



Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites: Policy Review Report

By

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EXECUTIVE SUMMARY

Federal land managing agencies hold in public trust a great diversity of landscapes and sites, including many culturally important sites held sacred by Indian tribes. Recognizing a common goal and obligation to consider the impacts of agency actions on historic properties of traditional cultural and religious importance to tribes, on December 5, 2012, five Federal agencies (the Departments of Defense, the Interior, Agriculture, and Energy and the Advisory Council on Historic Preservation (ACHP)) entered into a memorandum of understanding (MOU) to improve the protection of and Indian access to sacred sites through interagency coordination and collaboration.

MOU COMMITMENTS

The MOU is a five-year commitment by the signatories to carry out 11 specific action items as well as a review of existing Federal authorities. The action items revolve around five themes: (1) improving training and guidance for Federal staff regarding sacred sites and how to collaborate effectively with tribes on sacred sites issues; (2) developing best management practices and building agency and tribal capacity to more effectively address sacred sites issues; (3) identifying and analyzing mechanisms for, and developing recommendations related to, the confidentiality of information about sacred sites; (4) increasing outreach to the public and non-Federal partners about maintaining the integrity of sacred sites and the need for public stewardship; and (5) reviewing the legal authorities related to sacred sites and identifying and making recommendations to address impediments to the protection of sacred sites.

In developing and implementing each of the action items, the agencies committed to consulting with tribes as appropriate to gain valuable feedback, insight, and recommendations on potential improvements.

An Executive Working Group of policy level officials, currently chaired by the Department of the Interior, was formed to oversee implementation of the MOU, and in March 2013, the group released an Action Plan that outlines how the agencies will implement the MOU.

Day-to-day implementation of that Action Plan is the responsibility of a Core Working Group, which includes staff from each of the MOU agencies. Additionally, key subject matter experts and technical staff from each agency were identified to provide input and expertise to each area of the MOU and Action Plan. Names of the individuals who assisted in the preparation of this report are included in the Acknowledgements section.

INTRODUCTION

An important component of the Sacred Sites Memorandum of Understanding (MOU) is to ensure a comprehensive understanding of the laws, policies, and practices that Federal agencies follow in their management and treatment of sacred sites. This report documents the review of authorized identified in the MOU and the findings and recommendations of the signatories regarding those authorities. The Advisory Council on Historic Preservation (ACHP) was the lead on managing the Policy Subgroup.

TASKS

The MOU and Action Plan identified four primary tasks regarding existing Federal statutes and Executive orders:

- Review the following authorities to determine their potential relevance to sacred sites:
 - Executive Order 13007: Indian Sacred Sites
 - National Historic Preservation Act (NHPA)
 - National Environmental Policy Act (NEPA)
 - Native American Graves Protection and Repatriation Act (NAGPRA)
 - American Indian Religious Freedom Act (AIRFA)
 - Religious Freedom Restoration Act (RFRA)
 - Executive Order 13175: Consultation and Coordination with Indian Tribal Governments
 - Executive Order 12898: Environmental Justice
- Determine if additional inter-agency measures may be warranted to better protect sacred sites.
- Identify impediments to Federal-level protection of sacred sites.
- Make recommendations to the Executive Working Group to address those impediments.

REVIEW AND FINDINGS

As required by the MOU and the Action Plan, the Subgroup reviewed the authorities listed above to determine their relevance to sacred sites and to identify strengths and limitations that might exist under each of these authorities. In addition to reviewing these authorities, the Subgroup also reviewed the regulations implementing NAGPRA, NEPA, and Section 106 of the NHPA because these regulations also play a major role in how sacred sites are addressed by Federal agencies. The Subgroup also added the Archeological Resources Protection Act (ARPA) to the review because of its relationship to NAGPRA.

In conducting its review, the Subgroup also identified the strengths and limitations of each of the authorities in the MOU and the Action Plan. The full evaluations of the listed Federal authorities are presented at Attachment A.

In considering the relevance of the authorities to sacred sites, the Subgroup determined that the effectiveness of statutes and, to a limited extent, Executive orders is affected by court cases and decisions. Accordingly, the Subgroup also reviewed some of the more prominent court cases related to the listed authorities. An extensive review was beyond the scope of this report so it does not include every applicable case. In any case, the Subgroup's review is not intended to, and does not, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity, by any party against the United States, its agencies, its officers, or any person.

Based on its review of the authorities discussed above, the Subgroup finds that there is no single Federal authority that requires the preservation or protection of Indian sacred sites. Instead, there is a suite of Federal statutes and Executive orders that, taken together, create a Federal policy of "stop, look, listen" before making decisions that might affect Indian sacred sites. To the extent that various Federal authorities require agencies to collect information and talk with interested parties including Indian tribes about sacred sites, Indian tribes are afforded the opportunity to influence Federal decisions.

The Subgroup also finds that:

- There are only two Federal authorities that specifically address Indian sacred sites: the American Indian Religious Freedom Act (AIRFA) and Executive Order (E.O.) 13007: Indian Sacred Sites. While it clearly defines Federal policy, the effectiveness of AIRFA as a protective mechanism was significantly delimited through subsequent court cases. E.O. 13007 also established policy, directing Federal land managing agencies to: 1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and 2) avoid adversely affecting the physical integrity of such sacred sites. In doing so, agencies are instructed to maintain confidentiality regarding sacred sites. However, E.O. 13007 applies only to sacred sites on Federal land.
- RFRA contributes to a policy preserving religious freedom for Indian tribes and individuals.
- Procedural laws and regulations in NAGPRA, NEPA, and NHPA constitute limited protective measures. NAGPRA provides for tribe ownership or control of cultural items from grave sites. NEPA provides for analysis of impacts to cultural resources, including sacred sites, and provides for consideration of environmental justice (E.O. 12898). NHPA provides the most effective means of considering the effects of Federal projects on sacred sites. ARPA and NHPA are withholding statutes that offer some protection of confidential information related to sacred sites.
- No Federal law creates a private right of action against the Federal Government for destroying or impacting sacred sites. Cases can be brought under the Administrative Procedure Act regarding compliance with NEPA and NHPA. Courts are able to review the adequacy of the Federal agency's compliance with required statutory processes. Where courts find mindful compliance with the laws, there is no further protection for sacred sites available under existing authorities or from the courts.

- Conflicting requirements among Federal statutes and/or regulations or among Federal and state requirements can also create challenges to a Federal agency's ability to take an action that either preserves a sacred site or avoids impacts to it.
- When Section 106 of the NHPA and NEPA are integrated, this marriage of laws and review and analysis protocols provides perhaps the greatest extant protection for sacred sites in an operational sense.
- Sacred sites or access to sacred sites may be considered in the analysis of environmental justice.

NEXT STEPS

In the course of reviewing the authorities listed in the MOU and the Action Plan, the Subgroup determined that a review of these authorities alone does not provide adequate information upon which to “determine if additional inter-agency measures may be warranted to better protect sacred sites” or to identify “impediments to Federal-level protection of sacred sites” as called for in the MOU.

To some extent, since none of the statutes and Executive orders prescribes a specific outcome, i.e., mandatory protection and preservation of a sacred site, they allow for Federal agency discretion in decision making. Therefore, potential impediments are as much about how an agency implements its responsibilities under these authorities as it is about what the authorities require. For example, there is nothing in any of these authorities that prohibits a Federal agency from ensuring the protection of a sacred site. Therefore, an agency must recognize that it could use its discretion under these authorities to protect a sacred site regardless of all the other interests it must balance. Accordingly, the impediments may not be inherent in the statutes or Executive orders but rather in how Federal agencies make decisions under these authorities.

The Policy Review Subgroup will next undertake a review of existing guidance, policies, and internal directives of the signatories. These documents will not only reveal how each signatory has interpreted its responsibilities under Federal statutes and Executive orders but may include provisions that could be adapted for use as interagency measures to better protect Indian sacred sites. For example, the U.S. Department of Agriculture recently released its Report to the Secretary of Agriculture entitled, “USDA Policy and Procedures Review and Recommendations: Indian Sacred Sites,” concluding two years of research and consultation. Any recommendations for potential interagency measures, at a minimum, should take into consideration USDA's report. This level of research to locate agency-specific documents and evaluate them was beyond the scope of effort for this year's implementation of the MOU and Action Plan. Instead, the Subgroup will undertake this analysis in 2014.

As the Subgroup develops any preliminary recommendations regarding potential measures for improved protection of Indian sacred sites, the agencies will seek continued dialogue with tribal leaders.

ACKNOWLEDGEMENTS

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Attachment A: Evaluations of the Authorities Listed in the MOU and Action Plan

This attachment includes the individual evaluations of the authorities listed in the MOU and Action Plan:

Executive Order 13007: Indian Sacred Sites

National Historic Preservation Act

National Environmental Policy Act

Native American Graves Protection and Repatriation Act

American Indian Religious Freedom Act

Religious Freedom Restoration Act

Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

Executive Order 12898: Environmental Justice

Archeological Resources Protection Act (added by the Policy Review subgroup)

EXECUTIVE ORDER 13007 INDIAN SACRED SITES

Summary

Executive Order 13007: Indian Sacred Sites (E.O. 13007), issued in 1996, directs Federal land managing agencies to: 1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and 2) avoid adversely affecting the physical integrity of such sacred sites. In doing so, Federal agencies are instructed to maintain confidentiality regarding sacred sites.

Federal agencies are required to implement procedures for meeting these requirements, including (where practicable) procedures to notify Indian tribes of proposed actions or policies that may restrict future access to or use of sacred sites or adversely affect them. Agencies were required to report to the President within one year on their implementation of the Executive order.

Relevance to the protection of sacred sites

E.O. 13007 is the only Federal statute or Executive order that deals solely with sacred sites.

Summary of relevant implementing regulations

By virtue of being an Executive order, there are no implementing regulations.

Strengths as a tool for protecting sacred sites

- In the absence of comprehensive legislation addressing protection of sacred sites, E.O. 13007 provides strong directives to Federal agencies.
- Despite caveats (discussed below), E.O. 13007 not only requires agencies to accommodate access to sacred sites but also to avoid adversely affecting them.
- The primacy of tribal identification of sites is foundational to the order's definition of a sacred site. Sites do not need to pass any further test of their significance, such as being found eligible for the National Register of Historic Places.
- Federal agencies are required to be proactive in communicating with Indian tribes to notify them of actions or policies that may affect sacred sites. The order also indicates that agencies should have procedures in place to facilitate government-to-government consultation with tribes to resolve disputes arising from such actions or policies.
- E.O. 13007 requires agencies to maintain confidentiality regarding sacred sites.

Limitations as a tool for protecting sacred sites

- E.O. 13007 does not create any private right of action against the Federal government in court.
- The Executive order instructs agencies to accommodate access to sacred sites and to avoid adversely affecting them, but provides that agencies should do so "to the extent practicable, permitted by law, and not clearly inconsistent with essential agency

functions.” While providing land managers some flexibility in juggling competing needs, these provisions could be an avenue for agencies to attempt to circumvent the intent of the order.

- The Executive order’s definition of a sacred site states that it must be a “specific, discrete, narrowly delineated location.” This requirement may be difficult to meet when large landscapes are considered sacred. Indeed, the phrase “narrowly delineated” could be read to suggest that such large landscapes are not covered by the order’s definition of a sacred site.
- Only sacred sites on Federal land are addressed.

Where decision making rests

Although Indian tribes define what is sacred, Federal agencies are the ultimate decision makers as to how such sites are treated under E.O. 13007.

Brief summary of court decisions and the effect on utility regarding sacred sites protection

Failing to consider E.O. 13007 may be arbitrary and capricious agency action in the 9th Circuit, but otherwise courts have not analyzed E.O. 13007 in the context of sacred sites. At least one court has held agencies may include the E.O. as a basis for action in internal guidelines. (*Mineral Policy Center v. Norton*, 292 F.Supp. 2d, 2009).

NATIONAL HISTORIC PRESERVATION ACT

Summary

The National Historic Preservation Act (NHPA), passed in 1966, expresses a general policy of supporting and encouraging the preservation of historic properties for present and future generations, directing Federal agencies to assume responsibility for considering such properties in their activities. The NHPA does not mandate preservation but requires Federal agencies to consider the impact of their undertakings on historic properties. The statute sets forth a multifaceted preservation scheme to accomplish these policies and mandates at the state and Federal levels.

Relevance to the protection of sacred sites

The NHPA addresses “historic properties” which are defined as “any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties.” Amendments to the NHPA in 1992 clarified that properties of religious and cultural significance to Indian tribes and Native Hawaiian organizations could be eligible for the National Register of Historic Places (National Register)¹ and that Federal agencies are required to consult with Indian tribes and Native Hawaiian organizations in meeting their responsibilities under Section 106 of the NHPA.

Section 106 of the NHPA requires Federal agencies to take into account the effects of their undertakings on historic properties, and afford the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment. Since these historic properties include those that are of religious and cultural significance to an Indian tribe, Federal agencies must consider the effects of their proposed actions on such properties. Further, Federal agencies are required to consult with Indian tribes when these properties may be affected by an undertaking, thus, affording Indian tribes an opportunity to influence Federal decision making regarding such properties.

Sacred sites may be eligible for the National Register; therefore, Federal agencies would be required to consider the effects of their proposed projects on them.

Summary of relevant implementing regulations

Federal agencies meet the requirements of Section 106 including tribal consultation by carrying out the process outlined in regulations issued by ACHP at 36 C.F.R. Part 800.

Strengths as a tool for protecting sacred sites

¹ The National Register of Historic Places is the official list of the Nation's historic places worthy of preservation. Authorized by the National Historic Preservation Act of 1966, the National Park Service's National Register of Historic Places is part of a national program to coordinate and support public and private efforts to identify, evaluate, and protect America's historic and archeological resources.

- The statute and Section 106 regulations require consultation with Indian tribes, thus affording Indian tribes an opportunity to influence Federal decision making that may have an impact on historic properties which are sacred to them.
- It applies to historic properties anywhere in the United States.
- There is a provision for protecting sensitive information at Section 304 of the NHPA. Information on the location, character, or ownership of historic resources must not be disclosed if it might cause a significant invasion of privacy, risk harm to the historic resources, or impede the use of a traditional religious site by practitioners.
- Pursuant to the Administrative Procedure Act, Indian tribes can bring suit against a Federal agency challenging the adequacy of an agency's conduct of the Section 106 process and seek an injunction pending resolution of the case.

Limitations as a tool for protecting sacred sites

- While the NHPA requires Federal agencies to consider the effects of their actions on historic properties, it does not require that such properties be preserved or protected.
- Only sacred sites that meet the criteria for listing in the National Register are considered under the NHPA.
- For a variety of reasons, the National Register criteria are not necessarily a good fit for sacred sites.

Where decision making rests

The Federal agency, in consultation with others including Indian tribes, determines which properties are eligible for the National Register and what effects its actions will have on those properties. In making its decisions, the Federal agency must take into account the views of others but remains the decision maker regarding all aspects of the Section 106 process.

Brief summary of court decisions and the effect on utility regarding sacred sites protection

There are no court decisions that have diminished or impeded the Federal government's ability to take into account the effect of its actions on historic properties of religious and cultural significance to historic properties. Decisions make clear that mindful application of this law and the process are required, not a particular level of protection or preservation. There is a split between circuits as to whether NHPA creates a cause of action or is enforceable only through the Administrative Procedure Act.

Courts have recognized a failure to protect when agencies do not appropriately follow the procedures of the NHPA. Where actions, i.e., litigation, against agencies failed under NHPA, it was because the agency mindfully fulfilled the procedural requirements under NHPA (to consult and consider adverse effects); the tribe bringing action was not federally recognized (*Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 2008) or the Federal action was dictated by Congress (*Sequoyah v. TVA*, 620 F.2d 1159, 1980). NHPA's confidentiality provision is only protective of sacred sites information if it has gone through the statutory withholding process; if the

information is mid-process then it is vulnerable to release under the Freedom of Information Act (FOIA). (*Hornbostel v. USDOJ*, 305 F.Supp.2d 21, 2003).

NATIONAL ENVIRONMENTAL POLICY ACT

Summary

Signed into law in 1970, the fundamental goal of the National Environmental Policy Act (NEPA) is to foster and maintain conditions under which man and nature can exist in productive harmony while still fulfilling the social, economic, and other requirements of present and future generations. To accomplish this, NEPA mandates that Federal agencies must assess the impact of their proposed actions on the environment before deciding on how to proceed.

This calls for the evaluation of reasonable alternatives to a proposed Federal action; solicitation of input from organizations and individuals that could potentially be affected; and the unbiased presentation of direct, indirect, and cumulative environmental impacts.

Relevance to the protection of sacred sites

While sacred sites are not specifically mentioned in NEPA, a stated policy of the law is to “preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice.” If a sacred site could be affected by a proposed Federal action, that proposed action generally is subject to NEPA review.

Summary of relevant implementing regulations

Regulations (40 C.F.R. Parts 1500-1508) established by the Council on Environmental Quality (CEQ) set the standard for NEPA compliance. They also require Federal agencies to create their own NEPA implementing procedures. These procedures must meet the CEQ standard while reflecting each agency's unique mandate and mission. Consequently, NEPA procedures vary from agency to agency.

NEPA regulations establish a review process whereby a Federal agency gathers data in order to determine whether its proposed action could significantly affect the quality of the human environment. Some proposed actions fall into identified categories that normally do not have significant environmental impacts, and these categorical exclusions require minimal review. Other proposed actions require further study through the development of an Environmental Assessment in order to determine the scope of their potential impacts. Proposed actions with the potential for significant effects require development of a detailed Environmental Impact Statement.

Strengths as a tool for protecting sacred sites

- The adequacy of a proposed project's review under NEPA is subject to judicial review under the Administrative Procedure Act. Since the mandate of NEPA is essentially procedural, a court cannot rule on the result of the NEPA review but can rule on whether regulatory procedure was followed and whether further review is required. A court can also issue an injunction to stop the project from proceeding until the case is resolved.
- CEQ's implementing regulations (and agency procedures) require consultation with Indian tribes at key points during the NEPA review process.
- Impacts to sacred sites both on and off Federal land are subject to review.

Limitations as a tool for protecting sacred sites

- Sacred sites are not specifically mentioned in the law or the CEQ regulations. Although impacts to such sites still can be assessed under NEPA in the context of considering impacts on historic and cultural resources, the law does not specifically address the sacred nature of such sites.
- While NEPA requires Federal agencies to consider the effects of their actions on historic and cultural properties (which can include sacred sites), it does not require that such properties be preserved or protected.

Where decision making rests

Federal agencies are the ultimate decision makers.

Brief summary of court decisions and the effect on utility regarding sacred sites protection

Courts have limited ability to protect sacred sites under NEPA. Courts have found grounds for enjoining Federal actions that failed to consider impacts to sacred sites under NEPA analysis (see, for example, *Muckleshoot Indian Tribe v. USFS*, 177 F.3d 800, 1999; *Pit River Tribe V. USFS*, 469 F.3d 768, 2006). By the same token, because NEPA is purely procedural, courts have consistently found that if an agency gave thoughtful consideration to impacts to sacred sites, then the agency complied with NEPA, regardless of the nature of the impacts (see, for example, *Navajo Nation v. USFS*, 535 F.3d 1058, 2008; *Conservation Law Foundation v. FERC*, 216 F.3d 41, 2000).

NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

Summary

The Native American Graves Protection and Repatriation Act (NAGPRA) was enacted in 1990 to address the rights of Native Americans to control the disposition of their own cultural items, including those previously obtained by museums.

NAGPRA provides a process for federally-supported museums and Federal agencies to return certain Native American cultural items -- human remains, funerary objects, sacred objects, or objects of cultural patrimony -- to lineal descendants, and culturally affiliated Indian tribes and Native Hawaiian organizations. NAGPRA includes provisions addressing unclaimed and culturally unidentifiable Native American cultural items, intentional and inadvertent discovery of Native American cultural items on Federal and tribal lands, and penalties for noncompliance and illegal trafficking.

Relevance to the protection of sacred sites

NAGPRA is relevant to a certain type of sacred site, i.e., Native American burial sites which may be considered sacred by an Indian tribe or tribes. NAGPRA defines burial sites as “any natural or prepared physical location, whether originally below on, or above the surface of the earth, into which as a part of the death rite or ceremony of a culture, individual human remains are deposited.”

Section 3 of NAGPRA requires a permit issued under section 4 of the Archaeological Resources Protection Act of 1979 (ARPA) for the excavation or removal of Native American cultural items from Federal or tribal lands. It also requires tribal consent for the removal of human remains and cultural items on tribal lands and tribal consultation for such removals on Federal lands. While consultation does not necessarily lead to protection, it does afford an Indian tribe the opportunity to influence Federal decision making.

Summary of relevant implementing regulations

The regulations, at 43 C.F.R. Part 10, carry out provisions of NAGPRA. These regulations develop a systematic process for determining the rights of lineal descendants and Indian tribes and Native Hawaiian organizations to certain Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony with which they are affiliated.

These regulations pertain to the identification and appropriate disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony that are:

- (i) In Federal possession or control; or
- (ii) In the possession or control of any institution or State or local government receiving Federal funds; or
- (iii) Excavated intentionally or discovered inadvertently on Federal or tribal lands.

Strengths as a tool for protecting sacred sites

On Federal and tribal lands, NAGPRA and its implementing regulations require:

- Tribal consent for the removal of human remains and funerary objects inadvertently discovered on tribal lands.

- Tribal consultation for both intentional excavation and inadvertent discoveries on Federal land.
- Pursuant to the Administrative Procedure Act, Indian tribes can bring suit against a Federal agency challenging the validity of the NAGPRA process and seek an injunction pending resolution of the case.

Limitations as a tool for protecting sacred sites

NAGPRA and its implementing regulations do not:

- Provide protection for Native American human remains, funerary objects, sacred objects or items of cultural patrimony on state, local government, or private lands, or
- Require the in situ preservation of burial sites.

Where decision making rests

On tribal lands, the tribe decides whether or not human burials and cultural items may be disturbed. On Federal lands, the Federal agency makes the decision but does so in consultation with Indian tribes.

Brief summary of court decisions and the effect on utility regarding sacred sites protection

NAGPRA has been primarily used successfully in the protection of sacred sites which were also burial sites to temporarily enjoin Federal activity harming burial sites associated with a sacred site. (See, for example, *Yankton Sioux Tribe v. USACE*, 258 F.Supp.2d 1027, 2003).

AMERICAN INDIAN RELIGIOUS FREEDOM ACT

Summary

The American Indian Religious Freedom Act (AIRFA) was passed in 1978 to address a long standing pattern of abridging the First Amendment rights of Native Americans to the free exercise of religion. Throughout most of the United States' history, Native American religious practices had been discouraged or actively repressed. AIRFA was passed in an effort to end such discrimination.

AIRFA establishes as policy that the United States will protect and preserve for American Indians, Alaska natives, and Native Hawaiians their freedom to exercise their traditional religions. Specific aspects of such freedom identified in the law are: access to sacred sites; use and possession of sacred objects; and worship through ceremonials and traditional rites. In 1994, AIRFA was amended to specifically provide for the use of peyote (an otherwise controlled substance) in traditional religious ceremonies. AIRFA also required the President to report to Congress within one year regarding changes made to Federal agency policies and procedures as a result of the Act and any recommendations for further legislative action.

Relevance to the protection of sacred sites

AIRFA specifically includes "access to sites" as covered by the law's policy of protecting American Indian religious freedom. AIRFA's preamble notes that Federal laws and policies "often deny American Indians access to sacred sites required in their religions, including cemeteries." Protection of such sites is not specifically addressed, but is implied.

Summary of relevant implementing regulations

AIRFA does not have implementing regulations.

Strengths as a tool for protecting sacred sites

- AIRFA's provision for protecting Native American access to sacred sites is an important foundational statement of policy.
- Although AIRFA does not define sacred sites, that ambiguity can be seen as strength, since it does not place specific limitations on the definition of such sites. For example, any such site presumably is covered regardless of its location although this aspect of the law is most applicable on Federal land.
- In general, the courts have interpreted AIRFA as requiring consultation with Indian tribes to attempt to accommodate their religious practices although this requirement is not **stated specifically in the law.**

Limitations as a tool for protecting sacred sites

- AIRFA does not contain a specific prohibition against harming sacred sites.
- While AIRFA is important in setting policy regarding sacred sites, a major Supreme Court decision (*Lyng v. Northwest Indian Cemetery Protective Association* – see more below) found that the law does not establish any legal rights or causes of action beyond those recognized under the First Amendment. Thus, while AIRFA may serve to

encourage Federal agencies to protect sacred sites and accommodate access to them, it cannot be used as a judicial enforcement mechanism. In 1994, legislation was introduced in Congress to amend AIRFA so as to strengthen the requirements on Federal land managers and specify the right of Indian tribes to sue for enforcement of such requirements. The proposed bill did not pass.

Where decision making rests

Federal agencies are the ultimate decision makers. As noted earlier, the courts have indicated that decision making should be informed by consultation with Indian tribes.

Brief summary of court decisions and the effect on utility regarding sacred sites protection

The Supreme Court's decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n* (485 U.S. 439, 1988) significantly undermines the influence AIRFA could bring to protecting sacred sites. Holding that the statute provides no more than a statement of policy, agencies are prohibited from taking action which coerces or penalizes any particular religious practice in violation of the First Amendment. In the wake of this holding, courts have consistently failed to overturn agency action that negatively impacts sacred sites. Discretionary agency action intended to protect sacred sites, however, is affirmed (see, for example, *City of Albuquerque v. Browner*, 97 F.3d 415, 1996, holding establishment of water quality standards based on ceremonial use was within EPA's authority).

RELIGIOUS FREEDOM RESTORATION ACT

Summary

The Religious Freedom Restoration Act (RFRA), passed in 1993, reiterated that governments should not substantially burden religious exercise without compelling justification and attempted to “provide a claim or defense to persons whose religious exercise is substantially burdened by government.”

The stated purposes of RFRA are to restore the compelling interest test and to guarantee its application in all cases where free exercise of religion is substantially burdened; and to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

Relevance to the protection of sacred sites

RFRA is only indirectly relevant to the protection of sacred sites. The subject of RFRA is religious freedom and to the extent that the protection of an Indian sacred site could be viewed as the protection of religious freedom, RFRA may be relevant.

Summary of relevant implementing regulations

There are no regulations implementing RFRA.

Strengths as a tool for protecting sacred sites

- It protects religious freedom for individuals.
- It broadly applies to “a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State or a subdivision of a State.”
- It creates or restores a right of action regarding substantial burdens imposed by governments on the free exercise of religious freedom.

Limitations as a tool for protecting sacred sites

- RFRA is not directly applicable to the protection of sacred sites and subsequent case law significantly affects its ability to serve as a sacred sites protection tool (see below).
- It allows a government to substantially burden a person’s exercise of religion if there is a compelling government interest and the decision is the least restrictive means of furthering that compelling governmental interest.

Where decision making rests

Governments maintain authority to make decisions regarding compelling government interests. However, a person whose religious exercise has been burdened in violation of RFRA may assert that violation in a judicial proceeding and obtain appropriate relief against a government.

Brief summary of court decisions and the effect on utility regarding sacred sites protection

RFRA generally has not been successfully applied by courts to protect sacred sites. The 9th Circuit used a substantial burden test when applying RFRA in *Navajo Nation v. USFS* (535 F.3d 1058, 2008). The court held the use of treated wastewater in a sacred site did not substantially

burden tribes' use of that site, despite assertions from multiple tribes that it would desecrate their sacred space. The Supreme Court has similarly held that RFRA does not have a unique ability to protect religious sites, although it has not applied RFRA to a sacred site. An Oklahoma District Court did protect a sacred site using the substantial burden test, finding a military training center warehouse would substantially burden tribal religious practices. (*Comanche Nation v. US*, WL4426621, 2008).

EXECUTIVE ORDER 13175: CONSULTATION AND COORDINATION WITH INDIAN TRIBAL GOVERNMENTS

Summary

Executive Order 13175: Consultation and Coordination with Indian Tribal Governments (E.O. 13175) was signed by President Clinton in November 2000 and took effect in January 2001. E.O. 13175 directs Federal agencies to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes. It requires Federal agencies to adopt an accountable process to involve tribal officials in the development of regulatory policies that have tribal implications.

Relevance to the protection of sacred sites

E.O. 13175 is focused on consultation regarding policies that have tribal implications. Policies refer to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. While there is no explicit reference to sacred site protection, the Executive order contributes to and reinforces Federal obligations to communicate with Indian tribes on a broad range of topics and Federal actions.

Summary of relevant implementing regulations

By virtue of the nature of an Executive order, there are no implementing regulations.

Strengths as a tool for protecting sacred sites

- E.O. 13175 requires tribal consultation by Federal agencies regarding policies that have tribal implications (see above for a definition of “policies”). To the extent that such policies may, themselves, result in impacts to sacred sites, the Executive order provides tribal governments with an opportunity to influence the development of such policies.
- Fundamental principles established in E.O. 13175, including recognition of a trust responsibility, tribal sovereignty and self-determination, as well as current administration commitments to transparency and collaboration² contribute to government-to-government relationships in which sacred site protection is a valid subject.
- Some Federal agencies have interpreted their responsibilities under E.O. 13175 broadly, to include consultation under NHPA and NEPA.
- The Executive order applies to agency policies or plans to consult with Indian tribes and to protect sacred sites.

Limitations as a tool for protecting sacred sites

E.O. 13175 does not:

- Mention or directly address sacred sites.

² See 2010 memo from OMB providing guidance for implementing E.O. 13175.

- Prescribe specific consultation for individual Federal agency actions which might directly impact sacred sites.
- Prevent Federal agency actions which might impact sacred sites.

Where decision making rests

Federal agencies are responsible for developing their consultation processes pursuant to the Executive order and make the final decisions regarding the content of their regulatory policies.

Brief summary of court decisions and the effect on utility regarding sacred sites protection

Executive orders are generally not enforceable in a court of law. There is no formal judicial review available for non-compliance with E.O. 13175. Nonetheless, a Florida District Court referenced the Executive order to support an Indian tribe's standing to intervene in a case against the U.S. Fish and Wildlife Service based on the Indian tribe's religious use of land.

(*Conservancy of Southwest Fla. V. USFWS*, WL 2776840, 2010).

EXECUTIVE ORDER 12898: ENVIRONMENTAL JUSTICE

Summary

Issued in 1994 by President Clinton, Executive Order 12898: Environmental Justice (E.O. 12898), is designed to focus Federal attention on environmental and human health conditions in minority communities and low-income communities with the goal of achieving environmental justice. The Executive order directs Federal agencies to develop strategies to identify and address the disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority and low-income populations. It also addresses the need to provide minority and low-income communities with access to public information on, and an opportunity for public participation in, matters relating to human health or the environment. In addition, E.O. 12898 established an Interagency Working Group on Environmental Justice chaired by the Administrator of the Environmental Protection Agency and comprised of the heads of 11 departments or agencies and several White House offices.

The Executive order specifically states that its provisions apply to Native American programs. The Department of the Interior is named as the lead on coordinating steps to be taken under the Executive order that address federally recognized Indian tribes.

Relevance to the protection of sacred sites

Environmental justice issues encompass a broad range of impacts on the natural or physical environment and interrelated social, cultural, and economic effects. Thus, although E.O. 12898 does not directly address sacred site protection, adverse impacts to them or the restriction of access are subject to consideration under the order to determine if such impacts are disproportionately high and adverse to the health of Indian tribes and to the environment.

Summary of relevant implementing regulations

By virtue of being an Executive order, there are no implementing regulations. However, a Presidential Memorandum was issued the same day as E.O. 12898 to underscore that certain environmental and civil rights statutes provide opportunities for agencies to address environmental hazards in minority communities and low-income communities. The memorandum directs agencies to consider environmental effects of proposed Federal actions on minority and low-income communities during review of such actions under NEPA. The memorandum also directs the Environmental Protection Agency to ensure that Federal agencies analyze environmental effects, including interrelated social and economic effects, on minority and low-income communities as part of its review of projects under Section 309 of the Clean Air Act.

Strengths as a tool for protecting sacred sites

- E.O. 12898 provides another lens through which to view and assess impacts of Federal actions on sacred sites. In addition to analyzing project effects on the religious, cultural, and historic importance of sacred sites, agencies also must consider the issue of disproportionately high and adverse environmental and health impacts on Indian tribes.
- The Executive order applies to any sacred site, not just those on Federal or tribal land.

Limitations as a tool for protecting sacred sites

- E.O. 12898 does not create any private right of action against the Federal government in court. However, since the implementing Presidential Memorandum specifically discusses addressing environmental justice during review of projects under NEPA and the Clean Air Act, consideration of environmental justice and sacred sites could be reviewed by the courts in the context of those laws.
- While project impacts on sacred sites are reviewable under E.O. 12898, it does not require that such properties be preserved or protected.

Where decision making rests

Federal agencies are the ultimate decision makers as to how sites are treated under E.O. 12898.

Brief summary of court decisions and the effect on utility regarding sacred sites protection

Courts are split on whether E.O. 12898 provides for judicial review: the 5th and D.C. Circuits have held that failure to include consideration of the Executive order in a NEPA analysis may be arbitrary and capricious agency action. Conversely, the 9th and 4th Circuits hold the Executive order is unreviewable based on express language in the Executive order that it provides no cause of action for noncompliance. In *Morongo Band of Mission Indians v. FAA* (161 F.3d 569, 1998) the 9th Circuit applied this standard of non-reviewability to sacred site protection.

ARCHAEOLOGICAL RESOURCES PROTECTION ACT

Summary

The Archaeological Resources Protection Act (ARPA) was signed into law in 1979 to protect archaeological resources on Federal and Indian lands from looting, vandalism, and unregulated excavation. The law establishes a permitting process whereby Federal land managers may issue a permit for excavation of an archaeological site if the project is in the public interest and the applicant has sufficient professional qualifications to undertake the excavation. Criminal and civil penalties are set forth for unpermitted disturbance of archaeological resources, including their excavation, removal, damage, or defacement.

Relevance to the protection of sacred sites

While the term “sacred site” is not used in ARPA, it explicitly mentions sites that have religious and cultural importance to Indian tribes. In fact, many archeological sites are considered sacred by Indian tribes. Archaeological resources protected by the law are broadly defined, but specifically can include graves and human remains. The law’s implementing regulations further define such sites in a manner that acknowledges their potentially sacred nature.

Summary of relevant implementing regulations

ARPA requires that the Departments of the Interior, Agriculture, and Defense, and the Tennessee Valley Authority develop uniform regulations to implement the law. In the development of these regulations, the agencies were required to consider the provisions of the American Indian Religious Freedom Act. The resulting regulations are codified as follows: Department of Agriculture, 36 CFR Part 296; Department of the Interior, 43 CFR Part 7; Department of Defense, 32 CFR Part 229; and Tennessee Valley Authority, 18 CFR Part 1312.

Strengths as a tool for protecting sacred sites

- The criminal and civil penalties of ARPA can serve as a deterrent to looting or vandalism of sacred sites on Federal or Indian lands.
- Federal agencies are specifically required to notify Indian tribes before a permit is issued that may harm any site that the Indian tribes deem to have religious or cultural importance. Requirements for consultation following such notification are spelled out in the implementing regulations. The regulations also state that agencies may notify and consult with other Native American groups that do not meet the definition of an Indian tribe under ARPA.
- On Indian lands, consent of the Indian tribe or individual Indian allottee is required before an ARPA permit can be issued, and the permit must include any terms or conditions the Indian tribe or allottee requests.
- To improve Federal agency planning and permitting, the ARPA regulations require Federal agencies to identify Indian tribes having aboriginal or historic ties to Federal lands and seek to learn from the Indian tribes the location of sites of religious or cultural importance to them.

- ARPA contains a confidentiality provision that requires agencies to not release information on the nature or location of excavated archaeological resources unless doing so would not create a risk of harm to such resources or to the site at which such resources are located. (Information may be released upon request to a State if a commitment is made to adequately protect the confidentiality of the information.)

Limitations as a tool for protecting sacred sites

- ARPA does not apply off Federal or Indian lands.
- While consultation with Indian tribes is required when sites of religious or cultural importance to the Indian tribes are subject to a permit application, ARPA does not require that the agency follow the wishes of the Indian tribes when the resources are not on Indian land.
- The provision for insuring confidentiality of information only applies to archaeological resources, so a sacred site must contain such resources or otherwise fit the definition of archeological resource in order for information on the site to be withheld.

Where decision making rests

Federal agencies are the ultimate decision makers, but consent of the Indian tribe or Indian allottee is required for issuance of ARPA permits on tribal lands.

Brief summary of court decisions and the effect on utility regarding sacred sites protection

Case law applying ARPA in the context of protecting sacred sites demonstrates that the law has very little utility for that purpose. ARPA applies only to the intentional excavation of archaeological resources on Federal or tribal land and, as such, is not triggered when other actions occur on Federal land that might affect sacred sites (*San Carlos Apache Tribe v. U.S.*, F.Supp.2d 860, aff'd 417 F.3d 1091), including the unintentional disturbance of sacred sites (Franco v. DOI, WL 3070269). It does have a non-disclosure provision which can be effective in withholding sacred site information from the public when requested under FOIA. (See for example, *Kawaiisu Tribe of Tejon v. Salazar*, WL 489561).