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# The Protection of Cultural Resources on Public Lands: Federal Statutes and Regulations

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# ELR

## NEWS & ANALYSIS

### The Protection of Cultural Resources on Public Lands: Federal Statutes and Regulations

by Sandra B. Zellmer

#### I. Introduction

The federal public lands—national forests, parks, and rangelands—are widely known for their vast natural resources: timber; range; minerals; watersheds; wildlife; and sweeping vistas of incredible beauty and diversity. No less notable are the cultural resources found on the public lands. Some of the earliest withdrawals of public lands from homesteading or other disposition occurred because of their cultural and historic importance.<sup>1</sup>

Preserving and allowing access to resources with cultural significance are critical to sustaining diverse, viable communities as well as our national, collective heritage. For American Indian people in particular, certain places, physical features, and objects on the public lands hold deep cultural and spiritual significance. Without ongoing relationships with a defined physical “place,” the integrity of many contemporary American Indian societies could be jeopardized.<sup>2</sup>

This Article provides an assessment of federal law governing the management and preservation of cultural resources on public lands, focusing on resources of interest to American Indians. It reviews federal statutes and regulations governing cultural and historic resource protection, as well as laws applicable to specific categories of federal public lands. In addition, it assesses the National Environmental Policy Act (NEPA),<sup>3</sup> an integral part of the decision-

making process for most activities on public lands, and its use as a tool for protecting the resources and accommodating their use.

The principal cultural resource statutes are the National Historic Preservation Act (NHPA)<sup>4</sup>; the Archaeological Resources Protection Act (ARPA)<sup>5</sup>; and the Native American Graves Protection and Repatriation Act (NAGPRA).<sup>6</sup> These laws provide procedural mechanisms through which interested parties can participate in decisionmaking processes, as well as substantive protection for cultural and historic resources. The NHPA requires federal agencies to engage in consultation, often accomplished in conjunction with the NEPA process, to take into account the effect of federal undertakings on historic properties and traditional cultural resources. ARPA prohibits the excavation or removal of archaeological resources from federal lands without a permit. The most recent addition to this trilogy of cultural resource laws, NAGPRA, provides for the repatriation of American Indian remains and cultural items imbedded in federal and tribal lands. These statutes and their implementing regulations provide significant roles for tribal governments, in recognition of their inherent sovereign interests in tribal historic, cultural, and religious resources.<sup>7</sup>

The public lands statutes, the Federal Land Policy Management Act (FLPMA)<sup>8</sup>; the National Forest Management Act (NFMA)<sup>9</sup>; and the National Park Service Organic Act,<sup>10</sup> play an affirmative role in cultural resource management and preservation by recognizing cultural values in land management plans and by preventing the degradation of the resources. The NFMA and FLPMA direct that multiple uses be allowed on the public lands in a manner that can be sustained over time. The National Park Service Organic Act provides for conservation and public enjoyment of National Park System lands and resources. Together with the cultural resource statutes and NEPA, these laws encourage, and in some cases may even mandate, federal accommodation of cultural values of American Indian tribes.

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1. Six of the first nine national monuments to be designated under the Antiquities Act of 1906, 16 U.S.C. §431, were included in large part for their historic and ethnological interest. Examples include the nation's first monument, Devils Tower, see Presidential Proclamation No. 658, 34 Stat. 3236 (1906) (describing the butte as “a natural wonder and an object of historic and great scientific interest”); Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814, 816, 29 ELR 21083, 21084 (10th Cir. 1999), cert. denied, 120 S. Ct. 1530 (2000) (discussed *infra*, at Section IV.C.), along with El Morro and Chaco Canyon National Monuments, see Presidential Proclamation No. 695, 34 Stat. 3264 (1906) (noting “greatest historical [and archaeological] value” of El Morro's rock carvings and ruins); Presidential Proclamation No. 740, 35 Stat. 2119 (1907) (describing Chaco Canyon's extraordinary “prehistoric communal or pueblo ruins”).
2. See Raymond Cross & Elizabeth Brennehan, *Devils Tower at the Crossroads: The National Park Service and the Preservation of Native American Cultural Resources in the 21st Century*, 18 PUB. LAND & RESOURCES L. REV. 5, 45 (1997). See also FRANK POMMERSHEIM, *BRAID OF FEATHERS* 33-35 (1995) (describing the land as a “sacred text” that serves a “prophetic function in the life of the [Lakota] community”).
3. 42 U.S.C. §§4321-4370d, ELR STAT. NEPA §§2-209.

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4. 16 U.S.C. §§470-470w-6.

5. *Id.* §§470aa-470ll.

6. 25 U.S.C. §§3001-3013.

7. For detailed treatment of cultural resource provisions applicable to tribal lands, see Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 VT. L. REV. 145 (1996); Dean B. Suagee, *Cultural Resources and Historic Preservation in Indian Country: An Outline of Federal Law* (2000) (unpublished manuscript, on file with author).

8. 43 U.S.C. §§1701-1785, ELR STAT. FLPMA §§102-603.

9. 16 U.S.C. §§1600-1687, ELR STAT. NFMA §§2-16.

10. *Id.* §§1-4. Although provisions governing other types of public lands may be relevant, see, e.g., National Wildlife Refuge System Act, 16 U.S.C. §668dd, only the three major statutory regimes—the NFMA, FLPMA and the National Park Service Organic Act—are covered here.

No discussion of cultural resource management on the federal public lands would be complete without considering the constitutional implications of decisions affecting cultural resources, many of which hold spiritual or religious significance. This Article provides a brief overview of the First Amendment's religion clauses, and concludes that, although the Free Exercise Clause has not afforded concrete protection for cultural and religious resources on public lands, neither has the Establishment Clause prevented land management agencies from accommodating interests in such resources.<sup>11</sup> Accommodation of American Indian interests is consistent with the unique federal relationship with tribes, as well as the policies expressed in the American Indian Religious Freedom Act (AIRFA),<sup>12</sup> and the Executive Order on Sacred Sites, which directs agencies to accommodate the use of sacred sites and to avoid actions that adversely affect their physical integrity.<sup>13</sup> Moreover, the Religious Freedom Restoration Act (RFRA),<sup>14</sup> may prohibit federal land managers from taking action that substantially burdens religious interests absent compelling reasons.

## II. Cultural Resource Protection Statutes

Congress has emphasized the importance of cultural resource protection: "The historical and cultural foundations of the nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people."<sup>15</sup> This policy is effectuated through three key statutes: the NHPA; ARPA; and NAGPRA. The NHPA is predominately procedural in nature, while ARPA and NAGPRA provide substantive rights and liabilities.

### A. The National Historic Preservation Act

#### 1. The Scope of the NHPA's Coverage

The NHPA expresses the "national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States."<sup>16</sup> It protects such properties through detailed and rigorous consultation requirements for any federal undertaking affecting historic and cultural properties, including properties of traditional cultural and religious importance to American Indian tribes. The statute provides additional protections for national historic landmarks.

The primary mechanism for the protection of historic and cultural resources under the NHPA is procedural in nature. Pursuant to NHPA §106, all federal agencies must consider the effect of federal undertakings on districts, sites, structures, and objects included in or eligible for inclusion in the

National Register.<sup>17</sup> The Secretary of the Interior, through the National Park Service (NPS), is responsible for determining eligibility for the National Register.<sup>18</sup> Public or private property may be eligible if it meets the following National Register criteria: (1) it is associated with events that have made a significant contribution to the broad patterns of our history; (2) it is associated with the lives of persons significant in our past; (3) it possesses high artistic values or distinctive characteristics of a period, type, or method of construction, or represents the work of a master; or (4) it may yield important historical information.<sup>19</sup>

Properties that have achieved significance within the past 50 years are generally not eligible for the National Register.<sup>20</sup> Likewise, religious properties are not eligible unless they "are integral parts of districts that do meet the criteria" or derive their "primary significance from architectural or artistic distinction or historical importance."<sup>21</sup> The 1992 NHPA amendments explicitly provide that "properties of traditional religious and cultural importance" to American Indian tribes may be eligible.<sup>22</sup> Such properties are often referred to as "traditional cultural properties" (TCPs).

An NPS guidance document, *Bulletin 38, Guidelines for Evaluating and Documenting Traditional Cultural Properties*, defines a TCP as a property "eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community."<sup>23</sup> An undisturbed area of the natural world, such as a mountain peak or butte like Devils Tower, Wyoming, may be a TCP.<sup>24</sup> Accordingly, American Indian "sacred sites," as that term is used in Executive Order on Sacred Sites, may be TCPs.<sup>25</sup>

The inclusion of TCPs within the NHPA's coverage has triggered controversy both because of the potential geographic scope of the NHPA as it relates to TCPs, which can encompass large areas of land, and because of the difficulty

11. See section V, *infra*, for an analysis of the Free Exercise and Establishment Clauses of the First Amendment as applied to sacred sites and cultural items and practices on federal public lands. This topic is the subject of a related article, currently in progress by the author.

12. 42 U.S.C. §1996.

13. Exec. Order No. 13007 §1(a), 61 Fed. Reg. 26771 (May 29, 1996).

14. 42 U.S.C. §2000bb(1).

15. 16 U.S.C. §470(b)(2). Congress further provided that "the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans." *Id.* §470(b)(4).

16. *Id.* §461.

17. *Id.* §470f.

18. See *id.* §470a(1); 36 C.F.R. pt. 60.

19. 36 C.F.R. §60.4. Private landowners may opt out by objecting to a proposal for inclusion of their property on the National Register. See 16 U.S.C. §470a(a)(6); 36 C.F.R. §60.6.

20. 36 C.F.R. §60.6.

21. *Id.*

22. 16 U.S.C. §470a(d)(6).

23. NPS, NATIONAL REGISTER BULLETIN 38, GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES 1 (1990) [hereinafter BULLETIN 38], available at <http://www2.cr.nps.gov/tribal/bull3803.html> (last visited Mar. 21, 2001).

24. See *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814, 29 ELR 21083 (10th Cir. 1999), cert. denied, 120 S. Ct. 1530 (2000). See also Suagee, *Tribal Voices*, *supra* note 7, at 172-74 (discussing Mount Shasta and the Helkau Historic District of the Six Rivers National Forest in northern California, both TCP's); Pueblo of Sandia v. United States, 50 F.3d 856 (10th Cir. 1995) (describing consultation efforts regarding Las Huertas Canyon in the Cibola National Forest).

25. See Exec. Order No. 13007, 61 Fed. Reg. 26771 (May 29, 1996). The order's definition of "sacred site" is more limited:

[a]ny 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.

*Id.* §1(b)(iii).

in determining the location and eligibility of TCPs.<sup>26</sup> Unlike many other properties, there may be no distinguishing physical features of a site that characterize it as a TCP; “there may be nothing observable to the outsider about a place regarded as sacred by a Native American group.”<sup>27</sup> As a result, fulfilling the §106 requirements for TCP’s can be a challenging duty for federal land managers.<sup>28</sup>

## 2. The Consultation Process

The consultation requirement for federal undertakings sweeps quite broadly to include:

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

- (A) those carried out by or on behalf of the agency;
- (B) those carried out with federal financial assistance;
- (C) those requiring a Federal permit, license, or approval; and
- (D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.<sup>29</sup>

A wide variety of actions have been found to be undertakings for purposes of §106, including forest planning; rulemaking; construction of dams, fences, and other structures; land exchanges; lease approvals for mining on Indian lands; and permits for activities on federal and private lands.<sup>30</sup> However, §106 may not be triggered if the federal action is merely ministerial or authorizes inconsequential activities.<sup>31</sup>

If an undertaking is proposed, NHPA §106 provides that the federal “action agency with direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking . . . shall, . . . take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.”<sup>32</sup> Thus, §106 does not force substantive outcomes. When historic properties will be adversely affected by a federal undertaking, the consultation process is typically concluded by a Memorandum of Agreement (MOA), but the undertaking may still go forward even without an MOA.<sup>33</sup>

The federal action agency has responsibility for effectuating each step of consultation and ensuring that the appropriate entities are involved during the process. States play a key role in the consultation process through their State Historic Preservation Officers (SHPOs). SHPOs are directed to iden-

tify historic properties, evaluate their significance, and formulate measures to protect properties deemed worthy of protection.<sup>34</sup> Within reservation boundaries, tribal governments and Tribal Historic Preservation Officers (THPOs) may assume the functions that would otherwise be performed by SHPOs.<sup>35</sup>

Action agencies must consult with SHPOs or THPOs on undertakings that may affect historic properties.<sup>36</sup> Action agencies must also consult with interested tribes when an undertaking may affect properties of “religious and cultural significance,” even if the property is outside reservation boundaries.<sup>37</sup> The Advisory Council on Historic Preservation (the Council), an independent agency that administers §106, has issued detailed regulations regarding the five steps of consultation, as described below.<sup>38</sup>

### *a. Initiate Consultation and Coordinate With NEPA*

The action agency must determine whether the proposed federal action is an “undertaking” that has the potential to affect historic properties and TCPs. If so, the agency must identify the appropriate SHPO or THPO to be involved in the consultation process. With respect to undertakings on federal lands, the agency must also “make a reasonable and good faith effort to identify any Indian tribes or Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties.”<sup>39</sup>

The NHPA regulations encourage the action agency to coordinate its §106 compliance with the preparation of any necessary NEPA documents.<sup>40</sup> Similarly, NEPA’s implementing regulations provide that agencies must prepare environmental impact statements (EIS) concurrently and in an integrated fashion with related studies required by other environmental laws.<sup>41</sup> Historic and cultural resources are expressly included among the environmental consequences to be considered in EIS.<sup>42</sup>

34. *Id.* §470a(a)(b)(3)(I). See also 36 C.F.R. §61.4(b).

35. *Id.* §470a(d)(2). See also 36 C.F.R. §800.2(c).

36. 16 U.S.C. §470a(a)(b)(3)(I). Applicants for federal assistance or a federal permit or license are also entitled to participate as consulting parties. See 36 C.F.R. §800.2(c)(4).

37. 16 U.S.C. §470a(d)(6).

38. See *id.* §470i(a) (directing the establishment of the Council). The Council has been in the process of amending its regulations for several years. See 64 Fed. Reg. 27044 (May 18, 1999) (rule revising NHPA regulations). See also 65 Fed. Reg. 42834 (July 11, 2000) (reissuing revisions as a proposed rule). The final revised regulations were issued on December 12, 2000, and became effective on January 11, 2001. See 65 Fed. Reg. 77698 (Dec. 12, 2000). Changes are summarized at <http://www.achp.gov/newsregs12-00.html> (last visited Mar. 21, 2001); however, the new regulations maintain “the core elements of the Section 106 process.” *Id.* Unless otherwise noted, all references in this Article are to the most current version of the regulations.

39. 16 C.F.R. §800.3(f)(2). As proposed, the rules would have required consultation with “traditional cultural authorities,” people recognized by their communities as repositories of knowledge about traditional beliefs and practices. However, this requirement was eliminated in response to objections from federal agencies regarding the difficulty of identifying such authorities. See 64 Fed. Reg. at 27046.

40. 36 C.F.R. §800.8. See also NEPA, 42 U.S.C. §4332(2)(C), ELR STAT. NEPA §102(2)(C) (requiring consideration of the environmental effects and alternatives of major federal actions).

41. See 40 C.F.R. §1502.25.

42. See *id.* §1502.16. For a detailed discussion of NEPA, see *infra*, section III.

26. In reaction to a controversy over a ski resort on Mount Shasta, Rep. Wally Herger (R-Cal.) sponsored H.R. 563, providing that no property can be determined eligible for the National Register unless it contains physical evidence of human activity, such as artifacts. See 141 CONG. REC. H325 (daily ed. Jan. 18, 1995). The Herger bill, had it passed, would have rendered Mount Shasta and many other TCPs ineligible for the National Register. See Suagee, *Tribal Voices*, *supra* note 7, at 174.

27. BULLETIN 38, *supra* note 23, at 11-12.

28. See, e.g., *Pueblo of Sandia*, 50 F.3d at 856 (finding that the Forest Service had failed to make a reasonable effort to identify TCPs within forest plan area).

29. 16 U.S.C. §470w(7).

30. See Suagee, *Tribal Voices*, *supra* note 7, at 188 (collecting cases).

31. See *id.* (citing cases).

32. 16 U.S.C. §470f.

33. See *id.* §470h-2(l).

### b. Identify Historic Properties

The action agency must consult with the SHPO to determine the area of potential effects and review existing information about the identity of historic properties in that area. The agency must also seek information from consulting parties and others, including Indian tribes, with regard to the identity of properties that may hold religious and cultural significance for those tribes.<sup>43</sup> The agency must make reasonable, good-faith efforts to identify historic properties and TCP's by conducting background research, interviews, and field surveys.<sup>44</sup> Tribal oral tradition can also be used to establish the location and significance of a place.<sup>45</sup>

Information regarding TCPs is often highly sensitive in nature. Agencies engaged in the consultation process are required to seek the views of Indian tribes regarding their confidentiality concerns.<sup>46</sup> Information regarding the location, character, or ownership of a historic resource may not be disclosed if the agency and the NPS make a determination that disclosure may cause a significant invasion of privacy, risk of harm to the historic property, or inhibit the use of a traditional religious site by practitioners.<sup>47</sup>

Once information about a historic property in the project area comes to light, the action agency, in consultation with the SHPO and with any tribe that might attach significance to the property, must evaluate its significance and determine whether it is eligible for the National Register by applying the National Register criteria.<sup>48</sup> If the agency and the SHPO agree that a property is not eligible, it shall be considered not eligible.<sup>49</sup> However, if the Council requests a determination of eligibility, then the agency must seek a formal determination from the NPS. A tribe that attaches religious and cultural significance to a historic property located off tribal lands may ask the Council to request a formal determination.<sup>50</sup>

43. 36 C.F.R. §800.4(a)(4).

44. *Id.* §800.4(b). In *Pueblo of Sandia v. United States*, 50 F.3d 856, 860-62 (10th Cir. 1995), the Tenth Circuit found that the Forest Service had failed to make a reasonable effort to identify TCPs when it ignored the guidelines of *Bulletin 38* and sent only written inquiries to tribal representatives in spite of receiving information indicating that TCPs may be present in the affected area. See *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 807-08, 29 ELR 21168, 21170-71 (9th Cir. 1999) (determining that the Forest Service had properly referenced *Bulletin 38* in identifying TCPs, but enjoining a proposed land exchange due to the agency's failure to characterize effects as adverse and for NEPA violations).

45. See *Pueblo of Sandia*, 50 F.3d at 860-61; *Hoonah Indian Ass'n v. Morrison*, 170 F.3d 1223, 29 ELR 21024 (9th Cir. 1999). In the *Hoonah* case, the court considered tribal oral evidence, but ultimately upheld the Forest Service's determination that a route taken by the survivors of a battle in 1804 was not eligible for the National Register because there was "no physical marking, no documentation, and no well established tribal consensus, to establish exactly what . . . paths the retreating Kiks.adi had taken . . . . That important things happened in a general area is not enough to make the area a 'site.'" *Id.* at 1231-32, 29 ELR at 21027.

46. 36 C.F.R. §800.11(c).

47. 16 U.S.C. §470w-3(a)(3).

48. 36 C.F.R. pt. 63. See *supra* notes 17-20 and accompanying text (describing eligibility criteria).

49. 36 C.F.R. §800.4(c)(2). See *Hoonah*, 170 F.3d at 1231, 29 ELR at 21027 (concluding that if the federal agency official and the SHPO agree that a property is not eligible for the National Register, it is not eligible).

50. 36 C.F.R. §800.4(c)(2). If the tribe subsequently fails to appeal the NPS' eligibility determination, it may be barred from bringing suit in

If the action agency determines that there are no historic properties, or that there are historic properties but they will not be affected, the agency provides documentation to the SHPO and notice to other consulting parties. If neither the SHPO nor the Council objects within 30 days, the agency's §106 responsibilities are fulfilled.<sup>51</sup> If, however, either the SHPO or the Council objects or the action agency determines that the undertaking will affect historic properties, the consultation process must continue to determine the nature of the effects.

### c. Assess Adverse Effects

Using the criteria specified in the regulations, the action agency must determine whether effects on historic properties will be adverse, in consultation with the SHPO and any tribe that attaches significance to identified historic properties. An effect is adverse when it may "diminish the integrity of the property's location, . . . setting, . . . feeling, or association."<sup>52</sup> Examples of adverse effects include physical destruction, the introduction of visual, audible, or atmospheric elements that are out of character with the property, the alteration of the property's setting, and transferring the property without adequate restrictions to ensure its long-term preservation.<sup>53</sup>

If the agency proposes a finding of no adverse effect, notice must be provided to all the consulting parties. If the consulting parties agree with the agency's determination, the §106 process is concluded.<sup>54</sup> On the other hand, if any consulting party expresses disagreement with the finding within 30 days, the action agency must either consult with the party to resolve the disagreement or request that the Council review the finding. The agency is also encouraged to seek concurrence from any tribe that attaches religious and cultural significance to identified historic properties, whether or not such a tribe is a consulting party. If the tribe objects to the finding, it can request the Council to review the finding. If the Council reviews the finding and determines that the effect would be adverse, the process continues to the next step.<sup>55</sup>

### d. Resolve Adverse Effects

The action agency must attempt to reach agreement with other consulting parties in developing and evaluating alternatives to avoid, minimize, or mitigate adverse effects.<sup>56</sup> Al-

court for failure to exhaust administrative remedies. See *Hoonah*, 170 F.3d at 1231, 29 ELR at 21027.

51. 36 C.F.R. §800.4(d)(1).

52. *Id.* §800.5(a)(1).

53. See *id.* §800.5(b). See also *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 807-08, 29 ELR 21168, 21170-71 (9th Cir. 1999) (rejecting agency's conclusion that photographing and mapping would mitigate adverse effects to significant features on property to be transferred to a private party, given that the site would likely be logged if it were transferred without "adequate restrictions and conditions"); 36 C.F.R. §800.5(a)(2)(vii) (providing examples of adverse effects, including "[t]ransfer . . . of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance").

54. See 36 C.F.R. §800.5(c).

55. See *id.* §800.5(d).

56. See *id.* §800.6(a). See also *Muckleshoot Indian Tribe*, 177 F.3d at 807-08, 29 ELR at 21170-71.

though all of the parties participate in this step, in most cases only the action agency and the SHPO must actually reach agreement, as expressed in an MOA. The Council may choose to participate on its own initiative or at the request of the SHPO, tribe, or another consulting party.<sup>57</sup> If the Council does participate, then it must also be a signatory to the MOA.<sup>58</sup> If consultation does not result in an MOA, the agency, the SHPO, or the Council may decide that further consultation will not be productive, and the process concludes with one final step.

#### *e. Failure to Resolve Adverse Effects*

When the action agency terminates consultation, it must ask the Council to comment on the undertaking.<sup>59</sup> If the SHPO terminates consultation, the agency and the Council may continue consultation and execute an MOA without the SHPO's involvement.<sup>60</sup> In contrast, if a THPO terminates consultation, the Council must provide comments on the undertaking, and the agency official and the Council cannot execute an MOA.<sup>61</sup> In the absence of an MOA, the undertaking may proceed, but only if the decision is made by the head of the agency.<sup>62</sup> The decision must explain the rationale for the decision and provide evidence that the agency considered the Council's comments.<sup>63</sup>

### 3. National Historic Landmarks

In contrast to §106, NHPA §110 provides that, if an undertaking would adversely affect a national historic landmark, the action agency must take steps to minimize harm to the landmark "to the maximum extent possible."<sup>64</sup> Public or private properties may be designated as landmarks if they "possess exceptional value or quality in illustrating or interpreting the heritage of the United States in history, architecture, archeology, engineering and culture and . . . a high degree of integrity of location, design, setting, materials, workmanship, feeling and association."<sup>65</sup> For example, the Medicine Wheel in the Bighorn National Forest is a national landmark subject to a Programmatic Agreement and Historic Preservation Plan, signed by the U.S. Forest Service and consulting parties.<sup>66</sup> The plan emphasizes tradi-

tional cultural values as the management directive for the area, closes a nearby road, and requires information exchange and consultation before logging or other disruptive activities go forward.<sup>67</sup>

Section 110 also imposes programmatic responsibilities on federal agencies, directing them to establish a preservation program to ensure that historic properties under the agency's control are identified, evaluated, and nominated to the National Register, and managed in a manner that considers their "historic, archaeological, architectural, and cultural values."<sup>68</sup> In addition, §110 provides that the action agency's own procedures for implementing the NHPA's requirements must be consistent with the Council's regulations, and must provide for the disposition of "cultural items" covered by NAGPRA in accordance with that statute.<sup>69</sup>

### 4. Enforcement

Federal agencies that fail to execute their NHPA responsibilities, along with their permittees, may be enjoined from proceeding with the undertaking in question.<sup>70</sup> Further, an applicant or permittee who has intentionally caused significant adverse effects to a historic property may be barred from receiving loans, permits, licenses, or other assistance, although the assistance may be granted if it is "nevertheless justified."<sup>71</sup> The agency must "take into account the effects of the undertaking" on the property, and consider the Council's opinion as to the justification for granting assistance and the availability of any possible mitigation measures.<sup>72</sup> Factors to be considered include the circumstances under which the adverse effects occurred and the degree of damage to the property.<sup>73</sup>

#### *B. The Archaeological Resources Protection Act*

ARPA applies to archaeological resources imbedded in, or removed from, federal public lands and Indian lands.<sup>74</sup> For the purposes of ARPA, "public lands" include lands within the National Park System, the National Wildlife Refuge System, and the National Forest System, as well as most

57. 36 C.F.R. §800.6(a)(1), 800.9(a). The Council is likely to enter the process when an undertaking presents issues of concern to Indian tribes. *Id.* pt. 800, app. A(c)(4).

58. *Id.* §800.6(c)(1). In addition, the agency official may invite a concerned tribe to be a signatory if the MOA encompasses TCPs on federal lands. *Id.* §800.6(c)(2).

59. *Id.* §800.7.

60. *Id.* §800.7(a)(2).

61. *Id.* §800.7(a)(3).

62. 16 U.S.C. §470h-2(l). See 36 C.F.R. §800.7(c)(4).

63. 36 C.F.R. §800.7(c)(4).

64. 16 U.S.C. §470h-2(f). See 36 C.F.R. §800.10.

65. 36 C.F.R. §65.4(a). Additional criteria listed in the regulations include consideration of sites "composed of integral parts of the environment not sufficiently significant by reason of historical association or artistic merit to warrant individual recognition but [that] outstandingly commemorate or illustrate a way of life or culture." *Id.* §65.4(a)(5).

66. U.S. DEP'T OF AGRIC. FOREST SERVICE REGION 2, HISTORIC PRESERVATION PLAN FOR THE MEDICINE WHEEL NATIONAL HISTORIC LANDMARK AND VICINITY (1996), signed by Forest Supervisor Larry Keown, the Council, the SHPO, the Medicine Wheel Alliance,

the Medicine Wheel Coalition for Sacred Sites, the Federal Aviation Administration, and Big Horn County Commissioners (on file with author).

67. *Id.* The plan is intended to promote continued traditional cultural uses and protect the area from inconsistent uses. *Id.* See *infra* notes 188-91, discussing pending litigation over the plan.

68. 16 U.S.C. §470h-2(a). See also NPS, The Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act, 63 Fed. Reg. 20496 (Apr. 24, 1998).

69. 16 U.S.C. §470h-2.

70. See *Pueblo of Sandia v. United States*, 50 F.3d 856, 862 (10th Cir. 1995); *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 808, 29 ELR 21168, 21171 (9th Cir. 1999).

71. 16 U.S.C. §470h-2(k).

72. 36 C.F.R. §800.9(c).

73. *Id.* The agency must provide documentation of these factors to the Council, along with any comments received from the applicant, the SHPO, Indian tribes, and other interested parties. *Id.*

74. See 16 U.S.C. §470ee. ARPA complements its predecessor, the Antiquities Act of 1906, which prohibits the appropriation, excavation, or destruction of historic ruins, monuments, or "any object of antiquity" situated on federal lands. See *id.* §433.

other lands for which fee title is held by the United States.<sup>75</sup> The term “archaeological resource” is defined as “any material remains of past human life or activities which are of archaeological interest.”<sup>76</sup> The statutory definition expressly includes graves and human skeletal remains. However, to be covered, items and remains must be at least 100 years of age.<sup>77</sup>

Under ARPA, the excavation, removal, alteration, or destruction of archaeological resources on federal, public, or tribal lands is prohibited unless it occurs pursuant to a permit.<sup>78</sup> ARPA also prohibits the sale, purchase, transport, or receipt of any archaeological resource excavated or removed from federal or tribal lands in violation of ARPA or, if the act took place in interstate or foreign commerce, in violation of state or local law.<sup>79</sup>

Permits may be obtained pursuant to uniform regulations issued jointly by the Secretaries of the Interior, Agriculture, and Defense, and the Chairman of the Tennessee Valley Authority.<sup>80</sup> Prior to granting a permit, the land manager must contact all Indian tribes with historic ties to the federal lands at issue in order to identify sites of religious or cultural importance.<sup>81</sup> If the activity may result in harm to any such site, the land manager must provide notice to interested tribes and allow 30 days for a response.<sup>82</sup> Upon request, the land manager may meet with tribal representatives to discuss their interests, including ways to mitigate harm to the site.<sup>83</sup> Permits must include any mitigation measures that are adopted.<sup>84</sup>

Violations of ARPA are subject to civil and criminal penalties. Civil penalties may be assessed by the federal land manager in an amount that reflects restoration costs and the fair market value of lost or destroyed resources.<sup>85</sup> Persons who knowingly violate ARPA may be subject to imprisonment.<sup>86</sup> Archaeological resources taken in violation of

ARPA, along with vehicles and equipment used in connection with such violation, are subject to forfeiture to the United States.<sup>87</sup> ARPA also provides for a bounty of up to \$500 for persons providing information leading to a conviction or the assessment of a civil penalty.<sup>88</sup>

### C. Native American Graves Protection and Repatriation Act

NAGPRA was enacted in 1990 to correct decades of abusive treatment of American Indian remains and burial grounds.<sup>89</sup> It complements ARPA by regulating the discovery and removal of human remains and cultural items from federal and tribal lands, but it goes beyond ARPA by requiring repatriation to lineal descendants or appropriate tribes. NAGPRA also requires federal agencies and museums to inventory their collections and repatriate all remains and cultural items covered by the Act.

#### 1. The Scope of NAGPRA's Coverage

NAGPRA establishes rights of federally recognized tribes, Alaskan Native villages, and Native Hawaiian organizations to obtain repatriation of human remains and cultural items.<sup>90</sup> The provisions applicable to museums extend to collections held by federal, state, and local governments and public and private educational institutions that receive federal funds.<sup>91</sup> Native American human remains and cultural items embedded in federal public lands and tribal lands

75. *Id.* §470bb(3). Lands on the Outer Continental Shelf and lands under the jurisdiction of the Smithsonian Institution are excluded from the term “public lands.” *Id.* §470bb(3)(b).

76. *Id.* §470bb. *See also* 43 C.F.R. §7.3(a) (providing detailed regulatory definitions of statutory terms).

77. 16 U.S.C. §470bb(1).

78. *Id.* §470ee. ARPA exempts Indian tribes from the permit requirement for excavations on tribal lands, and also exempts any tribal member if the tribe has a law regulating the excavation or removal of archaeological resources. *See id.* §470cc(g).

79. *Id.* §470ee(c).

80. *See* 18 C.F.R. pt. 1312 (Tennessee Valley Authority); 32 C.F.R. pt. 229 (Defense); 36 C.F.R. pt. 296 (Agriculture - Forest Service); and 43 C.F.R. pt. 7 (the Interior).

81. 43 C.F.R. §7.7(b).

82. *Id.* §7.7(a).

83. *Id.* §7.7(a)(3). If it is necessary to issue a permit immediately due to imminent threat of loss or destruction of the resource, the land manager must provide notification to the appropriate tribe. *Id.* §7.7(a)(4).

84. *Id.* §7.7(a)(3).

85. *See* 16 U.S.C. §470ff(a) (authorizing civil penalties). *See also* 43 C.F.R. §§8365.1-5, 8360.0-7 (BLM authority to assess penalties); 36 C.F.R. §296.16 (Forest Service authority to assess penalties). Civil penalties can be quite severe. *See* Sean Whaley, *Man Fined \$2.5 Million*, LAS VEGAS REV.-J., Apr. 20, 1996, at 1B; Notice of Assessment from Ann J. Morgan, BLM State Director, to Jack Lee Harelson (Sept. 3, 1996) (on file with author).

86. *See* 16 U.S.C. §470dd(d) (providing that violators shall be fined not more than \$10,000 or imprisoned not more than one year; penalties and confinement may be increased if the value of the resource or cost of restoration exceed \$500, or if the violator is a repeat offender). Offenders may also be charged with theft of government property and malicious mischief, *see* 18 U.S.C. §§641, 1361, and violation of the

Antiquities Act of 1906, which provides for a \$500 penalty and 90 days' imprisonment for the appropriation, excavation, or destruction of historic ruins, monuments or “any object of antiquity” situated on federal lands. *See* 16 U.S.C. §433. The circuit courts are split as to whether the Antiquities Act, which does not define the term “object of antiquity,” is unconstitutionally vague in violation of the Fifth Amendment Due Process Clause. *Compare* United States v. Diaz, 499 F.2d 113 (9th Cir. 1974) (finding statute fatally vague) with United States v. Smyer, 596 F.2d 939 (10th Cir.) (disagreeing with Diaz and affirming conviction for taking artifacts), *cert. denied*, 444 U.S. 843 (1979). ARPA prosecutions have withstood vagueness challenges. *See* United States v. Austin, 902 F.2d 743 (9th Cir.), *cert. denied*, 498 U.S. 874 (1990).

87. 16 U.S.C. §470gg(b)-(c). If the resources were taken from Indian lands, penalties and forfeited items may be transferred to the affected Indian tribe. *Id.*

88. *Id.* §470gg(a).

89. *See* H.R. REP. NO. 101-877, at 9 (1990), reprinted in 1990 U.S.C.C.A.N. 4367, 4368; Wendy Crowther, *Native American Graves Protection and Repatriation Act: How Kennewick Man Uncovered the Problems in NAGPRA*, 20 J. LAND RESOURCES & ENVTL. L. 269, 270 (2000); Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35 (1992).

90. *See* 25 U.S.C. §§3002-3003. The term “Native American” is defined as “relating to, a tribe, people, or culture that is indigenous to the United States.” 26 U.S.C. §3001(9). The term “tribe” includes “any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.” *Id.* §3001(7). “Native Hawaiian” means “any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.” *Id.* §3001(10). The term Native American, as used throughout this section of the Article, includes all persons and tribes covered by NAGPRA.

91. *See* 25 U.S.C. §3001(8). Repatriation from museum and agency collections is beyond the scope of this Article. For relevant provisions, *see id.* §§3003-3005 (repatriation requirements), and 43 C.F.R. §10.12 (civil penalty provisions).

are also covered by NAGPRA.<sup>92</sup> Federal lands include “any land other than tribal lands which are controlled or owned by the United States, including lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act of 1971.”<sup>93</sup> Tribal lands include privately owned lands within reservation boundaries and dependent Indian communities.<sup>94</sup>

As defined in NAGPRA, “cultural items” include human remains as well as funerary objects, sacred objects, and objects of cultural patrimony.<sup>95</sup> Funerary objects are those that were placed with human remains as part of a death rite or ceremony.<sup>96</sup> Sacred objects are “specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents.”<sup>97</sup> Objects of “cultural patrimony” include “object[s] having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself . . . which, therefore, cannot be alienated, appropriated, or conveyed by any individual.”<sup>98</sup>

The term “remains” is not defined in NAGPRA. Although one federal district court has held that NAGPRA does not apply to the corpse of a recently buried tribal member because the corpse lacked cultural or archaeological interest,<sup>99</sup> its interpretation of the statute contradicts both the plain language and remedial purposes of the Act.<sup>100</sup> A more

plausible construction was rendered by a district court in South Dakota, which specifically rejected arguments that NAGPRA applies only to prehistoric human remains.<sup>101</sup> The court reasoned that such an interpretation would render NAGPRA’s priority for lineal descendants of human remains “meaningless, since it is nearly, if not completely, impossible to determine the lineal descendants of persons who died before recorded time.”<sup>102</sup>

## 2. Protection and Disposition of Cultural Items on Federal and Tribal Lands

The excavation or removal of Native American human remains and cultural items from federal or tribal lands is prohibited unless a permit has been issued by the federal land manager under ARPA.<sup>103</sup> Before a permit will be issued, notice and consultation with culturally affiliated tribes are required.<sup>104</sup> Although tribal consent is not required for the issuance of a permit, culturally affiliated tribes have the right to determine the disposition of excavated human remains or cultural items.<sup>105</sup>

If Native American human remains or cultural items are discovered on federal or tribal lands, the person making such a discovery must notify the responsible federal or tribal official.<sup>106</sup> When remains are found on federal lands, the agency official is required to provide notice to the appropriate tribe. Meanwhile, the activity that led to the discovery must cease.<sup>107</sup> The activity may be resumed 30 days after certification that notice has been received, but an ARPA permit is required if the activity would result in the excavation or removal of human remains or cultural items.<sup>108</sup>

Native American human remains and cultural items that are excavated or removed from federal lands or tribal lands are subject to rights of ownership or control according to the priorities established in NAGPRA.<sup>109</sup> Lineal descendants have the highest priority with regard to human remains and associated funerary objects. If lineal descendants cannot be ascertained, and for unassociated funerary objects, sacred objects, and objects of cultural patrimony, discovered on tribal lands, the tribe on whose lands they were discovered has the right of ownership or control. Otherwise, if the discovery took place on federal lands, the tribe with the closest cultural affiliation has the right of ownership and control. However, if the Indian Claims Commission or Court of

thropologists collected and studied crania and other body parts in an effort to prove that Indians were biologically inferior to Caucasians. See Trope & Echo-Hawk, *supra* note 89, at 40 (describing aggressive collection practices, such as taking skulls from battlefields, hospitals, and grave sites).

92. See 25 U.S.C. §3002. See also 60 Fed. Reg. 62134 (Dec. 4, 1995) (codified at 43 C.F.R. part 10); 62 Fed. Reg. 41292 (Aug. 1, 1997) (correcting amendments).
93. 25 U.S.C. §3001(5). See 43 C.F.R. §10.2(f)(1).
94. 25 U.S.C. §3002. See *id.* §3001(15); 43 C.F.R. §10.2(f)(2) (defining tribal lands).
95. 25 U.S.C. §3001(3).
96. *Id.* §3001(3)(A)-(B). Funerary objects are further categorized into “associated funerary objects,” where “both the human remains and associated funerary objects are presently in the possession or control of a Federal agency or museum” or were “exclusively made for burial purposes or to contain human remains,” and “unassociated funerary objects.” *Id.*
97. *Id.* §3001(3)(C).
98. *Id.* §3001(3)(D). In *City of Providence v. Babbitt* (D.R.I. 1996) (No. 96-668) (on file with author), a museum sought a declaratory judgment regarding a Hawaiian spear rest characterized by Hawaiian groups as both an object of cultural patrimony and a sacred object. The city claimed that the object was merely decorative, and that it had a right of possession, having obtained it lawfully from an individual with a right to alienate it. *Id.* §§3005(c), 3001(13). The NAGPRA Review Committee recommended its return, see Isaac Moriwake, *Critical Excavations: Law, Narrative, and the Debate on Native American and Hawaiian “Cultural Property” Repatriation*, 20 U. HAW. L. REV. 261, 265 (1998), and the case was ultimately settled upon return of the object to the Hawaiians. See C.J. Chivers, *An Intense Aloha: City of Providence Bids Farewell to Disputed Hawaiian Artifact*, PROVIDENCE J., Aug. 8, 1998, at B1.
99. See *Kickapoo Traditional Tribe of Tex. v. Chacon*, 46 F. Supp. 2d 644, 650 (W.D. Tex. 1999) (referring to ARPA, which is limited to “material remains of past human life . . . which are of archeological interest,” 16 U.S.C. §470bb(1), to justify a restrictive construction of “human remains” under NAGPRA). The court allowed Texas officials to exhume the body, which had been buried on tribal land, and perform an autopsy, rejecting both NAGPRA and constitutional claims. See *id.* at 653 (holding that criminal laws of “general applicability” had a rational basis and therefore did not violate the First Amendment, citing Employment Div., Dep’t of Human Resources of Or. v. Smith, 494 U.S. 872 (1990)).
100. See Crowther, *supra* note 89, at 270 (describing remedial purposes of NAGPRA as correcting a long history of abusive treatment of Native American remains). Notably, some of the most egregious abuses occurred immediately after a corpse was buried, when physical an-

101. *Yankton Sioux Tribe v. Corps of Eng’rs*, 83 F. Supp. 2d 1047 (D.S.D. 2000).
102. *Id.* at 1055.
103. 25 U.S.C. §3002(c); 16 U.S.C. §470cc. This provision applies to discoveries after November 16, 1990, the effective date of NAGPRA. *Id.* §3002(a).
104. The term “cultural affiliation” is defined as “a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.” *Id.* §3001(2).
105. See 43 C.F.R. §§10.3, 10.5.
106. See 25 U.S.C. §3002(d); 43 C.F.R. §10.4.
107. 25 U.S.C. §3002(d).
108. 43 C.F.R. §10.4(d)(v), (e)(iii).
109. 25 U.S.C. §3002. See 43 C.F.R. §10.6.

Claims has determined that the federal lands at issue are the aboriginal lands of a tribe, that tribe has a presumptive right of ownership or control unless another tribe makes a stronger showing of cultural affiliation.<sup>110</sup>

Failure to comply with the inadvertent discovery provisions of NAGPRA may result in civil and criminal penalties. In *United States v. Tidwell*,<sup>111</sup> the Ninth Circuit affirmed the conviction of Rodney Tidwell on a number of counts, including trafficking in cultural items in violation of NAGPRA, theft of tribal property, unlawful removal of archaeological resources, interstate transportation of stolen property, and conspiracy.<sup>112</sup> In defense, Tidwell argued that the term “cultural patrimony” was unconstitutionally vague in violation of the Due Process Clause,<sup>113</sup> in that it failed to give him fair notice that his conduct was prohibited, because whether an item is “inalienable” and has “ongoing historical, traditional, or cultural importance” can only be determined by reference to unwritten tribal law. The court rejected these arguments, concluding that Tidwell was on notice that the items he traded might be covered, as he held himself out as a dealer in Native American art. Further, Tidwell had previously been convicted of violating NAGPRA, and therefore had personal knowledge of the statute’s requirements.<sup>114</sup>

NAGPRA also allows certain private enforcement actions. Section 15 provides that the federal district courts “shall have jurisdiction over any action brought by any person alleging a violation of this Act and shall have the authority to issue such orders as may be necessary to enforce the provisions of this Act.”<sup>115</sup> According to the U.S. Department of the Interior (DOI), this authorizes civil actions against federal agencies to compel compliance with the statute.<sup>116</sup>

### 3. Recent Disputes Calling the Act’s Scope and Constitutionality Into Question

NAGPRA’s requirements for inadvertent discoveries of human remains are being tested in several pending cases, highlighting the Act’s practical and perhaps even constitutional vulnerabilities.

#### *a. Unidentifiable, Ancient Remains: Kennewick Man*

A significant “loophole” in NAGPRA came to the forefront in 1996, when human remains believed to be over 9,000 years old were discovered in the bank of the Columbia River near Kennewick, Washington. At the time of NAGPRA’s enactment, Congress was well aware of the tension between

the scientific desire for further study of ancient remains and the objectives of the tribes, but it failed to resolve the issue of ownership or control of remains whose cultural affiliation could not be determined.<sup>117</sup> Instead, the task was delegated to the DOI to resolve through rulemaking, but regulations have not yet been issued.<sup>118</sup>

Scientists raised both constitutional and statutory challenges to the decision of the U.S. Army Corps of Engineers (the Corps) to transfer the Kennewick remains to Indian tribes for reburial.<sup>119</sup> With respect to the constitutional issue, the court determined, as a preliminary matter, that NAGPRA had not been shown to violate equal protection requirements because Congress could have reasonably concluded that state and local laws against abusing a corpse and grave-robbing were adequate for most cemeteries, but that special measures were required for the unique problem of the desecration of Native American remains.<sup>120</sup> Moreover, it found that Congress has a direct interest in regulating the disposition of remains discovered on federal lands,<sup>121</sup> and a special obligation toward Native Americans.<sup>122</sup>

The court did, however, find that the Corps’ decision to repatriate was arbitrary, in that the agency had neither considered all of the relevant facts regarding the discovery nor articulated a satisfactory explanation for its action.<sup>123</sup> It remanded the case to the Corps, and ordered it to retain custody of the remains and store them in a manner that would preserve their potential scientific value. The plaintiffs’ re-

117. See Crowther, *supra* note 89, at 271 (citing *Hearings on S. 1980 Before the Senate Select Commission on Indian Affairs*, 101st Cong. 70 (1990) (statement of Prof. Keith Kintigh)). For discussion of the scientific need for further study and suggestions for a resolution, see Renee M. Kosslak, *The Native American Graves Protection and Repatriation Act: The Death Knell for Scientific Study?*, 24 AM. INDIAN L. REV. 129 (2000).

118. The issue had come up at least once before, and in *Na Iwi O Na Kupuna O Mokapu v. Dalton*, 894 F. Supp. 1397 (D. Haw. 1995), examinations were allowed to identify the cultural affiliation of remains. However, that case involved an inventory conducted under §3003(b)(2), which prevents agencies and museums from conducting additional research after completion of the initial inventory but does not preclude further scientific study if necessary to conduct the inventory in an accurate fashion. See 894 F. Supp. at 1417; 25 U.S.C. §3005(b) (“agency or museum shall expeditiously return such items unless such items are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States”). In contrast, §3002 says nothing about research or studies upon inadvertent discovery. *Id.* §3002.

119. See *Bonnichsen v. Department of the Army*, 969 F. Supp. 628 (D. Or. 1997). The Nez Perce Tribe and the Confederated Tribes of the Umatilla Indian Reservation participated in the case as amicus curiae. *Id.*

120. *Id.* Equal protection requires that similarly situated parties be treated in similar fashion, and forbids decisions based on “race, religion, or other arbitrary classification.” See *United States v. Armstrong*, 517 U.S. 456, 464 (1996).

121. *Bonnichsen*, 969 F. Supp. at 649. See U.S. CONST. art. IV, §3, cl. 2 (providing that “Congress shall have power to dispose of the territories and make all needful rules and regulations respecting the territory or other property belonging to the United States”).

122. *Bonnichsen*, 969 F. Supp. at 649 (citing *Morton v. Mancari*, 417 U.S. 551, 554-55 (1974)). Although the court noted that it was addressing the issue at a preliminary stage of the case, it indicated that the plaintiffs would have a long way to go to convince the court otherwise in subsequent proceedings. *Id.* See also *Idrogo v. Department of the Army*, 18 F. Supp. 2d 25 (D.D.C. 1998) (dismissing equal protection claim brought by non-Indians to compel repatriation of the remains of Geronimo for lack of standing, finding that only direct descendants of Native American remains and affiliated tribes stand to be injured by NAGPRA violations).

123. *Bonnichsen*, 969 F. Supp. at 646.

110. 25 U.S.C. §3002(a)(2)(C).

111. 191 F.3d 976 (9th Cir. 1999).

112. *Id.* The items at issue included Hopi masks and a set of priest robes from the Pueblo of Acoma. *Id.* at 979. Tidwell was convicted of several other crimes, including one count of trafficking in unlawfully removed archaeological resources under ARPA, 16 U.S.C. §470ee.

113. *Tidwell*, 191 F.3d at 979-80.

114. *Id.* at 980 (citing *United States v. Corrow*, 119 F.3d 796, 28 ELR 20125 (10th Cir. 1997), *cert. denied*, 522 U.S. 1133 (1998)). “NAGPRA requires the government to establish that the defendant ‘knowingly’ traded in cultural items in violation of the NAGPRA. This scienter element protects the unwary from criminal punishment.” *Id.*

115. 25 U.S.C. §3013.

116. 62 Fed. Reg. 1820 (Jan. 13, 1997).

quest to study the remains was denied pending completion of the Corps' investigation.<sup>124</sup> The DOI ultimately concluded that the remains were culturally affiliated with five Northwest tribes because the bones were found near the tribes' aboriginal lands, according to geographic data and the tribes' oral histories.<sup>125</sup>

Meanwhile, the NAGPRA Review Committee published a notice in the *Federal Register* calling upon the Secretary of the Interior to propose rules for the disposition of culturally unidentifiable human remains. The committee provided recommendations for a general approach, including the return, where appropriate, of remains recovered from tribal and aboriginal lands and of remains "for which there is a relationship of shared group identity with non-federally recognized Native American groups."<sup>126</sup> The committee also noted that consultations might lead to regional decisionmaking frameworks for the disposition of unidentifiable remains, and that its recommendations could be sought in individual cases.<sup>127</sup>

### *b. Ongoing Duties to Protect Cultural Items: Missouri River*

In December 1999, the Corps drew down the water level in Lake Francis Case pursuant to its annual operating plan for the reservoir, resulting in the exposure of Native American remains and artifacts from the White Swan Burial Grounds, also known as St. Phillip's Cemetery.<sup>128</sup> The cemetery had been used by members of the Yankton Sioux Tribe since at least the 19th century. The land on which the cemetery was located was acquired by the federal government in the early 1950s to construct the Fort Randall Dam, and it is now submerged for part of each year by the reservoir.<sup>129</sup>

The Yankton Sioux Tribe filed suit, seeking a preliminary injunction against the Corps. The district court ruled that the exposure of human remains through the lowering of the lake level was an inadvertent discovery of remains subject to NAGPRA.<sup>130</sup> The court directed the Corps to remove all the loose human remains in order to protect them from flooding, and prohibited the Corps from raising the lake level until the later of two dates: (1) the expiration of the statutory 30-day period after certification of notice of the inadvertent discovery; or (2) the date by which all loose human remains and cultural items have been removed.<sup>131</sup> The court suggested that the Corps and the tribe might reach an agreement by which tribal members could gather the loose human remains

and maintain custody of them pending disposition in accordance with NAGPRA.<sup>132</sup>

With respect to human remains and cultural items that could not be safely removed from the frozen ground, the court allowed the Corps to raise the level of the lake in accordance with its operating plan (after the loose remains had been removed), thereby covering the embedded remains and items with at least 10 feet of water. However, it specified that, before the annual draw-down in fall 2000, the Corps and the tribe should prepare for the full recovery of the embedded remains and cultural items.<sup>133</sup> Subsequently, a second lawsuit was brought against the Corps by the Standing Rock Sioux Tribe for the protection of burial sites on Lake Oahe, another reservoir on the Missouri River.<sup>134</sup> The court entered a temporary restraining order against the Corps, requiring the Corps to maintain water levels at Lake Oahe to prevent disturbances to the burial sites, and negotiations are ongoing.<sup>135</sup>

These two cases are notable for imposing ongoing duties on the federal land manager upon discovery of human remains and cultural items. It appears that the Corps could have anticipated these issues, and perhaps minimized the impact on its operations, had it fully implemented a 1994 programmatic agreement under the NHPA for the management of the Missouri River Mainstem Reservoirs. However, the Corps contends that it has insufficient staff and funding to comply with its terms.<sup>136</sup>

### III. NEPA and Executive Orders on Environmental Justice and Sacred Sites

Federal decisions regarding cultural resources on public lands often require environmental analysis pursuant to NEPA. Like NHPA §106, NEPA is wholly procedural in nature.<sup>137</sup> NEPA ensures that federal agencies "look before they leap" by considering the effects of major federal actions on the human environment, along with a range of reasonably available alternatives to the proposed action. Although the statute does not require the agency to choose the least environmentally degrading alternative,<sup>138</sup> NEPA's pol-

124. *Id.* at 646.

125. See Aviva L. Brandt, *Judge Reactivates "Kennewick Man" Case*, COLUMBIAN, Oct. 26, 2000, at C2. Trial is set for June 2001. *Id.*

126. See 65 Fed. Reg. 36462, 36463 (June 8, 2000).

127. *Id.*

128. See *Yankton Sioux Tribe v. Corps of Eng'rs*, 83 F. Supp. 2d 1047 (D.S.D. 2000); Kay Humphrey, *South Dakota Indian Tribe Sues to Protect Ancestral Lands, Burial Grounds*, KNIGHT-RIDDER TRIB. BUS. NEWS: INDIAN COUNTRY TODAY, Oct. 30, 2000.

129. See *Yankton Sioux Tribe*, 83 F. Supp. 2d at 1049. The Corps adjusts lake levels for multiple purposes pursuant to the Flood Control Act of 1944, including flood control, irrigation and power, as well as navigation and recreation on the Missouri River. *Id.* at 1050.

130. *Id.* at 1056.

131. *Id.* at 1059. The court noted that the Corps must make reasonable efforts to protect the remains, 25 U.S.C. §3002(d)(1); 43 C.F.R. §10.4(d)(1)(ii), and that it must consult with tribes and develop a written plan of action in the course of obtaining a permit to remove the remains, 43 C.F.R. §10.4(d)(1)(v). See 83 F. Supp. 2d at 1058.

132. *Id.* at 1059.

133. *Id.* at 1060.

134. See Kay Humphrey, *Indian Lawsuits Force Army Engineers to Regulate Level of South Dakota Lake*, KNIGHT-RIDDER TRIB. BUS. NEWS: INDIAN COUNTRY TODAY, Nov. 12, 2000.

135. *Id.* See *Trial Postponed in Lawsuit Over Indian Graves*, MINN. STAR-TRIB., Nov. 30, 2000, at 30A.

136. See *South Dakota: Drawdown of Francis Case Reservoir*, at <http://www.achp.gov/casearchive/cases6-00SD1.html> (last visited Mar. 21, 2001). After the court entered its order on the NAGPRA issue, the Yankton Sioux Tribe requested Council involvement. The Corps acknowledged that drawing down the reservoir is an undertaking for purposes of the NHPA, but concluded that the cemetery was not eligible for the National Register. The SHPO has not concurred in this determination and has requested additional documentation. *Id.*

137. See 42 U.S.C. §4332(2)(C), ELR STAT. NEPA §102(2)(C); section II.A.1, *supra* (discussing requirements of NHPA §106).

138. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 19 ELR 20743 (1989). The agency should, however, identify the environmentally preferable alternative in its NEPA analysis, defined as the one that "causes the least damage to the biological and physical environment [and] best protects, preserves, and enhances historic, cultural, and natural resources." See *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18026, 18028 (Mar. 23, 1981) (Question 6a).

icies include using “all practicable means” to preserve “important historic, cultural, and natural aspects of our national heritage,” and to maintain “an environment which supports diversity and variety of individual choice.”<sup>139</sup> Effects that must be considered include “ecological, aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative.”<sup>140</sup>

Guidance documents issued by the Council on Environmental Quality (CEQ) provide that NEPA analyses must consider effects on minority and low income populations in accordance with Executive Order No. 12898 on environmental justice.<sup>141</sup> The Executive Order provides that each federal agency shall, “to the greatest extent practicable and permitted by law . . . make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations . . . .”<sup>142</sup> The Executive Order explicitly includes American Indians within its scope.<sup>143</sup> Other guidance documents specify that impacts to unique cultural resources of populations covered by the Executive Order must be considered through NEPA.<sup>144</sup>

In addition, Executive Order No. 13007 on sacred sites encourages agencies to “protect and preserve Indian religious practices” by accommodating the access and use of sacred sites and by avoiding actions that would adversely affect the physical integrity of sacred sites.<sup>145</sup> NEPA is an appropriate tool for preserving and accommodating the use of sacred sites. Although both the sacred sites order and the environmental justice order expressly state that they create no legal rights or remedies,<sup>146</sup> a failure to consider effects on sacred sites and environmental justice through NEPA, as pro-

vided in the relevant guidance documents, could arguably be set aside as arbitrary and capricious.<sup>147</sup>

#### IV. Public Lands Statutes

The federal public lands are governed not only by NEPA and the cultural resource protection statutes discussed above, but each category of public lands is also subject to its own management mandates. The Bureau of Land Management (BLM) and National Forest System lands are governed by multiple use sustained yield principles pursuant to FLPMA and the NFMA, respectively, while the National Park Service Organic Act provides for conservation and enjoyment of park resources. Although decisions to accommodate American Indian cultural and religious resources on the public lands have been subject to a variety of challenges, each of the relevant statutory schemes allows for cultural resource protection as an appropriate component of the agency’s overall mission, and each provides for integration with the cultural objectives of NEPA, ARPA, the NHPA, and NAGPRA.

##### A. The Federal Land Policy and Management Act

FLPMA was enacted to coordinate over a century’s worth of piecemeal, disjointed statutes and executive orders governing the public lands and resources, and to declare that the public lands would be retained in federal ownership unless it was determined, after following extensive planning procedures, that disposal would serve the national public interest.<sup>148</sup> The statute provides for land acquisition, sale and withdrawal, roads and rights-of-way, and the processing of mining claims,<sup>149</sup> and establishes a comprehensive management scheme for public lands managed by the BLM.<sup>150</sup>

FLPMA requires the BLM to recognize and balance a variety of “interests as diverse as the lands themselves . . . in a dynamic, evolving manner.”<sup>151</sup> It allows for the designation of special “areas of critical environmental concern” to protect historic and cultural values.<sup>152</sup> Further, FLPMA provides that “[i]n managing the public lands, the Secretary [of the Interior] shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.”<sup>153</sup> This provision is most frequently raised

139. 42 U.S.C. §4331(b)(4), ELR STAT. NEPA §101(b)(4).

140. 40 C.F.R. §1508.8 (emphasis added).

141. See CEQ, ENVIRONMENTAL JUSTICE GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (1997), available at <http://ceq.eh.doe.gov/nepa/regs/ej/ej.pdf> (last visited Mar. 21, 2001). The CEQ guidance states that “[a]gencies should recognize the interrelated cultural . . . factors that may amplify the environmental and physical effects of the proposed agency action.” *Id.* at 9. In addition, agencies should seek tribal representation during the NEPA process in a manner consistent with the government-to-government relationship, the federal trust responsibility, and treaty rights. *Id.*

142. Exec. Order No. 12898 §1-101, 59 Fed. Reg. 7629 (Feb. 11, 1994), ADMIN. MAT. 45075. The order further directs each federal agency to develop its own agencywide environmental justice strategy. *Id.* §1-103.

143. See *id.* §6-606, ADMIN. MAT. at 45077 (“Each Federal agency responsibility set forth under this order shall apply equally to Native American programs.”).

144. See U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA), INTERIM FINAL GUIDANCE FOR INCORPORATING ENVIRONMENTAL JUSTICE CONCERNS IN EPA’S NEPA COMPLIANCE ANALYSIS §2.2.2 (1997), available at <http://es.epa.gov/oeca/ofa/ejpa.html> (last visited Mar. 21, 2001). The EPA guidance explains that “potential effects to on- or off-reservation tribal resources (e.g., treaty-protected resources, cultural resources and/or sacred sites) may disproportionately affect the local Native American community and implicate the federal trust responsibility to tribes.” *Id.* §2.1.1.

145. Exec. Order No. 13007 §1(a), 61 Fed. Reg. 26771 (May 29, 1996).

146. See *id.* §4; Exec. Order No. 12898 §6-609, ADMIN. MAT. at 45077. The sacred sites order also states that it may not “be construed to impair enforceable rights to use of Federal lands that have been granted to third parties through final agency action.” Exec. Order No. 13007 §3, 61 Fed. Reg. at 26772.

147. See *Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 13 ELR 20672, 20676 (1983). *But see Citizens Concerned About Jet Noise v. Dalton*, 48 F. Supp. 2d 582, 604, 29 ELR 21340, 21347-48 (E.D. Va. 1999) (rejecting NEPA challenge on ground that court could not review environmental justice issue pursuant to its express terms: “[t]his order shall not be construed to create any right to judicial review”), *aff’d*, 217 F.3d 838 (4th Cir. 2000). Compare Exec. Order No. 13007 §4, 61 Fed. Reg. at 26772 (stating that it does not “create any right . . . enforceable at law or equity by any party against the United States”).

148. See 43 U.S.C. §1701(a), ELR STAT. FLPMA §§102(a).

149. See, e.g., 43 U.S.C. §§1713-1721, ELR STAT. FLPMA §§203-211 (land acquisition and disposition); *id.* §1744, ELR STAT. FLPMA §314 (recording of mining claims), *id.* §§1761-1770, ELR STAT. FLPMA §§501-510 (rights-of-way).

150. See *id.* §1702(c), ELR STAT. FLPMA §103(c) (defining “multiple use”).

151. *Rocky Mountain Oil & Gas Ass’n v. Watt*, 696 F.2d 734, 738, 13 ELR 20038, 20039 (10th Cir. 1982).

152. See 43 U.S.C. §§1702(a), 1712(c)(3), ELR STAT. FLPMA §§103(a), 202(c).

153. *Id.* §1732(b), ELR STAT. FLPMA §302(b) (emphasis added).

in the context of disturbances to natural resources due to extractive activities like grazing and mining. However, BLM regulations governing surface disturbances for mining have long defined “unnecessary or undue degradation” by focusing only on the “unnecessary” prong: “surface disturbances greater than what would normally result when an activity is being accomplished by a prudent operator in usual, customary, and proficient operations of similar character. . . .”<sup>154</sup> This narrow interpretation reflects the long-standing federal policy of encouraging hard-rock mining on public lands under the 1872 General Mining Act, which allows citizens to locate mining claims by making a discovery of a valuable mineral deposit on federal lands “open to location.”<sup>155</sup>

Signaling that change was afoot, a 1999 Solicitor’s Opinion on the Regulation of Hard Rock Mining (Solicitor’s Opinion) noted that “the conjunction ‘or’ between ‘unnecessary’ and ‘undue’ speaks of a secretarial authority to address separate types of degradation. . . .”<sup>156</sup> Subsequently, in November 2000, the regulatory definition of “unnecessary and undue degradation” was amended to clarify that the term “undue” has independent meaning: “operators must not cause *substantial irreparable harm* to significant resources that cannot be effectively mitigated.”<sup>157</sup> The revised regulations are prospective in nature, in that they do not apply to most ongoing mining operations.<sup>158</sup>

The Solicitor’s Opinion arose in the context of a proposed plan of operations submitted by Glamis Corporation for its Imperial Mine Project, a cyanide heap-leach gold mine on land administered by the BLM El Centro district in the California Desert Conservation Area Act (CDCA).<sup>159</sup> Under the

BLM’s management plan for the CDCA, the affected area is designated for limited use, “giving priority to the protection of sensitive natural, scenic, ecological and cultural resources.”<sup>160</sup> The project would affect sites holding religious and cultural significance for three federally recognized tribes, the Quechan Tribe, the Colorado River Indian Tribe, and the Ft. Mojave Indian Tribe.<sup>161</sup> The final EIS states that the area is a place of solitude for the Quechan, “where religious practitioners came to seek knowledge and spiritual power.”<sup>162</sup> The Council reviewed the proposal pursuant to the NHPA, concluding that the mine would destroy the historic resources of the project area and that mitigation measures proposed by the mining company would not compensate for the devastating impacts on traditional religious and cultural values.<sup>163</sup> The Council recommended that the BLM take whatever legal means available to deny approval for the project.<sup>164</sup>

The Solicitor’s Opinion, upon review of the Council’s recommendations, concluded that the BLM is not compelled to deny approval for the mine, but rather that it has authority to do so under the “undue impairment” standard of the CDCA.<sup>165</sup> The final EIS for the project ultimately designated the “no action” alternative, i.e., denial of the company’s proposed plan of operations, as the preferred alternative.<sup>166</sup> The record of decision, issued by then-Secretary Babbitt in January 2001, denied Glamis’ plan on the

2001). A plan of operations is required by the §3809 regulations. See 43 C.F.R. §3809.1-4.

154. 43 C.F.R. §3809.0-5(k).

155. 30 U.S.C. §22, et seq. See also 43 U.S.C. §1701(a)(12), ELR STAT. FLPMA §102(a)(12) (stating congressional intent that the “public lands be managed in a manner which recognizes the Nation’s need for domestic sources of minerals”). Section 22 of the Mining Law explicitly states that the public lands are open to exploration “under regulations prescribed by law,” and provides for the application of local mining customs and rules “so far as . . . not inconsistent with the laws of the United States.” 30 U.S.C. §22.

156. Memorandum from the U.S. DOI, Office of the Solicitor, to Secretary Babbitt and the Acting Director, BLM (Dec. 27, 1999), available at [http://www5.ca.blm.gov/ads-cgi/viewer.pl/pdfdocs/glamis/Glamis\\_ROD\\_final\\_1-01.pdf](http://www5.ca.blm.gov/ads-cgi/viewer.pl/pdfdocs/glamis/Glamis_ROD_final_1-01.pdf) (app. B) The Secretary concurred with the opinion on January 3, 2000. *Id.* at 19.

157. *Final Rule: Mining Claims Under the General Mining Laws*, 65 Fed. Reg. 69998, 70001 (Nov. 21, 2000) (emphasis added). The revised regulations define “unnecessary or undue degradation” as “conditions, activities, or practices” that fail to comply with performance standards, terms of an approved plan of operations or other federal and state laws related to environmental and cultural resource protection or reclamation, or that result in “substantial irreparable harm to significant scientific, cultural, or environmental resource values of the public lands that cannot be effectively mitigated.” *Id.* at 70115 (to be codified at 43 C.F.R. §3809.5). See also [http://www.ca.blm.gov/news/3809finalrule\\_nr11-00.html](http://www.ca.blm.gov/news/3809finalrule_nr11-00.html) (press release discussing revised 3809 regulations) (last visited Mar. 21, 2001).

158. See 65 Fed. Reg. at 69998 (providing an effective date of Jan. 20, 2001); *id.* at 70038 (stating that “any plan of operations submitted prior to the effective date of the final regulations would be able to use the plan content requirements and performance standards in the previous regulations”). The National Mining Association and the state of Nevada have challenged the new regulations, see Christian Bourge, *Court Allows Mining Changes to Take Effect*, AM. METAL MARKET, 2001 WL 8177009, Jan. 23, 2001, at 6, and the Bush Administration has proposed to suspend them altogether. See 66 Fed. Reg. 16162, 16164 (Mar. 23, 2001).

159. See 64 Fed. Reg. 8398 (Feb. 19, 1999); Press Release, Final EIS/EIR for Imperial Project Gold Mine Available, at [http://www.ca.blm.gov/news/glamis\\_imperial\\_final\\_eis.html](http://www.ca.blm.gov/news/glamis_imperial_final_eis.html) (last visited Mar. 21,

160. See Record of Decision for the Imperial Project Gold Mine Proposal 13 (Jan. 17, 2001) [hereinafter Glamis ROD], available at [http://www5.ca.blm.gov/ads-cgi/viewer.pl/pdfdocs/glamis/Glamis\\_ROD\\_final\\_1-01.pdf](http://www5.ca.blm.gov/ads-cgi/viewer.pl/pdfdocs/glamis/Glamis_ROD_final_1-01.pdf) (last visited Mar. 21, 2001) (describing Limited Use category (Multiple Use Class L) as “specifically intended for the protection of ‘sensitive, natural, scenic, ecological, and cultural resource values’ [which] provides for ‘generally lower-intensity, carefully controlled multiple use of resources, while ensuring that sensitive values are not significantly diminished’”).

161. See Letter from Courtney Ann Coyle to Douglas Romoli, BLM, Re: Imperial Project 5-8 (Apr. 12, 1998) (discussing project’s impact on the Quechan’s sacred landscapes and pathways in the Indian Pass area, including the Trail of Dreams, used for “religious pilgrimages associated with the Keruk ceremony, the most important and deeply religious” of ceremonies) (on file with author). The final EIS states that the Indian Pass-Running Man area, an Area of Traditional Cultural Concern, should be treated as a significant resource, even though the “data are insufficient to determine whether the [Area] should stand alone as a potential TCP, or should be evaluated as part of a larger complex . . .” Imperial Project, Final Environmental Impact Statement/Environmental Impact Report (Sept. 2000), at 3.6.2.4, available at [http://www5.ca.blm.gov/ads-cgi/viewer.pl/pdfdocs/imperial/Vol-1\\_gw.pdf?page=312&mode=sbpgc100](http://www5.ca.blm.gov/ads-cgi/viewer.pl/pdfdocs/imperial/Vol-1_gw.pdf?page=312&mode=sbpgc100) (last visited Mar. 21, 2001). A total of 55 sites within and near the project area have been evaluated as eligible for the National Register. *Id.* at 3.6.2.1.

162. See Imperial Project, Final Environmental Impact Statement/Environmental Impact Report, *supra* note 161, at 3.6.2.4.

163. See *Council Seeks Halt to Proposed Imperial Mine Project*, at <http://www.achp.gov/casearchive/newsimperialmine.html> (last visited Mar. 21, 2001).

164. See *id.*

165. See 16 U.S.C. §1781(f), ELR STAT. FLPMA §601(f) (providing for regulations to protect scenic, scientific, and environmental values from “undue impairment”).

166. See Notice of Availability of FEIS, 65 Fed. Reg. 67396 (Nov. 7, 2000); Press Release, *supra* note 159 (describing “no action” as the BLM’s preferred alternative “based on the finding that the company’s proposed action, even with the application of additional mitigation measures, would result in significant adverse impacts to Native American archeological and cultural resources considered sacred to the Quechan Indian Tribe and other sensitive resources”).

grounds that the mine and associated facilities would cause unavoidable harm to cultural, historic, and visual resources, and that negative impacts would outweigh the economic benefits of the project.<sup>167</sup> The decision is the first time that the development of perfected mining claims has been denied under FLPMA and the CDCA.<sup>168</sup> Although the decision is entitled to deference as a reasonable interpretation of the two statutes,<sup>169</sup> and appears to be on solid ground both with respect to statutory and constitutional requirements, Glamis has filed suit, alleging violations of FLPMA, the CDCA, and the Establishment Clause.<sup>170</sup>

### B. The National Forest Management Act

The lands within the National Forest System are managed pursuant to the NFMA and its predecessors, the Forest Service Organic Act of 1897<sup>171</sup> and the Multiple-Use Sustained-Yield Act of 1960 (MUSYA).<sup>172</sup> These enactments require that national forests be managed for multiple uses of forest resources, including watersheds, timber, fish and wildlife, range, recreation, and wilderness, while maintaining the resources without impairment of productivity “in perpetuity.”<sup>173</sup> MUSYA directs the Forest Service to make the “most judicious use of the land for some or all of the resources,” in a manner that allows it to “conform to changing needs and conditions.”<sup>174</sup> It further specifies that “some land will be used for less than all of the resources” and calls for “harmonious and coordinated management of the various resources . . . with consideration being given to the[ir] relative values.”<sup>175</sup> To effectuate these directives, the NFMA establishes comprehensive planning and public participation requirements, and requires that forest uses be consistent with land and resource management plans.<sup>176</sup>

Regulations governing Forest Service activities provide that cultural resources should play a key role in the management of the national forests. Specifically, “physical, biological, economic, and social effects,” including the preservation of cultural resource values, must be considered during

the planning process.<sup>177</sup> Regional plans and forest plans are to be based on multiple use sustained yield principles, including “[p]reservation of important historic, cultural, and natural aspects of our national heritage [and] protection and preservation of the inherent right of freedom of American Indians to believe, express, and exercise their traditional religions . . . .”<sup>178</sup> The regulations provide detailed requirements for the identification and protection of “significant cultural resources” on national forests.<sup>179</sup> The evaluation of planning alternatives must satisfy NEPA and the NHPA and must be coordinated with the SHPO.<sup>180</sup> Consultation with tribes is also required to ensure that treaty and trust resources are identified early on in the decisionmaking process and that tribal information, suggestions, and concerns are considered.<sup>181</sup>

The Forest Service has issued several recent decisions to protect tribal cultural resources pursuant to the NFMA and the NHPA. For example, it has precluded oil and gas leasing along the Rocky Mountain Front Range within the Lewis and Clark National Forest in order to protect the “value and spirituality of place,” including aesthetic and social values and Blackfoot sacred sites.<sup>182</sup> A Montana district court rejected constitutional and statutory claims brought by industry groups in *Rocky Mountain Oil & Gas Ass’n v. U.S. Forest Service*, finding that the decision utilized valid management criteria for protecting “the pristine scenery and diverse resources” of the area.<sup>183</sup> An appeal to the Ninth Circuit is pending.<sup>184</sup>

167. See Glamis ROD, *supra* note 160. Glamis claims the mine would yield 1.1 million ounces of gold worth \$300 million. See *Babbitt Kills Bid to Dig Gold Mine Near Indian Sacred Sites*, L.A. TIMES, Jan. 18, 2001, at A16.

168. *Babbitt Kills Bid to Dig Gold Mine Near Indian Sacred Sites*, *supra* note 167.

169. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 14 ELR 20507 (1984). See also *Udall v. Tallman*, 380 U.S. 1 (1965) (deferring to agency interpretation of regulations and secretarial orders).

170. *Glamis Imperial Corp. v. Department of the Interior*, No. 1:01CV00530 (D.D.C. Mar. 12, 2001). Glamis had previously filed a lawsuit challenging the Solicitor’s Opinion, but it was dismissed for lack of final agency action. *Glamis Imperial Corp. v. Babbitt*, No. 00 CV 1934W (S.D. Cal. Oct. 31, 2000). Except for possible Fifth Amendment takings claims, which are beyond the scope of this Article, relevant constitutional provisions are addressed below, see *infra* section V.B. (discussing the First Amendment).

171. See 16 U.S.C. §§473-482, 551.

172. See *id.* §§528-531.

173. See *id.* §§475 (providing for establishment of national forests to secure water flows and timber supply), 528 (providing for recreation, range, timber, watershed, wildlife and fish, as well as for mineral resources), 529 (providing for wilderness), and 1604(e) (incorporating uses specified in 16 U.S.C. §§528-529).

174. *Id.* §531(a).

175. *Id.*

176. See *id.* §1604(i).

177. 36 C.F.R. §219.12 (2000). See 7 C.F.R. §3100.43(a) (stating that the “Department of Agriculture is committed to the management—identification, protection, preservation, interpretation, evaluation and nomination—of our prehistoric and historic cultural resources for the benefit of all people of this and future generations”).

178. 36 C.F.R. §219.1(b)(5)-(6) (2000).

179. See *id.* §219.24 (2000) (requiring planning “for the protection of significant cultural resources from vandalism and other human degradation, and natural destruction”). See also *id.* §219.27(b)(1) (2000) (requiring management measures so that vegetative manipulation shall be “best suited to the multiple-use goals established for the area, considering potential environmental, economic and cultural resource impacts”). Recently published revisions to the regulations continue to recognize cultural needs and values in forest planning. See Final Rule, 65 Fed. Reg. 67514, 67550, 67558 (Nov. 9, 2000).

180. See 36 C.F.R. §219.24 (2000). See also 65 Fed. Reg. at 67573, to be codified at 36 C.F.R. §219.21 (social and economic sustainability).

181. See 65 Fed. Reg. at 67573, to be codified at 36 C.F.R. §219.15 (interaction with American Indian tribes and Alaska Natives). See also 36 C.F.R. §219.1(b)(9) (2000) (requiring that forest plans be coordinated with “other Federal agencies, State and local governments, and Indian tribes”); 7 C.F.R. §3100.43(d) (stating that the U.S. Department of Agriculture “is committed to consideration of the needs of American Indians, Eskimo, Aleut, and Native Hawaiians in the practice of their traditional religions”).

182. See *Independent Petroleum Ass’n of Am. v. U.S. Forest Serv.*, at [http://www.mountainstateslegal.org/legal\\_cases\\_category\\_home.cfm?casecategoryid=2](http://www.mountainstateslegal.org/legal_cases_category_home.cfm?casecategoryid=2) (last visited Mar. 21, 2001); Sherry Devlin, *429,000 Acres Closed to Hard Rock Mining*, MISSOULIAN, Feb. 4, 1999, at A1; Tom Laceky, *Red Tape Seals Off Sacred Lands*, L.A. TIMES, Oct. 19, 1997, at B1. The agency has also withdrawn areas of the Rocky Mountain Front Range from hard-rock mining in consideration of traditional uses by American Indians, and to protect endangered species and roadless values. See Public Land Order No. 7480, 66 Fed. Reg. 6657 (Jan. 22, 2001); *Final EIS on Decision to Withdraw Front Range*, at <http://www.fs.fed.us/r1/lewisclark> (last visited Mar. 21, 2001).

183. No. 98-22-H-CCL, Opinion and Order at 5-6 (D. Mont., Mar. 7, 2000); Steve Davies, *Judge Upholds Decision Not to Open Forest to Natural Gas Leasing*, INSIDE ENERGY, Mar. 13, 2000, at 17. The court dismissed the constitutional Establishment Clause claim for

The agency is also facing a challenge to the Bighorn National Forest's Historic Preservation Plan for the Medicine Wheel, a sacred site and national historic landmark. The plan requires consultation with tribes before logging and other activities that might harm the spiritual value of the site, and closes a road within the viewshed of the Medicine Wheel.<sup>185</sup> In *Wyoming Sawmills, Inc. v. U.S. Forest Service*,<sup>186</sup> the plaintiff, a commercial logging company, alleges that the Forest Service has given the tribe "veto power" within the 18,000-acre area of consultation, thereby inhibiting economic opportunities and establishing a religion in violation of the Establishment Clause of the First Amendment.<sup>187</sup> Briefs have been filed in the district of Wyoming.<sup>188</sup>

The NFMA, the NHPA, and other relevant statutes and regulations provide ample authority to withdraw portions of the National Forest System lands from mineral leasing and to declare some areas unsuitable for timber harvest in order to protect aesthetic and cultural resources. The NFMA specifically provides that some land may be used "for less than all of the [MUSYA] resources" in order to ensure sustainability as well as "harmonious and coordinated management" of the various resources, given their relative values.<sup>189</sup> So long as the decisions regarding the Rocky Mountain Front Range and the Medicine Wheel are consistent with the relevant forest plans, and are well-documented, rational, and based on a thorough consideration of relevant data, they should withstand statutory review.<sup>190</sup> Further, the decisions will likely survive constitutional scrutiny, as discussed below.<sup>191</sup>

### C. The National Park Service Organic Act

NPS properties are managed pursuant to the National Park Service Organic Act "to conserve the scenery and the natu-

failure to exhaust administrative remedies. See Opinion and Order, *supra*, at 6 n.2.

184. See [http://www.mountainstateslegal.org/press\\_releases.cfm?press\\_releaseid=66](http://www.mountainstateslegal.org/press_releases.cfm?press_releaseid=66) (last visited Mar. 21, 2001).
185. See HISTORIC PRESERVATION PLAN FOR THE MEDICINE WHEEL, *supra* note 66; section II.A.1., *supra* (discussing the NHPA's provisions for national historic landmarks).
186. No. 99-CV-031J (D. Wyo. Feb. 16, 1999). See [http://www.mountainstateslegal.org/legal\\_cases.cfm?legalcaseid=44](http://www.mountainstateslegal.org/legal_cases.cfm?legalcaseid=44) (last visited Mar. 21, 2001).
187. See Pauline Arrillaga, *Sacred Indian Sites Pit Almighty Buck Against Almighty Logging*, L.A. TIMES, July 23, 2000, B1.
188. See *id.*
189. 16 U.S.C. §531(a). See 16 U.S.C. §1604(k) (directing that some lands may be identified as unsuitable for timber production due to "physical, economic, and other pertinent factors"); *id.* §551 (requiring regulations to preserve the forests from destruction due to mining). Prohibitions on hard-rock mining, however, raise more difficult issues. See *id.* §428 (requiring that no rule or regulation prohibit "proper and lawful purposes, including that of prospecting, locating and developing the mineral resources"); *United States v. Weiss*, 642 F.2d 296, 11 ELR 20512 (9th Cir.1981) ("Secretary may adopt reasonable rules and regulations which do not impermissibly encroach upon the right to use and enjoyment of . . . claims for mining purposes"); *United States v. Shumway*, 199 F.3d 1093, 1106, 30 ELR 20278 (9th Cir. 1999) (citing *Weiss*, and stating that use of national forest lands by miners may be regulated "only to the extent that the regulations are 'reasonable' and do not impermissibly encroach on legitimate uses incident to mining and mill site claims").
190. See *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 13 ELR 20672, 20676 (1983).
191. See *infra*, section V (discussing the First Amendment to the U.S. Constitution, as well as equal protection principles).

ral and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."<sup>192</sup> Congress' purpose in establishing the National Park System was clarified in subsequent amendments: "These areas, though distinct in character, are united through their inter-related purposes and resources into one national park system as cumulative expressions of a single national heritage. . . ."<sup>193</sup>

In addition to the National Park Service Organic Act, individual units of the National Park System each have their own legislative directive. Several protect historic Christian churches.<sup>194</sup> Some specifically acknowledge and protect the integrity of, and American Indian access to, sacred sites and cultural properties.<sup>195</sup>

NPS regulations and policies proclaim duties to conserve and to avoid impairment of park resources and values.<sup>196</sup> Park resources and values include, among other things, "archaeological resources; cultural landscapes; ethnographic resources; [and] historic and prehistoric sites, structures and objects."<sup>197</sup> Impacts that would harm the integrity of park resources or values are prohibited.<sup>198</sup> An impact is likely to constitute an impairment "to the extent that it affects a resource or value whose conservation is . . . key to the natural or cultural integrity of the park or to opportunities for enjoyment of the park. . . ."<sup>199</sup> The superintendent of an individual

192. 16 U.S.C. §1.

193. *Id.* §1a-1. See 36 C.F.R. pts. 1-59 (NPS regulations).

194. The National Park System includes San Antonio Missions National Historical Park, see 16 U.S.C.A. §410ee (establishing the park and authorizing cooperative management agreements with the Catholic Archdiocese), as well as Christ Church, an Episcopal Church in Boston, and St. Joseph's Catholic Church in Philadelphia, see Anastasia P. Winslow, *Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites*, 38 ARIZ. L. REV. 1291, 1317 (1996). In addition, there are chapels in numerous parks, including the Grand Canyon, Yellowstone, and Yosemite. *Id.*

195. See, e.g., California Desert Protection Act, 16 U.S.C. §410aaa-75(a) (recognizing that Indian people long utilized areas of the desert for traditional purposes, and directing the Secretary to ensure access by authorizing temporary closures upon request); El Malpais National Monument and Conservation Area, 16 U.S.C. §460uu-47(c) (authorizing temporary closure "to protect the privacy of religious activities in such areas by Indian people"); Jemez National Recreational Area, 16 U.S.C. §460jjj-1 (requiring the Secretary to ensure protection of Indian "religious and cultural sites" and provide access to sites for traditional uses); Zuni-Cibola National Historic Park, 16 U.S.C. §410pp-4, pp-6 (establishing a Zuni-Cibola advisory committee to guide park management and authorizing the Secretary, upon request, to temporarily close areas "to protect the privacy of religious activities by Indian people").

196. See 36 C.F.R. §§2.1(a) (prohibiting the possession, destruction or disturbance of various natural resources, including cultural or archaeological resources); 1.5(a) (listing protection of cultural values, subsistence uses and species conservation as factors to consider in issuing closures or use restrictions). See also 2001 NPS MANAGEMENT POLICIES 1.4, available at <http://www.nps.gov/refdesk/mp/index.html> (last visited Apr. 7, 2001) (replacing Director's Order No. 55: Interpreting the NPS Organic Act (Sept. 8, 2000) (on file with author)).

197. NPS Management Policies §1.4.6. See *id.* ch. 5 (cultural resource management); Director's Order No. 28, at <http://www.nps.gov/refdesk/DOrders/DOrder28.html> (last visited Apr. 7, 2001).

198. NPS Management Policies §1.4.4. See *id.* §5.3.5 (committing to "the long-term preservation of, public access to, and appreciation of, the features, materials, and qualities contributing to the significance of cultural resources").

199. *Id.* §1.4.5. See 36 C.F.R. §2.1 (providing for the preservation of cultural and archaeological resources).

park unit may order a closure or restrict the use of an area to protect natural or cultural resources.<sup>200</sup>

Given the central role that the National Park System plays in our national heritage, it is no surprise that NPS decisions affecting American Indian interests within national parks and monuments have been highly controversial. NPS decisions to protect sacred sites and accommodate traditional practices have triggered a variety of challenges from non-Indian users of the public lands.

In *Bear Lodge Multiple Use Ass'n v. Babbitt*,<sup>201</sup> the district court dismissed claims by commercial climbers who had challenged the Climbing Management Plan for Devils Tower National Monument.<sup>202</sup> The tower, known in Sioux lore as *Mato tipi paha*, or Bear Lodge Hill, has tremendous significance to many tribes as a highly important pilgrimage site for Sun Dances and Vision Quests, both of which require solemnity and solitude.<sup>203</sup> The district court held that the plan, which provides for a voluntary climbing closure during the month of June to accommodate religious and cultural practices of northern plains tribes, and the posting of signs advising visitors of the tribes' values, did not violate the regulatory provisions regarding closures.<sup>204</sup> Further, it determined that the plan satisfied the Establishment Clause, as it had the secular purpose of removing barriers and accommodating American Indian religious practices, it was not coercive and did not advance or endorse religion, and there was no excessive entanglement with tribal worship.<sup>205</sup> On appeal, the Tenth Circuit dismissed the complaint on the grounds that the climbers lacked standing to challenge the plan.<sup>206</sup>

Similar claims have been asserted in *Natural Bridge & Arch Society v. National Park Service*,<sup>207</sup> a challenge to the Management Plan for Rainbow Bridge National Monument. The complaint alleges that the Establishment Clause is violated by a decision to post signs requesting that visitors respect the "long-standing beliefs" of American Indian tribes by not approaching or walking under the bridge, a

278-foot natural arch held sacred by five tribes.<sup>208</sup> According to the plaintiff, although the signs request "voluntary compliance," visitors who approach the site are threatened with arrest if they step off a trail, but the trail itself has been concealed with boulders.<sup>209</sup> The government disputes the allegations, and the parties' dispositive motions are pending before a district court in Utah.<sup>210</sup>

Cultural disputes over park resources are not limited to the access and use of sacred lands. The NPS is currently engaged in a controversial decisionmaking process regarding the collection of golden eagle chicks at Wupatki National Monument, an area historically used by the Hopi Tribe. A proposed rule would allow the Hopi to gather eaglets, considered messengers between the physical and spiritual worlds, so that they may be reared and sacrificed for ceremonial purposes.<sup>211</sup> The proposal has been criticized as opening the door to hunting in the parks, a practice generally prohibited,<sup>212</sup> although permits may be granted in certain circumstances.<sup>213</sup>

The National Park Service Organic Act and its implementing regulations and guidance authorize the protection and even prioritization of cultural resources and practices in appropriate cases, particularly where tribes have historic ties to the lands at issue. If treaty rights specifically provide for the use of resources on the federal lands, access must be provided, absent congressional abrogation of the treaty.<sup>214</sup>

200. See 36 C.F.R. §§1.5, 13.30.

201. 2 F. Supp. 2d 1448 (D. Wyo. 1998), *appeal dismissed*, 175 F.3d 814, 816, 29 ELR 21083, 21084 (10th Cir. 1999).

202. *Id.* The district court had previously granted a preliminary injunction against implementation of an earlier version of the plan that prohibited commercial climbing during June. See *Bear Lodge*, 2 F. Supp. 2d at 1450-51 (finding a likelihood of success on the merits of the Establishment Clause claim as to a mandatory closure).

203. See *Bear Lodge*, 175 F.3d at 816, 29 ELR at 21084 (citing Romanus Bear Stops, a traditional leader of the Cheyenne River Sioux Tribe). See also Dr. Raymond J. DeMallie, in GUNDERSON, *DEVILS TOWER: STORIES IN STONE* ix (High Plains Press 1988) (explaining that the "soaring height of the tower inevitably makes it, in human perception, a link between earth and sky").

204. *Bear Lodge*, 2 F. Supp. 2d at 1447 (citing NPS Management Policies §8.9: "Performance of traditional activities . . . will not be a reason for prohibiting the use of that area by others except where temporary closings are authorized by law . . ."). See 36 C.F.R. §§1.5, 13.30 (regulations specifying closure procedures); 2001 NPS MANAGEMENT POLICIES §§8.2, 8.5, available at <http://www.nps.gov/refdesk/mp/index.html> (last visited Apr. 7, 2001) (current policies regarding closures and Native American use).

205. *Bear Lodge*, 2 F. Supp. 2d at 1454-56. For detailed discussion of the Establishment Clause, see *infra*, section V.B.

206. See *Bear Lodge*, 175 F.3d at 821-22, 29 ELR at 21086. Although the court did not reach the merits of the claims, it clearly recognized the importance of the site to American Indian culture and religion. See *id.* at 816, 29 ELR at 21084 (citing Romanus Bear Stops).

207. No. 2000CV-0191J (D. Utah Mar. 3, 2000).

208. See *Denver Group Claims Park Service Is Promoting Native American Religion*, DENVER POST, Mar. 8, 2000. The Navajo, Hopi, San Juan Southern Paiute, Kaibab Paiute, and White Mesa Ute have expressed an interest in Rainbow Bridge as a traditional sacred site. See *Rainbow Bridge National Monument*, at <http://www.nps.gov/rabr/intro.htm> (last visited Mar. 21, 2001).

209. See *Denver Group Claims Park Service Is Promoting Native American Religion*, *supra* note 208.

210. See [http://www.mountainstateslegal.org/legal\\_cases.cfm?legalcaseid=53](http://www.mountainstateslegal.org/legal_cases.cfm?legalcaseid=53) (last visited Mar. 21, 2001). Plaintiffs filed a motion for summary judgment on January 31, 2001, and the government responded on February 14. *Id.*

211. See Proposed Rule: Religious Ceremonial Collection of Golden Eagles From Wupatki National Monument, 66 Fed. Reg. 6516 (Jan. 22, 2001); Mark Shaffer, *Hopis Hopeful on Eagle Plan*, THE ARIZ. REPUBLIC, Oct. 31, 2000, at B5.

212. See *The Humane Society News: Babbitt Wants to Allow Eagle Taking on Park Lands*, at <http://www.hsus.org/whatnew/eagle081400.html> (last visited Mar. 21, 2001). NPS regulations generally prohibit "possessing, destroying, . . . or disturbing" wildlife, fish or plants, or the parts or products of any of these items. 36 C.F.R. §2.1(a).

213. See 36 C.F.R. §§2.1(c) (personal use of certain plants and items); 2.5(b) (research). The "taking, use or possession of fish, wildlife or plants for ceremonial or religious purposes" is only allowed "where specifically authorized by Federal statutory law, treaty rights, or in accordance with §2.2 [wildlife protection] or §2.3 [fishing]." *Id.* §2.1(d). Pursuant to §2.2(b)(2), hunting may be authorized "where such activity is specifically authorized as a discretionary activity under Federal statutory law if the superintendent determines that such activity is consistent with public safety and enjoyment, and sound resource management principles." *Id.* The Hopi have obtained eagle collection permits from the U.S. Fish and Wildlife Service under the Eagle Protection Act, 16 U.S.C. §668a. See Environmental Assessment on Proposed Rule 3 (Jan. 2001), at <http://www.nps.gov/wupa/pphtml/facts.html> (last visited Mar. 21, 2001).

214. See *United States v. Dion*, 476 U.S. 734, 739, 16 ELR 20676, 20677 (1986) (requiring clear congressional intent to abrogate treaty rights); NPS Management Policies §8.9 (stating that consumptive uses must be allowed if authorized by treaties). See also Sandi B. Zellmer, *Indian Lands as Critical Habitat for Indian Nations and Endangered Species: Tribal Survival and Sovereignty Come First*, 43 S.D. L. REV. 381, 400-05 (1998) (discussing interplay between wildlife conservation principles and Indian treaty rights).

Otherwise, reasonable and timely closures that allow traditional ceremonies to take place undisturbed by other visitors, along with other suitably tailored accommodations, are apt management tools in the preservation and allocation of park resources.

## V. Constitutional Provisions Relevant to Cultural Resource Protection

The First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .”<sup>215</sup> Between these two clauses lies an area of discretion, where federal action is neither constitutionally required nor forbidden. Providing for the use of cultural properties that hold religious significance for interested parties, particularly American Indian tribes, comes well within this discretionary window. Although accommodation may not be required by the Free Exercise Clause, it is generally not prohibited by the Establishment Clause.

### A. The Free Exercise of Religion

The Free Exercise Clause prohibits the government from compelling the affirmation of a religious belief, or penalizing individuals or groups because of their religious views.<sup>216</sup> The freedom to hold religious beliefs has been described as “absolute,”<sup>217</sup> although religious practices may be subject to regulation. Governmental actions that directly target religions are typically struck down as failing to satisfy the strict scrutiny standard required of fundamental rights,<sup>218</sup> while neutral laws of general applicability are tested by less demanding standards.

In *Lyng v. Northwest Indian Cemetery Protective Ass’n*,<sup>219</sup> the Supreme Court rejected a Free Exercise Clause challenge to a Forest Service decision to build a timber road through a sacred site.<sup>220</sup> The Court held that a governmental decision having only “incidental” effects on American Indian religious practices, severe though those effects may be, need only have a rational basis.<sup>221</sup> Accordingly, because the agency had a legitimate reason to build the road, and had not intentionally coerced religious practitioners to violate their beliefs, it had not run afoul of the Free Exercise Clause. To hold otherwise, opined the Court, would impose a “religious servitude” and “could easily require de facto beneficial ownership of some rather spacious tracts of public property.”<sup>222</sup> It concluded that “the diminution of the Govern-

ment’s property rights, and the concomitant subsidy of the Indian religion would in this case be far from trivial. . . .”<sup>223</sup>

The Court also rejected claims based on the American Religious Freedom Act of 1979 (AIRFA).<sup>224</sup> AIRFA voices the federal policy of protecting American Indians’ “inherent right of freedom to believe, express, and exercise . . . traditional religions . . . , including but not limited to access to sites, use and possession of sacred objects. . . .”<sup>225</sup> Citing the bill’s sponsor, the Court found that AIRFA created no legally enforceable rights.<sup>226</sup>

Subsequently, in *Employment Division, Department of Human Resources v. Smith*,<sup>227</sup> the Supreme Court held that the Free Exercise Clause did not forbid Oregon from either banning sacramental peyote use through general criminal prohibitions or denying unemployment benefits to practitioners terminated from their jobs for peyote use.<sup>228</sup> The Court unequivocally specified that neutral laws of general applicability need only be supported by a rational basis, even where such laws could destroy the central tenets of a religion.<sup>229</sup>

A few years after *Smith* was handed down, Congress attempted to restore the compelling interest test in all cases where governmental action substantially burdens religion by enacting the Religious Freedom Restoration Act (RFRA).<sup>230</sup> In *City of Boerne v. Flores*,<sup>231</sup> the Court held that Congress’ attempt to prescribe a legal standard for analyzing Free Exercise Clause claims exceeded its authority to enforce the law under §5 of the Fourteenth Amendment: “Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause.”<sup>232</sup>

By its own terms, the Fourteenth Amendment applies only to the states, leaving some question as to whether RFRA may have continuing force as applied to federal actions.<sup>233</sup> Congress has since amended RFRA to limit its scope to federal action by omitting references to state and

215. U.S. CONST. amend. I.

216. See *Sherbert v. Verner*, 374 U.S. 398, 402 (1963).

217. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Reynolds v. United States*, 98 U.S. 145 (1878).

218. See *Church of Lukumi Babalu Aye v. Hialeh*, 508 U.S. 520 (1993); *Sherbert*, 374 U.S. at 403 (concluding that the disqualification of a Sabbatarian from receiving unemployment benefits because of her refusal to work on Saturday did not satisfy the compelling interest test); *Wisconsin v. Yoder*, 406 U.S. 205, 215, 219 (1972) (finding that a compulsory education law that would “gravely endanger” Amish religious beliefs did not satisfy strict scrutiny).

219. 485 U.S. 439, 18 ELR 21043 (1988).

220. *Id.* at 454-55, 18 ELR at 21046-47.

221. *Id.* at 450-51, 18 ELR at 21045 (citing *Bowen v. Roy*, 476 U.S. 693 (1986)).

222. *Id.* at 452-53, 18 ELR at 21046.

223. *Id.* at 453, 18 ELR at 21046.

224. *Id.* at 454, 18 ELR at 21046-47 (citing 42 U.S.C. §1996).

225. 42 U.S.C. §1996.

226. *Lyng*, 485 U.S. at 455, 18 ELR at 21047 (citing statement of Rep. Morris Udall (D-Ariz.), the Act “has no teeth”). See also *Conservation Law Found. v. Federal Energy Regulatory Comm’n*, 216 F.3d 41, 50, 30 ELR 20693, 20696 (D.C. Cir. 2000) (finding that AIRFA calls upon federal agencies to consider, but not necessarily to defer to, Indian religious values).

227. 494 U.S. 872 (1990).

228. *Id.* at 883-85.

229. *Id.* at 883-86.

230. 42 U.S.C. §2000bb(1).

231. 521 U.S. 507 (1997).

232. *Id.* at 516, 519. Section 5 provides: “The Congress shall have power to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment].” U.S. CONST. amend. XIV, §5. The Court concluded that the enforcement power of §5 allows Congress to preserve rights protected by the Fourteenth Amendment but does not allow it to go beyond the Court’s authoritative interpretation of those rights. *City of Boerne*, 521 U.S. at 519.

233. Compare U.S. CONST. amend. XIV, §1, 5 with U.S. CONST. amend. V, which has no parallel enforcement clause. See Thomas C. Berg, *The Constitutional Future of Religious Freedom Legislation*, 20 U. ARK. LITTLE ROCK L.J. 715, 728 (1998). Several circuit courts have concluded that RFRA is constitutional as applied to federal law. See *In re Young*, 141 F.3d 854, 856 (8th Cir.), cert. denied, 525 U.S. 811 (1998) (holding RFRA continues to apply to federal bankruptcy laws); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 832 (9th Cir.1999) (finding that the application of federal copyright laws did not violate RFRA).

local governments.<sup>234</sup> If RFRA, as limited to federal actions, should survive constitutional scrutiny, decisions that incidentally but substantially affect religious beliefs by restricting access to public lands, or by altering the landscape such that religious practices would be destroyed, would be subject to strict scrutiny. Logging, grazing, road-building, and other discretionary activities may be legitimate uses of public lands, but they pale in comparison to American Indian religious interests and “fall far short of constituting the ‘paramount interests’ necessary to justify infringement of plaintiffs’ freedom of religion.”<sup>235</sup>

### B. The Establishment Clause

Although the Establishment Clause prevents either the church or the state from invading the prerogatives of the other, “total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable.”<sup>236</sup> Governments are prohibited from singling out religious organizations for preferred treatment,<sup>237</sup> but the Establishment Clause does not condone callous indifference to religious needs.<sup>238</sup> Governments “may (and sometimes must) accommodate religious practices and . . . may do so without violating the Establishment Clause.”<sup>239</sup>

In resolving Establishment Clause challenges, courts generally apply the three-pronged *Lemon v. Kurtzman*<sup>240</sup> test: (1) whether the activity has a secular purpose; (2) whether its primary effect is the advancement of religion; and (3) whether the activity constitutes an excessive entanglement with religion. These factors are not rigidly applied, but are viewed as useful tools in resolving the ultimate issue: whether the activity, in reality, establishes or endorses a religion or religious faith.<sup>241</sup> In analyzing an Establishment Clause issue, courts should consider all the circumstances of a particular case, such as historic circumstances, special relationships, and the location of the activity.<sup>242</sup>

The accommodation of American Indian sacred sites and TCPs is unlikely to offend Establishment Clause principles, given the unique context of the government’s relationship with, and responsibilities toward, federally recognized tribes. In *Lyng*, the Supreme Court encouraged federal agencies to accommodate American Indian religious practices on public lands even if not required to do so under the Free Exercise Clause.<sup>243</sup> *Lyng* is not necessarily binding in the Establishment Clause context; however, it is consistent with the long-standing principle that accommodations for federally recognized Indian tribes are permissible *political*, not racial or religious, distinctions.

In *Morton v. Mancari*,<sup>244</sup> the Court held that Bureau of Indian Affairs hiring preferences for American Indians were based on a permissible political distinction, the special trust relationship between the federal government and Indian tribes. As such, the program was subject to rational basis review, a threshold that it easily surpassed. Following *Morton*, several circuit courts have held that the government need only demonstrate a rational relationship to a legitimate interest to satisfy the Establishment Clause when accommodations are made for federally recognized tribes, given their unique legal and political status.<sup>245</sup>

Fulfillment of the government’s trust responsibility and alleviating burdens imposed by federal land ownership and past governmental policies are secular political purposes, with the secular effect of promoting tribal sovereignty. Many statutes demonstrate the federal government’s secular political purposes in protecting tribal culture and sovereignty.<sup>246</sup> Some, like the NHPA, specifically advance the policy of accommodating cultural practices and protecting

234. See Pub. L. No. 106-274, §7(a)(1), 114 Stat. 806 (codified at 42 U.S.C. §2000bb-2) (Sept. 22, 2000) (defining “government” as a “branch, department, agency, instrumentality, and official . . . of the United States, or of a covered entity,” and striking the reference to “a State, or a subdivision of a State”).

235. Northwest Indian Cemetery Protective Ass’n v. Peterson, 565 F. Supp. 586, 596, 13 ELR 20793, 20796 (N.D. Cal. 1983) (quoting Sherbert v. Verner, 374 U.S. 398, 406 (1963)), *aff’d in relevant part*, 764 F.2d 581, 15 ELR 20682 (9th Cir. 1985), *rev’d sub nom.*, *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 18 ELR 21043 (1988).

236. *Lynch v. Donnelly*, 465 U.S. 668, 672 (1984) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971)).

237. See *Board of Educ. of Kiryas Joel v. Grumet*, 114 S. Ct. 2481, 2487 (1994) (plurality opinion); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

238. See *Lynch*, 465 U.S. at 673 (“Such hostility would bring us into ‘war with our national tradition as embodied in the First Amendment’s guaranty of the free exercise of religion.’”) (citing *McCullum v. Board of Educ.*, 333 U.S. 203, 211-212 (1948)).

239. *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987) (quoting *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 144-45 (1987)).

240. 403 U.S. 602, 612-13 (1971).

241. *Lynch*, 465 U.S. at 678. See *Agostini v. Felton*, 521 U.S. 203 (1997).

242. See *Lynch*, 465 U.S. at 679; *Lemon*, 403 U.S. at 614; *Marsh v. Chambers*, 463 U.S. 783 (1983); *Larson v. Valente*, 456 U.S. 228 (1982); *Lamont v. Woods*, 948 F.2d 825 (2d Cir. 1991).

243. *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 454-55, 18 ELR 21043, 21046-47 (1988). The Court noted with approval the many “ameliorative” measures taken by the Forest Service to minimize impacts on tribal interests. *Id.* at 454, 18 ELR at 21043. The Tenth Circuit took a different view in a pre-*Lyng* Free Exercise Clause case, stating in dicta that a decision to exclude all non-Indian visitors from a national monument, or to allow religious practitioners to control the use of the monument, would violate the Establishment Clause. See *Badoni v. Higginson*, 638 F.2d 172, 179, 11 ELR 20204 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

244. 417 U.S. 551-52, 555 (1974). The *Morton* rationale applies to federal actions that affect unique interests of federally recognized tribes, such as self-governance, tribal lands, and cultural interests. See *Rice v. Cayetano*, 120 S. Ct. 1044 (2000); *Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997). See also *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979) (“It is settled that ‘the unique legal status of Indian tribes under federal law’ permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive.”).

245. See *Rupert v. Director, U.S. Fish & Wildlife Serv.*, 957 F.2d 32 (1st Cir. 1992) (upholding exemption for tribal members from prohibition on possession of eagle feathers); *Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991) (upholding Native American Church exemption from prohibition on use of peyote). See also *Bear Lodge Multiple Use Ass’n v. Babbitt*, 2 F. Supp. 2d 1448, 1454-56 (D. Wyo. 1998) (rejecting Establishment Clause challenge to Devils Tower Climbing Management Plan, discussed *supra* at note 205).

246. See 16 U.S.C. §470f; 36 C.F.R. §60.4. See also 25 U.S.C. §3601 (declaring U.S. government-to-government relationship with tribes and responsibilities to protect tribal sovereignty, and noting the importance of tribal culture to effectuating tribal sovereignty); *id.* §2901 (proclaiming U.S. responsibility for ensuring the survival of American Indian cultures); *id.* §2001(c)(2) (directing that educational standards take into account the “specific cultural heritage of each tribe”); *id.* §1901 (noting the importance of cultural standards of American Indian communities and families to tribal integrity).

sacred sites.<sup>247</sup> The fact that accommodations might also incidentally advance religious interests does not require invalidation of such actions or policies.<sup>248</sup> The Court has upheld numerous governmental programs that provide incidental benefits to religious organizations, such as Sunday closing laws and policies providing open access to public fora for both religious and nonreligious groups.<sup>249</sup>

Finally, federal actions that promote or remove impediments to the access and use of sacred sites do not excessively entangle the government with American Indian religious practices or beliefs; instead, such actions simply allow religious practices to advance themselves uninhibited by government. Entanglement occurs when government action results in pervasive state surveillance of religious activities<sup>250</sup> or a “fusion of governmental and religious functions.”<sup>251</sup> Conversely, “[a] law is not unconstitutional because it *al-*

*lows* churches to advance religion, which is their very purpose.”<sup>252</sup> Removing impediments to the use of government-owned sites of cultural and religious importance to tribes simply effectuates the government’s political and remedial purposes, allowing tribes and tribal members to advance their own beliefs and practices, and does not establish or endorse a religion.

## VI. Conclusion

Together, FLPMA, the NFMA and the National Park Service Organic Act, along with the overarching requirements of the NHPA, NEPA, ARPA and NAGPRA, provide ample grounds for accommodating cultural interests in public lands, particularly American Indian traditional cultural properties. Although accommodation is generally not required by the Free Exercise Clause in the wake of the *Lyng* case, neither is it prohibited by the Establishment Clause. Further, the protection and accommodation of access to cultural resources are affirmatively encouraged by federal policy, and perhaps even mandated by RFRA. Reasonable accommodations, tailored to the specific parcel of land and resource at issue, and supported by thorough administrative records showing a responsiveness to the long-term needs of the resources as well as the public, should withstand constitutional and statutory challenges.

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247. See 16 U.S.C. §470a(d)(6). See also 42 U.S.C. §1996 (adopting policy “to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise traditional religions . . . , including but not limited to access . . . and the freedom to worship through ceremonials at traditional sites”).
248. See *McGowen v. Maryland*, 366 U.S. 420, 444-45 (1961) (upholding Sunday closing laws because, although they provided some benefit to Christian churches and churchgoers, they also advanced secular goals of promoting public health, safety, and well-being through a uniform day of rest).
249. See *id.* at 444-45; *Widmar v. Vincent*, 454 U.S. 263, 273-74 (1981).
250. See *Lemon v. Kurtzman*, 403 U.S. 602, 619-20 (1971); *Agostini v. Felton*, 521 U.S. 203, 232 (1997).
251. See *Larkin v. Grendel’s Den*, 459 U.S. 116, 126-27 (1982) (citing *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 222 (1963)) (invalidating a state statute that delegated power to religious bodies to veto applications for liquor licenses near churches).

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252. *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337 (1987) (emphasis in original). See *Everson v. Board of Educ. of Ewing*, 330 U.S. 1, 15-16 (1947) (Establishment Clause prevents state from “participat[ing].”