*; see also 25 U.S.C. § 3002(c).

¹¹⁸ However, Senator McCain, a principal NAGPRA sponsor, admonished that the development of a site could continue following 30 days after notice has been delivered to the Secretary. 136 Cong. Rec. at S171716; see also S. Rep. No. 473, 101st Cong., 2d Sess. 16 (“the activity may resume 30 days after certification that that notice provided for in this section has been received.”).

(a) A permit must be issued under the Archaeological Resources Protection Act (ARPA),¹¹⁹ “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.¹²⁰

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.¹²¹

6. NAGPRA Compliance Planning.

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.¹²²

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 and may be pertinent to “adverse effect” determinations under NHPA. The notice and consultation processes under NAGPRA and NHPA also should be coordinated where possible.

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 days by an inadvertent discovery of cultural items.

¹¹⁹ See Archaeological Resources Protection Act, 16 U.S.C. §§ 470aa - 470ll (2006); 16 U.S.C. § 470cc.

¹²⁰ 25 U.S.C. § 3002(c).

¹²¹ 25 U.S.C. § 3002(c)(3); *see also* 43 C.F.R. § 10.3.

¹²² *See* 36 C.F.R. §800.4(b).

III. Sacred Sites and Religious Freedom Considerations.

A. The American Indian Religious Freedom Act and the Free Exercise Clause: Tribal Rights and Agency Duties Following *Lyng v. Northwest Cemetery Protective Association*.

The American Indian Religious Freedom Act (“AIRFA”),¹²³ provides that “it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to site, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rights.”

Any discussion of AIRFA’s effect on activities on the public land must begin with *Lyng v. Northwest Indian Cemetery Protective Association*.¹²⁴ 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.¹²⁵ 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.¹²⁶ While the Forest Service considered substantial evidence of the effects the road would have on religious practices, it decided to build the road.¹²⁷

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.¹²⁸ 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 words, the law “has no teeth in it.”¹²⁹

Whether AIRFA creates enforceable procedural rights that survive the *Lyng* decision is perhaps a close question. *Lyng* quotes legislative history supporting the view that federal agencies should not impede Indian religious practices “without a clear decision on the part of the Congress or the administrators that such religious

¹²³ 42 U.S.C. § 1996

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

¹²⁵ 485 U.S. at 442-43.

¹²⁶ *Id.* at 447-48.

¹²⁷ *See id.* at 454-55.

¹²⁸ *Id.* 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.”).

¹²⁹ *Id.*, quoting Representative Udall, 124 Cong. Rec. 21444-45 (1978).

practices must yield to some higher consideration."¹³⁰ 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.¹³¹ At least one court has held that AIRFA created no procedural duties or cause of action with respect to specific federal actions.¹³²

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.¹³³ 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."¹³⁴ Courts applying *Lyng* have rejected Free Exercise claims to a protected religious use of public lands.¹³⁵ Following *Lyng*, even "extremely grave" impacts on Native American religion cannot foreclose federally authorized uses of public lands.¹³⁶

B. Executive Order No. 13007: Indian Sacred Sites.

On May 24, 1996, President Clinton issued Executive Order No. 13007, titled "Indian Sacred Sites." The purpose of this Order was "to protect and preserve Indian religious practices"¹³⁷ Section 1(a) of the Order provides that:

[i]n managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of

¹³⁰ *Id.*

¹³¹ *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)(AIRFA creates no enforceable rights; court undertook a review of the EIS to ascertain whether the agency gave appropriate consideration to impacts on traditional religion as part of its NEPA compliance obligations).

¹³² *Lockhart v. Kenops*, 927 F.2d 1028, 1036 (8th Cir. 1991)(rejecting claim that agency violated AIRFA by not consulting with Indian religious leaders over a land exchange).

¹³³ 485 U.S. at 452-53 ("No disrespect for these practices is implied when on notes that such beliefs could easily require de facto [Indian] beneficial ownership of some rather spacious tracts of public property.").

¹³⁴ *Id.* at 449.

¹³⁵ *Lockhart v. Kenops*, 927 F.2d at 1036; *United States v. Means*, 858 F.2d 404 (8th Cir. 1988); *Havasupai Tribe v. United States*, 752 F.Supp. at 1485 (Free Exercise claim rejected though proposed mine will allegedly "destroy" traditional religion).

¹³⁶ 485 U.S. at 451.

¹³⁷ Executive Order No. 13007, Preamble.

such sacred sites. Where appropriate, agencies shall maintain the confidentiality of sacred sites.¹³⁸

“Sacred sites” in this context are defined to be “any specific, discrete, narrowly delineated [sacred] location” that is identified to the land management agency by a tribe or by a Native American “determined to be an appropriately authoritative representative of an Indian religion”.¹³⁹ In turn, “sacred” is described as “sacred by virtue of its established religious significance to, or ceremonial use by, and Indian religion.”¹⁴⁰

To implement these goals, Section 2 requires federal land management agencies “to ensure reasonable notice is provided of proposed actions or land management policies that may restrict future access to or ceremonial use of, or adversely affect the physical integrity of, sacred sites.”¹⁴¹ Agencies were also charged with reporting to the President within a year of the Order concerning what procedures have been “implemented or proposed to facilitate consultation with appropriate Indian tribes and religious leaders”¹⁴²

Generally, land management agencies appear to have incorporated their compliance efforts with this Order into other programs managing Indian religious practices on federal lands.

C. Religious Freedom Restoration Act Considerations.¹⁴³

The enactment of the Religious Freedom Restoration Act (“RFRA”)¹⁴⁴ adds another element to consideration of tribal religious and traditional interests. 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*.¹⁴⁵ Section 2 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).

¹³⁸ *Id.*, Section 1(a).

¹³⁹ *Id.*, Section 1(b)(iii).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*, Section 2(a).

¹⁴² *Id.*, Section 2(b)(iii).

¹⁴³ The author would like to acknowledge the assistance of William C. Scott in the preparation of this section of this paper, particularly including the analysis of *Navajo Nation v. United States Forest Service*.

¹⁴⁴ 42 U.S.C. §§ 2000bb - 2000bb-4.

¹⁴⁵ 42 U.S.C. §§ 2000bb. *Smith* was an employment discrimination case involving the regulation of peyote use.

(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.¹⁴⁶

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.¹⁴⁷ RFRA, while not a permitting statute or a law that imposes compliance obligations on project developers, will require additional analysis, however, beyond the Free Exercise Clause matters examined in *Lyng*. Project developers should take time to consult with tribes and related groups to understand the extent to which the project area may encompass or impact areas of religious significance to those groups, and assess the extent to which the project might be subject to RFRA claims if not addressed in some fashion.

The U.S. Court of Appeals for the Ninth Circuit, in a 9-3 decision, stated that a *prima facie* claim under RFRA must establish two elements: "First, the activities the plaintiff claims are burdened by the government action must be an 'exercise of religion' Second, the government action must 'substantially burden' the plaintiff's exercise of religion . . . if the plaintiff cannot prove either element, his RFRA claim fails."¹⁴⁸

According to the court in *Navajo Nation v. United States Forest Service*, the tribal plaintiffs "contend that the use of recycled waste water to make artificial snow for skiing on the Arizona Snowbowl, a ski area that covers approximately one percent of the San Francisco Peaks, will spiritually contaminate the entire mountain and devalue their religious exercises" in violation of RFRA.¹⁴⁹ The Ninth Circuit rejected these claims. In reaching this conclusion, the court sought to draw a bright line between activities that burden Native Americans' exercise of religion and those that do not. As to the first element of the RFRA claim, the Ninth Circuit agreed with the district court that the tribal plaintiffs had sincerely held religious beliefs associated with the San Francisco Peaks.¹⁵⁰

The bulk of the court's analysis, then, focused on the question whether the proposed snowmaking would "substantially burden" the exercise of religion: "The crux of this case, then, is whether the use of recycled wastewater on the Snowbowl

¹⁴⁶ 42 U.S.C. §§ 2000bb-1.

¹⁴⁷ 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*, 78 F.3d 1491 (10th Cir. 1996).

¹⁴⁸ *Navajo Nation v. United States Forest Service*, 535 F.3d 1058, 1068 (9th Cir. 2008)(*en banc*).

¹⁴⁹ *Id.* at 1063.

¹⁵⁰ *Id.*

imposes a 'substantial burden' on the exercise of the Plaintiffs' religion."¹⁵¹ The Ninth Circuit concluded that it does not.¹⁵² As to that question, the Ninth Circuit outlined some of the relevant facts:

The district court also found, however, that there are no plants, springs, natural resources, shrines with religious significance, or religious ceremonies that would be physically affected by the use of such artificial snow. No plants would be destroyed or stunted; no springs polluted; no places of worship made inaccessible, or liturgy modified. The Plaintiffs continue to have virtually unlimited access to the mountain, including the ski area, for religious and cultural purposes. On the mountain, they continue to pray, conduct their religious ceremonies, and collect plants for religious use.¹⁵³

Based on these facts, the Ninth Circuit determined that the "sole effect of the artificial snow is on the Plaintiffs' subjective spiritual experience."¹⁵⁴ In other words, "the presence of the artificial snow on the Peaks is offensive to the Plaintiffs' feelings about their religion and will decrease the spiritual fulfillment Plaintiffs get from practicing their religion on the mountain."¹⁵⁵ The nine member majority held that was insufficient to establish a RFRA violation.¹⁵⁶

The use of recycled wastewater on a ski area that covers 1% of the Peaks does not force the Plaintiffs to choose between following the tenets of their religion and receiving a governmental benefit.... The use of recycled wastewater to make artificial snow also does not coerce the Plaintiffs to act contrary to their religion under the threat of civil or criminal sanctions.... The Plaintiffs are not fined or penalized in any way for practicing their religion on the Peaks or on the Snowbowl. Quite the contrary: the Forest Service "has guaranteed that religious practitioners would still have access to the Snowbowl" and the rest of the Peaks for religious purposes....

The only effect of the proposed upgrades is on the Plaintiffs' subjective, emotional religious experience. That is, the presence of recycled wastewater on the Peaks is offensive to the Plaintiffs' religious sensibilities. To Plaintiffs, it will spiritually desecrate a sacred mountain and will decrease the spiritual fulfillment they get from practicing their religion on the mountain. Nevertheless, under Supreme Court

¹⁵¹ *Id.*

¹⁵² *Id.* at 1070.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 1063-64.

precedent, the diminishment of spiritual fulfillment - serious though it may be - is not a "substantial burden" on the free exercise of religion.¹⁵⁷

The majority explained: a government action that "decreases the spirituality, the fervor, or the satisfaction with which a believer practices his religion is not what Congress has labeled a 'substantial burden' - a term of art chosen by Congress to be defined by reference to Supreme Court precedent - on the free exercise of religion."¹⁵⁸ Where there is no showing the government has "coerced the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions, or conditioned a governmental benefit upon conduct that would violate the Plaintiffs' religious beliefs, there is no 'substantial burden' on the exercise of their religion."¹⁵⁹

Were it otherwise, any action the federal government were to take, including action on its own land, would be subject to the personalized oversight of millions of citizens. Each citizen would hold an individual veto to prohibit the government action simply because it offends his religious beliefs, sensibilities, or tastes, or fails to satisfy his religious desires. Further, giving one religious sect a veto over the use of public park land would deprive others of the right to use what is, by definition, land that belongs to everyone.

"[W]e are a cosmopolitan nation made up of people of almost every conceivable religious preference." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). Our nation recognizes and protects the expression of a great range of religious beliefs. Nevertheless, respecting religious credos is one thing; requiring the government to change its conduct to avoid any perceived slight to them is quite another. No matter how much we might wish the government to conform its conduct to our religious preferences, act in ways that do not offend our religious sensibilities, and take no action that decreases our spiritual fulfillment, no government - let alone a government that presides over a nation with as many religions as the United States of America - could function were it required to do so.¹⁶⁰

The three judge dissent asserted that "spraying 1.5 million gallons per day of treated sewage effluent on the most sacred mountain of southwestern Indian tribes" violated RFRA because it did impose a substantial burden on the Tribes' exercise of religion and was not justified by a compelling government interest.¹⁶¹ Plaintiffs filed a petition for *certiorari* on January 5, 2009, which was assigned U.S. Supreme Court Case No. 08-846. The question presented was "[w]hether a governmental action cannot constitute a 'substantial burden' under RFRA unless it forces individuals to

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 1063.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 1063-64.

¹⁶¹ *Id.* at 1097.

choose between following the tenets of their religion and receiving a governmental benefit or coerces them by threatening civil or criminal sanctions to act contrary to their religious beliefs.” The Supreme Court denied the Petition on June 8, 2009. We will have to await further litigation before getting any guidance from the Supreme Court on this subject. However, people interested in these matters should monitor potential legislative developments. As has been noted earlier in this discussion, judicial decisions have led to legislative changes in this arena.

Irrespective of the specifics of individual court opinions, public lands managers and 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 project modifications that could resolve potential disputes and avoid delays.

IV. Practical Recommendations in Working with Tribes and Related Groups.

Project developers should recognize that tribes are governments, and respect their sovereignty and their recognized role under applicable federal laws and policies. Just as one would seek to open lines of communication early with federal, state, and local governments and agencies, whether or not they will be involved in issuing permits, project proponents should initiate communication with interested tribes early in the project development timeline.¹⁶² As noted above, this may be driven in part by scoping requirements under NEPA and consultation obligations under NHPA Section 106 and other applicable statutes, but one should not limit the conversation to those subjects.

What follows is a list of possible action items to consider in order to aid in effective tribal consultation efforts. Of course, one must exercise some judgment in determining the extent of any investment of time and energy in any of these items. One size does not fit all in this context. The practical suggestions include:

1. Consult early with involved federal (and state) permitting and land management agencies to identify tribes with potential interest in the project area.
2. Consult early with the applicable State Historic Preservation Officer to obtain her input on tribes with potential interest in the project area.
3. Contact tribes on reservation or other Indian lands near the project area to ascertain their potential interest in the project area and to identify their concerns about potential project impacts on their tribal lands. These communications may also help in identifying other tribes with cultural affiliations or historical connections to the project area.

¹⁶² This same recommendation applies to non-governmental organizations (“NGOs”) that are comprised of tribal members.

4. Pursue research to ascertain what tribes have aboriginal connections to the lands within or adjacent to the project area. Tribes with interest in projects may not be limited to tribes on adjacent reservations. For example, there are tribes in Arizona and Oklahoma - mainly Apache - with roots in, and relationships, to lands in New Mexico. To pursue this research effectively, one may want to consult with an historian, ethnographer or anthropologist with experience in researching tribal histories.
5. Engage tribal leadership of potentially interested tribes early in the planning and permitting process. "Tribal leadership" in this context will necessarily vary depending on the tribe, the project and the area.
6. Recognize that there may be competing and different interests as between tribes. Not all tribes will have the same views and positions. These differences may stem from any number of sources.
7. Learn as much as reasonably possible about each tribe with which you may be working, to understanding its governmental structure, treaty and other rights, laws, customs and culture.
8. Develop a clear understanding of tribal sovereignty and demonstrate a sincere respect for each tribe and its sovereignty. Tribes are governments with sovereign authority. While the reach of their sovereign powers may not extend beyond reservation boundaries or onto non-Indian lands, tribes often will have rights that are important to recognize and respect. As discussed in the paper, some of those rights may be treaty rights, while others may be rights provided by statute, regulation, executive order, and policy guidance.
9. If one has questions about a tribe's rights and sovereign position in our federal system, it is best to get an education in those matters before initiating contact with tribal leaders and tribal members.
10. Just as one should open lines of communication with tribal leaders, one should initiate communication with tribally-affiliated non-governmental organizations, with tribal member, grassroots leaders, with religious and traditional practitioners, and other respected locals.
11. As formal and informal regulatory and permitting processes are initiated, consider written and public service announcement communication in the relevant native language(s). While most regulatory schemes do not require such efforts, undertaking communication in that fashion may serve to blunt (not eliminate) potential criticism of the manner in which the agency and proponent are proceeding.
12. Consider retaining a respected tribal member to help advise and assist with developing appropriate communication and public relation strategies.

13. Carefully document communications and consultation efforts and work with agency officials to ensure that the administrative record is clear concerning the extent of tribal and associated consultation.
14. Recognize that each statute and regulatory scheme may have different requirements concerning consultation obligations.
15. Recognize that many issues requiring consultation are of a sensitive nature to the tribal and religious leaders and members with whom you consult. Tribal members may be reluctant to disclose information to people with whom they have not developed a relationship of trust and respect. Even then, some information may continue to be viewed as confidential or sensitive.
16. As a project proponent, remember that some tribal representatives will prefer to consult only with federal agency officials on a “government-to-government” basis.

With these and related pointers, a project proponent may be able to get started on the right (or proper) foot in regulatory and permitting processes requiring tribal consultation.

Thank you for your attention.

Appendix A

Off-Reservation Tribal Consultation Summary Table

Statute or Executive Order	Consulting Entities	Timing	Comments
American Indian Religious Freedom Act	Traditional Practitioners; Religious Leaders; Tribal Officials	None specified; recommend early consultation	Leaders may be reticent to disclose sensitive information
National Historic Preservation Act	Tribal Officials - designated tribal representative could be Tribal Historic Preservation Officer (THPO), but representative does not have to be the THPO; Traditional Cultural Leaders	None specified; should start consultation early; prior to determination of area of potential effect	As with AIRFA, subject of consultation can be sensitive; tribal representatives may be reluctant to disclose information
Native American Graves Protection and Repatriation Act	Tribal Officials; Culturally Affiliated Groups; Lineal Descendants	Where remains are discovered, three days to initiate consultation	Important to consider tribal customs concerning death
Religious Freedom Restoration Act	Traditional and Religious Leaders or Practitioners	None specified; recommend early initiation of consultation	
Sacred Sites; Executive Order 13007	Tribal Officials; Traditional and Religious Leaders	None specified	Leaders may prefer to retain confidentiality of sites; agencies are obligated to do the same
National Environmental Policy Act	Tribal Officials; Native Non-Governmental Organizations	Begin with Scoping	“Early and often”

Appendix B

NAGPRA Implementing Regulations: Key Consultation Provisions

The National Park Service's implementing regulations found at 43 C.F.R. Part 10 includes specific requirements to implement NAGPRA's key consultation obligations. Of particular importance are 43 C.F.R. §§ 10.3, 10.5, and 10.14. Given their importance, I have taken the liberty of providing significant quotes from the regulations.

Section 10.3, titled "Intentional archaeological excavations," provides in pertinent part:

(a) **General.** This section carries out section 3 (c) of the Act regarding the custody of human remains, funerary objects, sacred objects, or objects of cultural patrimony that are excavated intentionally from Federal or tribal lands after November 16, 1990.

(b) **Specific Requirements.** These regulations permit the intentional excavation of human remains, funerary objects, sacred objects, or objects of cultural patrimony from Federal or tribal lands only if:

(1) The objects are excavated or removed following the requirements of the Archaeological Resources Protection Act (ARPA) (16 U.S.C. 470aa et seq.) and its implementing regulations. * * * For BIA procedures for obtaining such permits, see 25 CFR Part 262 or contact the Deputy Commissioner of Indian Affairs, Department of the Interior, Washington, DC 20240. * * * Procedures and requirements for issuing permits will be consistent with those required by the ARPA and its implementing regulations;

(2) **The objects are excavated after** consultation with or, in the case of tribal lands, **consent of, the appropriate Indian tribe or Native Hawaiian organization pursuant to Sec. 10.5;**

(3) The disposition of the objects is consistent with their custody as described in Sec. 10.6; and

(4) **Proof of the consultation or consent is shown to the Federal agency official or other agency official responsible for the issuance of the required permit.**

(c) **Procedures.** (1) **The Federal agency official must take reasonable steps** to determine whether a planned activity may result in the excavation of human remains, funerary objects, sacred objects, or objects of cultural patrimony from Federal lands. **Prior to issuing any**

approvals or permits for activities, the Federal agency official must notify in writing the Indian tribes or Native Hawaiian organizations that are likely to be culturally affiliated with any human remains, funerary objects, sacred objects, or objects of cultural patrimony that may be excavated. The Federal agency official must also notify any present-day Indian tribe which aboriginally occupied the area of the planned activity and any other Indian tribes or Native Hawaiian organizations that the Federal agency official reasonably believes are likely to have a cultural relationship to the human remains, funerary objects, sacred objects, or objects of cultural patrimony that are expected to be found. The notice must be in writing and describe the planned activity, its general location, the basis upon which it was determined that human remains, funerary objects, sacred objects, or objects of cultural patrimony may be excavated, and, the basis for determining likely custody pursuant to Sec. 10.6. The notice must also propose a time and place for meetings or consultations to further consider the activity, the Federal agency's proposed treatment of any human remains, funerary objects, sacred objects, or objects of cultural patrimony that may be excavated, and the proposed disposition of any excavated human remains, funerary objects, sacred objects, or objects of cultural patrimony. Written notification should be followed up by telephone contact if there is no response in 15 days. Consultation must be conducted pursuant to Sec. 10.5.

(2) Following consultation, the Federal agency official must complete a written plan of action (described in Sec. 10.5(e)) and execute the actions called for in it.

(3) If the planned activity is also subject to review under section 106 of the National Historic Preservation Act (16 U.S.C. 470 et seq.), the Federal agency official should coordinate consultation and any subsequent agreement for compliance conducted under that Act with the requirements of Sec. 10.3 (c)(2) and Sec. 10.5. Compliance with these regulations does not relieve Federal agency officials of requirements to comply with section 106 of the National Historic Preservation Act (16 U.S.C. 470 et seq.).

(4) If an Indian tribe or Native Hawaiian organization receives notice of a planned activity or otherwise becomes aware of a planned activity that may result in the excavation of human remains, funerary objects, sacred objects, or objects of cultural patrimony on tribal lands, the Indian tribe or Native Hawaiian organization may take appropriate steps to: (i) Ensure that the human remains, funerary objects, sacred objects, or objects of cultural patrimony are excavated or removed following Sec. 10.3 (b), and (ii) Make certain that the disposition of any human remains, funerary objects, sacred

objects, or objects of cultural patrimony excavated intentionally or discovered inadvertently as a result of the planned activity are carried out following Sec. 10.6.

Section 10.5, titled “Consultation,” provides:

Consultation as part of the intentional excavation or inadvertent discovery of human remains, funerary objects, sacred objects, or objects of cultural patrimony on Federal lands must be conducted in accordance with the following requirements.

(a) Consulting parties. Federal agency officials must consult with known lineal descendants and Indian tribe officials:

(1) From Indian tribes on whose aboriginal lands the planned activity will occur or where the inadvertent discovery has been made; and

(2) From Indian tribes and Native Hawaiian organizations that are, or are likely to be, culturally affiliated with the human remains, funerary objects, sacred objects, or objects of cultural patrimony; and

(3) From Indian tribes and Native Hawaiian organizations that have a demonstrated cultural relationship with the human remains, funerary objects, sacred objects, or objects of cultural patrimony.

(b) Initiation of consultation. (1) Upon receiving notice of, or otherwise becoming aware of, an inadvertent discovery or planned activity that has resulted or may result in the intentional excavation or inadvertent discovery of human remains, funerary objects, sacred objects, or objects of cultural patrimony on Federal lands, the responsible Federal agency official must, as part of the procedures described in Sec. Sec. 10.3 and 10.4, take appropriate steps to identify the lineal descendant, Indian tribe, or Native Hawaiian organization entitled to custody of the human remains, funerary objects, sacred objects, or objects of cultural patrimony pursuant to Sec. 10.6 and Sec. 10.14. The Federal agency official shall notify in writing: (i) Any known lineal descendants of the individual whose remains, funerary objects, sacred objects, or objects of cultural patrimony have been or are likely to be excavated intentionally or discovered inadvertently; and (ii) The Indian tribes or Native Hawaiian organizations that are likely to be culturally affiliated with the human remains, funerary objects, sacred objects, or objects of cultural patrimony that have been or are likely to be excavated intentionally or discovered inadvertently; and (iii) The Indian tribes which aboriginally occupied the area in which the human remains, funerary

objects, sacred objects, or objects of cultural patrimony have been or are likely to be excavated intentionally or discovered inadvertently; and (iv) The Indian tribes or Native Hawaiian organizations that have a demonstrated cultural relationship with the human remains, funerary objects, sacred objects, or objects of cultural patrimony that have been or are likely to be excavated intentionally or discovered inadvertently.

(2) The notice must propose a time and place for meetings or consultation to further consider the intentional excavation or inadvertent discovery, the Federal agency's proposed treatment of the human remains, funerary objects, sacred objects, or objects of cultural patrimony that may be excavated, and the proposed disposition of any intentionally excavated or inadvertently discovered human remains, funerary objects, sacred objects, or objects of cultural patrimony.

(3) The consultation must seek to identify traditional religious leaders who should also be consulted and seek to identify, where applicable, lineal descendants and Indian tribes or Native Hawaiian organizations affiliated with the human remains, funerary objects, sacred objects, or objects of cultural patrimony.

(c) **Provision of information.** During the consultation process, as appropriate, the Federal agency official must provide the following information in writing to the lineal descendants and the officials of Indian tribes or Native Hawaiian organizations that are or are likely to be affiliated with the human remains, funerary objects, sacred objects, or objects of cultural patrimony excavated intentionally or discovered inadvertently on Federal lands:

(1) A list of all lineal descendants and Indian tribes or Native Hawaiian organizations that are being, or have been, consulted regarding the particular human remains, funerary objects, sacred objects, or objects of cultural patrimony;

(2) An indication that additional documentation used to identify affiliation will be supplied upon request.

(d) **Requests for information.** During the consultation process, Federal agency officials must request, as appropriate, the following information from Indian tribes or Native Hawaiian organizations that are, or are likely to be, affiliated pursuant to Sec. 10.6 (a) with intentionally excavated or inadvertently discovered human remains, funerary objects, sacred objects, or objects of cultural patrimony:

(1) Name and address of the Indian tribe official to act as representative in consultations related to particular human remains, funerary objects, sacred objects, or objects of cultural patrimony;

(2) Names and appropriate methods to contact lineal descendants who should be contacted to participate in the consultation process;

(3) Recommendations on how the consultation process should be conducted; and

(4) Kinds of cultural items that the Indian tribe or Native Hawaiian organization considers likely to be unassociated funerary objects, sacred objects, or objects of cultural patrimony.

(e) Written plan of action. Following consultation, the Federal agency official must prepare, approve, and sign a written plan of action. A copy of this plan of action must be provided to the lineal descendants, Indian tribes and Native Hawaiian organizations involved. Lineal descendants and Indian tribe official(s) may sign the written plan of action as appropriate. At a minimum, the plan of action must comply with Sec. 10.3 (b)(1) and document the following:

(1) The kinds of objects to be considered as cultural items as defined in Sec. 10.2 (b);

(2) The specific information used to determine custody pursuant to Sec. 10.6;

(3) The planned treatment, care, and handling of human remains, funerary objects, sacred objects, or objects of cultural patrimony recovered;

(4) The planned archeological recording of the human remains, funerary objects, sacred objects, or objects of cultural patrimony recovered;

(5) The kinds of analysis planned for each kind of object;

(6) Any steps to be followed to contact Indian tribe officials at the time of intentional excavation or inadvertent discovery of specific human remains, funerary objects, sacred objects, or objects of cultural patrimony;

(7) The kind of traditional treatment, if any, to be afforded the human remains, funerary objects, sacred objects, or objects of cultural patrimony by members of the Indian tribe or Native Hawaiian

organization;

(8) The nature of reports to be prepared; and

(9) The planned disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony following Sec. 10.6.

(f) Comprehensive agreements. Whenever possible, Federal Agencies should enter into comprehensive agreements with Indian tribes or Native Hawaiian organizations that are affiliated with human remains, funerary objects, sacred objects, or objects of cultural patrimony and have claimed, or are likely to claim, those human remains, funerary objects, sacred objects, or objects of cultural patrimony excavated intentionally or discovered inadvertently on Federal lands. These agreements should address all Federal agency land management activities that could result in the intentional excavation or inadvertent discovery of human remains, funerary objects, sacred objects, or objects of cultural patrimony. Consultation should lead to the establishment of a process for effectively carrying out the requirements of these regulations regarding standard consultation procedures, the determination of custody consistent with procedures in this section and Sec. 10.6, and the treatment and disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony. The signed agreements, or the correspondence related to the effort to reach agreements, must constitute proof of consultation as required by these regulations.

(g) Traditional religious leaders. The Federal agency official must be cognizant that Indian tribe officials may need to confer with traditional religious leaders prior to making recommendations. Indian tribe officials are under no obligation to reveal the identity of traditional religious leaders.

43 C.F.R. § 10.14, titled “Lineal descent and cultural affiliation,” provides:

(a) General. This section identifies procedures for determining lineal descent and cultural affiliation between present-day individuals and Indian tribes or Native Hawaiian organizations and human remains, funerary objects, sacred objects, or objects of cultural patrimony in museum or Federal agency collections or excavated intentionally or discovered inadvertently from Federal lands. They may also be used by Indian tribes and Native Hawaiian organizations with respect to tribal lands.

(b) Criteria for determining lineal descent. A lineal descendant is an individual tracing his or her ancestry directly and without

interruption by means of the traditional kinship system of the appropriate Indian tribe or Native Hawaiian organization or by the common law system of descent to a known Native American individual whose remains, funerary objects, or sacred objects are being requested under these regulations. This standard requires that the earlier person be identified as an individual whose descendants can be traced.

(c) Criteria for determining cultural affiliation. Cultural affiliation means a relationship of shared group identity that may be reasonably traced historically or prehistorically between a present-day Indian tribe or Native Hawaiian organization and an identifiable earlier group. All of the following requirements must be met to determine cultural affiliation between a present-day Indian tribe or Native Hawaiian organization and the human remains, funerary objects, sacred objects, or objects of cultural patrimony of an earlier group:

(1) Existence of an identifiable present-day Indian tribe or Native Hawaiian organization with standing under these regulations and the Act;
and

(2) Evidence of the existence of an identifiable earlier group. Support for this requirement may include, but is not necessarily limited to evidence sufficient to: (i) Establish the identity and cultural characteristics of the earlier group, (ii) Document distinct patterns of material culture manufacture and distribution methods for the earlier group, or (iii) Establish the existence of the earlier group as a biologically distinct population; and

(3) Evidence of the existence of a shared group identity that can be reasonably traced between the present-day Indian tribe or Native Hawaiian organization and the earlier group. Evidence to support this requirement must establish that a present-day Indian tribe or Native Hawaiian organization has been identified from prehistoric or historic times to the present as descending from the earlier group.

(d) A finding of cultural affiliation should be based upon an overall evaluation of the totality of the circumstances and evidence pertaining to the connection between the claimant and the material being claimed and should not be precluded solely because of some gaps in the record.

(e) Evidence. Evidence of a kin or cultural affiliation between a present-day individual, Indian tribe, or Native Hawaiian organization and human remains, funerary objects, sacred objects, or objects of

cultural patrimony must be established by using the following types of evidence: Geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical, or other relevant information or expert opinion.

(f) **Standard of proof.** Lineal descent of a present-day individual from an earlier individual and cultural affiliation of a present-day Indian tribe or Native Hawaiian organization to human remains, funerary objects, sacred objects, or objects of cultural patrimony must be established by a preponderance of the evidence. Claimants do not have to establish cultural affiliation with scientific certainty.