



**Progress Report on Implementation
of the
Memorandum of Understanding
Regarding Interagency Coordination and
Collaboration for the
Protection of Indian Sacred Sites**

By

*U.S. Department of Defense
U.S. Department of the Interior
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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. The following report provides an update on the agencies' progress in implementing the MOU.

The progress report is organized by working group and outlines the tasks that have been accomplished and identifies next steps, where appropriate. Copies of the MOU and Action Plan are also included.

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.

ACCOMPLISHMENTS

The MOU has fostered a new level of interagency dialogue and focus on sacred sites issues. An Executive Working Group of policy level officials, currently chaired by the Department of the Interior, has been 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 have been identified to provide input and expertise to each area of the MOU and Action Plan. Names of these individuals are included in the Acknowledgements section of this report.

The Action Plan was released on March 5, 2013, and the Core Working Group immediately began implementation. The 11 action items in the MOU were organized into five areas, and responsibility for each area was assigned to a Core Working Group member. Each of the signatories also identified subject matter experts within their departments to assist with implementation and began working on their assigned responsibilities. The five areas and lead agency are:

- **Training (Defense)** – The Training Subgroup has worked to identify existing training resources for the legal protections and limitations regarding the accommodation of, access to, and protection of sacred sites. The Subgroup is also working to promote awareness of existing trainings and training resources and identify needs for developing or acquiring additional training resources for Federal employees regarding sacred sites. It is necessary for the Training Subgroup to communicate with tribal leaders, subject matter experts and Native American non-governmental organizations (NGOs) to gain further knowledge of perceived difficulties in the field as identified by our non-Federal partners. It is anticipated that further training needs will be identified after full analysis of existing trainings is completed.
- **Confidentiality Standards (Interior)** – The Confidentiality Standards Subgroup is charged with identifying existing confidentiality standards and requirements for maintaining the confidentiality of sensitive information about sacred sites, analyzing the effectiveness of these mechanisms, and, developing recommendations for addressing challenges regarding confidentiality. The Confidentiality Standards Subgroup developed an internal survey to assess the participating agencies' current standards, requirements, and internal guidance as well as the challenges the agencies have faced in using these standards. The survey also asked respondents to identify suggestions and recommendations for improvement of how the signatories maintain the confidentiality of sacred sites. Following the completion of its analysis, the Confidentiality Standards Subgroup will develop preliminary recommendations on how to better address challenges regarding the confidentiality of sensitive information involving sacred sites. Continued dialogue with tribal leaders will inform the development of these recommendations.
- **Management Practices and Capacity Building (Agriculture)** – The Management Practices and Capacity Building Subgroup identified current agency consultation practices and sacred sites protocols. In particular, the subgroup reviewed policies and practices related to reimbursements for tribes' consultation expenses, finding and managing acceptable technologies for consultation, exchanging or sharing personnel with tribes, and guidance regarding treatment of sacred sites. As part of its recommendations following this review, the Subgroup suggested a Federal guide for management practices and capacity building related to sacred sites. Such a guide would need to allow for adjustment by tribe, agency, consultation, or location. Additionally, the Subgroup believes that tribes and the respective local Federal land management agencies would benefit from establishing local sacred sites working groups whose members include tribes and representatives of multiple Federal agencies, forests and/or parks who have

responsibility for land management on or near a reservation or group of reservations in a specific geographic area.

- **Public Outreach and Communications (Energy)** – The Public Outreach and Communications Subgroup drafted a sample communications plan and language to craft a clear and simple message that advances the understanding of Federal agencies and the public about sacred sites issues and the MOU. The Subgroup also took the lead in ensuring signatory agencies provided information on their programs or policies related to sacred sites for inclusion on a Sacred Sites MOU website, available at <http://www.fs.fed.us/spf/tribalrelations/sacredsitesmou.shtml>. All agencies have made presentations at various tribal and intertribal meetings to reach key stakeholders regarding progress of MOU implementation. The signatory agencies co-hosted a listening session in conjunction with the White House Tribal Nations Conference regarding the Sacred Sites MOU. The Subgroup plans to utilize the website more in the coming year to communicate updates and progress on an ongoing basis.
- **Policy Review (ACHP)** – The Policy Review Subgroup reviewed legal authorities including laws, Executive orders, and court cases to determine their potential relevance to sacred sites. 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, but there is no single Federal authority that requires the preservation or protection of Indian sacred sites. From this initial effort to examine Federal authorities with relevance to Indian sacred sites, it is apparent that there are factors beyond just the statutes, implementing regulations, and Executive orders that may influence how well sacred sites are protected. The Policy Review Subgroup will next undertake a review of existing guidance, policies, and internal directives of the signatories to further assess the scope of requirements and guidance governing how sacred sites are managed. Prior to developing any recommendations based on these reviews, the agencies will seek additional input with Indian tribes on potential measures for improved protection of Indian sacred sites.

For more information on each of the subgroups’ accomplishments and plans, please see the relevant subsection below. The key agency contact for each subgroup is listed at the end of each subsection.

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**Memorandum of Understanding
Among the
U.S. Department of Defense,
U.S. Department of the Interior,
U.S. Department of Agriculture,
U.S. Department of Energy,
and the Advisory Council on Historic Preservation
Regarding Interagency Coordination and Collaboration for the
Protection of Indian Sacred Sites**

I. Purpose and Principles

The Departments of Defense, the Interior, Agriculture, Energy, and the Advisory Council on Historic Preservation (Participating Agencies) enter into this Memorandum of Understanding (MOU) to improve the protection of and tribal access to Indian sacred sites through enhanced and improved interdepartmental coordination and collaboration.

II. Background

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. Indian tribes are defined here as an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior has published on the list of federally-recognized tribes pursuant to Public Law No. 103-454, 108 Stat. 4791. All Federal agencies are responsible for assessing the potential effects of undertakings they carry out, fund, or permit on historic properties of traditional cultural and religious importance to Indian tribes. While the physical and administrative contexts in which Federal agencies encounter sacred sites vary greatly, similarities do exist. Because of those similarities, the Participating Agencies recognize that consistency in policies and processes can be developed and applied, as long as they remain adaptable to local situations.

For purposes of this MOU, a “sacred site” retains the same meaning as provided in Executive Order 13007; that is “ – any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site.” Such sacred sites may also be eligible for the National Register of Historic Places as historic properties of religious and cultural significance to Indian tribes.

Sacred sites often occur within a larger landform or are connected through features or ceremonies to other sites or a larger sacred landscape. Agencies should consider these broader areas and connections to better understand the context and significance of sacred sites. Sacred sites may include, but are not limited to geological features, bodies of water, archaeological sites, burial locations, traditional cultural properties, and stone and earth structures.

III. Authorities Which May be Relevant to the Protection and Preservation of Sacred Sites

The participating agencies will review the following authorities to determine their potential relevance to sacred sites and to determine if additional inter-agency measures may be warranted to better protect sacred sites.

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

IV. Participating Agency Agreement

The Participating Agencies hereby agree to work together to accomplish, and consult with Indian tribes as appropriate in developing and implementing the following actions:

1. Creating a training program to educate Federal staff on (a) the legal protections and limitations regarding the accommodation of, access to, and protection of sacred sites and (b) consulting and collaborating effectively with Indian tribes, tribal leaders, and tribal spiritual leaders to address sacred sites;
2. Developing guidance for the management and treatment of sacred sites including best practices and sample tribal-agency agreements;
3. Creating a website that includes links to information about federal agency responsibilities regarding sacred sites; agency tribal liaison contact information; the websites of the agencies participating in this MOU; and, information directing agencies to appropriate tribal contact information for project consultation and sacred sites issues. This website would be hosted by one of the Participating Agencies;
4. Developing and implementing a public outreach plan focusing on the importance of maintaining the integrity of sacred sites and the need for public stewardship in the protection and preservation of such sites;
5. Identifying existing confidentiality standards and requirements for maintaining the confidentiality of sensitive information about sacred sites; analyzing the effectiveness of these mechanisms; and, developing recommendations for addressing challenges regarding confidentiality;
6. Establishing management practices that could be adopted by Participating Agencies. These could include mechanisms for the collaborative stewardship of sacred sites with Indian tribes, such as Federal-tribal partnerships in conducting landscape level cultural geography assessments;
7. Identifying impediments to Federal-level protection of sacred sites and making recommendations to address the impediments;

8. Developing mechanisms to exchange/share subject matter experts among Federal agencies and identifying contracting mechanisms for obtaining tribal expertise;
9. Developing outreach to non-Federal partners to provide information about (a) the political and legal relationship between the United States and Indian tribes; (b) Federal agency requirements to consult with Indian tribes; and, (c) the importance of maintaining the integrity of sacred sites;
10. Exploring mechanisms for building tribal capacity to participate fully in consultation with federal agencies and to carry out the identification, evaluation, and protection of sacred sites; and,
11. Establishing a working group of appropriate staff from each of the Participating Agencies to facilitate the implementation of the provisions of this MOU and address issues as they arise. The working group will develop an action plan for implementation of this MOU within 90 days. Participating Agency representatives will serve on the working group until replaced by their agencies. The working group will be chaired by one of the Participating Agencies chosen by majority vote of the working group and will serve a two-year term. At the expiration of the chair's term, the Participating Agencies shall select a new chair from among the Participating Agencies.

V. Non-Funding Obligor Document

Participating Agencies will handle their own activities and use their own resources in pursuing these objectives. Each party will carry out its separate activities in a coordinated and mutually beneficial manner.

Nothing in this MOU shall obligate any Participating Agency to obligate or transfer funds. Specific work projects or activities that involve the transfer of funds, services, or property among the various Participating Agencies will require execution of separate agreements and will be contingent upon the availability of appropriated funds. Any such activities must be independently authorized by appropriate statutory authority. This MOU does not provide such authority. Negotiation, execution, and administration of each such agreement must comply with all applicable statutes and regulations.

VI. Third Parties

This MOU 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.

VII. Administrative Provisions

1. This MOU takes effect upon the signature of all Participating Agencies, and shall remain in effect until December 31, 2017. This MOU may be extended or amended upon written consent from any Participating Agency and the subsequent written concurrence of the others.
2. Any Participating Agency can opt out of this MOU by providing a 60-day written notice to the other signatories.
3. Other Federal agencies may participate in this MOU at any time while the MOU is in effect. Participation will be evidenced by an agency official signature on the MOU

VIII. Signatures of the Participating Agencies of the MOU on Indian Sacred Sites



Leon Panetta
Secretary
U.S. Department of Defense

12/4/12

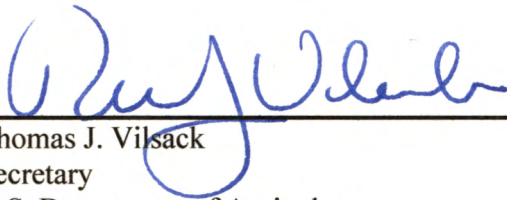
Date



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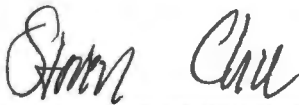
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Action Plan to Implement the Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites March 5, 2013

Introduction

On December 5, 2012, the Departments of Defense, the Interior, Agriculture, and Energy, and the Advisory Council on Historic Preservation (participating agencies) entered into a Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites (MOU) to improve the protection of and tribal access to Indian sacred sites through enhanced and improved interdepartmental coordination and collaboration. The MOU is based on the requirements of Executive Order 13007, Indian Sacred Sites.

Executive Order 13007 requires that:

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

The MOU will be in effect for five years and requires the participating agencies to establish a working group and develop an action plan for the purpose of carrying out the provisions of the MOU in consultation with Indian tribes.

Mission Statement

The mission of the Working Group is to work together to improve the protection of and tribal access to Indian sacred sites, in accordance with Executive Order 13007 and the MOU, through enhanced and improved interdepartmental coordination and collaboration and through consultation with Indian tribes.

Definitions

Participating agency means any federal agency that enters into the MOU as evidenced by an agency official signature on the MOU.

Sacred site for purposes of this Action Plan and the MOU, has the same meaning as provided in Executive Order 13007; that is, “ - any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site.”

The participating agencies acknowledge that such sacred sites may also be eligible for the National Register of Historic Places as historic properties of religious and cultural significance to Indian tribes.

Sacred sites may include, but are not limited to, geological features, bodies of water, archaeological sites, burial locations, traditional cultural properties, and stone and earth structures.

Indian Tribes means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior has published on the list of federally-recognized tribes pursuant to Public Law No. 103-454, 108 Stat. 4791.

Guiding Principles

The participating agencies are committed to interagency coordination and collaboration to enhance the protection of and tribal access to Indian sacred sites. The participating agencies:

- Will consult with Indian tribes, as appropriate, in developing and implementing the actions outlined in this plan;
- Recognize that consistency in policies and processes can be developed and applied, as long as such policies and processes remain adaptable to local situations and mission requirements; and
- Recognize that tribal input is essential to ensure that tribal perspectives are incorporated into the actions undertaken pursuant to the MOU and to ensure the development of meaningful strategies for sacred sites protection.

Action Plan

The action plan is a dynamic strategy for meeting the requirements of the MOU. As such, the participating agencies through the executive and core working groups will review the plan periodically, update it when necessary, and ensure that Indian tribes are kept informed of such updates.

Each of the following headings relates to the action items outlined in the MOU and agreed upon by the participating agencies. The participating agencies intend to carry out the provisions of the MOU in phases. The first phase will be to gather information about existing resources that may meet the action items of the MOU and action plan. The second phase will be an evaluation of those resources and the development of plans to produce additional tools, if needed, to meet the actions. The third phase will be the development of recommendations and additional tools that enhance agency protection of and tribal access to Indian sacred sites.

Working Groups

Implementation of the MOU requires both leadership and staff level involvement of participating agencies. To accomplish the action plan, there will be two working groups. The first is the Executive Working Group, which is comprised of senior executives from all participating agencies. The Executive Working Group will make final decisions and be the representatives in government to government consultations. The second is the Core Working Group, which is made up of senior Department-level staff members, who will serve as the lead point of contact for their agencies. The Core Working Group will identify subject matter experts (SME), as appropriate, from the respective sub-agencies within their agencies. The role of the SMEs is to provide the Core Working Group with input and perspectives on a variety of subject areas, as necessary to guide implementation of the MOU.

More information on both working groups is available at Appendix A.

Evaluation of Existing Authorities

The Working Groups will:

1. Review the following authorities to determine their potential relevance to sacred sites:
 - 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
2. Identify, based on the review, impediments to federal-level protections for sacred sites; determine if additional interagency measures may be warranted to better protect sacred sites; and make recommendations to the Executive Working group that address the impediments.

Training Program

The Working Groups will:

1. Identify existing training resources for the:
 - a. legal protections and limitations regarding the accommodation of, access to, and protection of sacred sites; and
 - b. effective consultation and collaboration with Indian tribes, tribal leaders, and tribal spiritual leaders to address sacred sites
2. Identify needs for developing or acquiring additional training resources;
3. Make recommendations for training delivery; and
4. Develop appropriate training and/or modules within existing training programs.

Development of Guidance

The Working Group will:

1. Gather existing federal guidance regarding the management and treatment of sacred sites including examples of best practices and agreements;
2. Identify information and document gaps and draft guidance to fill the gaps; and
3. Make guidance available on a new website created in accordance with the MOU

Creation and Maintenance of the Website

The Working Group will:

1. Identify a participating agency or agencies to host a publicly accessible website;
2. Create structure, functionality, and base content for a website; and
3. Post information, materials, and links as appropriate

Public Outreach Plan

The Working Groups will:

1. Identify existing resources for a public outreach plan; and
2. Develop and implement a public outreach plan that focuses on the importance of maintaining the integrity of sacred sites and the need for public stewardship in the protection and preservation of such sites. The public outreach plan will include steps to appropriately reach out to the general public.

Confidentiality Standards

The Working Groups will:

1. Compile and review existing requirements and authorities for maintaining the confidentiality of sensitive information about sacred sites and analyze the effectiveness of these mechanisms including the identification of similarities, differences, and gaps in the protections afforded sacred sites; and
2. Develop recommendations for addressing challenges regarding confidentiality and potential policy changes.

Management Practices

The Working Groups will:

1. Compile and analyze examples and case studies of relevant management practices; and
2. Establish model practices and include them on the web site, in the training program, and distribute them through other mechanisms.

Interagency Expertise and Contracting with Indian Tribes

The Working Groups will:

1. Identify a range of mechanisms for exchanging and sharing personnel among Federal agencies and Indian tribes;
2. Develop model agreements and other tools to expedite exchanging and sharing personnel;
3. Identify and recommend categories of personnel that would contribute to the goals of the MOU through exchanging and sharing; and
4. Develop model contracting mechanisms for obtaining appropriate federal and tribal expertise.

Outreach to Non-Federal Partners

The Working Groups will:

1. Identify and review existing methods for outreach to non-federal partners including state and county governments, non-profits and other non-governmental organizations;
2. Develop an outreach plan template that can be customized for use by each participating agency, and which is also available to other agencies who might want to improve their outreach on sacred sites, and compile associated outreach materials; and
3. Recommend an outreach process and associated materials to other interested parties.

Building Tribal Capacity

The Working Groups will:

1. Compile existing information about building tribal capacity to participate fully in consultation and the identification, evaluation, and protection of sacred sites;
2. Analyze compiled information and share with Indian tribes for initial feedback; and
3. Recommend steps to build tribal capacity.

Appendix A: Working Groups

Executive Working Group

Implementation of the MOU and its action plan requires both leadership and staff level involvement of the participating agencies. Therefore, an Executive Working Group comprised of senior executives from all participating agencies will be established.

Core Working Group

A Core Working Group comprised of agency staff representatives has been established and is responsible for coordinating all staff work under the MOU and plan. The Department of the Interior representative will serve as the chair for the Core Working Group for the initial two-year term.

These individuals may be contacted for questions regarding either the MOU or the action plan. The members are:

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TRAINING

A SUBGROUP OF THE SACRED SITES MOU CORE WORKING GROUP

INTRODUCTION

The focus of the Training Subgroup is to enhance the effectiveness of efforts to compile, develop, and share knowledge about sacred sites and best practices in sacred sites management across the Federal Government. The United States Department of Defense (“DoD”) was selected to chair the Training Subgroup, which includes employee training and human resources development experts from several signatory agencies, including DoD, the U.S. Department of Agriculture, and the U.S. Forest Service.

TASKS

The Subgroup was tasked with strengthening the protection of and access to sacred sites through training by:

- Identifying existing training resources for the legal protections and limitations regarding the accommodation of, access to, and protection of sacred sites; and effective consultation and collaboration with Indian tribes, tribal leaders, and tribal spiritual leaders to address sacred sites;
- Promoting awareness of existing trainings and training resources; and
- Identifying needs for developing or acquiring additional training resources for Federal employees regarding sacred sites.

PROGRESS

One of the first efforts undertaken by the Subgroup was to compile and analyze existing tribal trainings (on all tribal matters, not solely sacred sites), which would allow for a database to be created for broader access to these trainings. Furthermore, detailed analysis of the compiled trainings will identify deficiencies in all existing tribal trainings currently available.

Within the Forest Service, there has been established a Forest Service Tribal Relations Training Group that provides subject matter expertise on applicable aspects of Forest Service Tribal Relations training, regulation, policy, and guidelines; develops ideas, outlines, recommendations, and/or content for a comprehensive Tribal Relations training program; works with both internal and external partners to gather existing Tribal Relations training material; and works with the other Tribal Relations Working Groups and tribes to catalog existing training materials, evaluate content, and conduct a gap analysis to recommend future training needs. Similarly, DoD has established successful internal training courses that are aimed at equipping DoD/military and civilian personnel with tools, skills, and strategies to conduct effective tribal consultation. The Subgroup is evaluating whether efforts such as these can be replicated across, and potentially used by, other Federal agencies.

Through the Subgroup’s efforts, one of the first high priority training needs already identified is training that would focus on increasing effective coordination and

communication between government departments/agencies as it relates to protection of and access to tribal sacred sites, places, and landscapes.

NEXT STEPS

It is necessary for the Training Subgroup to communicate with tribal leaders, subject matter experts and Native American NGOs to gain further knowledge of perceived difficulties in the field as identified by our non-Federal partners to help further identify potential training opportunities that will improve relationships between Federal agencies and tribal governments. Additionally, the Subgroup expects that the gap analysis being undertaken by the Forest Service of existing trainings will help determine what other training needs may exist. Ultimately, we would like to see a comprehensive training developed for Federal employees.

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CONFIDENTIALITY STANDARDS

A SUBGROUP OF THE SACRED SITES MOU CORE WORKING GROUP

INTRODUCTION

The signatories to the MOU recognize the importance of maintaining the confidentiality of sensitive information about sacred sites. The Core Working Group designated a subgroup to focus specifically on addressing the challenges regarding confidentiality standards. The Confidentiality Standards Subgroup is headed by the Department of Interior and includes subject matter experts from a cross-section of the signatories.

TASKS

In accordance with the MOU and the Action Plan, the signatories are required to take the following actions in regard to the confidentiality standards for sacred sites:

- Identify existing confidentiality standards and requirements for maintaining the confidentiality of sensitive information about sacred sites;
- Analyze the effectiveness of these mechanisms; and,
- Develop recommendations for addressing challenges regarding confidentiality

PROGRESS

To fulfill the first task above, the Confidentiality Standards Subgroup developed an internal survey to assess the participating agencies' current standards, requirements, and internal guidance as well as the challenges the agencies have faced in using these standards. The survey also asked respondents to identify suggestions and recommendations for improvement of how the signatories maintain the confidentiality of sacred sites.

Each of the signatories provided feedback through the survey. The survey was distributed as widely as possible within the signatory agencies. The responses represent a broad view of the current policies utilized and suggested to maintain the confidentiality of sacred sites. The survey's completion demonstrates success in interdepartmental collaboration. Distributing and responding to the survey also helped to continue to keep agencies' attention focused on sacred sites issues at a high level.

The Confidentiality Standards Subgroup is currently in the second phase of its work under the MOU and the Action Plan: analysis of the effectiveness of current standards, requirements, and policies and guidance. The results of the survey are crucial in this analysis, but the Subgroup also recognizes that tribal leaders have previously provided feedback on their experiences dealing with the confidentiality of sacred sites information with the Federal Government. The Confidentiality Standards Subgroup is utilizing the results of previous listening sessions and consultations with tribal leaders on sacred sites issues, and will continue to seek additional information through further informal feedback.

NEXT STEPS

Following the completion of its analysis, the Confidentiality Standards Subgroup will develop preliminary recommendations on how to better address challenges regarding the confidentiality of sensitive information involving sacred sites. Continued dialogue with tribal leaders will inform the development of these recommendations. Once these preliminary recommendations have been finalized internally, they will be merged into a package of deliverables under the MOU. The signatories will present a cohesive plan and recommendations for tribal consultation.

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MANAGEMENT PRACTICES AND CAPACITY BUILDING

A SUBGROUP OF THE SACRED SITES MOU CORE WORKING GROUP

INTRODUCTION

The MOU signatories recognized the importance of ensuring that Federal agencies adopt appropriate and consistent management practices regarding sacred sites and maintain sufficient internal capacity to ensure that sacred sites issues are adequately addressed. The United States Department of Agriculture (“USDA”) was selected to chair the Management Practices and Capacity Building subgroup, which is comprised of subject matter experts from multiple agencies and offices of the Departments of Agriculture and Interior.

TASKS

The Subgroup’s primary tasks are to assess current Federal management practices and consider Federal and tribal capacity building that would support Federal and tribal support of sacred sites. Specifically:

- Identify existing examples and case studies of management practices relevant to sacred sites;
- Gather existing Federal guidance regarding management and treatment of sacred sites, including examples of best practices and agreements;
- Identify current range of mechanisms for exchanging and sharing personnel among Federal agencies and Indian tribes;
- Compile existing information (within signatory agencies) about building tribal and Federal capacity to participate more fully in consultation and the identification, evaluation and protection of sacred sites.

PROGRESS

As required by the MOU and the Action Plan, the Subgroup identified current agency practices in consultation and protocols for sacred sites. In particular, the subgroup reviewed the following:

- Policies or practices to reimburse tribes’ consultation expenses;
- Efforts with tribes to find and manage acceptable technologies for consultation;
- Processes and protocols for consultation with tribes;
- Prevalence of exchanging or sharing personnel with tribes and types of agreements used;
- Guidance regarding management and treatment of sacred sites; and
- Relevant personnel management practices.

In conducting its review, the Management Practices Subgroup identified strengths and limitations of current practices as well as noting where there are gaps in documentation. There were areas, such as documentation and employee sharing, where the group determined more

extensive investigation may have identified additional relevant documentation and differing practices, but that such extensive analysis would not be effective for the purposes of this report.

Based on the review of current practices with a limited number of Federal agencies, the Subgroup found that practices and protocols vary significantly from agency to agency. There is no single Federal authority for managing practices and protocols concerning sacred sites with tribes; however, most agencies rely on a limited number of authorities for their work. The regional and local Federal offices that have daily oversight and management of sacred sites due to the location of federally-designated lands in and around sacred sites (e.g., National Park Service and the Forest Service) have different, often closer, relationships with tribes and different protocols for consultation on sacred sites than agencies that do not have a daily relationship with tribes or their sacred places.

In general, agencies do have management protocols and/or processes in place for collaboration and consultation with tribes on sacred sites. The protocols and processes rely on many materials identified and reviewed by the Policy Subgroup. The most often referenced guidance, regulations and law include:

- Section 106 of the National Historic Preservation Act of 1966 (NHPA);
- The Nationwide Programmatic Agreement (PA) that was signed on November 14, 2008 to provide coordination between the National Park Service (NPS), the Advisory Council on Historic Preservation (ACHP), the National Conference of State Historic Preservation Officers (NCSHPO), federally recognized Indian tribes, and Native Hawaiian organizations to implement Section 106 under the National Historic Preservation Act of 1966;
- Several agencies are also expecting a new National Environmental Policy Act (NEPA) regulation that will provide protocols under Section 106;
- USDA's Policy and Procedures Review and Recommendations: Indian Sacred Sites; and
- National Park Service Director's Order #28: Cultural Resource Management.

The Subgroup acknowledged that other guidance materials exist that provide some guidance for management, collaboration and consultation on sacred sites, namely NEPA, and the Native American Graves Protection and Repatriation Act (NAGPRA), each with its own requirements.

Additionally, agencies have built out their own protocols on top of these regulations and directives in the form of handbooks and manuals as well as regional and individual government-to-government policy statements.

The Subgroup also considered a number of specific practices:

Cost-Sharing

There is a broad spectrum of practices across agencies concerning cost-sharing and reimbursements to tribal participants for travel related to consultations, including:

- authorization for full compensation to tribal members (most of the funding for which was frozen in 2013 due to sequestration and continues to be limited);
- Federal travel to consult with or near multiple tribes; requests for funding from third-party, non-Federal sources; and
- consultations with no Federal reimbursement or cost-sharing.

One agency reimburses tribal participants in consultation using guidelines prescribing fees for professional services while others have used contracts for specialty or support services. Some agencies have the authority to reimburse tribal expenses while others do not and may not have funds to travel to tribes. In general, where there are funds available, the agencies also have guidelines for managing consultation travel and utilize available funds to assist with tribes' expenses for consultation-related travel.

Use of technology

While multiple agencies are using technology – from local field office A/V facilities to webinars to teleconferences – Federal offices recognized that tribes prefer face-to-face consultations. One Federal participant is surveying tribes to learn more about their teleconferencing capabilities. There is a general understanding that it is difficult to conduct consultation on sacred sites using webinars or other remote tools. Several agencies noted it is impossible to conduct the ceremony surrounding sacred site and NAGPRA consultations when using media – reaffirming the need for consultation in person.

Additionally, the ability and need to utilize technology for consultation varies greatly depending on the project, site and purpose or scope of the consultation. Whereas an exhibit or site-specific consultation may require a lengthy consultation over a longer period of time, Federal programs administered nationwide find it challenging to consult with individual tribes and often need to rely on technology-based consultations due to Federal and tribal travel restrictions, budget limitations or availability of personnel. There is a limitation to the technology that can be used with tribes due to poor telecommunication access on many reservations. One agency provided camcorders to a number of tribes' Tribal Historic Preservation Officers (THPOs) to use to collect comments and is working with the tribes to establish protocols for consulting via teleconferencing.

Several agencies regularly hold meetings with tribal counterparts when new regulations, processes and procedures are introduced. Others have begun holding regular tribal conference calls and webinars to introduce new issues and present preparatory and supplemental information and material. Increasingly, Federal agencies are relying on web pages to publish information of greatest interest to tribes. It is not clear that tribes are taking, or are able to take, full advantage of the variety of new methods of outreach that are being employed by Federal agencies.

Personnel exchanges and sharing

Agencies often have a need to have extended, long-term working relationships with tribal members on specific projects or for specific needs. There are a variety of arrangements that accommodate those extended needs: specific agreements with tribes to provide services for Section 106 purposes, to perform details with Federal agencies or to provide technical services. Additionally, Federal partners contract tribal professionals for different requirements related to

Federal projects. The Subgroup identified one program that utilizes Memoranda of Understanding to cross-share tribal and Federal personnel.

Several agencies are working with Land Grant Tribal and State colleges and universities to assist students with career movement into Federal service. Agencies are also working together to bring Native Americans into Federal positions.

Intra-Agency Coordination

Within Federal agencies that participated in our Working Group, we noted that regional or local Federal entities often acted independently of others within their own agencies. There was little interaction among local Federal entities from other agencies concerning consultation or collaboration with tribes on tribal sacred sites. The result is that tribes are required to consult with each Federal agency, and often with different local personnel within each agency, for the same purpose of protecting sacred sites. The result is a checkerboard of protection and continuing dialogue that is often dependent on the personalities of the respective tribal leaders and local Federal managers.

NEXT STEPS

The Subgroup identified several potential actions that could be implemented as next steps to address issues of inconsistent management practices and the need to build capacity within agencies related to sacred sites. These actions include:

Developing Sacred Sites Management Guidance

The Management Practices Subgroup considered a cross-agency, Federal guide for management practices and capacity building related to sacred sites. Such a guide would need to be written as high level guidance -- allowing for adjustment tribe-by-tribe, agency-by-agency and, potentially, consultation-by-consultation, or location-by-location. So, while a guide or guidance could be used to provide the framework, or minimum requirements, for Federal practices concerning sacred sites, modifications would be necessary to meet the needs of the local or regional tribes and Federal agencies. The most useful components of such a guide would be guidelines for more interactive management practices, including detailing of Federal and tribal personnel; and guidance for all relevant local offices of Federal agencies to participate in joint consultation with local tribe(s) with sacred sites concerns or in need of guidance for a specific geography. The practice today is for each agency, and often several independent agency representatives, to work with a tribe, often in oblivion of discussions other Federal agencies are having with the same tribe concerning the same or adjoining lands.

Creation of Local/Regional Federal Agency and Tribal Working Groups

The Subgroup concluded that tribes and the respective local Federal land management agencies would benefit from establishing local sacred sites working groups whose members include tribes and representatives of multiple Federal agencies, forests and/or parks who have responsibility for land management on or near a reservation or group of reservations in a specific geographic area. The Subgroup recommends consultation with tribes to determine whether and how cross-agency sacred sites working groups and a limited number of tribes within each region or locale could generate a better government-to-government dialogue between the respective tribes(s) and the Federal entities managing space(s) that involve sacred sites. Today, without coordination among the Federal agencies, tribes work independently with each agency, and often with each local

forest or park, on sacred sites matters. The resulting tribal/Federal management practices can vary by agency, local Federal office, forest or park and, often, the personalities involved.

As an illustration, consider how one tribe works with multiple Forest Service, National Park Service, DOD, United States Army Corps of Engineers (“USACE”) and other local representatives of Federal agencies in a defined geographic area where the tribe has the same sacred sites management considerations, but the agencies’ focuses vary. Today individual land management plans may be developed independently of each other even though the tribe looks at the space as contiguous and expects the Federal agencies to be one, interconnected representative of the Federal government.

Going forward, the Subgroup will be assessing whether one or more tribes can be identified that are interested in working with us on one or more pilots in geographical regions where multiple agencies have responsibilities for land that has sacred spaces identified by one or more local tribes. The recommended goal of these pilots is two-fold: to have tribal consultations on sacred sites simultaneously with all relevant local Federal lands managers and to identify a process to develop localized, cross-agency management plans among the local agencies and local tribe(s) for management of the sacred sites within the specific geographical region.

The Subgroup also recommends that the interagency pilot projects recommended by this Subgroup take into consideration the U.S. Department of Agriculture Report to the Secretary of Agriculture entitled, “USDA Policy and Procedures Review and Recommendations: Indian Sacred Sites” in addition to each agency’s applicable laws, regulations, handbooks, and manuals.

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COMMUNICATION AND PUBLIC OUTREACH

A SUBGROUP OF THE SACRED SITES MOU CORE WORKING GROUP

INTRODUCTION

The MOU signatories recognize that tribes and the general public often lack access to information about how Federal agencies manage sacred sites issues and created the Communication and Public Outreach Subgroup to identify strategies for improved communication with a variety of stakeholders on these issues. The United States Department of Energy (“DOE”) was selected to chair the Communications and Public Outreach Subgroup.

TASKS

The Subgroup was charged with responding to the following four elements:

- Identify the existing information available within respective agencies that could be used to create a Sacred Sites MOU web site.
- Craft a clear, simple message based upon MOU language for other Federal agency and public understanding.
- Determine what outreach capacity currently exists within the respective agencies that could incorporate and build awareness of the MOU and the respective activities of the Subgroups, which includes presentations, conferences, webinars, or any and all other outreach efforts by participating agencies concerning sacred sites protection and access.
- Identify best practices for outreach that could be replicated and used to communicate the MOU goals and activities.

PROGRESS

The Communication and Public Outreach Subgroup drafted a sample communications plan and made progress in the elements under its charge. In addition to the work of the Subgroup, participating agencies continue communications and outreach activities.

- The Subgroup drafted the following as an initial attempt to craft a clear and simple message that reflects the MOU language and advances the understanding of other Federal agencies and the public.

“Sacred sites on Federal lands that are subject to the MOU often occur within larger landforms or connect through features or ceremonies to other sites or a larger sacred landscape. Agencies should consider broader areas and connections to better understand sacred site context and significance. Sacred sites include, but are not limited to, geological features, bodies of water, archaeological sites, burial locations, traditional cultural properties, and stone and earth structures.”

- The USDA USFS created and maintains the Sacred Sites MOU website, available at <http://www.fs.fed.us/spf/tribalrelations/sacredsitesmou.shtml>.
- The Subgroup took the lead in ensuring signatory agencies provided information on their programs or policies related to sacred sites for inclusion on the Sacred Sites MOU website. Like all aspects of outreach, this effort to populate the website will continue.
- All agencies have made presentations at various tribal and intertribal meetings regarding progress of MOU implementation.
- DOI and ACHP co-hosted a listening session in conjunction with the White House Tribal Nations Conference regarding the Sacred Sites MOU.
- DOE made a concerted drive to increase utilization of the Working Effectively with Tribal Governments on-line training during the month of November 2013.
- DOI refined a generic power-point presentation about the MOU for all signatory agencies to use.

Based on a review of the current practices of a limited number of Federal agencies, the Subgroup found that institutional capacity of subject matter experts in communications on these topics varies significantly. There is no single Federal authority for managing Federal outreach and communications concerning sacred sites with tribes.

NEXT STEPS

It is the preliminary recommendation that the Sacred Sites Core Working Group and the Public Engagement and Communications Subgroup share information regarding on-going communications activities among the signatories and that efforts continue to build capacity within Federal agencies to better communicate about these issues.

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POLICY REVIEW

A SUBGROUP OF THE SACRED SITES MOU CORE WORKING GROUP

INTRODUCTION

An important component of the 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. The Advisory Council on Historic Preservation (ACHP) is 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.

PROGRESS

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.

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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.

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 archaeological resources.

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

- 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.
- 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.

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

- 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.
- 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 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).