

TRIBAL VOICES IN HISTORIC PRESERVATION: SACRED LANDSCAPES, CROSS-CULTURAL BRIDGES, AND COMMON GROUND

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"Before he died, Black Elk called up a rain shower out of a blue sky in an effort to nourish the roots of the withered sacred tree. The Indian spirit was, and remains, hard to break."¹

INTRODUCTION

Listen. We need to tell you some of our stories. We need to tell them, and you need to hear them. By "we," I mean the American Indian and other indigenous cultures of North America. By "you," I mean the non-Indian people of North America. (Of course, I realize that many of us, myself included, have ancestors and family members, as well as facets of our individual personalities, that fit within both of these pronouns.) By "stories," I mean a wide range of narratives, such as stories of the first encounters between Europeans and Indians, as well as accounts of more recent events, the kinds of stories that you might generally regard as "history." I also mean to include accounts of our histories that pre-date encounters with Europeans and Euro-Americans, the kinds of stories that you might call "prehistory." I also mean to include stories that occurred in what you might call "mythic" time, some of which you might call "folk tales," and some "legends" or "myths." Many of these kinds of stories are sacred. Some of them were given to us by spirit beings at the dawn of mythic time. For many of us, many of these kinds of stories should be kept private—only certain kinds of people should know them. But even though you do not really need to know stories of this kind, you do need to know something about them.

1. JAMES WELCH, *KILLING CUSTER: THE BATTLE OF THE LITTLE BIGHORN AND THE FATE OF THE PLAINS INDIANS* 286 (1994).

Some of our stories, especially the stories of our histories, are tragedies on an epic scale; when you hear them from our perspectives, they may make you angry or ashamed. Some of our folk tales may make you smile or laugh. Some of our stories may help you to grasp some deeper meaning about the ways that human communities relate to the natural world. We do not expect anyone to listen to *all* of our stories. There simply are too many. But each of you needs to know some of them.

Now that I have drawn you in with this talk of storytelling, I should confess that I do not intend to engage in any real storytelling in this Article. While I have aspirations of someday becoming a storyteller, my main purpose in this Article is to help bring the voices of Indian storytellers to the American public, to help Indian storytellers get their voices heard within the framework of our national historic preservation program. I hope to do this by explaining the legal framework established by federal law in which Indian tribes can insist that federal agencies take our stories into account. The audience that I hope to reach is comprised of different groups of people. One group consists of tribal officials and people who work for tribal governments as employees or consultants. (For this segment of my audience, perhaps I should have started by saying, "We need to tell them some of our stories.") I also hope that people who work for state and federal agencies in the field of historic preservation and cultural resources management find this Article useful. In my experience, we have quite a number of committed allies among their ranks. (And we should not overlook the fact that some of us work for them.) In addition, I hope that people who are involved with non-governmental organizations find this Article useful. By non-governmental groups, I mean environmental groups that are primarily non-Indian as well as groups that work with tribal members who are recognized as traditional cultural authorities but are not directly involved in tribal government.

Part I of this Article offers some thoughts on why it matters for the larger American society to know about our stories. One reason is that Indian tribes are still here, and we intend to be here for many generations to come. Ignorance about our histories causes harm to contemporary tribal communities. Another reason is that Indian people can help concerned people in the larger American society to fashion approaches to environmental stewardship that work for the modern world. We can do this by sharing some of our stories about the natural world.

Parts II, III, and IV explain the three main federal statutes that set the stage for bringing tribal voices into the decisionmaking processes used by federal agencies when those decisions affect places and things that hold religious or cultural importance for tribes. Part II focuses on the statute

that sets out the legal framework for our national historic preservation program, the National Historic Preservation Act (NHPA),² with an emphasis on the provisions of NHPA that are particularly relevant to Indian concerns. Parts III and IV provide summary explanations of two other federal statutes that overlap the coverage of NHPA: the Archaeological Resources Protection Act (ARPA)³ and the Native American Graves Protection and Repatriation Act (NAGPRA).⁴ Taken together, these three statutes form a patchwork that is far from ideal from a tribal perspective, but a patchwork that has worked reasonably well in some cases. This patchwork works best where tribes have built their own governmental programs to deal with the subjects that these laws cover.

In Part V, I offer some thoughts on how tribes can make the most of the opportunities presented by these federal laws. By building tribal programs to deal with historic properties within reservation boundaries, tribes will be better able to make use of the procedural requirements of federal historic preservation and cultural resources law in order to protect places outside reservation boundaries that have cultural and religious importance. The extent to which they are successful in such efforts will depend on how persuasively they present their views and the degree to which people in the larger society come to share, or at least respect, their views.

Over the next few decades, I believe that tribal historic preservation programs will offer a variety of ways to help people in the larger American society to learn many of our stories and important aspects of what these stories mean. This kind of knowledge will enrich the larger American society. I hope that this enrichment will contribute to a widespread recognition by the larger American society that Indian tribes are here to stay and that this recognition will be supported by an irrevocable commitment, under federal law, to the right of self-determination and self-government for each and every tribe.

I. OUR STORIES MATTER

Our stories matter. Not just for us, and not just for non-Indian Americans. Our stories matter for the whole world. Some will challenge me to explain just why our stories matter so much. I hope that this Article contributes to a wider understanding of why our stories matter and will

2. 16 U.S.C. §§ 470 to 470x-6 (1994).

3. *Id.* §§ 470a-470mm.

4. 25 U.S.C. §§ 3001-13 (1994).

help those of you who do not already accept this point to come around to it on your own terms.

A. Our Places in American History

Every generation of Americans needs to learn how so much of this land was taken from our ancestors. Americans need to learn this, but not for the purpose of dwelling on the past or trying to make present-day generations feel guilty about the actions of some of their ancestors (or perhaps more specifically, the ancestors of some groups within the American people). Each generation of Americans needs to learn the stories of the acquisition of Indian lands because these stories comprise an essential part of the history of the American people, as essential a part of the American story of origin as the Declaration of Independence and the Constitution. America is an amalgamation of peoples carrying on a system of government in a land, a wondrous and beautiful land, from sea to shining sea. I cannot imagine the amalgamation of peoples that we now think of as the American people existing except in connection with the land now enclosed within the borders of the United States of America. We all (you and we) need to know how it is that the American people came to claim this land.

In addition to this philosophical reason, there is also a very important pragmatic, future-oriented reason why every generation needs to learn this history: we are still here and we intend to be here for many generations to come. Not just as scattered bits of colorful and distinctive cloth in the ethnic patchwork quilt of America, but as politically separate, self-governing communities. As peoples. This is the essence of what the ancestors of some of us bargained for in treaties with the sovereigns of Europe and with the United States. Over the generations, we have suffered from the recurrent efforts of the dominant American society to force us to stop being Indians; we know from experience the disastrous consequences of these efforts. People in the larger society need to know some of this history so that they will stop trying to resurrect failed policies and learn to accept our permanence as the third kind of sovereign in our federal system.

Many of the stories of the dealings between the American people and Indian tribes and nations are tragic, and reading them, or hearing them told, can be an unpleasant experience. And there are so many stories. Although each tribe or nation has its own history of dealings with the United States, for many people, Indians and non-Indians alike, these stories seem to share many common elements. Many of these elements are unsettling and depressing, so that once one has grasped the basic theme

there is little interest in learning the many variations. As historian Christopher Vecsey has observed, many of his academic colleagues see little benefit in dwelling on the dark side of America's treatment of Indians:

The verdict is in, they say, and America has been found guilty; now let us move on to some other topic. Academic wisdom these days notes that everyone knows America has acted badly toward Indians, so what else can we say about massacres and deceptions a century and more old?⁵

The way this question is phrased reveals part of the problem. We can add quite a lot to what has already been said about massacres and deceptions, especially when Indian voices and oral histories are featured in the telling, but whether we add something new matters less than the contemporary implications of ignorance on the part of the dominant American society. Indian peoples are still here. There is much more to the histories of dealings between the United States and Indian tribes than massacres and deceptions that took place more than a century ago. (Although the last of the massacres occurred at Wounded Knee in 1890, deceptions have been perpetrated throughout most of the twentieth century.) Ignoring or distorting our more recent stories can cause real damage to contemporary Indian communities.⁶

Most of the massacres took place during an era in which the federal government entered into treaties with Indian tribes, a practice which ended

5. Christopher Vecsey, *Envision Ourselves Darkly, Imagine Ourselves Richly*, in *THE AMERICAN INDIAN AND THE PROBLEM OF HISTORY* 120, 121 (Calvin Martin ed., 1987). One of the reasons that Vecsey offers for telling and retelling these stories is that if historians stop telling these stories they will fade in our collective memory, and we will forget the "grisly truth" about America's past. *Id.* at 122. In other words, we do not need to justify telling these stories by the possibility of gaining some new insight, we simply cannot let these stories be forgotten.

6. See Milner S. Ball, *Constitution, Court, Indian Tribes*, 1 *AM. B. FOUND. RES. J.* 1, 114-15 (1987) (criticizing the Supreme Court's "particularly preposterous" fictional view of American history in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 289-90 (1955)); Joseph W. Singer, *Sovereignty and Property*, 86 *NW. U. L. REV.* 1, 15-35 (1991) [hereinafter Singer, *Sovereignty and Property*] (explaining how the Supreme Court ignored or distorted relevant historical events in its decision in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989)); Aviam Soifer, *Objects in Mirror Are Closer Than They Appear*, 28 *GA. L. REV.* 533, 534 (1994) (arguing that judicial reliance on history in the context of Native American legal claims may be devastating); Joseph W. Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 *GA. L. REV.* 481, 482 (1994) [hereinafter Singer, *Well Settled?*] (noting that the Vermont Supreme Court in *State v. Elliott*, 616 A.2d 210 (Vt. 1992), *cert. denied*, 507 U.S. 911 (1993), used the "increasing weight of history" to extinguish Abenaki title to the Tribes traditional lands) (footnote omitted).

in 1871.⁷ During this treaty-making period, each branch of the federal government contributed to the fashioning of some basic principles regarding the relationships between Indian tribes and the United States. Typically, a treaty recorded an agreement through which a tribe conveyed land to the United States in exchange for promises by the federal government to recognize and protect the tribe's right to continue to live as a separate people and to exercise self-government within the territory that it reserved to itself.⁸ Since the end of treaty-making, we have lived through four distinct periods of federal Indian policy, commonly known as allotment, reorganization, termination, and self-determination.⁹

From one period to the next, the overriding objective of the federal government changed dramatically, shifting back and forth between two fundamentally different visions of the future of Indian people in American society. During the allotment and termination eras, the overriding theme was that Indian people, as individuals, should become assimilated into the larger American society, and that Indian peoples, as politically distinct entities, should cease to exist. At the beginning of the reorganization era in 1934¹⁰ and again at the beginning of the modern era of self-determination (in the 1960s),¹¹ federal policy returned to the basic approach of supporting the continued existence of Indian tribes and nations as politically distinct communities. This approach, which Professor Charles Wilkinson has called a "measured separatism,"¹² is generally consistent with the understandings that many of our ancestors had when they entered into treaties with the United States.

Some understanding of this more recent history is a prerequisite to an understanding of federal Indian law and policy in the modern era. As Professor Gloria Valencia-Weber has noted, history, in the study and

7. See FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 105-07 (1982 ed.).

8. See generally *id.* at 62-105.

9. See generally *id.* at 108-206.

10. *Id.* at 144 dates the beginning of the reorganization period at 1928. The period takes its name from the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (1994) (as amended).

11. COHEN, *supra* note 7, at 180, dates the beginning of the self-determination period at 1961. No particular event marks the end of the termination period. An event that can be seen as the beginning of the self-determination period was the enactment in 1968 of legislation, codified at 25 U.S.C. §§ 1321-1323 (1994), requiring tribal consent to the assumption of criminal and/or civil jurisdiction by a state over an Indian reservation (and authorizing the United States to accept retrocession of jurisdiction previously acquired by a state) pursuant to the termination period statute commonly known as Public Law 280, which is codified at 18 U.S.C. § 1162 (1994) and 28 U.S.C. § 1360 (1994). See COHEN, *supra* note 7, at 177. The self-determination period takes its name from the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450n (as amended).

12. CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 16 (1987).

practice of Indian law, is much more than "a remote intellectual concern."¹³ In my experience, the universe of people in the larger American society who have at least a generalized grasp of the last century or so of the history of Indian America is a small universe indeed, consisting mainly of lawyers who work in the field of Indian law, or who studied the subject in law school, along with an assortment of other professionals, including historians, anthropologists, ethnohistorians, and educators.

Somehow, we need to bring a lot more people into this universe of understanding. Historic preservation offers a variety of ways to bring people into this universe, ways that focus on particular places, particular Indian peoples, and particular non-Indian communities and individuals. Focusing on specifics will help us to overcome stereotypes and the kind of damage that stereotypes cause. As most present day Indians know from personal experience, stereotypes about Indians abound in present day America.¹⁴

1. Owning Up to the Legacy of Cultural Genocide

As we are working to overcome stereotypes and encouraging people for whom these histories are new to draw their own conclusions and lessons, there are some common patterns and general principles that we should be straightforward in acknowledging. One common pattern is that the policies that the federal government pursued during the half century of the allotment era caused damage to tribal cultures on a massive scale. This period of federal Indian policy has come to be known as the "allotment" era because the conversion of tribal land to individual land was the principal legal mechanism by which the assimilationist policies of the era were carried out. During this era, which began at the end of a period of treaty-making (and warfare and massacres), the federal government attacked the core values of Indian tribal cultures on several fronts: traditional religious practices were outlawed; children were taken away to boarding schools; and tribal landholdings were confiscated and converted into individual "allotments" with the so-called "surplus" lands made available for settlement by non-Indians.¹⁵ The results of allotment

13. Gloria Valencia-Weber, *American Indian Law and History: Instructional Mirrors*, 44 J. LEGAL EDUC. 251, 251 (1994) (discussing ways to use history in teaching Indian law).

14. For an insightful essay on the worldwide prevalence of stereotypes about Indians, see Michael Dorris, *Indians on the Shelf*, in PAPER TRAIL: ESSAYS 122 (1994).

15. COHEN, *supra* note 7, at 129-38; WILKINSON, *supra* note 12, at 19-23. See generally Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995).

included the loss of an enormous amount of Indian land¹⁶ and the contemporary presence of a substantial number of non-Indians living within the boundaries of many Indian reservations.

In addition to acknowledging the amount of lost Indian land, we also must acknowledge that, in carrying out the allotment policy, the federal government sought to force Indian people to reject a core cultural value and to replace it with a core value of Anglo-American culture. More specifically, the allotment policy forced Indian people to accept the idea that land, Mother Earth, can be divided into parcels that can be owned by individual human beings. This idea struck at the heart of a core value common to most tribal cultures: the belief that families, clans, and communities belong to the land and have responsibilities to it and to other living things with whom they share it, but that individuals cannot own it. Since tribal common ownership had been recognized in treaties, one might think that the constitutional right not to be deprived of property without due process of law and just compensation would have protected Indian tribal landholdings. In 1903, the Supreme Court ruled otherwise, however, in *Lone Wolf v. Hitchcock*,¹⁷ which set the stage for the unilateral opening of many reservations to settlement by non-Indians.¹⁸

Dean Rennard Strickland has used the term "genocide-at-law" to describe the policies of the allotment era.¹⁹ Of course, in the nineteenth century and early twentieth century, when allotment was carried out, the term "genocide" had not yet been coined. As Dean Strickland has shown, the federal policies of that era, carried out through law, amounted to genocide, at least under a dictionary definition of the term: "the deliberate and systematic destruction of a racial, political, or cultural group."²⁰ As a term of international law, genocide is defined more precisely in Article

16. The Indian land base of 138 million acres at the enactment of the General Allotment Act of 1887 had been reduced to 48 million acres by enactment of the Indian Reorganization Act of 1934, which repudiated allotment era policies. COHEN, *supra* note 7, at 138. Thus, about two-thirds of the Indian land base passed out of Indian possession during this period. For an explanation of the mechanisms through which this loss of land occurred, see Royster, *supra* note 15, at 10-17. See also Michael Dorris & Louise Erdrich, *The Hundred Year War for White Earth*, in PAPER TRAIL: ESSAYS 207 (1994).

17. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564 (1903).

18. See Singer, *Sovereignty and Property*, *supra* note 6, at 30 (noting that "the failure to identify a forced allotment of tribal property as a taking requiring just compensation distinguishes tribal property from other forms of commonly owned property in the United States") (footnote omitted); see also Royster, *supra* note 15, at 13-14 (noting that within two years after the *Lone Wolf* decision, Congress had enacted six "surplus lands" acts without tribal consent and that, in 1905, four of the affected reservations were opened to non-Indian settlement).

19. Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 KAN. L. REV. 713, 713-14 (1986).

20. *Id.* at 713 (quoting Webster's Collegiate Dictionary).

II of the Convention on the Prevention and Punishment of the Crime of Genocide.²¹ Various aspects of federal policy carried out through law during the allotment era might be shown to constitute genocide when held up to this standard,²² but I will not attempt to make such a showing in this Article.

Rather, I want to address the concept of "cultural genocide" and to note that the policies of the allotment era clearly fit within this concept. In 1993, the United Nations Working Group on Indigenous Populations approved the text of the United Nations Draft Declaration on the Rights of Indigenous Peoples (Draft Declaration).²³ The basic idea underlying the concept of cultural genocide is that, in addition to the Genocide Convention's prohibitions, international human rights law also prohibits the destruction of a people's culture, or, stated affirmatively, every people has a right to exist and to carry on its own way of life.²⁴ Accordingly, Article 7 of the Draft Declaration provides:

21. G.A. Res. 2670, U.N. GAOR, 3d Sess., pt. 1, 179th plen. mtg. at 174, U.N. Doc. A/810 (1948). As defined in this multilateral treaty:

[G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Id. at art. II. The United States ratified the Genocide Convention in 1985. Pub. L. No. 100-606, 102 Stat. 3045 (codified as amended at 18 U.S.C. § 1091 (1994)).

22. The taking of tribal landholdings and the allotment of these lands to individuals attacked a fundamental value of Indian tribal cultures, and the results of allotment can be shown to violate both clauses (b) and (c) of the definition. The policy of sending Indian children to off-reservation boarding schools violated clause (e) of the definition, and one could argue that, until the enactment of the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (1994), the legal framework governing adoptions and child custody placements also violated this clause.

23. U.N. Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56, at 105 (1994) [hereinafter Draft Declaration], quoted in S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 207 (1996). While some readers may find it less than compelling to cite a draft document as a source of international human rights law, the Draft Declaration is the product of more than a decade of work by representatives of member states of the United Nations, indigenous peoples, and nongovernmental organizations. The rights recognized in the Draft Declaration "constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world." *Id.* art. 42. On the legal significance of the principles contained in the Draft Declaration, see ANAYA, *supra* at 153-54.

24. See S. James Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8 ARIZ. J. INT'L & COMP. L. 1, 16 (1991); see also ANAYA, *supra* note 23, at 98-104 (discussing the collective right of indigenous peoples to maintain their cultural integrity).

Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:

(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights;

(d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;

(e) Any form of propaganda directed against them.²⁵

The federal laws of the allotment era obviously violate clauses (a) through (d) of this Article. If the larger American society should have learned anything from the last century of federal Indian policy, it is that to survive as distinct peoples, Indian tribes must have the right of self-government. As the Supreme Court has recognized, the purpose of the allotment policy was the "ultimate destruction of tribal government."²⁶ Although Congress has long since repudiated the policies of the allotment era, the Supreme Court has continued to give effect to laws enacted during that era²⁷ even though a reasoned application of long-standing principles of federal Indian law could have supported outcomes more consistent with contemporary policies that support tribal self-government.²⁸

Of course, it would be unfair to hold up the policies of more than a century ago and judge them by the human rights standards of today. On the other hand, if the policies of the allotment era were to be resurrected

25. Draft Declaration, *supra* note 23, at art. 7; *see also* Declaration of San Jos, adopted by the UNESCO Meeting of Experts on Ethno-Development and Ethnocide in Latin America, San Jos, Dec. 11, 1981. UNESCO Doc. FS 82/WF.32 (1982), *reprinted in* ANAYA, *supra* note 23, at 192 (defining "ethnocide" as meaning where "an ethnic group is denied the right to enjoy, develop, and transmit its own culture and its own language, whether collectively or individually").

26. *Montana v. United States*, 450 U.S. 544, 560 n.9 (1981).

27. *See, e.g., id.* (acknowledging that although Congress had repudiated the policy of the allotment period, "what is relevant in this case is the effect of the land alienation occasioned by that policy"). *See generally* Royster, *supra* note 15.

28. *See* Royster, *supra* note 15, at 23 (noting that in its decision construing the General Allotment Act in *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992), "the Court discarded two principles of interpretation of Indian statutes that are crucial to the protection of tribal autonomy") (footnote omitted); *see also* Singer, *Sovereignty and Property*, *supra* note 6, at 30-31 (arguing that the Court erred in focusing on the congressional intent behind the General Allotment Act of 1887 and ignoring the congressional intent behind the Indian Reorganization Act of 1934).

by Congress and re-enacted into law in today's world, informed persons who care about human rights should not hesitate to label such laws cultural genocide.

Modern tribal governments face an array of challenges in exercising governmental authority within their reservations. While some of the challenges facing tribal governments are similar to those faced by other kinds of governments in late twentieth century America, other challenges are more or less unique to Indian country, including the challenges associated with regulating some kinds of activities of people who are not eligible to be tribal members. Many of these people feel very strongly that tribal governments should have no authority over them whatsoever.²⁹ Tribal officials must take these concerns seriously because the people who hold such views have some legitimate concerns.³⁰ In addition, these people tend to have little hesitancy in taking their concerns to political branches of federal and state governments.³¹ The concerns of contemporary non-Indians should be addressed, however, with the awareness of the histories of how Indian reservations were opened to settlement by non-Indians in the first place, and with respect for the collective human rights of Indian tribes to continue to exist as distinct peoples. Whether or not we can fashion a resolution of these competing rights that is fair to all involved presents a formidable challenge. We have no hope at all unless we begin by owning up to the legacy of cultural genocide.

2. Celebrating Our Survival and Our Differences

Although each generation of American society should own up to this legacy, we cannot afford to become obsessed with it. When given a choice, most people will choose not to wallow in a painful experience. Like the historians to whom Christopher Vecsey attributed his rhetorical question, most people would rather move on to some other topic. I

29. See Dean B. Suagee & Christopher T. Stearns, *Indigenous Self-Government, Environmental Protection, and the Consent of the Governed: A Tribal Environmental Review Process*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 59, 76-79 (1994). See generally Timothy R. Malone & Bradley B. Furber, *Regulatory Jurisdiction over Non-Members' Lands within Indian Reservations*, NAT. RESOURCES & ENV'T, Spring 1993, at 14.

30. See Suagee & Stearns, *supra* note 29, at 66-67, 76-79; see also Singer, *Sovereignty and Property*, *supra* note 6, at 39-40 (arguing that in divesting tribes of jurisdiction in order to protect "non-Indians from the feared arbitrary or unjust power of Indian nations [the Court has subjected] Indian nations to the arbitrary power of state and federal officials").

31. See Dean B. Suagee, *Clean Water and Human Rights in Indian Country*, NAT. RESOURCES & ENV'T, Fall 1996, at 46, 47; see also Suagee & Stearns, *supra* note 29, at 76-79.

suggest that we put some serious effort into offering up some other topics, or at least in shading the presentation of old topics. There is much that is inspirational and life-affirming in our stories, including our histories of mistreatment. In many of our epic tragedies one can find incredible stories of survival and triumph of the human spirit.

Some of these stories have been commemorated through our national historic preservation program. Most Americans probably know something about the forced removal of the Cherokee, Chickasaw, Choctaw, Creek, and Seminole Nations from the Southeast in the 1820s and 1830s.³² The story of the fighting flight of the Nez Perce in 1877 in their attempt to reach the Canadian border is also well-known.³³ Both the Trail of Tears and the route taken by the Nez Perce have been commemorated as National Historic Trails.³⁴ In addition, battle sites of the Nez Perce War of 1877, along with a number of other sites of historic and cultural significance, have been collectively designated the Nez Perce National Historical Park.³⁵ These stories are certainly tragic, but they are also inspirational stories of survival and important parts of American history.

These are but two examples. By bringing more of these stories into the public consciousness and commemorating some of the places where these stories occurred, the people of the larger American society could be enriched in a variety of ways, not the least of which is an enhanced appreciation of the basic humanity of Indian peoples. On one level, many of these stories are simply stories of particular men and women doing what they thought they had to do to take care of their families and their communities—sometimes with honor, sometimes with humor, sometimes with personal shortcomings—the kinds of traits that are common to people everywhere. Nothing overcomes stereotypes like getting to know real people. We need to help the larger society get to know our ancestors as real people.

In addition to appreciating our common humanity, commemorating some of the places associated with our stories can help the larger American society to appreciate some of the ways that tribal cultures are different. Writer Michael Dorris has offered an example that helps bring out this

32. See ANGIE DEBO, *A HISTORY OF THE INDIANS OF THE UNITED STATES* 117-49 (1970). See generally JOHN EHLE, *TRAIL OF TEARS: THE RISE AND FALL OF THE CHEROKEE NATION* (1988).

33. See ALVIN M. JOSEPHY, JR., *THE PATRIOT CHIEFS: A CHRONICLE OF AMERICAN INDIAN RESISTANCE* 312-40 (1969); ROBERT M. UTLEY, *THE INDIAN FRONTIER OF THE AMERICAN WEST 1846-1890*, at 189-93 (1984).

34. See Steven Elkinton & Donald C. Maglinenti, *Preserving America's National Historic Trails*, *HIST. PRESERVATION F.*, July-Aug. 1994, at 17, 19, 21.

35. Bob Chenoweth & Linda Paisano, *Sapatqayn, Nakia's Link to the Past*, *CULTURAL RESOURCES MGMT.*, 1995, at 38, 38.

point.³⁶ It is a story common to many cultures of the Pacific Northwest—a story about how the culture hero/trickster Raven created human beings.³⁷ According to this story, human beings were created accidentally when Raven ate a lot of berries from a kind of bush that he/she had not seen before. While flying away, Raven was struck by the worst case of diarrhea in history, and human beings came to life from his/her excrement. Raven breaks out in laughter to see these ridiculous creatures, and the human beings look up to see Raven and laugh back. As Dorris points out,

A society with this irreverent coda has a very different self-concept than one with solemn Genesis as its primary referent. [The relationship between creator and createe is one] without guilt, affection, or even clear purpose. . . . [T]he joking relationship between Raven and humanity persists and becomes even more perverse over time.³⁸

The places where these kinds of stories take place may be commemorated as historic places.³⁹ As the historic significance of such places is acknowledged, more people in the larger society will have the opportunity to learn, in the context of particular places and particular tribal cultures, that human societies can indeed have different ways of perceiving the world. It is no small educational accomplishment for students reared in the Euro-American tradition “to discover that cultural pluralism is real, that people can actually think, believe, and act differently and still be people.”⁴⁰ As Michael Dorris suggests, to understand that any one tribal society or any one non-Western people has depth and intellectual complexity means that one should understand and accept this by inference for other non-Western peoples: “The discovery of just one alternate way of being and becoming human puts to rest forever, for that discoverer, the destructive myth that any single group holds a monopoly on civilization or imagination.”⁴¹

36. Michael Dorris, *Discoveries*, in *PAPER TRAIL: ESSAYS* 154-55 (1994).

37. *Id.*

38. *Id.*

39. For example, as reported by Chenoweth & Paisano, *supra* note 35, at 38, the Nez Perce National Historic Park includes some places that are associated with Coyote stories.

40. Michael Dorris, *Native American Literature in an Ethnohistorical Context*, in *PAPER TRAIL: ESSAYS* 253 (1994).

41. *Id.* at 254.

B. *The Contemporary Need for Stewardship*

One of the most significant ways in which Indian tribal cultures are different from much of the larger American society can be seen in the ways that tribal cultures understand their relationships with the natural world. Our stories offer some of the best sources of information on our explanations of these relationships. Indian stories espouse a "triplefold declaration of dependence on the surrounding world: of the individual on the community, of the community on nature, and of nature on the ultimately powerful world of spirit."⁴²

By focusing some of our attention on the ways that particular tribal cultures relate to the natural world and the ways in which they explain these relationships, we can help people in the larger American society come to a fuller understanding of the relationships between human societies and the natural world. In so doing, we can help them become better practitioners of a concept that non-Indian environmentalists might call "stewardship."

All human societies depend on the natural world. In using the natural world to meet their needs and wants, all human societies cause some changes in the web of life. Some societies have achieved an equilibrium, by not taking things faster than the natural world can replace them and by putting things back in ways that make human communities productive components of the natural world. Other societies show a marked indifference to the capacities of natural systems to recover from exploitative invasions. People in such societies commonly view lands (and waters) as economic resources, in which the values assigned to animals and plants reflect the extent to which they can be converted into money. In such societies, the exploitation of natural resources is commonly carried out under the banner of "development." The United States is a diverse society in which there is widespread support for environmental protection. There are also vocal and powerful segments of the American society which espouse and act on the view that the private property rights of owners should be virtually unlimited.

Over the last decade, an awareness has been growing around the world that much of what has been done under the banner of "development" is simply not sustainable. Unsustainable development takes too much, changes too much, destroys too much. Consequently, governments, international organizations, and non-governmental organizations have started using a new buzzword, "sustainable

42. Vecsey, *supra* note 5, at 125.

development."⁴³ Although there is not much agreement over what kinds of "development" might be "sustainable," there is broad agreement that it must include a concept of stewardship: a commitment on the part of present generations to preserve and protect the Earth's natural systems so that future generations will be able to draw on them to meet their needs.

Some of the Indian people who become involved in historic preservation are mainly concerned with protecting a particular sacred place from damage as a result of "development." I suggest that we broaden our focus and put some serious energy into promoting the idea of sustainable development and the corollary principle of stewardship. Of course we all know that some environmentalists, and some Indians, have suggested that tribal cultures embody a concept of environmental stewardship that the larger American society would do well to emulate.⁴⁴ (Some might use only past tense verbs in attributing this characteristic to tribal cultures.) Others have argued that such claims portray a romanticized and inaccurate picture of tribal cultures.⁴⁵ Regardless of the relative truth of such claims and counterclaims, many of the people who have had something to say on this issue have said it in general terms, sometimes with a few anecdotes offered in support, but often without much reference to any particular tribal culture.

43. The concept of sustainable development was placed on the international agenda, in 1987, by the publication of the report of the World Commission on Environment and Development. *WORLD COMM'N ON ENV'T & DEV., OUR COMMON FUTURE* (1987) [hereinafter *OUR COMMON FUTURE*]; see Dean B. Suagee, *Self-Determination for Indigenous Peoples at the Dawn of the Solar Age*, 25 U. MICH. J.L. REF. 671, 721-25 (1992). The basic idea is that "[s]ustainable development seeks to meet the needs and aspirations of the present without compromising the ability to meet those of the future." *OUR COMMON FUTURE*, *supra* at 40. By Executive Order No. 12852, 58 Fed. Reg. 35,841 (1993), President Clinton established the President's Council on Sustainable Development (PCSD), which has published a report. Copies of the report are available from the PCSD at 730 Jackson Place, N.W., Washington, DC 20503; phone: (202) 408-5296; (800) 363-3732; fax: (202) 408-6839; worldwide web: www.whitehouse.gov/pcsd.

44. Cf. J. Baird Callicott, *American Indian Land Wisdom*, in *THE STRUGGLE FOR THE LAND: INDIGENOUS INSIGHT AND INDUSTRIAL EMPIRE IN THE SEMIARID WORLD* 255 (Paul A. Olson ed., 1990) (discussing several works, mainly in academic literature, arguing that tribal cultures either did or did not practice what might be called environmental conservation); DONALD A. GRINDE & BRUCE E. JOHANSEN, *ECOCIDE OF NATIVE AMERICA: ENVIRONMENTAL DESTRUCTION OF INDIAN LANDS AND PEOPLES* 23-55 (1995) (discussing similar claims in the academic literature and other sources). One of the best known examples is the speech given by Chief Seattle sometime between 1853 and 1855, which has been widely circulated in a version that has been shown to be quite different from the original speech. See DAVID SUZUKI & PETER KNUDTSON, *WISDOM OF THE ELDERS: SACRED NATIVE STORIES OF NATURE* xx-xxiii (1992).

45. See, e.g., Callicott, *supra* note 44; GRINDE & JOHANSEN, *supra* note 44. See generally WILLIAM CRONON, *CHANGES IN THE LAND: INDIAN, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND* (1983); CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* (1992).

1. Our Stories About Nature

If we can get past anecdotes and stereotypes, and focus on specific tribal cultures in particular parts of North America, we will find that tribal cultures can make important contributions to the quest for sustainable development and a richer concept of stewardship. Baird Callicott, environmental philosophy professor, has suggested that an informed analysis of our stories is one useful method to find the values and the nature wisdom that our ancestors held and sought to pass on through the generations.⁴⁶ Acknowledging the difficulties inherent in knowing how people in tribal cultures acted and what they believed prior to contact with Europeans, Callicott suggests that our stories convey some of this information, in part because stories "persist with only incidental changes, through radically changed cultural circumstances."⁴⁷ Another way that stories can help us to glimpse beyond the time horizon is through the analysis of the native languages in which the stories are told, for example, the characteristics that are attributed to animals and plants through words and syntax.⁴⁸ Callicott labels this method of inquiry "ethnolinguistic/narrative analysis," and he suggests that it be used in conjunction with the more commonly accepted techniques of descriptive ethnography and ethnohistory.⁴⁹ Applying this approach to one particular culture, the Objibwa peoples of the Great Lakes region, Callicott finds evidence that they did practice what he calls an "environmental ethic," characterized by socially structured relations between human communities and the various communities of "other-than-human persons."⁵⁰

The methods of ethnography, ethnohistory, and ethnolinguistic/narrative analysis could be used to examine many different tribal cultures to see if their values profess, and if their actions demonstrate, something that might be called environmental wisdom. Zoology professor and television personality David Suzuki and science writer Peter Knudtson do this in *Wisdom of the Elders*, an accessible collection of stories from various indigenous peoples around the world, drawing on published literature as well as their own personal experiences.⁵¹ Suzuki and Knudtson present the native stories that they have selected in a way which shows that the ecological knowledge revealed

46. Callicott, *supra* note 44, at 264-66.

47. *Id.* at 264.

48. *Id.* at 264-65.

49. *Id.* at 266.

50. *Id.* at 266-67.

51. SUZUKI & KNUDTSON, *supra* note 44.

in these stories is entitled to respect from the scientific community. Comparing the approaches to knowledge taken by the scientist and the shaman, they find that, while these approaches are definitely different, they can be "complementary and mutually enriching."⁵²

In the final chapter of their book, Suzuki and Knudtson note that many respected scientists, especially older scientists with impeccable academic credentials, have become quite vocal in recent years regarding the fate of the earth and the consequences of ecologically destructive practices being carried out around the world.⁵³ Then, they present the voices of some Native elders, showing that the warnings given by respected scientists and the warnings given by Native elders sound very similar.

2. Values in Conflict over the Use of Land

Among people who care about the natural world, the notion that the nature wisdom of tribal cultures might be drawn upon to help the larger American society meet its need for environmental stewardship probably enjoys considerable support, at least in the abstract. When a particular place that has religious or cultural importance to a particular tribal culture is threatened by some kind of "development," abstract notions may have little to do with how the conflict is resolved on the ground. In the past two decades or so, we have seen quite a number of such conflicts, some of which have been well publicized.⁵⁴ A few observations on two such

52. *Id.* at 223. As the ways of acquiring knowledge practiced by shaman and scientist can be complementary, so might the ways in which the significance of this knowledge is conveyed to other people in their respective cultures. Suzuki and Knudtson point out that in tribal cultures, the knowledge of the shaman is often conveyed in the context of stories and myths which emphasize giving people instructions for daily life without necessarily explaining the underlying reasons. *Id.* at 62-67, 159-67. Perhaps stories and myths based on traditional knowledge should be considered as an alternative (or complement) to command and control regulation based on a mix of scientific analyses and political judgments.

53. *Id.* at 223-29.

54. For example, stories about several such conflicts have been published in a recent issue of *Cultural Survival Quarterly*. See, e.g., Jack F. Trope, *Existing Federal Law and the Protection of Sacred Sites: Possibilities and Limitations*, *CULTURAL SURVIVAL Q.*, Winter 1996, at 30, 33 (including discussion of the conflict involving the Bighorn Medicine Wheel); Leigh Jenkins et al., *Managing Hopi Sacred Sites to Protect Religious Freedom*, *CULTURAL SURVIVAL Q.*, Winter 1996, at 36; Peter Whiteley, *Paavahu and Paanaqawu: Wellsprings of Life and the Slurry of Death*, *CULTURAL SURVIVAL Q.*, Winter 1996, at 40; Roger Anyon, *Zuni Protection of Cultural Resources and Religious Freedom*, *Cultural Survival Q.*, Winter 1996, at 46; Elizabeth A. Brandt, *The Fight for Dził Nchaa Si An, Mt. Graham: Apaches and Astrophysical Development in Arizona*, *Cultural Survival Q.*, Winter 1996, at 50; Mario Gonzales, *The Black Hills: The Sacred Land of the Lakota and Tsistsistas*, *CULTURAL SURVIVAL Q.*, Winter 1996, at 63. See generally Barbara S. Falcone, *Legal Protection (or the Lack Thereof) of American Indian Sacred Religious Sites: The Need for Comprehensive Legislation*, 41 *FED.*

conflicts will help to set the stage for the discussion of the federal statutes and regulations in Parts II, III, and IV.

a. Bighorn Medicine Wheel

The Bighorn Medicine Wheel in Wyoming offers one example of a tribal sacred place that is now on federal land where the religious interests of the Indian people have been accommodated fairly well, at least so far.⁵⁵ The Bighorn Medicine Wheel was constructed hundreds of years ago near the top of a mountain in what is now the Bighorn National Forest.⁵⁶ Composed of rocks set out in an elaborate pattern, which resembles a spoked wheel some 80 feet across, it may have been used by ancient plains tribes to keep track of the seasons by alignment of the Medicine Wheel with the stars in the sky.⁵⁷ Traditional religious practitioners of modern plains tribes regard the Medicine Wheel as a powerful religious site, a site that they actively use.⁵⁸ The Medicine Wheel has been designated a National Historic Landmark.

In 1988, the Forest Service proposed to build a visitor center and viewing platform near the Medicine Wheel. Pursuant to the National Environmental Policy Act (NEPA),⁵⁹ the Forest Service prepared an environmental assessment to consider the impacts of the proposal. The State Historic Preservation Officer (SHPO) in Wyoming and the Advisory Council on Historic Places expressed opposition to the proposal, as did the Medicine Wheel Alliance, a group comprised of Indians and non-Indian environmentalists. In 1990, another group joined the fray: the Medicine Wheel Coalition on Sacred Sites in North America, a coalition comprised of tribally designated traditional religious practitioners. In a recent article, Jack Trope has chronicled the generally effective efforts to persuade the Forest Service to accommodate the Indian religious interests.⁶⁰ The terms of the eventual deal were recorded in a Memorandum of Agreement

BAR J. & NEWS 568 (1994); Donald Falk, *Lyng v. Northwest Indian Cemetery Protective Association: Bulldozing First Amendment Protection of Indian Sacred Lands*, 16 *ECOLOGY L.Q.* 515 (1989); Rayanne J. Griffin, *Sacred Site Protection Against a Backdrop of Religious Intolerance*, 31 *TULSA L.J.* 395 (1995); David C. Williams & Susan H. Williams, *Volitionalism in Religious Liberty*, 76 *CORNELL L. REV.* 769 (1991).

55. See generally Trope, *supra* note 54.

56. John A. Eddy, *Probing the Mystery of the Medicine Wheels*, *CULTURAL SURVIVAL Q.*, Winter 1996, at 73, 73.

57. *Id.*

58. Trope, *supra* note 54, at 33.

59. 42 U.S.C. §§ 4321-4370d (1994).

60. *Id.*

(MOA) which concluded the consultation process required by section 106 of the NHPA. The viewing platform and visitor center were scrapped, motor vehicle access was prohibited (except for persons with disabilities), and twelve days of the year were set aside for Indian use of the Medicine Wheel without disturbance.⁶¹

b. Mount Graham

Mount Graham in Arizona offers an example of a tribal sacred place on federal lands where the religious interests of the Indian people have not been accommodated, but rather, have been literally bulldozed and chainsawed.⁶² Certain bands of the western Apaches, including bands now residing on the San Carlos Reservation in Arizona, regard Mount Graham as a sacred place. It is there that the spirit beings known as the Gaans emerged many ages ago and gave the original medicine to the original Apache medicine man and then returned into the mountain to rest.⁶³ These Apaches said that bulldozing and blasting on top of the mountain might disturb the Gaans, which would result in a great cosmic disturbance in the universe.⁶⁴ Recently, an international coalition of scientific, business, and religious interests, including the University of Arizona, decided that Mount Graham would be a fine place for a complex of astronomical telescopes. The University successfully lobbied to have Congress grant its project an exemption from otherwise applicable environmental laws.⁶⁵ When the University found that its original exemption was not large enough, it asked

61. *Id.* at 34.

62. *See generally* Brandt, *supra* note 54.

63. Robert A. Williams, Jr., *Large Binocular Telescopes, Red Squirrel Pinatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World*, 96 W. VA. L. REV. 1133, 1151 (1994).

64. *Id.*

65. *Id.* at 1145-46.

its congressman for a bigger exemption,⁶⁶ rather than try to comply with the law.

c. A Few Observations

Jack Trope has offered some explanations for these two different outcomes.⁶⁷ Success in the Medicine Wheel matter can be attributed to a number of factors: the Indians got involved in the federal agency's decisionmaking process early; the Wyoming SHPO and the Advisory Council supported the Indian agenda; the economic interests of the non-Indian community were not diametrically opposed to accommodating the Indian concerns; the Indians focused on achievable goals; and, when they got to the table, the Indian spokespersons expressed their concerns in a manner that others simply had to respect.⁶⁸ All of these factors seem to cut the other way in the Mount Graham controversy. There, the Indians barely got to the table at all, and when they did, the University scientists scarcely took them seriously.⁶⁹ This last factor was a failing on the part of the University rather than on the part of the Indians.⁷⁰

Professor Robert Williams suggests that one of the main reasons that the Apache interests were not successful in blocking the desecration of their sacred mountain was because of the way the conflict was presented to the public.⁷¹ The University scientists captured the imagination of the public with their talk about the pursuit of answers to fundamental questions

66. See Brandt, *supra* note 54, at 57; *They Don't Have to Play by the Rules*, NEWS FROM INDIAN COUNTRY, Mid May 1996, at 2-A. This ploy succeeded. A rider sponsored by Representative Jim Kolbe (R-Ariz.) was enacted as section 335 of the Omnibus Appropriations Act of 1996, Pub. L. No. 104-134, § 135, 110 Stat. 1321-180-184; 142 CONG. REC. H3898 (daily ed. April 25, 1996). This rider provides: "The United States Forest Service approval of Alternative site 2 (ALT 2), issued on December 6, 1993, is hereby authorized and approved and shall be deemed to be consistent with, and permissible under, the terms of Public Law 100-696 (The Arizona-Idaho Conservation Act of 1988)." *Id.* For further information regarding the resolution of this issue, see *Mount Graham Coalition v. Thomas*, 89 F.3d 554, 555 (9th Cir. 1996) (denying the Mount Graham Coalition's request for a stay and holding that the rider had the effect of making the site exempt from NEPA and Endangered Species Act requirements); Rebecca Tsosie, Arizona State University Law School, *The Mount Graham Controversy: A Case Study*, prepared for the American Bar Association 8th Annual Conference on Environment and Development in Indian Country, Albuquerque, N.M., Nov. 7-8, 1996.

67. Trope, *supra* note 54, at 34-35.

68. *Id.*

69. Williams, *supra* note 63, at 1151, 1164 (saying that most of the scientists "simply snickered when I explained what the Apaches believed about that mountain and dismissed the Apache concerns out of hand").

70. See *infra* note 213 and accompanying text.

71. Williams, *supra* note 63, at 1142-43.

about the universe. In contrast, the non-Indian environmentalists failed to excite much of the public with their talk of cost-benefit analyses and their reliance on the red squirrel as a symbol of the mountain's importance.⁷² This observation is insightful and instructive. Although we may have allies who share some of our objectives, many of them may not really appreciate the value of our stories and the power of our storytellers.

Professor Williams also criticizes environmental law. After explaining how the story of the Gaans helps the Apaches to imagine their connection to, and dependence on, Mount Graham, he says, "Our environmental law is simply incapable of reflecting the types of connection that the story of the Gaans on Mt. Graham can teach us."⁷³ On this point I beg to differ. Environmental law is not incapable of this. Rather, NHPA provides a framework in which tribal voices can explain why a sacred mountain like Mount Graham matters, both to human society and for its own sake. It can do this by bringing our stories into the processes through which federal officials and others make decisions that affect places which hold religious or cultural importance for tribes. But it is not easy, and success in using this legal framework can be met with backlash in the political arena.⁷⁴ In my view, using NHPA to protect such places is more likely to prove successful if we keep in mind the need to share at least some of our stories with the larger American society, and if we never lose sight of the power that our stories hold.

II. NATIONAL HISTORIC PRESERVATION ACT

NHPA is the basic charter for our national historic preservation program.⁷⁵ Under NHPA, a variety of governmental agencies have roles to play: the Secretary of the Interior (Secretary) (usually acting through the National Park Service), the Advisory Council on Historic Preservation (Advisory Council), the SHPOs, and virtually every federal agency whose

72. *Id.*

73. *Id.* at 1155.

74. See *infra* notes 113-14 and accompanying text. As Professor Williams points out, the Mount Graham case illustrates how our environmental law can be subverted by the political process. Williams, *supra* note 63, at 1149-50.

75. See generally ADVISORY COUNCIL ON HISTORIC PRESERVATION, FEDERAL HISTORIC PRESERVATION CASE LAW (Charlotte R. Bell ed., 1985) (a special report published by the Advisory Council on Historic Preservation, an updated edition of which is scheduled for publication in the near future); WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 984-93 (2d ed. 1994); Walter E. Stern & Lynn H. Slade, *Effects of Historic and Cultural Resources and Indian Religious Freedom on Public Lands Development: A Practical Primer*, 35 NAT. RESOURCES J. 133, 140-43 (1995).

actions may affect historic properties.⁷⁶ Amendments to NHPA enacted in 1992 contain significant provisions relating to Indian tribes and Indian reservations.⁷⁷

A. National Register of Historic Places

Section 101(a) of NHPA authorizes the Secretary "to expand and maintain a National Register of Historic Places composed of districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, engineering, and culture."⁷⁸ If a property is listed on the National Register of Historic Places (National Register), or determined to be eligible for listing, the procedural protection of section 106 of NHPA applies to proposed federal or federally assisted undertakings that would affect the property.⁷⁹ Any property that is included in, or eligible for, the National Register is by definition an "historic property" or "historic resource."⁸⁰

1. Criteria for Eligibility

Regulations issued by the Secretary specify criteria for evaluating the eligibility of properties for the National Register.⁸¹ These regulations provide, in part:

The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and

76. 16 U.S.C. §§ 470 to 470x-6 (1994).

77. National Historic Preservation Act, Amendments of 1992, Pub. L. No. 102-575, 106 Stat. 4753 (codified as amended at 16 U.S.C. §§ 470 to 470w-6).

78. 16 U.S.C. § 470a(a).

79. *Id.* § 470f; see *infra* notes 118-19 and accompanying text.

80. 16 U.S.C. § 470w(5).

81. 36 C.F.R. § 60.4 (1995); see NATIONAL PARK SERV., NATIONAL REGISTER BULLETIN 15, GUIDELINES FOR APPLYING THE NATIONAL REGISTER CRITERIA (1991). The basic approach to determinations of eligibility has been criticized as taking so much time and money that only a small fraction of eligible properties have been nominated. W. Brown Morton III, *Forging New Values in Uncommon Times*, in PAST MEETS FUTURE: SAVING AMERICA'S HISTORIC ENVIRONMENTS 37, 40 (Antoinette J. Lee ed., 1992). This critic has said that "we have escalated a successfully completed National Register nomination form into a minithesis that requires months of research, a high degree of professional training, and a fat wallet" and has recommended that we "flip the system" so that one must show that a place is not of historic value before getting permission to change it. *Id.* at 40-41.

- (a) that are associated with events that have made a significant contribution to the broad patterns of our history; or
- (b) that are associated with the lives of persons significant in our past; or
- (c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or
- (d) that have yielded, or may be likely to yield, information important in prehistory or history.⁸²

The eligibility criteria regulations also provide that certain kinds of properties ordinarily are *not* eligible for the National Register, except that when certain "considerations" apply normally ineligible properties may be determined eligible.⁸³ For example, properties that have achieved historic significance within the past fifty years generally are not eligible, but such a property may be eligible if it is "of exceptional importance."⁸⁴ The National Park Service (NPS) has issued guidance on such properties.⁸⁵

2. Nominations and Determinations of Eligibility

SHPOs and federal agencies make nominations to the National Register.⁸⁶ Other entities and individuals may request that a property be nominated⁸⁷ and any person may appeal the nomination of a property or the refusal of a nominating agency to nominate a property.⁸⁸

If a property has been determined eligible for the National Register, the procedural protection of section 106 applies, regardless of whether it has been formally listed on the National Register.⁸⁹ The Secretary has issued regulations establishing a process, administered by the NPS, through which federal agencies can request determinations of eligibility.⁹⁰ Each federal agency is charged with carrying out this process, in

82. 36 C.F.R. § 60.4.

83. *Id.*

84. *Id.*

85. See NATIONAL REGISTER BULLETIN 22, GUIDELINES FOR EVALUATING AND NOMINATING PROPERTIES THAT HAVE ACHIEVED SIGNIFICANCE WITHIN THE LAST FIFTY YEARS (revised 1996).

86. 36 C.F.R. §§ 60.6, 60.9.

87. *Id.* § 60.11.

88. 16 U.S.C. § 470a(a)(5); 36 C.F.R. § 60.12.

89. 16 U.S.C. § 470f. The review process established by section 106 of NHPA and by implementing regulations issued by the Advisory Council, 36 C.F.R. § 800, is discussed *infra* notes 127-60 and accompanying text. The Advisory Council recently published proposed revisions to its regulations. See *infra* note 125 and accompanying text.

90. 36 C.F.R. § 63.

consultation with the relevant SHPO.⁹¹ If the federal agency and SHPO disagree on whether a property is eligible, the "Keeper of the National Register" (an NPS official) makes the determination.⁹²

3. National Historic Landmarks

Section 101(a) of NHPA authorizes the Secretary to establish criteria for designating certain properties as "National Historic Landmarks."⁹³ The Secretary has issued regulations for this purpose, recognizing the "exceptional" value of such properties to the nation as a whole.⁹⁴

Designation as a National Historic Landmark (NHL) renders a property subject to substantive protection under section 110(f) of NHPA, which requires that, before approving any action that would adversely affect any NHL, the head of the responsible federal agency "shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark."⁹⁵

Thus, section 110(f) of NHPA provides a real measure of protection for NHLs—a requirement that harm be minimized.⁹⁶ In contrast, the protection afforded to historic properties under section 106 only requires that the effects be considered.⁹⁷ In at least one case, this real measure of protection has worked to the benefit of Indian people. The Bighorn Medicine Wheel has been designated a NHL, and both the Wyoming SHPO and the Advisory Council used the fact of its NHL status to influence Forest Service decisions.⁹⁸

4. Traditional Cultural Properties

The term "traditional cultural properties" (TCPs) describes a subset of the term historic properties, a subset of places that have religious or

91. *Id.* § 63.3.

92. *Id.*

93. 16 U.S.C. § 470a(a)(2).

94. 36 C.F.R. § 65.2.

95. 16 U.S.C. § 470h-2(f). The Advisory Council's regulations for the section 106 consultation process include special provisions regarding the protection of NHLs. 36 C.F.R. § 800.10. This section provides, in part, that if a proposed federal undertaking would result in adverse effects on a NHL, the Council will participate in the section 106 consultation process and will report its comments to the President, Congress, the Secretary, and the head of the federal agency responsible for the undertaking. *Id.*; see 61 Fed. Reg. 48,590 (to be codified at 36 C.F.R. § 800.10).

96. 16 U.S.C. § 470h-2(f); see also 49 U.S.C. § 303 (preservation requirements for highway funding).

97. *Id.* § 470f.

98. Trope, *supra* note 54, at 34.

cultural importance to a community. The term was coined by the NPS to describe a kind of property that is eligible for the National Register because of its traditional cultural significance, and it has since come into fairly widespread use in federal, state, and tribal preservation programs. In 1990, NPS published a guidance document on TCPs, a document commonly known as Bulletin 38.⁹⁹ Bulletin 38 defines TCP in general terms as a property "that is 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."¹⁰⁰

As noted earlier, significance in American culture is a quality that may render a property eligible for the National Register.¹⁰¹ Bulletin 38 states that the term "culture" is understood to include "the traditions, beliefs, practices, lifeways, arts, crafts, and social institutions of any community, be it an Indian tribe, a local ethnic group, or the people of the nation as a whole."¹⁰² Bulletin 38 explains several ways in which traditional cultural properties may qualify under one or more of the criteria for eligibility.¹⁰³

The term TCP has gained acceptance in federal, state, and tribal programs, but many people still find it less than ideal. For example, from

99. PATRICIA L. PARKER & THOMAS F. KING, NATIONAL PARK SERV., NATIONAL REGISTER BULLETIN 38, GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES (1990) [hereinafter Bulletin 38]. The conflict over Mount Graham, discussed in Williams, *supra* note 63, began prior to the publication of Bulletin 38. It would be purely speculative to suggest that the outcome might have been different if the Forest Service had followed the procedures set out in Bulletin 38. However, if the Forest Service had followed those procedures, spokespersons for the traditional cultural authorities of the San Carlos Apache Tribe at least would have been contacted before the decision was made to go ahead with the project.

100. Bulletin 38, *supra* note 99, at 1. The term "traditional cultural property" is not used *per se* in NHPA or any of the other statutes, and so there is no statutory definition. As amended in 1992, the statutory language of NHPA now endorses the concept. See *infra* notes 110-12 and accompanying text.

101. See *supra* note 82 and accompanying text.

102. Bulletin 38, *supra* note 99, at 1. I have suggested that most tribal religious or cultural sites could be found eligible for the National Register under one or more criteria, especially sites that have major importance to a tribe, since "any major tribal religious or cultural site is likely to have been associated with events and persons that are significant in the tribe's history, and the history of every tribe is a significant, although usually neglected, part of American history." Dean B. Suagee, *American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth's Caretakers*, 10 AM. INDIAN L. REV. 1, 43 (1982).

103. Bulletin 38, *supra* note 99, at 11-12. A recent special issue of *Cultural Resources Management*, a publication of NPS, includes fifteen articles by a number of people who have had experience working with TCPs, from federal, tribal, and state perspectives. Special Issue, *Traditional Cultural Properties*, CULTURAL RESOURCES MGMT. 1 (1993).

an Indian perspective, many of the places that are treated as TCPs might be described more accurately as "sacred sites."¹⁰⁴ NHPA, however, does not offer protection to places because of their sacredness, but rather, because they have enough historic significance to be eligible for the National Register. By focusing on the historic significance of traditional cultural properties, Bulletin 38 helps those who seek to protect sacred places to show how such places fit within the existing structure of the National Register, and thus gain some measure of protection.¹⁰⁵

While the term TCP is of fairly recent origin, several places that now would be treated as TCPs had been determined eligible for the National Register years before the term was coined. A prime example is the Helkau Historic District in the high country of the Six Rivers National Forest in Northern California, which was determined eligible "because of its association with significant cultural practices of the Tolowa, Yurok, Karuk, and Hoopa Indian tribes of the area, who have used the district for generations to make medicine and communicate with spirits."¹⁰⁶

Because the Helkau District had been determined eligible for the National Register, when the Forest Service proposed to construct a paved logging road through the district, it was required to go through the section 106 consultation process. Based largely on the documentation that was generated for section 106 compliance, a federal district court and a circuit

104. Executive Order No. 13,007, 61 Fed. Reg. 26,771 (1996), does use the term sacred sites, which it defines as:

any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such site.

This Executive Order does not expressly refer to the National Register or to the section 106 consultation process. Curiously, the Advisory Council's 1996 Proposed Rules do not refer to this Executive Order, either in the text of the proposed rules or in the preamble, although the section 106 process is the principal procedure under existing law through which sacred sites can be afforded some measure of protection. See 61 Fed. Reg. 48,580.

105. See Patricia L. Parker, *What You Do and How We Think*, CULTURAL RESOURCES MGMT., Special Issue 1993, at 1, 3.

106. Bulletin 38, *supra* note 99, at 7; see Donald Falk, *Lyng v. Northwest Indian Cemetery Protective Association: Bulldozing First Amendment Protection of Indian Sacred Lands*, 16 *ECOLOGY L. Q.* 515, 523 n.70 (1989) (noting that the plaintiffs in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) alleged that the Forest Service had failed to comply with NHPA consultation requirements regarding impacts on the Helkau Historic District). The Helkau Historic District is comprised of some 13,500 acres of high country in Northern California. *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 565 F. Supp. 586, 604 (N.D. Cal. 1983), *aff'd*, 795 F.2d 688 (9th Cir. 1986), *rev'd sub nom. Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

court both held that the Forest Service's decision to go ahead with building the road was a violation of the Free Exercise Clause of the First Amendment.¹⁰⁷ The Supreme Court reversed,¹⁰⁸ holding that the First Amendment does not protect the religious freedom of American Indians when the places that they need for their religious practices are located on what is now federal land, and that the federal government may desecrate a tribal sacred place and "virtually destroy"¹⁰⁹ a tribal religion without even being required to show a compelling governmental interest.¹¹⁰ Although it is little consolation to those of us who believe that the First Amendment's promise of religious freedom really should be interpreted to include Indians, at least in the case of the Helkau District the road at issue never was built.

The 1992 Amendments to NHPA indicate congressional endorsement of the concept of TCPs as a way of protecting places that Indians and other Native people consider sacred.¹¹¹ Section 101(d)(6) of NHPA now provides that "[p]roperties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register."¹¹² If a property of "traditional religious and cultural importance" is eligible for the National Register, it would necessarily be a TCP as that term is used by NPS.¹¹³

Of course, when tribes actually use the TCP concept to try to protect sacred places from the "development" schemes of economically powerful interest groups, backlash occurs. For example, a number of northern California Indian tribes regard Mount Shasta as a sacred mountain, and they succeeded in having it determined eligible for the National Register as a TCP, because of its significance in their histories and its ongoing importance in their cultural traditions.¹¹⁴ Some local people have plans for

107. *Northwest Indian Cemetery Protective Ass'n*, 565 F. Supp. at 596; *Northwest Indian Cemetery Protective Ass'n*, 795 F.2d at 692.

108. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. at 441-42.

109. *Id.* at 472 (Brennan, J., dissenting).

110. *Id.* at 465 (Brennan, J., dissenting).

111. See *supra* note 99 and accompanying text.

112. 16 U.S.C. § 470a(d)(6)(A).

113. Bulletin 38, *supra* note 99, at 11-12.

114. See Michelle A. Schmitter & Leland M. Roth, *Thoughts on Mt. Shasta*, CULTURAL RESOURCES MGMT., 1995, at 35, 35; Ted Rieger, *Discontent Lingers after Decision On Mt. Shasta's Historical Status*, HISTORIC PRESERVATION NEWS, Feb.-Mar. 1995, at 12, 14 (noting that in this case, on March 11, 1994, the Keeper of the National Register determined that Mount Shasta was eligible for the National Register and set the boundary of the historic property as most of the mountain above the 4,000-foot elevation contour, an area encompassing some 150,000 acres). In November 1994, NPS revised this determination and reduced the size of the historic property to some 19,040 acres, roughly the mountain above the 8,000-foot contour line. Rieger, *supra* at 14.

Mount Shasta that they fear might be impaired if too much respect is afforded its status as a sacred mountain eligible for the National Register. An avalanche in 1978 damaged a skiing facility on the mountain, and some people want the Forest Service to allow the skiing facility to be rebuilt in a safer area, an area that Indians have used since time immemorial for religious ceremonies.

Responding to the interests of some of his constituents, Representative Wally Herger sponsored a bill in Congress purporting to provide that Mount Shasta is not eligible for the National Register and, more generally, that no property can be determined eligible for the National Register unless it contains artifacts or other physical evidence of human activity.¹¹⁵ The practical effect of this bill—sometimes known as the “Herger bill”—would be to render many TCPs ineligible for the National Register. The historic significance of TCPs derives from their importance in oral tradition and in ongoing cultural practices, not from physical evidence of human activities. Without the context of oral tradition and without the presence of tribal people at the time of observation, many TCPs may look like relatively undespoiled places in the natural world. Oral tradition and ongoing use provide good reasons for keeping them that way.

B. Advisory Council

Section 201 of NHPA established the Advisory Council as an independent agency of the federal government.¹¹⁶ The Advisory Council is comprised of twenty members, some of whom are appointed by the President¹¹⁷ and others who serve by virtue of the office that they hold. The latter category includes the Secretaries of Interior and Agriculture, the President of the National Conference of State Historic Preservation Officers, and the Chairman of the National Trust for Historic Preservation.¹¹⁸

115. See 141 CONG. REC. H325 (daily ed. Jan. 18, 1995) (statement of Rep. Herger sponsoring H.R. 563).

116. 16 U.S.C. § 470i.

117. The members appointed by the President include “one member of an Indian tribe or Native Hawaiian organization who represents the interests of the tribe or organization of which he or she is a member.” *Id.* § 470i(11). The Presidential appointees also include one state governor and one mayor. *Id.* § 470i(5), (6), (7). In my view, membership on the Advisory Council should be expanded by adding one chief executive officer of a tribe, i.e., an official similar to a governor. Furthermore, the provision calling for the appointment of either a tribal member or Native Hawaiian working in preservation should be changed to one of each, since the legal relationship of Native Hawaiians to the United States is fundamentally different from that of Indian tribes.

118. *Id.*

1. Statutory Roles

The Advisory Council performs the regulatory function of reviewing proposed federal actions to make sure that effects on historic properties are taken into account. This role is authorized by section 106 of NHPA, which provides:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title II [of NHPA] a reasonable opportunity to comment with regard to such undertaking.¹¹⁹

Federal agencies comply with section 106 by carrying out the consultation process outlined in regulations issued by the Advisory Council.¹²⁰ These regulations are discussed below.

In addition to its statutory role under section 106, the Advisory Council also performs a role under section 110(f), which requires federal agencies to minimize the harm their actions cause to NHLs.¹²¹ In addition, any federal agency considering an action that would adversely affect a NHL must give the Advisory Council an opportunity to comment.¹²² The Advisory Council's regulations include special provisions for this consultation requirement.¹²³

2. Advisory Council's Regulations

The Advisory Council's regulations governing the section 106 consultation process are codified at 36 C.F.R. section 800.¹²⁴ On October

119. *Id.* § 470f.

120. 36 C.F.R. § 800.

121. 16 U.S.C. § 470h-2(f).

122. *Id.*

123. 36 C.F.R. § 800.10.

124. See 51 Fed. Reg. 31,118 (1986) (outlining most provisions in the current version of the regulations); 52 Fed. Reg. 25,376 (1987) (providing certain technical corrections). The 1986 publication added certain provisions relating to Indian tribes; prior to that, the regulations had scarcely

3, 1994, the Advisory Council published a notice of proposed rulemaking which included proposed revisions to its regulations designed to implement the 1992 NHPA Amendments.¹²⁵ In response to comments received, the Advisory Council decided to make major changes in its approach and to publish the re-worked draft as proposed rules. The Advisory Council published its re-worked proposed rules on September 13, 1996 (1996 Proposed Rules).¹²⁶

Until the regulations are revised, federal agencies will continue to follow the consultation process as set out in the existing regulations. This Article provides a brief introduction to the regulations but, since the regulations are in the process of being revised, does not discuss them in great detail. In addition, the 1992 Amendments have changed the compliance responsibilities of federal agencies in certain ways that do not appear to require changes in the regulations to take effect.¹²⁷ With respect to the roles of Indian tribes and Native Hawaiian organizations, these statutory changes are discussed below.

a. Steps in the Consultation Process

The section 106 process consists of a number of steps which the federal agency preservation official is charged with carrying out, generally in consultation with the SHPO.¹²⁸ The steps in the process can be summarized as follows: (1) identifying historic properties (i.e., listed or eligible properties) within the proposed undertaking's "area of potential effects;"¹²⁹ (2) assessing the effects of the undertaking on historic properties;¹³⁰ (3) affording the Advisory Council an opportunity to comment.¹³¹

The 1996 Proposed Rules would change these basic steps somewhat, with the intent of streamlining the process and limiting the Advisory

mentioned tribes.

125. 59 Fed. Reg. 50,396 (1994).

126. 61 Fed. Reg. 48,580 (to be codified at 36 C.F.R. pt. 800) (proposed Sept. 13, 1996). Prior to the publication of these 1996 Proposed Rules, the Advisory Council had circulated a revised "Public Discussion Draft" dated July 20, 1995 (on file with author).

127. See *supra* note 99 and accompanying text.

128. 36 C.F.R. § 800.

129. *Id.* § 800.4.

130. *Id.* § 800.5. Under the existing regulations, this step is really a two-step process of determining whether the undertaking would affect any historic property and then determining whether the effect would be adverse. *Id.*

131. *Id.* § 800.6.

Council's involvement in reviewing proposed undertakings.¹³² Under the proposed revisions, the steps would be: (1) identification of historic properties (a step which would include determination of effects); (2) assessment of adverse effects; and (3) resolution of adverse effects.¹³³ The Advisory Council would provide comments if the process failed to resolve any adverse effects.¹³⁴

b. Parties

The existing regulations describe two categories of participants in the section 106 process: "consulting parties" and "interested persons."¹³⁵ The two main consulting parties are the federal agency official and the SHPO.¹³⁶ The Advisory Council is also a consulting party and may participate directly at any stage of the consultation process, though it usually does not become directly involved. For any proposed undertaking affecting "Indian lands,"¹³⁷ the federal agency official and the SHPO are required to invite the governing body of the tribe to be a consulting party and to concur in any agreement.¹³⁸ "Interested persons" may include applicants for federal permits or licenses, local governments, Indian tribes (with respect to undertakings that may affect historic properties outside of tribal jurisdiction), owners of affected properties, and the general public.¹³⁹ Traditional cultural leaders and other interested Native American individuals also may participate as "interested persons" for proposed undertakings either on Indian lands or outside reservation boundaries.¹⁴⁰

132. 61 Fed. Reg. 48,580-81.

133. *Id.* at 48,586-88 (to be codified at 36 C.F.R. §§ 800.4 to .6).

134. *Id.* at 48,588-89 (to be codified at 36 C.F.R. § 800.7).

135. 36 C.F.R. § 800.1(c).

136. *Id.*

137. The regulations define the term Indian lands as "lands under the jurisdiction or control of an Indian tribe." *Id.* § 800.2(f). The 1992 NHPA amendments use the term "tribal lands" rather than Indian lands. See *infra* notes 173-75 and accompanying text.

138. 36 C.F.R. § 800.1(c)(2)(iii).

139. *Id.* § 800.1(c)(2).

140. *Id.* § 800.1(c)(2)(iii). This subsection of the existing regulations provides, in part: "Traditional cultural leaders and other Native Americans are considered to be interested persons with respect to undertakings that may affect historic properties of significance to such persons." *Id.* Subsection 800.5 provides that "interested persons" are to be invited to participate in certain circumstances. These provisions of the existing regulations were published in the Federal Register on Sept. 2, 1986. 51 Fed. Reg. 31,118. Thus these provisions were in effect when the Forest Service conducted the environmental review of the University of Arizona's proposal to build telescopes on Mount Graham, discussed in Part I of this Article.

In the 1996 Proposed Rules, the Advisory Council uses the terms "principal," "consulting," and "affected" to describe the parties involved in section 106 consultation, and also includes provisions for involvement of the "public."¹⁴¹ The "principal" parties would be the federal agency official and the Advisory Council, and the SHPO would usually be a "consulting" party.¹⁴² If a tribe has taken over the duties of the SHPO for lands under tribal jurisdiction, the Tribal Preservation Officer would be a consulting party.¹⁴³ A tribe or Native Hawaiian organization would be a consulting party if the proposed undertaking would affect a TCP that holds religious and cultural significance for the tribe or organization.¹⁴⁴ Representatives of local governments and applicants for federal assistance could participate as "affected parties."¹⁴⁵

Rather than the term "traditional cultural leader," as in the existing regulations, the 1996 Proposed Rules use the term "traditional cultural authority,"¹⁴⁶ a term which is used in the NHPA 1992 Amendments but which is not defined in the statute.¹⁴⁷ The 1996 Proposed Rules define the term as "an individual or group of individuals in an Indian tribe, Native Hawaiian organization, or other social or ethnic group who is recognized by the members of the group as knowledgeable in the group's traditional history, cultural practices and living human values."¹⁴⁸ Traditional cultural authorities are among the kinds of persons that could participate in consultation as members of the "interested public."¹⁴⁹

c. Outcomes of the Process

Under the statute and the regulations, there are several ways in which the consultation process can be brought to completion, depending on the circumstances. If the federal agency official determines, in consultation with the SHPO, that there are no historic properties within the area of the

141. 61 Fed. Reg. 48,584-85 (to be codified at 36 C.F.R. § 800.2).

142. *Id.*

143. *Id.* at 48,585. The SHPO would participate in accordance with the tribe's plan approved by the NPS. See *infra* notes 179-81 and accompanying text. It also could participate as a member of the interested public. 61 Fed. Reg. 48,585 (to be codified at 36 C.F.R. § 800.2(b)(1), (2)).

144. *Id.* (to be codified at 36 C.F.R. § 800.2(b)(2)).

145. *Id.* (to be codified at 36 C.F.R. § 800.2(c)).

146. *Id.* at 48,594 (to be codified at 36 C.F.R. § 800.17).

147. The term traditional cultural authorities is used in section 101(d) of NHPA as amended, 16 U.S.C. § 470a(d)(4)(C)(i), but the term is not defined in the statute.

148. 61 Fed. Reg. 48,594 (to be codified at 36 C.F.R. § 800.17). This definition turns on recognition by members of the group rather than by the group's formal governing body.

149. *Id.* at 48,585 (to be codified at 36 C.F.R. § 800.2(d)(4)(ii)).

undertaking's potential effects, then providing documentation of this finding to the SHPO completes the federal agency's responsibilities under section 106.¹⁵⁰ Making this determination may involve a determination of eligibility by NPS. If historic properties are found, but the agency official determines that the undertaking would have no effect on them, documenting this finding and providing notice to the SHPO and interested persons completes the process, unless the SHPO files an objection.¹⁵¹

If the undertaking would affect an historic property, the agency official, in consultation with the SHPO, determines whether the effect would be adverse.¹⁵² In the vast majority of cases, this results in an MOA, which must be submitted to the Advisory Council (unless the Advisory Council has participated in negotiating the MOA and is already a signatory).¹⁵³ If the Advisory Council accepts the MOA, or proposes changes to the MOA which both the agency official and the SHPO agree to, this concludes the section 106 process.¹⁵⁴ The MOA is binding and enforceable and substantively governs the way that the undertaking is carried out.¹⁵⁵

If the Advisory Council does not accept the MOA, or if the agency or the Advisory Council decides to terminate consultation without an MOA, the Advisory Council will provide comments to the agency, and this completes the section 106 process.¹⁵⁶ In contrast to an MOA, when no MOA is reached, the Advisory Council's comments are not binding but only advisory. As amended in 1992, however, section 110(l) of NHPA now provides that, in the absence of an agreement with the Advisory Council, a decision by a federal agency to proceed with an undertaking

150. 36 C.F.R. § 800.4(d).

151. *Id.* § 800.5(b).

152. *Id.* §§ 800.5(c), (d). Under the existing regulations, documentation of a no adverse effect determination must be provided to the Advisory Council, and to the SHPO when the SHPO has not already concurred in the finding. *Id.* § 800.5(d). If the Advisory Council objects and the agency official does not agree to changes proposed by the Council, the effect is treated as adverse. *Id.* § 800.5(d)(2). In the 1996 Proposed Rules, the determination of whether an undertaking will affect historic properties would be deleted as a separate step (to be combined with the identification step), and the separate step of determining whether an effect would be adverse would be eliminated. See 61 Fed. Reg. 48,587, 48,581 (to be codified at 36 C.F.R. §§ 800.4(d), 800.5) (preamble discussion).

153. 36 C.F.R. § 800.5.

154. *Id.* § 800.6(a).

155. 16 U.S.C. § 470h-2(l).

156. 36 C.F.R. §§ 800.6(a)(iii), (b).

must be made by the head of the agency, i.e., any such decision cannot be delegated.¹⁵⁷

C. Roles of the SHPOs

Until the enactment of the 1992 Amendments, the role of the SHPOs in carrying out the section 106 process was based only on the Advisory Council's regulations as outlined above. Regulations issued by NPS list certain additional responsibilities of SHPOs.¹⁵⁸ Generally, SHPOs oversee the performance of three kinds of functions: identification of historic properties; evaluation of their significance; and formulation of steps to protect those properties deemed worthy of protection.¹⁵⁹ With the enactment of the 1992 Amendments, some of the responsibilities of SHPOs, including their role in the section 106 process, have been written into section 101(b)(3) of NHPA.¹⁶⁰ With respect to the section 106 process, this section of the statute provides that it is the responsibility of the SHPO to: "consult with the appropriate Federal agencies in accordance with [NHPA] on—(i) Federal undertakings that may affect historic properties; and (ii) the content and sufficiency of any plans developed to protect, manage, or reduce or mitigate harm to such properties."¹⁶¹ Thus, although section 106 by its terms only says that the federal agency must afford the Advisory Council an opportunity to comment, the process cannot be completed—or even started—without the SHPO.

D. Rights of Indian Tribes

The 1992 Amendments made some significant changes in the way Indian tribes are treated under NHPA. These new statutory provisions can be described as dealing with two kinds of tribal concerns: (1) the governmental authority of tribes within the boundaries of their reservations and on other lands under their jurisdiction; and (2) the religious and cultural importance to tribes of some historic properties whether or not within the boundaries of Indian reservations.

157. 16 U.S.C. § 470h-2(f). The 1996 Proposed Rules would incorporate this requirement and would require the head of the agency to document his or her decision in a record of decision. 61 Fed. Reg. 48,589 (to be codified at 36 C.F.R. § 800.7(b)(iv)).

158. 36 C.F.R. § 61.4(b).

159. *See id.*

160. 16 U.S.C. § 470a(b)(3).

161. *Id.* § 470a(b)(3)(I).

1. Tribal Authority on "Tribal Lands"

Language added by the 1992 Amendments to section 101(d) of NHPA includes several provisions regarding the authority of tribes, as sovereign governments, to develop and run their own historic preservation programs.¹⁶² As defined in section 301(4), the term "Indian tribe" includes all federally recognized tribes, expressly including Alaska Native villages, Regional Corporations, and Village Corporations as those terms are defined in the Alaska Native Claims Settlement Act.¹⁶³

a. Assistance for Tribal Programs

Subsection 101(d)(1) directs the Secretary, "acting through the Director of the National Park Service,"¹⁶⁴ to establish a program to assist Indian tribes in preserving their historic properties.¹⁶⁵ Although the statute directs NPS to establish this program and to promulgate regulations no later than October 1, 1994,¹⁶⁶ regulations have not yet been issued, even in proposed form. Rather, NPS has issued interim guidelines¹⁶⁷ (Interim Guidelines) in which NPS has expressed the intention to promulgate regulations after gaining some experience under the Interim Guidelines.¹⁶⁸

162. *Id.* § 470a(d).

163. 43 U.S.C. § 1602 (1994).

164. 16 U.S.C. § 470w(11).

165. *Id.* § 470a(d)(1)(A).

166. *Id.* § 470a(1)(C).

167. National Park Serv., Interim Guidelines to Establish Tribal Historic Preservation Programs pursuant to the National Historic Preservation Act Amendments of 1992, (Draft) (Oct. 12, 1995) (transmitted under cover of a letter from de Teel Patterson Tiller, Acting Chief, Heritage Preservation Services Division, NPS) [hereinafter Interim Guidelines]. On July 17, 1996, NPS announced that 12 tribes had been approved to assume a role "parallel to that of state government in administering the national program on their reservations." National Park Serv., News Release, National Historic Preservation Program Expanded: Twelve Tribes Welcomed as Full Participants in the National Historic Preservation Program, July 31, 1996. The twelve tribes are: Hualapai Tribe, Ariz.; Navajo Nation, Ariz., N.M. & Utah; Yurok Tribe, Cal.; Leech Lake Band of Chippewa Indians, Minn.; Mille Lacs Band of Ojibwe Indians, Minn.; Confederated Salish and Kootenai Tribes of the Flathead Nation, Mont.; Standing Rock Sioux Tribe, N.D. and S.D.; Confederated Tribes of the Umatilla Reservation, Or.; Confederated Tribes of the Warm Springs Reservation, Or.; Confederated Tribes of the Colville Reservation, Wash.; Spokane Tribe of Indians, Wash.; Lac Du Flambeau Band of Lake Superior Chippewa Indians, Wis. *Id.*

168. Interim Guidelines, *supra* note 167, at 2. In response to comments on the Interim Guidelines, NPS representatives have announced that they have decided to proceed with the publication of proposed regulations, but, while engaged in rulemaking, they will process applications from tribes that want to assume part or all of the duties of an SHPO in accordance with the Interim Guidelines. Bryan Mitchell, NPS Representative, Remarks at the 5th annual Keepers of the Treasures Conference, Scottsdale, Ariz. (March 11, 1996).

In the meantime, NPS has continued to provide financial assistance to tribes "for the preservation of their cultural heritage" pursuant to subsection 101(e)(3)(B) of NHPA,¹⁶⁹ a grant program which was authorized in the 1980 Amendments and for which funds were first appropriated in fiscal year 1990.¹⁷⁰ Although this grant program is funded at a very modest level (\$1.8 million in fiscal year 1996),¹⁷¹ and is discretionary and competitive, it has enabled quite a number of tribes to begin building programs for dealing with a wide range of historic preservation and cultural heritage issues.

b. Assuming the Role(s) of the SHPO

Subsection 101(d)(2) authorizes any federally recognized Indian tribe to assume "all or any part of the functions of [an SHPO] with respect to tribal lands, as such responsibilities may be modified for tribal programs through regulations issued by the Secretary."¹⁷² This new language is consistent with Congress's approach in the last decade in amending several of the major federal environmental statutes to authorize the Environmental Protection Agency (EPA) to treat Indian tribes as states.¹⁷³

As defined in NHPA, the term tribal lands means: "(A) all lands within the exterior boundaries of any Indian reservation; and (B) all dependent Indian communities."¹⁷⁴ This definition is based on the statutory definition of "Indian country."¹⁷⁵ In many cases the terms used in the tribal lands definitions have clear meanings, but in some cases they do not. For example, although in most cases it is fairly simple to determine what lands are located within the exterior boundaries of an Indian reservation, some lands that were set aside for Indians have not

169. 16 U.S.C. § 470a(e)(3)(B).

170. Interior & Related Agencies Appropriation Act, Pub. L. No. 101-121, 103 Stat. 701, 706-07 (1989).

171. Telephone Conversation with Ronald J. Emery, Tribal Historic Preservation Program, National Park Service (Nov. 5, 1996).

172. 16 U.S.C. § 470a(d)(2).

173. See, e.g., Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-11(a)(1) (1994) (treating tribes like states for certain purposes); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, also known as "Superfund"), 42 U.S.C. § 9626 (1994); Clean Water Act (CWA), 33 U.S.C. § 1377 (1994); Clean Air Act (CAA), 42 U.S.C. § 7601(d) (1994). See generally David F. Coursen, *Tribes as States: Indian Tribal Authority to Regulate and Enforce Federal Environmental Law and Regulations*, 23 ENVTL. L. REP. (ENVTL. L. INST.) 10,579 (Oct. 1993).

174. 16 U.S.C. § 470w(14).

175. 18 U.S.C. § 1151 (1994).

been formally designated "reservations."¹⁷⁶ Similarly, the term "dependent Indian community" clearly applies to some lands, but the application of the term to other lands raises questions.¹⁷⁷ In the context of NHPA, NPS could clarify these ambiguities through rulemaking.¹⁷⁸

Any tribe that seeks to assume some or all of the functions of an SHPO will be required to submit a plan to NPS.¹⁷⁹ Subsection 101(d)(2) provides that, before approving a tribe's plan, NPS must consult with the appropriate SHPO, the Advisory Council, and "other tribes, if any, whose tribal or aboriginal lands may be affected by conduct of the tribal preservation program."¹⁸⁰ In addition, before approving a tribe's plan, NPS must determine:

- (i) that the tribal preservation program is fully capable of carrying out the functions specified in the plan . . . ;
- (ii) that the plan defines the remaining responsibilities of the [NPS and SHPO]; [and]
- (iii) that the plan provides, with respect to properties neither owned by a member of the tribe nor held in trust by the Secretary for the benefit

176. EPA has faced this issue in implementing the tribal provisions of the statutes that it administers, e.g., final rules for "Treatment of Indian Tribes as States for Purposes of Sections 308, 309, 401, 402, and 405 of the Clean Water Act (CWA)." 58 Fed. Reg. 67,966 (1993) (codified at 40 C.F.R. §§ 122-24, 501). In the preamble of that rulemaking document, EPA states:

[T]he meaning of the term "reservation" must be determined in light of statutory law and with reference to relevant case law. EPA considers trust lands formally set apart for the use of Indians to be "within a reservation" for purposes of section 518(e)(2), even if they have not been formally designated as "reservations." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 111 S. Ct. 905, 910 (1991). This means it is the status and use of the land that determines if it is to be considered "within a reservation" rather than the label attached to it.

Id. at 67,970.

177. For a discussion of the origin of the term dependent Indian community, see COHEN, *supra* note 7, at 38-39 (noting that "Indian reservations and dependent Indian communities are not two distinct definitions of place but rather definitions which largely overlap. All Indian reservations are also dependent Indian communities unless they are uninhabited."). Questions sometimes arise as to whether Indian communities that are not within reservations may be dependent Indian communities. For example, land owned in fee by the Native Village of Venetie Tribal Government has been held to be Indian country as a dependent Indian Community. *Alaska v. Native Village of Venetie Tribal Gov't*, 1996 WL 668441 (9th Cir. Nov. 20, 1996). *But see Alyeska Pipeline Serv. Co. v. Kluti Kaah Village*, 1996 WL 668487 (9th Cir. Nov. 20, 1996) (holding that pipeline right-of-way not Indian country). NPS might reach a contrary conclusion in light of the purposes of NHPA.

178. An ambiguity in statutory language constitutes an implicit delegation of authority to the agency charged with implementing the statute to clarify the ambiguity through rulemaking, and such a clarification is entitled to substantial deference by a reviewing court. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984); *Arkansas v. Oklahoma*, 503 U.S. 91, 109-14 (1992).

179. 16 U.S.C. § 470a(d)(2).

180. *Id.* §§ 470a(b), (d).

of the tribe, at the request of the owner thereof, the [SHPO], in addition to the tribal preservation official, may exercise the historic preservation responsibilities [of an SHPO specified in subsections 101(b)(2) and (b)(3), including participation in the section 106 consultation process].¹⁸¹

c. Tribal Regulations in Lieu of the Advisory Council's

Subsection 101(d)(5) provides that the Advisory Council may enter into an agreement with a tribe "to permit undertakings on tribal land to be reviewed under tribal historic preservation regulations in place of" the Advisory Council's regulations for section 106 compliance.¹⁸² The statute does not require a tribe to have an NPS-approved plan in order to enter into such an agreement with the Advisory Council.¹⁸³ As a practical matter, developing tribal regulations may prove to be a more cumbersome process than obtaining NPS approval of a plan to take over SHPO duties. Additionally, having an approved plan may make the development of tribal regulations easier and may help convince the Advisory Council to agree to follow the tribe's regulations. But under the statute, a tribe can choose to pursue either of these two approaches for asserting tribal authority.¹⁸⁴

181. *Id.*

182. *Id.* § 470a(d)(5). The 1996 Proposed Rules would provide that if an Indian tribe has assumed the functions of the SHPO for the section 106 process for tribal lands, the federal agency official "shall consult with the Tribal Preservation Officer in accordance with the plan prepared pursuant to" section 101(d)(2) of NHPA and that the SHPO shall participate in accordance with the plan and may also participate as a member of the interested public. 61 Fed. Reg. 48,585 (to be codified at 36 C.F.R. § 800.2(b)). Thus, although the 1996 Proposed Rules refer to the statutory provision authorizing SHPO participation at the request of a landowner, such a landowner would not know of this right to invite the SHPO from the language of the proposed rules. *See id.*

In addition to this provision for substituting a Tribal Preservation Officer for the SHPO, the 1996 Proposed Rules also would provide that, for undertakings on tribal lands, even if a tribe has not assumed SHPO functions, the federal agency official must consult the tribe in identification of historic properties and the assessment and resolution of adverse effects, and that the tribe "shall be a signatory to any agreement reached under section 800.6." *Id.* at 48,591 (to be codified at 36 C.F.R. § 800.12(b)(4)) (resolution of adverse effects).

183. The 1996 Proposed Rules do not address this issue, rather, the relevant section is simply "reserved" for future proposed rules. 61 Fed. Reg. 48,594 (to be codified at 36 C.F.R. § 800.16).

184. 16 U.S.C. § 470a(d)(2).

d. Funding on an Annual Basis

SHPOs receive federal funding through NPS on an annual basis through the Historic Preservation Fund.¹⁸⁵ SHPOs typically receive a substantial part of their funding from their states and other nonfederal sources. Tribes that assume SHPO functions should be able to receive annual federal funding, too. In the Interim Guidelines, NPS has taken the position that such annual funding is authorized in the 1992 Amendments, but that Congress has not yet appropriated funds expressly for tribal programs that have assumed SHPO duties.¹⁸⁶ Thus, NPS has decided to make funds available from the competitive discretionary tribal historic preservation grant program.¹⁸⁷ Whether direct annual funding for tribal programs becomes a reality will depend on a variety of factors, including: whether tribes actively advocate for such funding and on how well they make the case before Congress and the Executive Branch; the extent to which members of Congress and Executive Branch officials are committed to helping tribal governments become full partners in the national program; and the breadth and depth of support for tribal programs from the broader preservation community.

2. Traditional Cultural Properties

Subsection 101(d)(6) of NHPA gives Indian tribes and Native Hawaiian organizations a statutory right to participate in the section 106 consultation process when a proposed undertaking would affect traditional cultural properties. This subsection states: "In carrying out [its] responsibilities under [section 106], a Federal agency *shall consult* with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to" a property that is listed on or eligible for the National Register.¹⁸⁸

185. The Historic Preservation Fund was established by section 108 of NHPA, which provides, in part, that the source of revenue for the fund is "revenues due and payable to the United States under the Outer Continental Shelf Lands Act (67 Stat. 462, 469), as amended (43 U.S.C. 338), and/or under section 7433(b) of Title 10." *Id.* § 470h.

186. Interim Guidelines, *supra* note 167, at 8. Authorizing language is found in several different subsections, including 16 U.S.C. §§ 470a(b)(6), (d)(4), (d)(5).

187. See *supra* note 171 and accompanying text.

188. 16 U.S.C. § 470a(d)(6)(B) (emphasis added). In the 1996 Proposed Rules, the federal agency official would be required to consult with the relevant tribe or Native Hawaiian organization in the identification of historic properties, assessment of adverse effects, and resolution of adverse effects, and, in the event of a failure to resolve adverse effects, the tribe or Native Hawaiian organization would have the same opportunities as the SHPO to participate in the process through which the Advisory Council would provide comments to the federal agency. 61 Fed. Reg. 48,591-92

Since section 106 is triggered by a proposed federal undertaking, regardless of the ownership status of the land on which an historic property is located, this statutory consultation requirement applies regardless of the land ownership status of any TCP affected by a federal undertaking.

E. Rights of Native Hawaiian Organizations

As the language quoted above provides, Native Hawaiian organizations also now have a statutory right to participate in section 106 consultation when proposed federal undertakings would affect any historic property to which the organization attaches "religious and cultural significance."¹⁸⁹ As defined in section 301(18) of NHPA, the term "Native Hawaiian organization" means: "any organization which—(A) serves and represents the interests of Native Hawaiians; (B) has as a primary and stated purpose the provision of services to Native Hawaiians; and (C) has demonstrated expertise in aspects of historic preservation that are culturally significant to Native Hawaiians."¹⁹⁰

Native Hawaiians are not yet recognized under federal law as having a kind of sovereign governmental power comparable to that of Indian tribes, though it has been argued that they should be treated as a sovereign people.¹⁹¹ Thus, NHPA does not include provisions relating to Native Hawaiians comparable to those which provide for Indian tribes to take over all or part of the functions of the SHPO.¹⁹² The 1992 Amendments, however, did add language requiring the SHPO for Hawaii to consult with Native Hawaiian organizations and to enter into agreements with such organizations regarding the nomination of traditional cultural properties to the National Register and the preservation of such properties.¹⁹³

F. Responsibilities of Federal Agencies

The responsibilities of federal agencies under NHPA are based mainly on section 106 and section 110. The following section highlights certain

(to be codified at 36 C.F.R. § 800.12(c)).

189. 16 U.S.C. § 470a(d)(6)(B).

190. *Id.* § 470w(17). In addition, the statutory definition expressly includes the "Office of Hawaiian Affairs of the State of Hawaii and Hui Malama I Na Kapuna O Hawai'i Nei, an organization incorporated under the laws of the State of Hawaii." *Id.*

191. See S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 311-12 (1994).

192. See 16 U.S.C. § 470a(d).

193. *Id.* § 470a(d)(6)(C).

aspects of these responsibilities that are particularly relevant to the concerns of Indian tribes and Native Hawaiian organizations. By carrying out these responsibilities, federal agencies can help to ensure that the rights of Indian tribes and Native Hawaiian organizations under NHPA and related laws are not just rights on paper but, rather, are rights in fact.

1. The Meaning of "Undertaking"

The section 106 consultation process applies to any proposed "federal or federally assisted undertaking" that would affect any property listed on or eligible for the National Register.¹⁹⁴ The statutory definition of the term "undertaking" provides that:

- (7) "Undertaking" means 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.¹⁹⁵

This statutory definition was added by the 1992 Amendments.¹⁹⁶ The legislative history indicates that the congressional intent of the revised statutory definition was the "rewording" of the definition based on the Advisory Council's regulations and the express inclusion of "programs carried out by States pursuant to Federal permits or funding."¹⁹⁷ To the extent that the revised statutory definition codifies the regulatory definition, prior case law should provide guidance on whether a given kind of federal action is an undertaking. Courts have held a wide variety of

194. *Id.* § 470f. For the full text of section 106, see *supra* note 119, and accompanying text.

195. *Id.* § 470w(7).

196. Prior to the 1992 Amendments, the statutory definition of the term was circular in nature (simply referring to the kinds of actions listed in section 106), although the term was clarified in the Advisory Council's regulations:

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

36 C.F.R. § 800.2(o).

197. S. REP. No. 336, 102d Cong., 2d Sess. 18 (1992) (report to accompany S. 684).

federal agency actions to be undertakings for purposes of section 106,¹⁹⁸ including: construction activities;¹⁹⁹ land management decisions;²⁰⁰ rulemaking actions;²⁰¹ permits for private activities on federal lands;²⁰² lease approvals for mining activities on Indian lands;²⁰³ federal permits and licenses for activities on private lands;²⁰⁴ and the approval of federal financial assistance to private, state, or local government projects.²⁰⁵ On the other hand, some courts have held that, even though a federal action has approved a project or issued a permit, an undertaking subject to section 106 has not occurred if the federal action was not a prerequisite for a nonfederal project,²⁰⁶ was merely ministerial,²⁰⁷ or authorized truly inconsequential activities.²⁰⁸

2. The Section 106 Process

Each federal agency is responsible for compliance with section 106 of NHPA, and compliance is achieved by following the Advisory

198. See generally ADVISORY COUNCIL ON HISTORIC PRESERVATION, *supra* note 75; RODGERS, *supra* note 75, at 984-93; Stern & Slade, *supra* note 75, at 140-43.

199. *Sequoyah v. Tennessee Valley Auth.*, 620 F.2d 1159, 1161 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980) (dam construction); *Attakai v. United States*, 746 F. Supp. 1395, 1405-06 (D. Ariz. 1990) (construction of fences and stock watering facilities).

200. *Pueblo of Sandia v. United States*, 50 F.3d 856, 859 (10th Cir. 1995) (Forest Service land management plan).

201. *Indiana Coal Council v. Lujan*, 774 F. Supp. 1385, 1388 (D.D.C. 1991), *vacated in part and appeal dismissed*, No. 91-5397 (D.C. Cir. Apr. 26, 1993) (finding regulations to violate NHPA).

202. *Wilson v. Block*, 708 F.2d 735, 753-54 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 956 (1983) (authorizing expansion of private ski resort on federal land); *Native Americans for Enola v. United States Forest Serv.*, 832 F. Supp. 297, 300 (D. Or. 1993), *vacated as moot*, 60 F.3d 645 (9th Cir. 1995).

203. *National Indian Youth Council v. Andrus*, 501 F. Supp. 649, 674 (D.N.M. 1980), *aff'd*, 664 F.2d 220 (10th Cir. 1981).

204. *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1437-38 (C.D. Cal. 1985) (dredge and fill permit issued by Army Corps of Engineers under CWA section 404, 33 U.S.C. § 1344).

205. *Stop H-3 Ass'n v. Coleman*, 533 F.2d 434, 438 (9th Cir. 1976), *cert. denied*, 429 U.S. 999 (1976) (highway funding); *Neighborhood Dev. Corp. v. Advisory Council on Historic Preservation*, 632 F.2d 21, 23-24 (6th Cir. 1980) (community development).

206. *Ringsred v. City of Duluth*, 828 F.2d 1305, 1309 (8th Cir. 1987) (BIA approval of a contract with an Indian tribe pursuant to 25 U.S.C. § 81 when such approval was not necessary for the challenged project to be lawfully carried out); *Village of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d. 1477, 1484 (10th Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991).

207. *Sugarloaf Citizens Ass'n v. Federal Energy Regulatory Comm'n*, 959 F.2d 508, 515 (4th Cir. 1992) (the Federal Energy Regulatory Commission certified a waste disposal facility).

208. *Vieux Carre Property Owners v. Brown*, 875 F.2d 453, 463-64 (5th Cir. 1989), *cert. denied*, 493 U.S. 1020 (1990) (holding NHPA not applicable where agency merely issues a license or permit for a riverfront park and aquarium).

Council's regulations. The 1996 Proposed Rules contain a new section²⁰⁹ which sets out requirements for consultation with Indian tribes for undertakings on tribal lands and with Indian tribes and Native Hawaiian organizations for undertakings that would affect tribes and Native Hawaiian organizations by affecting traditional cultural properties that are not located on tribal lands. This proposed new section calls for federal agencies to take steps to involve tribes and Native Hawaiian organizations at every step in the section 106 process.

a. "Reasonable and Good Faith" Effort

The Advisory Council's existing regulations require each federal agency to make a "reasonable and good faith effort to identify historic properties that may be affected by the undertaking and to gather sufficient information to evaluate the eligibility of these properties for the National Register."²¹⁰ Identifying traditional cultural properties may be difficult and time-consuming, in part because the people who are knowledgeable about traditional cultural matters may be reluctant to reveal information about significant places. Bulletin 38 provides guidance on how to make contact and consult with such people.²¹¹ A recent federal appeals court decision holds that simply requesting information from tribes is not necessarily a "reasonable" effort, and that when a tribe has indicated the existence of a traditional cultural property, Bulletin 38 should be used as a standard for judging whether a federal agency's effort is reasonable.²¹²

The Mount Graham controversy, discussed in Part I of this Article, provides an example in which a federal agency, the Forest Service, clearly failed to make a good faith effort to learn about the historic, cultural, and religious significance of the area that was affected by the telescope project. Nevertheless, the Forest Service got away with noncompliance, in part because the opponents of the project took too long to raise their NHPA-based objections.²¹³ The project's chief sponsor, the University of

209. 61 Fed. Reg. 48,591-92 (to be codified at 36 C.F.R. § 800.12).

210. 36 C.F.R. § 800.4(b).

211. Bulletin 38, *supra* note 99, at 6-7.

212. *Pueblo of Sandia*, 50 F.3d at 860-62. In *Pueblo of Sandia*, the court also held that by withholding information from the SHPO, the Forest Service had not made a "good faith" effort to identify historic properties. *Id.* at 862.

213. *Apache Survival Coalition v. United States*, 21 F.3d 895, 906-07 (9th Cir. 1994) (dismissing for laches without reaching the merits of the NHPA issues, after finding that correspondence providing notice to the tribal government was adequate to provide constructive notice to individual Indians who were members of the Apache Survival Coalition). Regarding the identity of the tribal government and the Coalition for notice purposes, see Williams, *supra* note 63, at

Arizona, could have found out about the mountain's significance in Apache religion and history with very little effort—by simply walking across campus and doing a little research in the collections of the Arizona State Museum, a part of the University.²¹⁴

b. Whom to Consult

Statutory provisions cited earlier require federal agencies to consult with tribes, which means, at the least, consulting with the federally-recognized governing bodies of tribes.²¹⁵ The question sometimes arises whether federal agencies should consult with individual members of tribes. Bulletin 38 indicates that it may be necessary to consult traditional cultural authorities as well as government leaders.²¹⁶ The legal reason is that, in the context of section 106, federal agencies have a duty to identify and evaluate properties that may be eligible for the National Register; sometimes this requires consultation with traditional cultural authorities because they may be the only ones with the knowledge necessary to identify and evaluate traditional cultural properties.²¹⁷

1159-62.

214. See Williams, *supra* note 63, at 1152-54. Professor Williams recounts that, when skeptical University officials first heard of the Apache religious interests in Mount Graham, they asked him, in his capacity as Director of the University's Office of Indian Programs (OIP), for assistance. He and an OIP anthropologist found substantial documentation in the Arizona State Museum supporting the Apache Coalition. *Id.* When I related this story to two of my colleagues, they reacted in unison, exclaiming, "They didn't even do a literature search!" Conversation with Rena Martin, Navajo archaeologist & Peter Jemison, Seneca historian, in Washington, D.C. (Oct. 2, 1995). In a recent response to the article by Professor Brandt, *supra* note 54, Professor Michael Cusanovich of the University of Arizona has countered the implications of Professor Williams's experience in finding the documentation in the Museum. Michael A. Cusanovich, *Dzil Nchaa Si An, Mt. Graham: Fact and Fiction*, CULTURAL SURVIVAL Q., Fall 1996, at 4, 5. Professor Cusanovich says "[a]rguments have been made to suggest that the University of Arizona had access to the Goodwin papers on Apache religious issues and ignored their content. This is not true. The Goodwin papers were deposited in the Arizona State Museum in May of 1989, almost one year after the studies were completed." *Id.* Incidentally, Professor Brandt, *supra* note 54, at 55, asserts that the Forest Service knew all along that Mount Graham was sacred to the Apache; if true, this shows either bad faith on the part of the Forest Service or a misunderstanding of the section 106 process. See *infra* note 217.

215. In addition to the statutory provisions, see The President, Memorandum of April 29, 1994, Government-to-Government Relations With Native American Tribal Governments, 59 Fed. Reg. 22,951 (1994) (directing the head of each federal agency to ensure that agency actions are carried out within a government-to-government relationship with respect for tribal sovereignty).

216. Bulletin 38, *supra* note 99, at 6.

217. 16 U.S.C. § 470a(d). The term traditional cultural authorities is used in section 101(d)(4) of the Act as amended. *Id.* § 470a(d)(4); see *supra* note 187 and accompanying text. Some advocates of the tribal sovereignty believe that all consultations between federal agencies and tribes should be channelled through tribal governments, but in the context of historic preservation I think this view is incorrect. Federal agencies have specific obligations to identify properties that are eligible for the

c. Timing of Compliance

The existing regulations²¹⁸ encourage federal agencies to coordinate their section 106 compliance with their compliance with NEPA²¹⁹ and the regulations issued by the Council on Environmental Quality.²²⁰ When an environmental impact statement (EIS) is prepared for a proposed action, compliance with section 106 typically is documented in the EIS. The requirements of the two statutes, however, are distinct²²¹ and sometimes cannot be achieved at the same time. In some cases courts may allow compliance with section 106 to be achieved after compliance with NEPA.²²² Whether such delayed NHPA compliance is really appropriate depends on the nature of the historic properties at issue. If the historic

National Register, and, in the context of traditional cultural properties, sometimes it is individuals outside of tribal government who have the knowledge required to identify such places and to evaluate their significance. See 61 Fed. Reg. 26,771 (1996) (suggesting consultation with Indian religious leaders and Indian individuals who are "appropriately authorized" representatives of Indian religions).

Professor Cusanovich says that "the University and the Forest Service followed the existing process, as flawed as it might have been" and he acknowledges that "some Apaches who believe Mt. Graham is sacred were apparently excluded by the process prescribed by law at the time and clearly feel cheated." Cusanovich, *supra* note 214, at 5. He also says that the "University of Arizona's position has been and remains that it will work with the elected tribal government to address any and all issues they deem important and, whenever possible, to mitigate the impacts of its activities." *Id.* The implication is that with the process as it existed at the time, i.e., prior to the issuance of Bulletin 38 and prior to the 1992 NHPA Amendments, the University and the Forest Service were somehow constrained to dealing only with the elected tribal government. In fact, the existing regulations, in effect since 1986, provide that "[t]raditional cultural leaders and other Native Americans are considered to be interested persons with respect to undertakings that may affect historic properties of significance to such persons" and that as interested persons, they may be "invited to participate as consulting parties." 36 C.F.R. §§ 800.1(c)(2)(iii), 800.5(e)(1).

218. 36 C.F.R. § 800.14. The 1996 Proposed Rules would seek to encourage greater coordination with the NEPA process. 61 Fed. Reg. 48,589 (to be codified at 36 C.F.R. § 800.8).

219. 42 U.S.C. §§ 4321-47.

220. 40 C.F.R. §§ 1500-08.

221. *Indiana Coal Council*, 774 F. Supp. at 1402 n.13; *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 858-59 (9th Cir. 1982); *National Indian Youth Council*, 501 F. Supp. at 674-81. Some courts, however, have treated NEPA and NHPA as very similar and have applied essentially the same reasoning in dealing with claims under each statute. See generally *Gettysburg Battlefield Preservation Ass'n v. Gettysburg College*, 799 F. Supp. 1571 (M.D. Pa. 1992), *aff'd*, 989 F.2d 487 (3d Cir. 1993); *Sugarloaf Citizens Ass'n*, 959 F.2d at 508.

222. *National Indian Youth Council*, 501 F. Supp. at 674-80 (holding that mining project in Indian land pursuant to a lease was an undertaking, but compliance need not be achieved prior to lease approval, where a subsequent federal action—approval of a mining plan—was required before mining could commence). Even though a court may allow delay for NHPA compliance, interested persons should not delay in raising their NHPA concerns. In the Mount Graham controversy, failure to raise NHPA issues during the NEPA review process, and then waiting for several years after NEPA review had been completed before going into court to challenge the Government action on NHPA grounds resulted in dismissal for laches. *Apache Survival Coalition*, 21 F.3d at 909-12.

properties are significant only for archaeological reasons, adverse effects may be mitigated by excavation; if an undertaking would affect one or more TCPs, tribal representatives will generally prefer avoidance over mitigation, and, unless there is early consultation, avoidance options may be foreclosed.²²³

3. Section 110

Section 110 of NHPA²²⁴ imposes on each federal agency a range of responsibilities. In contrast to the project-specific review process under section 106, agency responsibilities under section 110 can be described generally as programmatic in nature. These responsibilities also include heightened substantive preservation duties for historic properties under the jurisdiction or control of federal agencies.²²⁵ In 1988, NPS issued guidance for federal agencies on section 110,²²⁶ but given the extent to which section 110 was changed by the 1992 Amendments, that guidance document is in the process of revision. As amended in 1992, section 110 requires each federal agency to establish a preservation program to identify, evaluate, and nominate properties that are eligible for the National Register.²²⁷ Each agency's program is required to be carried out in consultation with other governmental agencies, including Indian tribes and Native Hawaiian organizations that are carrying out historic preservation planning activities.²²⁸ In addition, each agency is required to

223. On making consultation work, see *infra* notes 355-60 and accompanying text.

224. 16 U.S.C. § 470h-2

225. *Id.* § 470h-2(B). This subsection provides that each agency's historic preservation program "shall ensure . . . that such properties under the jurisdiction or control of the agency as are listed in or may be eligible for the National Register are managed and maintained in a way that considers the preservation of their historic, archaeological, architectural, and cultural values in compliance with section 470 of this title and gives special consideration to the preservation of such values in the case of properties designated as having National significance." *Id.* § 470h-2. In *Attakai*, 746 F. Supp. at 1409, the court held that section 110 does not impose responsibilities on the BIA with respect to Indian lands held in trust by the federal government, reasoning that the tribe was the real owner of the land. This case was decided prior to the enactment of the 1992 NHPA Amendments and, on this point, the decision construed the statutory language imposing responsibilities on the head of each federal agency for "the preservation of historic properties which are owned or controlled by such agency." *Id.* § 470h-2(a)(1). The 1992 NHPA Amendments added language imposing responsibilities on federal agencies for historic properties under their "jurisdiction or control." *Id.* § 470h-2(a)(2). Whether or not the district court correctly decided the "ownership" issue, Indian trust lands clearly are under the jurisdiction of the BIA. Thus, the precedential value of the *Attakai* decision on the section 110 issue is questionable.

226. 53 Fed. Reg. 4,727 (1988).

227. 16 U.S.C. § 470h-2(a)(2)(A).

228. *Id.* § 470h-2(a)(2)(D).

ensure that its procedures for conducting the section 106 process provide for consultation with, among others, Indian tribes and Native Hawaiian organizations.²²⁹ Agency procedures for the section 106 process also must ensure that the disposition of "Native American cultural items" excavated from federal or tribal land is consistent with NAGPRA.²³⁰

Tribal representatives often express a preference for an on-going consultative relationship with federal land managing agencies, rather than a short-term process focused on a particular proposed agency action. Section 110 provides authorization for on-going consultation. Building such relationships could contribute to expediting section 106 review of particular proposed projects, especially if federal agencies use the information obtained, and the relationships established, to direct development activities away from areas containing traditional cultural properties.

4. Section 112

Section 112 of NHPA²³¹ directs the Secretary to issue guidelines for federal, state, and tribal historic preservation programs to ensure that such programs include plans to carry out certain federal policies. While the explicit mandate of this section calls for NPS to issue guidelines, the guidelines, when issued, will be designed to help federal, state, and tribal programs carry out NHPA and related authorities. Of particular relevance to the concerns of tribes and Native Hawaiian organizations, federal, state, and tribal programs are supposed to include plans to:

(3) encourage the protection of Native American cultural items (within the meaning of section 3001(3) and (9) of [NAGPRA] and of properties of religious or cultural importance to Indian tribes, Native Hawaiians, or other Native American groups; and

(4) encourage owners who are undertaking archaeological excavations to . . .

(D) prior to excavating or disposing of a Native American cultural item in which an Indian tribe or Native Hawaiian organization may have an interest under section 3002(a)(2)(B) or (C) of

229. *Id.* §470h-2(a)(2)(E).

230. 25 U.S.C. §§ 3001-3013 (1994). NHPA section 110 expressly requires that each federal agency's procedures for compliance with NHPA section 106 provide for the disposition of Native American cultural items "in a manner consistent with" NAGPRA. 16 U.S.C. § 470h-2(a)(2)(E)(iii); see *infra* notes 290-339 and accompanying text.

231. 16 U.S.C. § 470h-4(b).

[NAGPRA] given [sic] notice to and consult with such Indian tribe or Native Hawaiian organization.²³²

5. Confidentiality

Information about traditional cultural properties tends to be quite sensitive. In many cases, the persons who have knowledge about the nature and location of such places may desire to keep such information secret, and in some cases they may be prohibited by their religious beliefs from revealing this information. This issue is discussed in Bulletin 38.²³³

In cases in which a federal agency has obtained information that a tribe or Native Hawaiian organization believes should be kept confidential, section 304 of NHPA provides a mandate for withholding such information from disclosure.²³⁴ This section provides, in part:

(a) The head of a Federal agency or other public official receiving grant assistance pursuant to [NHPA], after consultation with the Secretary, shall withhold from disclosure to the public, information about the location, character, or ownership of a historic resource if the Secretary and the agency determine that disclosure may—

- (1) cause a significant invasion of privacy;
- (2) risk harm to the historic resources; or
- (3) impede the use of a traditional religious site by practitioners.²³⁵

While this statutory language provides authority to withhold information from disclosure, the discretion to exercise this authority resides with the Secretary (acting through NPS) and the public official or head of the other federal agency that possesses the information. Tribes, Native Hawaiian organizations, and others, such as traditional cultural authorities, who choose to reveal some information in order to try to protect an historic property from damage or destruction, do not control the exercise of discretion. Tribes could address this problem in several ways. For example, they could include mechanisms in MOAs under the section 106 process and in programmatic agreements under the Advisory Council's

232. *Id.* § 470h-4(b)(4)(D).

233. Bulletin 38, *supra* note 99, at 17; *see also* Lynn Sebastian, *Protecting Traditional Cultural Properties Through the Section 106 Process*, CULTURAL RESOURCES MGMT., 1993, at 22, 25 (encouraging ethnographic consultants to limit the information provided to the SHPO to that needed to determine eligibility for the National Register and noting that much of the confidential, sacred knowledge about such places is not necessary for this purpose and can be best protected if not revealed in the first place).

234. 16 U.S.C. § 470w-3.

235. *Id.* § 470w-3(a).

regulations.²³⁶ To the extent that confidentiality is an issue regarding information produced from historic preservation and related activities conducted within reservation boundaries, tribes should consider addressing this issue through tribal law. For example, the Zuni Tribe requires a tribal permit for all archaeological and ethnological research conducted on the reservation, and the Tribe scrutinizes the research plan that is part of any such permit application.²³⁷

G. Judicial Review

Although NHPA does not expressly authorize citizen suits as an enforcement mechanism, federal courts routinely have found that they have jurisdiction over suits against federal agencies.²³⁸ Most suits assert that federal question jurisdiction²³⁹ exists for NHPA violations. In addition, the judicial review provisions of the Administrative Procedure Act²⁴⁰ can be cited as a basis for jurisdiction. At least one court has rejected the defense of sovereign immunity.²⁴¹

Courts generally limit the scope of their review to the administrative record.²⁴² Failure to participate in the administrative process has been relied upon to show the lack of a sufficient interest in a matter to have standing.²⁴³ In addition, failure to participate in the administrative process may enable the challenged federal agency to raise laches as a defense.²⁴⁴ In light of such holdings, persons who are considering litigation based on NHPA violations should be sure to participate in the administrative process.

236. See 36 C.F.R. § 800.13.

237. See Roger Anyon & T.J. Ferguson, *Cultural Resource Management at the Pueblo of Zuni, New Mexico, U.S.A.*, 69 ANTIQUITY 913, 927 (1995).

238. See generally ADVISORY COUNCIL ON HISTORIC PRESERVATION, *supra* note 75, at 19-22.

239. 28 U.S.C. § 1331; see, e.g., *Weintraub v. Rural Elec. Admin.*, 457 F. Supp. 78, 80 (M.D. Pa. 1978) (demolition of building).

240. 5 U.S.C. §§ 701-706; see, e.g., *Vieux Carré Property Owners*, 875 F.2d at 456; *Illinois Commerce Comm'n v. Interstate Commerce Comm'n*, 848 F.2d 1246, 1248 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1004 (1989).

241. *Indiana Coal Council*, 774 F. Supp. at 1393-94.

242. E.g., *Berkshire Scenic Ry. Museum v. Interstate Commerce Comm'n*, 52 F.3d 378, 381 (1st Cir. 1995); *Pueblo of Sandia*, 50 F.3d at 856.

243. *South Hill Neighborhood Ass'n v. Romney*, 421 F.2d 454, 454 (6th Cir. 1969), *cert. denied*, 397 U.S. 1025 (1970); see also *North Oakland Voters Alliance v. City of Oakland*, No. C-92-0743 MHP, 1992 WL 367096 (N.D. Cal. Oct. 6, 1992) (participation in administrative process found to show a real interest sufficient for standing).

244. *Apache Survival Coalition*, 21 F.3d at 907.

Most suits seek injunctive relief. In some cases, courts have held agencies to strict compliance with the Advisory Council's procedural requirements,²⁴⁵ but in others, courts have found "substantial" compliance acceptable.²⁴⁶ In any civil action brought by any interested person to enforce NHPA, if the person "substantially prevails," the court may award attorney fees, expert witness fees, and other costs deemed reasonable.²⁴⁷

III. ARCHAEOLOGICAL RESOURCES PROTECTION ACT

ARPA established a different, but related, set of cultural resource management requirements for federal agencies.²⁴⁸ ARPA is triggered by the presence of archaeological resources on federal public lands or on Indian lands.²⁴⁹ In addition to the statute, federal agencies that administer lands subject to ARPA must comply with uniform regulations issued jointly by the Secretaries of Interior, Agriculture, and Defense as well as the Chairman of the Board of the Tennessee Valley Authority.²⁵⁰ Amendments to the uniform regulations were published recently.²⁵¹ In

245. *E.g.*, *Attakai*, 746 F. Supp. at 1406 (injunction issued against BIA for failure to consult with SHPO despite efforts to identify and avoid historic properties); see ADVISORY COUNCIL ON HISTORIC PRESERVATION, *supra* note 75, at 22 nn.252-55 (collecting cases).

246. *E.g.*, *Sierra Club v. Clark*, 774 F.2d 1406, 1410-11 (9th Cir. 1985) (failure by Bureau of Land Management to consult with SHPO prior to approving course for 110-mile motorcycle race); see RODGERS, *supra* note 75, at 992.

247. 16 U.S.C. § 470w-4; *National Trust for Historic Preservation v. United States Army Corps of Eng'rs*, 570 F. Supp 465, 465 (S.D. Ohio 1983); see ADVISORY COUNCIL ON HISTORIC PRESERVATION, *supra* note 75, at 16. In contrast to the Equal Access to Justice Act, 28 U.S.C. § 2412 (1994), which sets fees at a relatively low hourly rate, NHPA fees are based on market rates. See *National Trust for Historic Preservation*, 570 F. Supp. at 470-73.

248. 16 U.S.C. §§ 470aa-470ll (1994). See generally SHERRY HUTT ET AL., *ARCHEOLOGICAL RESOURCES PROTECTION* (1992) [Preservation Press, National Trust for Historic Preservation]; Sherry Hutt, *The Archaeological Resources Protection Act: Progress of the Last Decade*, FED. LAW., Oct. 1995, at 30; RODGERS, *supra* note 75, at 977-84.

249. 16 U.S.C. § 470aa. While ARPA mainly applies to archaeological resources located on, or excavated from, federal and Indian lands, the criminal prohibition in ARPA, 16 U.S.C. § 470ee(c)(6), is not so limited. See *infra* notes 259-63 and accompanying text.

250. An identical set of the uniform regulations is codified in each of four different titles of the Code of Federal Regulations: 18 C.F.R. pt. 1312 (1996); 32 C.F.R. pt. 229 (1995); 36 C.F.R. pt. 296 (1995); and 43 C.F.R. pt. 7 (1996). (For convenience, references in this Article to the uniform regulations cite only the set codified at 43 C.F.R. pt. 7.)

251. 60 Fed. Reg. 5,256 (1995). The revisions implement certain changes in the statute made by Pub. L. No. 100-555, 102 Stat. 2778 (1988) and Pub. L. No. 100-588, 102 Stat. 2796 (1988) in particular, by expanding the scope of prohibited acts (to include attempts to excavate, remove, damage, or otherwise deface archaeological resources) and by lowering the threshold for felony prosecutions (to incidents in which the commercial value of the archaeological resources or the cost of restoration and repair of such resources exceeds \$500). In addition, the revised regulations now include provisions expressly deferring to NAGPRA regarding the disposition of human remains and cultural

order to lawfully excavate or remove archaeological resources from federal public lands or Indian lands, a person must obtain a permit from the federal land manager, unless that person fits within an exception established by the statute or regulations.

A. Places and Things Covered by ARPA

1. Archaeological Resources

ARPA defines archaeological resources as "any material remains of past human life or activities which are of archaeological interest, as determined under uniform regulations."²⁵² The statutory language prescribes that the regulatory definition shall include graves and human skeletal remains, but that no item of less than a hundred years of age shall be treated as an archaeological resource.²⁵³ The definition in the uniform regulations elaborates on the statutory definition, for example, by including a definition of the phrase "of archaeological interest."²⁵⁴ Many Indians and other Native Americans regard the inclusion of human remains within the term "archaeological resources" to be profoundly offensive.

2. Public Lands

The term "public lands" is defined in section 3 of ARPA as:

(A) lands which are owned and administered by the United States as part of--

- (i) the national park system,
- (ii) the national wildlife refuge system, or
- (iii) the national forest system; and

(B) all other lands the fee title to which is held by the United States, other than lands on the Outer Continental Shelf and lands which are under the jurisdiction of the Smithsonian Institution.²⁵⁵

items covered by NAGPRA. *Id.* at 5,258, 5,261.

252. 16 U.S.C. § 470bb(1).

253. *Id.*

254. 43 C.F.R. § 7.3(a).

255. 16 U.S.C. § 470bb(3).

3. Indian Lands

The term "Indian lands" is defined in section 3 of ARPA as: "lands of Indian tribes, or Indian individuals, which are either held in trust by the United States or subject to a restriction against alienation imposed by the United States, except for any subsurface interests in lands not owned or controlled by an Indian tribe or an Indian individual."²⁵⁶

ARPA's definition of Indian lands differs significantly from NHPA's definition of the term tribal lands which, as noted earlier, includes all lands within the exterior boundaries of Indian reservations and dependent Indian communities.²⁵⁷

4. Religious or Cultural Sites

Section 4(c) of ARPA provides that, prior to issuing an ARPA permit that may result in "harm to, or destruction of, any religious or cultural site," the federal land manager "shall notify any Indian tribe which may consider the site as having religious or cultural importance."²⁵⁸ The term "religious or cultural site" is not defined in the statutory language of ARPA or the implementing regulations. Obviously, if an ARPA permit would affect a TCP as defined in National Register Bulletin 38, a tribe that considers such a property to have "religious or cultural importance" would be entitled to notice.²⁵⁹ Under ARPA, however, a religious or cultural site need not qualify for the National Register to entitle a concerned tribe to receive notice.

B. Prohibited Acts and Penalties

Section 6 of ARPA lists activities that are prohibited.²⁶⁰ The basic prohibitions defined in section 6 of ARPA are:

No person may excavate, remove, damage, or otherwise alter or deface, or attempt to excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands or Indian lands unless such activity is pursuant to a permit issued under section

256. *Id.* § 470bb(4).

257. *See supra* notes 174-78 and accompanying text.

258. 16 U.S.C. § 470cc(c).

259. *Id.*

260. *Id.* § 470ee.

4 [of ARPA], a permit [under the Antiquities Act of 1906], or an exemption contained in section 4(g)(1) [of ARPA].²⁶¹

Section 6 also prohibits the sale, purchase, exchange, transport, receipt, or offer to sell, purchase, or exchange any archaeological resource, if such resource was excavated or removed from federal or Indian lands in violation of ARPA or any other provision of federal law.²⁶² In addition, if any such act violates state or local law, it constitutes a violation of ARPA if done in interstate or foreign commerce.²⁶³ Section 7 of ARPA authorizes civil penalties against any person who violates the terms of an ARPA permit or a prohibition contained in the regulations.²⁶⁴ Violators may be punished by fines and imprisonment.

C. Permit Procedures

In considering applications for ARPA permits, federal agencies must comply with the procedural requirements set out in the uniform regulations. This Article focuses on certain aspects of the regulations that are of particular concern to Indian tribes.

1. ARPA on Federal Public Lands

ARPA provides that, on federal public lands, if the issuance of a permit "may result in harm to, or destruction of, any religious or cultural site, . . . the Federal land manager shall notify any Indian tribe which may consider the site as having religious or cultural importance."²⁶⁵ The uniform regulations establish a process for notice to, and consultation with, Indian tribes.²⁶⁶ If a tribe considers a site that would be affected by an ARPA permit to have religious or cultural importance, the uniform

261. *Id.*

262. *Id.* § 470ee(b).

263. *Id.* § 470ee(c) (providing that "[n]o person may sell, purchase, exchange, transport, or receive or offer to sell, purchase, or exchange, in interstate or foreign commerce, any archaeological resources excavated, removed, sold, purchased, exchanged, transported, or received in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law"); see *United States v. Gerber*, 999 F.2d 1112, 1116-17 (7th Cir. 1993) (upholding this section of ARPA and affirming the conviction of a person who had taken archaeological items unearthed during road construction on private property in Indiana and transported to Kentucky).

264. *Id.* § 470ff.

265. 16 U.S.C. § 470cc(c).

266. 43 C.F.R. § 7.7. The statute required that the responsible federal agencies could promulgate regulations "only after consideration of the provisions of the American Indian Religious Freedom Act (92 Stat. 469; 42 U.S.C. 1996)." 16 U.S.C. § 470ii(a).

regulations require the federal land manager to give a thirty day notice to the tribe.²⁶⁷ The regulations also encourage federal land managers to give notice to Native American groups other than federally recognized tribes if such groups are known to consider potentially affected sites to have religious or cultural importance.²⁶⁸ The regulations encourage, but do not require, the federal land manager to meet with any tribe or group that responds to such notice.²⁶⁹

If cultural items covered by NAGPRA are located at the site, then NAGPRA requires consultation, in addition to notice.²⁷⁰ Similarly, if the site is eligible for the National Register, the tribe has a right to participate in section 106 consultation.²⁷¹

In addition to the notice requirement for specific ARPA permits, the uniform regulations also direct each federal land manager to identify and initiate communication with "all Indian tribes having aboriginal or historic ties to lands under the Federal land manager's jurisdiction."²⁷² The relevant paragraph provides regulatory authorization for federal land managers to establish on-going consultative relationships with tribes that have aboriginal or historic ties to federal public lands.²⁷³

The requirement to give notice to tribes and to consider their concerns is triggered by an application for an ARPA permit; however, the regulations exempt persons carrying out official federal agency duties from the requirement to obtain a permit.²⁷⁴ On the other hand, the regulations do provide that "any official duties that might result in harm to or destruction of any Indian tribal religious or cultural site, as determined by the Federal land manager, [must] have been the subject of consideration."²⁷⁵

2. ARPA in Indian Country

Within Indian country, the permit requirement of ARPA applies only to Indian lands, defined as lands of Indian tribes or individual Indians either held in trust by the United States or subject to a restraint on

267. 43 C.F.R. § 7.7(a).

268. *Id.* § 7.7(a)(1).

269. *Id.* § 7.7(a)(3).

270. *See infra* notes 326, 331 and accompanying text.

271. *See supra* note 79; *infra* notes 326-29 and accompanying text.

272. 43 C.F.R. § 7.7(b)(1).

273. *See id.*

274. *Id.* § 7.5(c).

275. *Id.*

alienation imposed by the United States.²⁷⁶ The final regulations implementing NAGPRA,²⁷⁷ however, extend the coverage of ARPA to fee lands within reservation boundaries in certain circumstances.²⁷⁸

A tribe is statutorily exempt from the permit requirement with respect to its own lands, and a tribal member is exempt if the tribe has enacted its own law regulating the excavation of archaeological resources.²⁷⁹ Regulations issued by the BIA elaborate on the applicability of the permit requirement to tribes and individual Indians.²⁸⁰ If a permit is required, the statute requires "consent of the Indian or Indian tribe owning or having jurisdiction over such lands."²⁸¹ As clarified in the regulations, for Indian lands owned by a tribe, tribal consent is required; for lands owned by individual Indians, consent of the landowner(s) is required, as well as consent of the tribe if the lands are subject to tribal regulatory jurisdiction.²⁸²

In conjunction with granting consent, a tribe and/or an individual Indian landowner may require that certain conditions be included in the permit.²⁸³ For example, permit conditions may be used to protect the confidentiality of information learned or disclosed in the course of conducting archaeological investigations. All permits issued by the BIA are required to include a condition stating that "human remains of Indians, funerary objects, sacred objects, and objects of cultural patrimony may not be excavated or removed unless the permittee has obtained the written consent of the [BIA] Area Director," and that such consent shall not be given prior to consultation with the appropriate tribe.²⁸⁴ Tribal officials might negotiate a permit condition setting out a procedure for such consultation. The BIA regulations provide, however, that if the tribe or individual Indians insist on conditions that are "in conflict with the provisions of [ARPA] or any other Act," the BIA may decide not to issue the permit.²⁸⁵

276. 16 U.S.C. § 470bb(4).

277. 43 C.F.R. pt. 10.

278. See *infra* note 299 and accompanying text. In my view, ARPA should be amended to cover all lands within reservation boundaries, and to expressly recognize tribal authority over such resources.

279. 16 U.S.C. § 470cc(g).

280. 25 C.F.R. § 262.4 (1996).

281. 16 U.S.C. § 470cc(g)(2).

282. 43 C.F.R. § 7.8(a)(5) (uniform regulations); 25 C.F.R. § 262.5(c) (BIA regulations).

283. 25 C.F.R. § 262.5(c).

284. *Id.* § 262.5(d).

285. *Id.* § 262.5(c)(v).

D. Enforcement of ARPA

ARPA provides for substantial civil penalties as well as the possibility of criminal penalties including imprisonment.²⁸⁶ Yet, enforcement presents practical problems, such as apprehending violators and obtaining sufficient evidence to support enforcement.²⁸⁷ ARPA does not include a citizen suit provision,²⁸⁸ so enforcement depends upon the willingness of federal authorities to pursue cases, although ARPA does provide for persons who provide information leading to the assessment of a civil penalty or criminal fine to receive rewards.²⁸⁹ In recent years, an increasing number of enforcement actions have been reported.²⁹⁰ Within reservation boundaries, tribes that have enacted their own laws regulating archaeological resources may pursue enforcement actions in tribal courts. In addition, tribes that have the human resources to investigate ARPA violations and to apprehend violators are better situated to persuade federal officials to pursue enforcement.

IV. NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

In 1990, after many years of legislative advocacy by Indians and their allies, Congress enacted NAGPRA.²⁹¹ In recognition of the fact that many Native American religions treat caring for the remains of ancestors as a very important obligation, NAGPRA establishes a mandate and a process

286. 16 U.S.C. §§ 470ee(d), 470ff.

287. For a critique of enforcement and penalties under ARPA, see RODGERS, *supra* note 75, at 982-84.

288. Section 8 of the Act does provide for a person who provides information which leads to the assessment of a civil penalty or criminal fine to receive a reward. 16 U.S.C. § 470gg.

289. *Id.* The reward amount is limited to no more than \$500 for furnishing information leading to a conviction or civil penalty for an ARPA violation on federal public lands, although for violations on Indian lands, the full amount of any civil penalty is to be transferred to the Indian tribe or Indian landowner. *Id.*; see 43 C.F.R. § 17. A thriving business in reporting offenders and collecting penalties has not appeared. RODGERS, *supra* note 75, at 982.

290. *United States v. Lindauer & Owens*, No. 1134105 (E.D. Cal. 1990); *United States v. Charlton*, No. 290-73 (E.D. Tenn. 1990); *Eel River Sawmills*, Docket Nos. ARPA 90-1 & 90-2 (Dep't of Interior Office of Hearings and Appeals, Hearings Division, Salt Lake City, UT) (Aug. 10, 1992). See generally SHERRY HUTT ET. AL., NAT'L PARK SERV., TECHNICAL BRIEF No. 16, THE CIVIL PROSECUTION PROCESS OF THE ARCHAEOLOGICAL RESOURCES PROTECTION ACT 1057-1574 (1994).

291. 25 U.S.C. §§ 3001-3013 (1994). For detailed discussion of NAGPRA, see generally the articles published in Symposium, *The Native American Graves Protection and Repatriation Act of 1990 and State Repatriation-Related Legislation*, 24 ARIZ. ST. L.J. 1 (1992); MENDING THE CIRCLE: A NATIVE AMERICAN REPATRIATION GUIDE: UNDERSTANDING AND IMPLEMENTING NAGPRA AND THE OFFICIAL SMITHSONIAN AND OTHER REPATRIATION POLICIES (Barbara Meister ed., 1996) [hereinafter MENDING THE CIRCLE] (published by the American Indian Ritual Object Repatriation Foundation); Stern & Slade, *supra* note 75, at 159-73.

for the repatriation of the physical remains of ancestors, funerary objects, and other sacred items that are in the custody of federal agencies or federally funded museums to tribes, Native Hawaiian organizations, and lineal descendants. In addition, NAGPRA establishes legal requirements for the protection of the physical remains of Indians and other Native Americans²⁹² that are imbedded in federal and tribal lands. On December 4, 1995, the Department of the Interior published final rules to implement NAGPRA.²⁹³ This Article emphasizes the graves protection provisions of NAGPRA.

A. Places and Things Covered by NAGPRA

1. Human Remains

For Indians and other Native American peoples, human remains are very special and need legal protection. Human remains generally hold great religious significance, both for present day descendants and for the spiritual well-being of the deceased ancestors. The idea that human remains could be treated as resources for scientific study is repugnant to many Indian people. NAGPRA established a legal regime to protect human remains and other cultural items located on tribal lands and federal lands.²⁹⁴ The term "human remains" is not defined in the statute,²⁹⁵ but is included within the definition of cultural items.²⁹⁶ The final regulations do not use the term cultural items, however, in response to objections raised by some over using that term to include human remains.²⁹⁷

Although NAGPRA establishes a distinct protective regime for human remains and other cultural items, it does not remove these items from inclusion in ARPA's definition of "archaeological resources."²⁹⁸ The recent amendments to the uniform ARPA regulations do provide though,

292. NAGPRA defines "Native American" as meaning "of, or related to, a tribe, people, or culture that is indigenous to the United States." 25 U.S.C. § 3001(9). More specifically, the Native American tribes, peoples, and cultures covered by NAGPRA are Indian tribes and the aboriginal peoples of Hawaii. The term "Indian tribe" expressly includes Alaska Native villages. *Id.* § 3001(7).

293. 43 C.F.R. pt. 10 (1996).

294. *See* 25 U.S.C. §§ 3001-3013.

295. In the final regulations, the term human remains is defined as "the physical remains of a human body of a person of Native American ancestry." 43 C.F.R. § 10.2(d)(1). The definition also excludes certain kinds of things from its coverage and provides that, for the purpose of determining cultural affiliation, "human remains incorporated into a funerary object, sacred object, or object of cultural patrimony . . . must be considered as part of that item." *Id.*

296. 25 U.S.C. § 3001(3).

297. 60 Fed. Reg. 62,137 (1995).

298. *See* 25 U.S.C. §§ 3001-3013.

that if human remains are excavated pursuant to an ARPA permit, the ultimate disposition of such remains is governed by NAGPRA.²⁹⁹

2. Other Cultural Items

NAGPRA defines cultural items to include four subsets, in addition to human remains: "associated funerary objects," "unassociated funerary objects," "sacred objects," and "cultural patrimony."³⁰⁰ The distinctions among these terms are significant for purposes of the repatriation provisions of NAGPRA. Funerary objects are objects that were placed with the remains of an individual at the time of death or later as part of a death rite or ceremony.³⁰¹ If a federal agency or museum has possession of both the human remains and the funerary objects, the objects are "associated," but if the federal agency or museum does not have possession of the human remains, the objects are "unassociated."³⁰² Sacred objects are ceremonial objects that are needed by traditional religious leaders for the present day practice of traditional Native American religions.³⁰³ Cultural patrimony refers to objects which have such cultural importance that they are considered the inalienable property of a tribe or group, not subject to ownership or alienation by individual members of the tribe or group.³⁰⁴

All these objects, as well as human remains, are included in the statutory definition of cultural items.³⁰⁵ As noted above, however, the final rules change this terminology in order to refrain from referring to human remains as cultural items. The final rules instead use the terms that describe the component subsets of the statutory term: "human remains, funerary object, sacred object, or object of cultural patrimony."³⁰⁶

3. Federal Lands

NAGPRA defines "federal lands" as: "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

299. 43 C.F.R. § 7.13(e).

300. 25 U.S.C. § 3001(3).

301. *Id.* §§ 3001(3)(A), (B).

302. *Id.* § 3001(3)(B).

303. *Id.* § 3001(3)(C).

304. *Id.* § 3001(3)(D).

305. *Id.* § 3001(3).

306. 43 C.F.R. § 10.2(d).

organized pursuant to the Alaska Native Claims Settlement Act of 1971.³⁰⁷

This definition appears to be quite similar to the definition of public lands in ARPA. With respect to the amount of federal "control" over land necessary to render the land subject to NAGPRA, and more specifically whether a federal permit requirement renders lands subject to federal control, the Department of Interior has taken the following position: "Such determinations must necessarily be made on a case-by-case basis. Generally, however, a federal agency will only have sufficient legal interest to 'control' lands it does not own when it has some other form of property interest in the land such as a lease or easement."³⁰⁸

4. Tribal Lands

With respect to Indian concerns, the NAGPRA definition of tribal land is identical to the NHPA 1992 Amendments' definition: "(A) all lands within the exterior boundaries of any Indian reservation; [and] (B) all dependent Indian communities."³⁰⁹ Since ARPA, by its express language, is limited to trust and restricted Indian lands, some commentators have suggested that NAGPRA should be construed as having implicitly amended ARPA.³¹⁰ The final rules adopt this position, at least to some extent, by providing that for private lands within the boundaries of an Indian reservation, the BIA will serve as the permitting authority for issuing any ARPA permits required by NAGPRA.³¹¹ The final rules include some curious language in the definition of tribal lands regarding the coverage of privately owned lands within reservation boundaries, as follows: "Actions authorized or required under these regulations will not apply to tribal lands to the extent that any action would result in a taking of property without compensation within the meaning of the Fifth Amendment of the United

307. 25 U.S.C. § 3001(5).

308. 60 Fed. Reg. 62,139.

309. 25 U.S.C. § 3001(15). The final regulations do not clarify the meaning of the term "dependent Indian communities" for purposes of NAGPRA. Although this issue is discussed in the preamble, 60 Fed. Reg. 62,140, that discussion does not provide any guidance on whether Alaska Native villages are dependent Indian communities for purposes of NAGPRA. See *supra* note 292 and accompanying text. In my view, there is ambiguity in the statutory language, and thus, Congress has implicitly delegated authority to the Secretary to clarify. The discussion in the preamble does not indicate whether any Alaska Native villages raised this issue or expressed a preference as to how it should be resolved. See *supra* note 177 and accompanying text.

310. Ralph W. Johnson & Sharon I. Haensly, *Fifth Amendment Takings Implications of the 1990 Native American Graves Protection and Repatriation Act*, 24 ARIZ. ST. L.J. 151, 155 n.31 (1992).

311. 43 C.F.R. § 10.3(b)(1).

States Constitution."³¹² As explained in the preamble to the final rules, this language is intended "to rectify a contradiction between the statutory definition of tribal lands in section 2(15) of the Act and the guarantee in section 2(13) of the Act that no taking of property without compensation . . . is intended."³¹³ The practical result of inserting this "takings" language may be to encourage litigation.³¹⁴

Allotted Indian trust lands outside reservation boundaries do not fit the statutory definition of tribal lands unless they also are within a dependent Indian community.³¹⁵ Nevertheless, such lands are held in trust by the United States and are subject to federal control. The final rules treat such lands as federal lands for purposes of NAGPRA.³¹⁶

With respect to Native Hawaiians, the definition of tribal lands in NAGPRA goes beyond the definition of tribal lands in NHPA. NAGPRA's definition also includes: "(C) any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of Public Law 86-3."³¹⁷ The final rules provide that the Department of Hawaiian Home Lands, a state agency, will issue ARPA permits required by NAGPRA, with the Hawaii State Historic Preservation Division acting in an advisory capacity.³¹⁸

B. Repatriation

Section 7 of NAGPRA sets out the basic policy that human remains and other cultural items in the possession or under the control of federal

312. *Id.* § 10.2(f)(2)(iv).

313. 60 Fed. Reg. 62,139-40. The proposed rules had redefined the term tribal lands to render privately owned lands within reservation boundaries not covered by the Act, a departure from the plain language of the Act that was corrected in the final rules. *Id.* at 62,140 (codified at 43 C.F.R. § 10.2(f)(2)).

314. The logic of the drafters in inserting this language is questionable, since the statutory concern for Fifth Amendment takings is stated in the context of the definition of "right of possession." This term comes into play when a federal agency or museum responds to a repatriation request for funerary objects, sacred objects, or objects of cultural patrimony, while the significance of including private lands within reservation boundaries in the term tribal lands is to require a permit for the intentional excavation of imbedded human remains and cultural items and to subject such materials to the inadvertent discovery provisions of NAGPRA. Thus, the reference to Fifth Amendment takings in section 2(13) does not contradict section 2(15) since these two sections have nothing to do with each other.

315. *See* 25 U.S.C. § 3001(15).

316. 60 Fed. Reg. 62,142 (codified at 43 C.F.R. §10.2(f)(1)).

317. 25 U.S.C. § 3001(15).

318. 43 C.F.R. § 10.3(b)(1).

agencies or "museums"³¹⁹ are to be repatriated to the appropriate Indian tribe, Native Hawaiian organization, or lineal descendant(s).³²⁰ Section 3 of NAGPRA sets out a hierarchy for determining which tribes, organizations, and lineal descendants have rights to obtain the repatriation of such human remains and cultural items.³²¹ The people who deal with repatriation issues—those who represent federal agencies as well as those who represent tribes and Native Hawaiian organizations—should be aware of the importance of building ongoing consultative relationships that go beyond the specific matters at hand. The manner in which people relate to each other in carrying out the repatriation provisions of NAGPRA may very well carry over into the kinds of relationships they have regarding a broad range of preservation and cultural resource issues.

C. *Imbedded Human Remains and Cultural Items*

1. Intentional Excavations

NAGPRA prohibits the intentional removal or excavation of Native American cultural items, including human remains from federal or tribal lands, unless a permit has been issued under ARPA.³²² For tribal lands, consent of the tribe, and proof of that consent, is required.³²³ Except with respect to Native Hawaiian lands, permits are issued by the BIA.³²⁴

For federal lands, consultation with the "appropriate" Indian tribe (or Native Hawaiian organization) is required.³²⁵ The appropriate tribe with which to consult must have a right of ownership or control determined in accordance with the hierarchy set out in section 3002(a) of NAGPRA.³²⁶ This should be relatively easy to determine if the land "is recognized by a final judgment of the Indian Claims Commission or the United States

319. NAGPRA defines museum as "any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items. Such term does not include the Smithsonian Institution or any other Federal agency." 25 U.S.C. § 3001(8).

320. *Id.* § 3005.

321. *Id.* § 3002. This Article does not address this part of NAGPRA.

322. *Id.* § 3002(c)(1).

323. *Id.* § 3002(c)(2).

324. 43 C.F.R. § 10.3(b)(1). BIA procedures for ARPA permits are codified at 25 C.F.R. pt. 262, subject to the uniform rules at 43 C.F.R. pt. 7. See *supra* notes 280, 282 and accompanying text. Regarding permits on Native Hawaiian lands, see *supra* note 188.

325. 43 C.F.R. § 10.3(b)(2).

326. 25 U.S.C. § 3002(a).

Court of Claims as the aboriginal land of some Indian tribe."³²⁷ If another tribe shows by a preponderance of the evidence that it has a stronger claim of cultural affiliation, consultation with such a tribe would be appropriate.³²⁸

For permits on federal lands, the responsibility for determining which tribes or Native Hawaiian organizations to consult resides with the federal agency official.³²⁹ The agency must give written notice to all tribes and Native Hawaiian organizations that "are likely to be culturally affiliated" with any human remains and cultural items that may be affected by the issuance of a permit.³³⁰ Notice must also be given to "any present day Indian tribe which aboriginally occupied the area of planned activity and any other Indian tribes or Native Hawaiian organizations that the federal agency official reasonably believes are likely to have a cultural relationship to the human remains [or cultural items] that are expected to be found."³³¹

Consultation must result in a "written plan of action" for the treatment of any human remains or cultural items found as a result of permitted activity.³³² More proactively, the final rules encourage federal agencies to enter into "comprehensive agreements" with tribes or Native Hawaiian organizations to address the full range of issues relating to intentional excavation and inadvertent discovery situations.³³³

2. Discovery Situations

NAGPRA requires that if Native American human remains or other cultural items (e.g., funerary objects, sacred objects, or objects of cultural patrimony) are inadvertently discovered on tribal lands or federal lands, the appropriate tribe or Native Hawaiian organization must be notified.³³⁴ If the discovery was made in connection with an activity such as

327. *Id.* § 3002(a)(2)(C).

328. *Id.* § 3002(a)(2)(C)(2).

329. 43 C.F.R. § 10.5(b)(1).

330. *Id.* § 10.3(c).

331. *Id.* One court has ruled that the definition of Indian tribe in NAGPRA, 25 U.S.C. § 3001(7), is not limited to federally recognized tribes. *Abenaki Nation of Mississquoi v. Hughes*, 805 F. Supp. 234, 251-52 (D. Vt. 1992). This case was decided prior to the promulgation of final rules to implement NAGPRA. In the preamble to the final rules, the Department of the Interior has taken the position that the term "Indian tribe" includes only federally recognized tribes, but that recognition may be through a federal agency other than the Bureau of Indian Affairs. 60 Fed. Reg. 62,136 (1995).

332. *Id.* § 10.5(e).

333. *Id.* § 10.5(f).

334. 25 U.S.C. § 3002(d)(1).

construction, mining, logging, or agriculture, the activity must cease while the appropriate tribe or Native Hawaiian organization is notified.³³⁵ The activity may resume thirty days after certification that the required notice has been received, provided that resumption of the activity does not require excavation or removal of the human remains or cultural items.³³⁶ If the human remains or other items must be excavated or removed, then the permit procedures for intentional excavations apply.³³⁷

The final rules encourage federal agencies to enter into comprehensive agreements that cover inadvertent discoveries on federal lands.³³⁸ Although the final rules do not expressly suggest such agreements for tribal lands, such an agreement might prove useful in the context of development on private lands within reservation boundaries. Such an agreement could be appended to a BIA-issued ARPA permit for such development. This approach could serve the interests of developers and tribes alike by establishing an agreed upon procedure for dealing with human remains and cultural items without having to stop work and issue a formal notice every time such a discovery occurs. Having such a procedure in place may reduce the frequency with which such discoveries simply go unreported.

3. Enforcement

Violations of the permit requirement established by NAGPRA can be pursued by federal officials as violations of ARPA. In addition, the statute provides that federal district courts "shall have jurisdiction over any action brought by any person alleging a violation of [ARPA] and shall have the authority to issue such orders as may be necessary to enforce the provisions of [ARPA]."³³⁹ A district court has ruled that this statutory language does not waive federal sovereign immunity.³⁴⁰ Whether or not such a ruling is correct, in the absence of federal enforcement, tribes may pursue civil actions against private persons in federal court. For matters arising within reservation boundaries, tribal law may provide for jurisdiction to address the subject matter covered by NAGPRA in tribal

335. *Id.*

336. *Id.*

337. 43 C.F.R. § 10.4(d)(v), (e)(iii).

338. *Id.* § 10.4.

339. 25 U.S.C. § 3013.

340. *Monet v. Lee*, Civ. Nos. 94-00884 HG & 95-00300 HG, WL 1995 774527, at *7 (D. Haw. Oct. 30, 1995).

court, which may be the most appropriate forum if the case at hand involves questions of tribal customary law.

V. CROSS-CULTURAL BRIDGES AND PARTNERSHIPS

Though the three statutes discussed in the three preceding parts of this Article—NHPA, ARPA, and NAGPRA—form the bulk of the federal legal framework for protecting places and things that hold religious, cultural, or historic significance to Indian and other Native peoples, other laws come into play as well. For example, important places and things on private lands outside reservation boundaries are generally beyond the reach of these laws, unless they would be affected by a federal or federally-assisted undertaking that triggers NHPA. Such places may be covered by state laws that protect archaeological resources or unmarked burials.³⁴¹ In addition, other federal laws often come into play: NEPA³⁴² establishes the procedural requirements for taking environmental impacts into consideration in federal agency decisions; CWA³⁴³ and the Endangered Species Act³⁴⁴ sometimes can be used to protect places and biological communities in the natural world that hold religious or cultural importance for tribal peoples.

For protecting places and things within reservation boundaries, tribal law complements federal law. Many tribes have enacted tribal legislation dealing with such things as historic places, archaeology, graves protection, and sacred places. Any tribe that takes over roles of the SHPO, under the 1992 NHPA Amendments, will need to enact appropriate legislation. In addition to tribal legislation, tribes also can make use of tribal customary law. After all, in tribal cultures, human behavior relating to the subjects covered by the three federal statutes typically is subject to cultural and religious norms. Tribal governmental authorities may properly regard such norms as comprising tribal customary law.

A. Building Tribal Programs

With this patchwork of laws as the legal framework, it should not be surprising that the tribes that have made the most effective use of these

341. See generally Catherine Bergin Yalung & Laurel I. Wala, *Statutory Survey: A Survey of State Repatriation and Burial Protection Statutes*, 24 ARIZ. ST. L.J. 419 (1992); Carol L. Carnett, *A Survey of State Statutes Protecting Archaeological Resources*, 14 PRESERVATION L. REP. 1117 (1995).

342. See 42 U.S.C. §§ 4321-4370d (1994).

343. See 33 U.S.C. §§ 1251-1287 (1994).

344. See 16 U.S.C. §§ 1531-1544 (1994).

laws are tribes that have built programs, within their governmental institutions, to make these laws work. Of all the tribal programs currently in existence, none yet deals with the full range of subjects covered by the three statutes discussed in this Article, although quite a few tribal programs do deal with much of the range. Some tribal programs emphasize archaeology; some emphasize certain subsets of historic preservation, such as traditional cultural properties; and some emphasize repatriation of the remains of ancestors and other cultural items. In some tribes, one governmental subdivision deals with one part of the picture and another subdivision deals with other parts.

For several years, I have searched for a term to describe the whole range of subjects covered by the statutes discussed in this Article, a term that conveys a sense of why these subjects matter to tribal peoples. Terms such as "historic preservation," "archaeology," and "cultural resources management" fall short.³⁴⁵ The three federal laws matter to tribes because they can be used to protect places and things that are important in carrying on cultural practices and values, and because they serve the goal of cultural preservation. Of course, realizing the goal of cultural preservation involves many other things besides the subjects covered by NHPA, ARPA, and NAGPRA. These statutes deal with places and things which can be considered "resources" to be used for cultural preservation. Thus, at least for the remainder of this Article, I will use "cultural resources" as a kind of generic term to describe tribal programs that deal with these subjects.

Some of the most well-established tribal cultural resources programs can be found in the Southwest. Programs of the Navajo Nation,³⁴⁶ Hopi Tribe,³⁴⁷ and Zuni Tribe³⁴⁸ are leading examples. Many other tribes have built exemplary programs,³⁴⁹ and by noting these three, I do not mean to slight any of the others. What I have tried to do in this section is to offer

345. I have used the term "cultural resources conservation," instead of "management" because "conservation" reflects that the people involved are conserving cultural resources as well as using them in their daily lives, while management connotes detachment. See Dean B. Suagee & Karen J. Funk, *Cultural Resources Conservation in Indian Country*, in *THE NATURAL RESOURCES LAW MANUAL* 458, 459 (Richard J. Fink ed., 1995).

346. See, e.g., Alan S. Downer & Alexandra Roberts, *The Navajo Experience with the Federal Historic Preservation Program*, *NAT. RESOURCES & ENV'T*, Winter 1996, at 39.

347. See, e.g., Jenkins, *supra* note 54.

348. See, e.g., Anyon, *supra* note 54; Anyon & Ferguson, *supra* note 237.

349. Staff representing tribal programs from around the country served as instructors in workshops at the 5th annual conference of Keepers of the Treasures, Cultural Council of American Indians, Alaska Natives and Native Hawaiians, held in Scottsdale, Arizona, March 11-14, 1996. Dedicated people in all of these programs are doing important work in their own communities and, by sharing their experiences, are enriching the rest of us as well.

a few observations, not to present a detailed analysis. The Navajo, Hopi, and Zuni programs work well to illustrate these observations because, over the years in which they have been involved in carrying out federal laws and tribal laws, the people in these programs have published papers and articles about their experiences, and readers who want to know more detailed information than I have offered can seek it in the published literature.³⁵⁰

1. Functions and Structures

Building a tribal program typically involves trying to accomplish several related but different kinds of functions with a limited staff. Whenever a tribal government considers taking on some new kind of activity, whether for the tribe's own reasons or because federal or state laws create new opportunities, an analysis of the functions involved in the new activity can prove useful in determining whether the existing governmental structures are adequate for the task at hand, or whether new agencies or institutions should be fashioned. An analysis of functions also helps with designing new institutions and specifying their relationships with existing institutions.³⁵¹

In several of the leading tribal programs, some of the functions have been assigned to different institutions of tribal government. For example, in both the Navajo and Zuni programs, archaeological work is conducted by a different tribal agency from the one that reviews impacts on historic properties.³⁵² This separation of functions serves to ensure that the independence of the historic preservation review function is not compromised. In the Zuni program, the agency that does archaeology is organized as a small, tribally-owned business which does contract work outside reservation boundaries, including work for federal agencies.³⁵³

2. Museums

Many tribes have built museums, and in quite a few cases, the tribal museum functions as an integral component of a multi-faceted heritage

350. See, e.g., Downer & Roberts, *supra* note 346; Anyon & Ferguson, *supra* note 237; Anyon, *supra* note 54; Jenkins, *supra* note 54.

351. For an analysis of the functions to be considered in designing a tribal repatriation program, see Dean B. Suagee, *Building a Tribal Repatriation Program: Options for Exercising Sovereignty*, in *MENDING THE CIRCLE*, *supra* note 291, at 31, 37.

352. See Downer & Roberts, *supra* note 347, at 41; Anyon & Ferguson, *supra* note 237, at 918.

353. Anyon & Ferguson, *supra* note 237, at 918.

preservation program. Museums serve as a place to display artifacts and other materials that have been excavated from sites within the reservation or elsewhere. They also serve as institutions to inform the general public and the tribal membership about the tribe's history and cultural heritage, and as places of employment for tribal members with specialized education and/or traditional knowledge. The staff of a museum may be assigned lead responsibility for seeking the repatriation of the remains of ancestors and cultural items from federal agencies and other museums. This function may include a role in reburial of human remains and funerary objects as well as the possible display of items of cultural patrimony that have been reclaimed (or replicas of such items). In many tribes the museum is an entity unto itself; but whether or not it is legally separate, the people who work in the museum should have working relationships with people in the other tribal government agencies that do cultural heritage work.

3. Education

In whatever manner a tribal program, or constellation of programs, is structured, each component should be charged with education as part of its mission, including both education within the tribal community and education directed toward the larger society. Many tribal programs have found that Indian youth find their work very interesting, in part because cultural resources work helps tribal people to identify with their ancestors. In turn, this sense of identity contributes to the development of group self-esteem, a sense that there is value in being part of a present-day generation of a people with an admirable past. Tribal programs also give young Indians the very positive message that they can earn a living doing this kind of work.

4. Native Languages

Tribal cultural resources programs deal with some subjects that cultural resources programs of the larger society might regard as outside their scope of work. One such very important subject is language preservation. Language, of course, is the principal means through which the oral traditions of a tribal culture have been passed down over the generations. The stories and songs that explain the significance of particular places, as well as names of places and words used to describe animals, plants, and spirit beings, exist first in native languages.

Some of the meanings of native words are lost when they are translated. Although these meanings must be translated, at least to some

extent, in order to bring important places and things under the protection of federal cultural resources laws, the use of native languages must be maintained and revitalized in order to realize tribal objectives for cultural preservation. Only through native languages can the full range of meanings be passed from one generation to the next. Because native language programs are typically carried out through tribally-controlled educational institutions, including tribal colleges, language programs offer a range of possibilities for interaction between cultural resources programs and educational activities.

5. Elders

Regardless of how comprehensive the scope of a tribal cultural resources program is, it must find ways to draw upon the knowledge and wisdom of tribal elders. Many tribal programs include a committee of elders who serve in an advisory capacity. The role of such a committee may go beyond providing advice to tribal officials and staff. The tribal governing body could vest such a committee with governmental authority over certain kinds of decisions, such as whether or not, and on what conditions, to grant tribal consent for the issuance of ARPA permits, and whether or not to approve MOAs to conclude the section 106 consultation process. This direct involvement in decisionmaking may place too much of a burden on elders, or it may be undesirable for other reasons.³⁵⁴ An alternative arrangement would be to vest such regulatory authority in a tribal cultural heritage commission,³⁵⁵ with the requirements that the commission consider the views of a council of elders, and that the tribal cultural resources program staff assist the council of elders in understanding the legal aspects of the matters on which they are asked to express their views.

354. For example, the Zuni religious leadership consists of more than 100 individuals. To have the staff of the Zuni Heritage and Historic Preservation Office (ZHHPO) consult with these people on a regular basis would be impractical and burdensome. So, the Zuni program features a Zuni Cultural Resources Advisory Team, composed of seven respected religious leaders, which serves as a bridge between the ZHHPO staff and the Zuni religious leadership. Anyon & Ferguson, *supra* note 237, at 922.

355. On the use of a tribal cultural heritage commission to carry out a tribal repatriation program, see Rennard Strickland & Kathy Supernaw, *Back to the Future: A Proposed Model Tribal Act to Protect Native Cultural Heritage*, 46 ARK. L. REV. 161, 163 (1993); Suagee, *supra* note, at 38.

6. Cross-Cultural Bridges

How best to fashion a structure that serves the function of bringing the wisdom of tribal elders into decisionmaking will differ from tribe to tribe. One factor that will be common to most tribes is the importance of tribal members who have acquired the education and training to do cultural resources work. With their abilities to converse in two very different worlds, such people act as living bridges between the ancient tribal cultures and the larger society of present day America. In their interactions with tribal elders, tribal cultural resources professionals provide information (e.g., explanations of how cultural resources laws work) as well as receive information (e.g., the significance of particular places in oral tradition). Because their foundations are set within the realm of tribal experience and values, tribal cultural resources professionals are likely to be better able than non-Indian professionals to bring out the wisdom of tribal elders and to present this wisdom in ways that have beneficial outcomes. They also may be more adept in helping tribal elders to speak for themselves in presenting their concerns to the outside world.

To build bridges between cultures also requires people whose cultural foundations are grounded in the larger American society. To sustain such bridges, we need foundations in both worlds, and we should not be expected to do this work alone. There is plenty of room for help from culturally sensitive non-Indians. Tribal programs should make good use of tribal members who themselves can serve as bridges between tribal cultures and the larger society, but the number of such individuals is just not enough for the many tasks at hand. Moreover, their skills and knowledge may be better used concentrating on their own tribal communities. Although many people in the larger society may not realize it, cross-cultural bridges are needed not just between tribal cultures and the larger society, but within tribal cultures as well.

B. Ongoing and Reciprocal Consultation

The patchwork of federal cultural resources laws discussed in this Article provide tribes with rights to receive notice and to be consulted when proposed federal actions may affect places outside of tribal jurisdiction which are religiously or culturally significant. Making notice and consultation meaningful is challenging. Sometimes consultation works to protect tribal interests, but often it does not. Tribal cultural resources staff often express the view that the existing legal framework is not

enough,³⁵⁶ especially if federal agencies take the approach of doing only what is required and only when it is required.³⁵⁷

For consultation to work, it must occur early and often. It should be ongoing and institutionalized, preferably with regularly scheduled meetings among federal agencies and tribal representatives to discuss a range of planned activities and not just specific proposals. It should be part of the federal planning processes and should not just be triggered by the need for NEPA and/or NHPA compliance for specific proposals. Federal agency representatives should not be limited to archaeologists and cultural resources personnel, but also should include some involvement by line officials.

There are practical limitations, to be sure, on the capacities of individual tribes to engage in ongoing consultation. It takes people and money to do this kind of work. One strategy for meeting the human and financial needs is to build tribal programs within the framework of NHPA and take on SHPO duties.³⁵⁸

In my experience, federal agency cultural resources management staff also see a need for ongoing, institutionalized consultation relationships with the tribes that have historic and aboriginal ties to federal public lands under their jurisdiction. From their perspectives, this need is driven by factors other than concern about protecting the integrity of sacred places.

356. The observations in this section are based, in part, on participation in a February 1995 workshop on traditional cultural properties, sponsored by the Arizona SHPO, the Inter-Tribal Council of Arizona, and on numerous conversations over the years with colleagues who work in tribal cultural resources programs. The February 1995 workshop on TCPs was followed by another workshop on October 5, 1995. On May 31, 1996, the Deputy State Historic Preservation Officer for Arizona transmitted to the workshop participants a set of materials generated by the various work groups, which included a document captioned "Suggested Consultation Guidelines for Agencies and Indian Tribes in Arizona." Letter and enclosed Guidelines from Carol Griffin, Deputy State Historic Preservation Officer, Arizona State Parks, to TCP Workshop Participants (May 31, 1996) (on file with author) [hereinafter Arizona TCP Guidelines]. These guidelines set out suggested procedures for consultation regarding the development and approval of land use plans, decisions regarding specific land use actions, and annual meetings between agency and tribal representatives. *Id.*

357. Other lines of criticism regarding consultation could be articulated. In my experience, tribes without cultural resources staff and concerned Indians who become involved in the consideration of specific proposals in a capacity other than as official representatives of their tribes, often express frustration about their dealings with federal agencies, which is sometimes the result of agencies trying to avoid doing what is required or doing it long after it should have been done. My focus, however, is on how to make the process work better when a tribe knows its rights and a federal agency makes a good faith effort to comply with the law.

358. For such a strategy to be viable for more than a handful of tribes, the level of appropriations for tribal programs would need to be increased substantially. For a discussion of statutory authority for financial assistance to tribes, see *supra* notes 169-71 and accompanying text. As reported in Downer & Roberts, *supra* note 347, at 40, in building its program, the Navajo Nation has used a different approach: self-determination contracting under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450-450n (1994).

One such factor is the need for finality on specific projects. At some point, decisions must be made, and part of a bureaucrat's job is wrapping things up so that line officials can make decisions. Another factor is the need to comply with the law. In spite of the difficulties, some officials and staff try to comply with the law just because it is the law; others comply because lack of compliance can mean trouble if challenged.

Although their needs are driven by such concerns, we still may be able to find some common ground. Beyond the practical limits of people and money, making ongoing consultation work requires building relationships, which in turn, requires an attitude of reciprocity. I think that we can meet some of our own needs by helping federal cultural resources meet some of their needs.³⁵⁹ As we come to understand their jobs and find ways to help them do their jobs, we will increase the likelihood of being drawn into the review of potentially damaging projects early enough to have a real influence on project planning. We also may find that they are receptive to our suggestions for changes in project plans, not just because our suggestions make sense, but also because we have helped them out in the past and they anticipate needing our help in the future.

Reciprocity, of course, only works if it works both ways. Tribes must be able to see results from participating in consultation. They must be able to see that federal agency decisions reflect their concerns. This tends to work better in the context of TCPs that are limited in geographic extent and that can be avoided by changing routes or choosing alternative sites.³⁶⁰ In areas where an entire landscape is sacred, avoiding impacts may not be possible unless the whole proposed action is abandoned. If a federal agency decides to proceed with a project that would severely damage a tribal sacred place, and if the tribe and its supporters are unable to reverse that decision through litigation or political action, relations between the agency and the tribe may suffer for generations.

No matter how well consultation works as a process, conflicts will arise. Resolving these conflicts should be accomplished, if possible, without destroying the ongoing relationship between the consulting parties. When both (or all) sides value the continuation of an ongoing relationship, the various forms of alternative dispute resolution (ADR), tend to work

359. Some of the tribes in the Southwest have made some real progress in this direction. The Arizona State Historic Preservation Office has played a leading role in trying to fashion a model for ongoing consultation relationships. See Arizona TCP Guidelines, *supra* note 356, at 1-3.

360. As one would expect, the experience of Arizona tribes suggests that those tribes with pro-active programs to protect off-reservation TCPs have a better success rate than those tribes that do not have such programs. The case of Zuni salt lake, reported in Anyon, *supra* note 54, at 46, provides one example of accommodation resulting from consultation.

better than litigation. ADR includes such processes as mediation, negotiation, and arbitration. In order to preserve their ongoing consultative relationship, a tribe and a federal agency might agree to use an ADR process rather than (or at least as a prerequisite to) litigation.³⁶¹ Such an agreement could be incorporated into an MOA or a programmatic agreement under the Advisory Council's regulations. When a dispute involves a question of tribal customary law, the ADR process could provide for such a question to be certified to tribal court or to a special master appointed by the tribal judiciary.

C. Partnerships and Alliances

Protecting traditional cultural properties outside of reservation boundaries presents a range of challenges which tribes cannot meet alone—nor should they be expected to. After all, these places are beyond the limits of tribal territorial jurisdiction. In any given conflict over land use, a variety of other entities can play important roles, and they have done so in many cases. Such entities include federal and state agencies, other tribal governments, intergovernmental federations, and private organizations such as environmental groups and historic preservation societies. For the most part such cooperative efforts have focused on a particular place and a particular proposed development project. Such focused and relatively short-term efforts might be called "partnerships." It is conceivable that some of these partnerships could grow into more long-term and more broadly focused relationships, which might be called "alliances." Whether short-term or long-term, such cooperative efforts are essential for protecting TCPs outside of Indian country.

In many cases, entities other than the concerned tribe(s) will be involved simply because of their institutional roles, not because of any pre-ordained affinity with tribal cultural values. The SHPO is such an entity. When conflicts arise concerning federal lands or involving federal actions, the SHPO always has a role to play, if the TCP at issue is arguably eligible for the National Register.³⁶² In some notable cases, including, *Lyng v. Northwest Indian Cemetery Protective Ass'n*, commonly known as the "G-O Road" case, the SHPO has sided with the Indians,³⁶³

361. Since the Department of Justice (DOJ) represents most federal agencies in litigation, when considering ADR to resolve disputes with federal agencies, tribal legal counsel should be aware of the DOJ policy on ADR. See, e.g., Lois J. Schiffer & Robin L. Juni, *Alternative Dispute Resolution in the Department of Justice*, NAT. RESOURCES & ENV'T, Summer 1996, at 11.

362. 36 C.F.R. § 800.4(b) (1995).

363. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 443 (1988) (the State of California was a party on the Indian side).

while in others, the SHPO has sided against the Indians.³⁶⁴ The relationships between tribes and SHPOs varies from state to state, but there are notable examples of SHPOs who have cultivated ongoing relationships with tribes, including some SHPOs that have provided help to tribes in developing their plans to take over SHPO functions under the 1992 NHPA Amendments.³⁶⁵ While I do not want to sound overly optimistic, there are reasons to believe that cooperation between state and tribal agencies in the field of historic preservation will become more of a standard practice and less of an exception to the rule.

Other entities with institutional roles include the Advisory Council, NPS (as discussed earlier in this Article), and other federal agencies such as the EPA and the BIA. Both the Advisory Council and NPS routinely review and comment on EISs that have been prepared for proposed federal actions, some of which may cause impacts in Indian communities. The EPA, pursuant to section 309 of CAA,³⁶⁶ and the BIA, pursuant to its special expertise in Indian affairs and its jurisdiction over Indian lands, also review and comment on these EISs.³⁶⁷ Whether either the EPA or the BIA actually raise Indian concerns in its review of any given proposed federal action depends, in large part, on how effectively a tribe makes its concerns known.

364. *E.g.*, *Wilson v. Block*, 708 F.2d 735, 755-56 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983) (noting that the SHPO agreed with the Forest Service's position that the San Francisco Peaks were not eligible for the National Register, contrary to the position taken by the Hopi Tribe and Navajo Medicine Men's Association).

365. To give just two examples, the Arizona SHPO has carried on cooperative efforts with Arizona tribes for many years, and the Minnesota SHPO actively helped Minnesota tribes apply to NPS to take over SHPO functions. By noting these two states, I do not mean to slight other SHPOs that have worked to build similar cooperative efforts.

366. 42 U.S.C. § 7609(a). In addition to proposed actions for which an EIS has been prepared, the EPA's duty under this section to review and comment on environmental impacts also applies to legislative proposals, newly authorized construction projects, and proposed regulations published by any federal agency. *Id.* In one recent example of the exercise of this duty, the EPA submitted written comments on the final EIS prepared under the authority of the Bureau of Land Management (BLM) for the proposed Zortman and Lundusky mines in northeastern Montana. Letter and enclosure from Carol L. Campbell, Director, Ecosystems Protection Program, EPA Region VIII, to David Mari, District Manager, BLM Lewiston District Office (May 9, 1996) (on file with author). In its comments, EPA states that "the proposed action potentially poses a significantly high and adverse impact to the cultural resources and religious practices of the tribal community, with little accrual of economic benefits. This raises questions of inequity and inconsistency with the President's Executive Order on environmental justice." *Id.* enclosure at 5 (referencing Executive Order No. 12,898, 59 Fed. Reg. 7,629 (1994)).

367. The President's Council on Environmental Quality (CEQ) regards the BIA as having jurisdiction by law and/or special expertise over a wide range of impacts on Indian lands. *See* 49 Fed. Reg. 49,750 (1984); *see also* Dean B. Suagee, *The Application of the National Environmental Policy Act to "Development" in Indian Country*, 16 AM. INDIAN L. REV. 377, 414 (1991).

In addition to governmental agencies, tribes and Indian organizations can forge partnerships and alliances with a range of private organizations. The National Trust for Historic Preservation (the Trust),³⁶⁸ one of the most prominent private organizations in the preservation movement, has staked out some territory in the forefront of such cooperative efforts. The Trust has included educational programs on Indian issues in each of its annual conferences since 1991, has taken an active role in protecting a number of traditional cultural properties,³⁶⁹ and has formed an alliance with the fledgling, national, intertribal, cultural preservation organization, Keepers of the Treasures.³⁷⁰ Moreover, the Trust is connected to state and local historic preservation organizations all across the country, and the potential for cooperation between such organizations and tribes is largely untapped.³⁷¹ What we have seen so far of the Trust's involvement in

368. The National Trust for Historic Preservation was created by an Act of Congress as a nonprofit, private corporation. 16 U.S.C. § 468. As a private entity, the Trust frequently engages federal and state agencies in litigation over historic preservation issues. See, e.g., *Indiana Coal Council, Inc. v. Lujan*, 774 F. Supp. 1385 (D.C.C. 1991), *vacated in part & appeal dismissed as moot*, Nos. 91-5397, 91-5406 (D.C. Cir. Apr. 26, 1993) (enforcing Office of Surface Mining compliance with NHPA section 106 requirements for archaeological surveys prior to permitting); *Landmarks Preservation Council v. City of Chicago*, 531 N.E.2d 9 (Ill. 1988); *National Trust for Historic Preservation v. United States Army Corps of Eng'rs*, 552 F. Supp. 784 (S.D. Ohio 1982) (enforcing compliance with NHPA section 106).

369. See, e.g., *Native Americans for Enola v. United States Forest Serv.*, 832 F. Supp. 297 (D. Or. 1993), *vacated & appeal dismissed as moot*, No. 93-36130 (9th Cir. July 21, 1995) (Trust participated as amicus in litigation to protect sacred site from logging); *National Trust for Historic Preservation v. City of Albuquerque*, 874 P.2d 798 (N.M. Ct. App. 1994) (litigation to protect Petroglyph National Monument from road construction along the boundary). The Trust also has played a key role in the ongoing efforts of several tribes to protect a sacred area know as Sweet Grass Hills in Montana from a proposed gold mine. See Karen J. Atkinson, *Case Studies on Historic Preservation Issues*, prepared for the American Bar Association 8th Annual Conference on Environment and Development in Indian Country, Albuquerque, N.M., Nov. 7-8, 1996 (on file with author). One of the steps taken by the Trust, in June 1993, was to include Sweet Grass Hill on its annual list of "America's Eleven Most Endangered Historic Places." *Id.* at 6.

370. The national office of Keepers of the Treasures, Cultural Council of American Indians, Alaska Natives and Native Hawaiians, is located in the National Trust, at 1785 Massachusetts Ave., N.W., Washington, D.C. 20036. The Trust also provides Keepers with a range of assistance.

371. See Special Issue, *Focus on Historic Preservation Partnerships*, HIST. PRESERVATION F., July-Aug. 1994, at 1. Of course, state and local organizations may focus their efforts on preserving and celebrating the history of the settling of the frontier, from the perspectives of the settlers and neglecting the perspectives of Indians. An example of a local historic preservation program that highlights both the Indian and the non-Indian parts of a town's history can be found in Toppenish, Washington, on the Yakima Indian Reservation, where many of the buildings are adorned with murals depicting historical events. I found another example of how a historical society can help to show both sides of an historical event in the home of my maternal grandfather in Pryor, Oklahoma. There, I read a story, preserved by the local historical society, about the beginning of the Trail of Tears, an account of a white woman riding on horseback into camp on one of the first nights of the journey to voluntarily go with the Cherokees because she did not want to stay in Georgia without the Cherokee man she loved. Stories like this help us to appreciate how interwoven our histories are.

preservation issues of concern to Indian and other Native peoples must be only the beginning.

Environmental groups have supported tribes in a number of conflicts involving traditional cultural properties. Partnerships between tribes and environmental groups may be more of a natural fit than partnerships with historic preservation groups, because the preservation movement has emphasized the built environment rather than historically significant places in the natural world. Partnerships with environmental groups have tended to be somewhat shaky, in part because environmental groups tend to seek out such partnerships only when the involvement of a tribe or Indian organization clearly serves their environmental agenda.³⁷² At least this is how Indians tend to see the outreach efforts of environmental groups. I, for one, would like to see some more firmly grounded long-term relationships between tribes and environmental groups. Such relationships would have to be based on a measure of reciprocity. Each party recognizes that the other has a constellation of interests and that sometimes building a relationship requires helping the other address an interest which is not at the top of one's own list of priorities.

An example of a partnership between an environmental group and a tribal community that appears promising is a project taken on by the Nature Conservancy and the Alaska Native village of St. Paul in the Pribilof Islands.³⁷³ This partnership features a natural history education program for Aleut children which combines the traditional knowledge of Aleut elders with western science.³⁷⁴ The partnership also features village-based ecotourism.³⁷⁵ In this case, the Nature Conservancy realized that its usual way of protecting key parts of the natural world (i.e., buying land and managing it for conservation) just would not work in Alaska, but that helping Alaska Native communities to maintain and revitalize their traditions of stewardship just might.³⁷⁶ This example seems to be firmly grounded in respect for native cultural values, which gives me reason to hope that it may be the beginning of an enduring and mutually beneficial relationship.

372. See, e.g., Williams, *supra* note 63, at 1150-51 (noting that the Apache religious concerns for Mount Graham started to receive attention and support from environmentalists only after the environmentalists' initial legal strategy failed); see also Dean B. Suagee, *Turtles War Party: An Indian Allegory on Environmental Justice*, 9 J. ENVTL. L. & LITIG. 461, 462-64 (1994).

373. See Nancy Shute, *Northern Insights: A Conversation with Larry Merculieff*, NATURE CONSERVANCY, Nov.-Dec. 1995, at 10, 14.

374. *Id.*

375. *Id.*

376. *Id.* at 15.

D. Persuasion Through Cross-Cultural Education

Conflicts over Indian sacred places on federal public lands raise some fundamental questions about the values of the American people. For example, given that freedom of religion is one of the founding principles of the United States, enshrined in the First Amendment to the Constitution, how can it be that the First Amendment gives Indians no protection at all against the prerogatives of the federal government agencies acting as landowners? If tolerance for the religious beliefs of others is implicit in the expectation of freedom to practice one's own religion, why are practitioners of traditional tribal religions often treated with condescension, as though tribal religions are just primitive superstitions that are not worthy of the kind of respect routinely shown for other religions?³⁷⁷ In cases in which Indian people somehow manage to save a sacred place from destruction by so-called development, why is it that non-Indian people who profess admiration for, and affinity with, tribal religious beliefs (some of whom accept the label "New Age") sometimes overrun the place, and in doing so, interfere with the ability of Indian people to carry out religious practices in accordance with the instructions that have been handed down to them?

These fundamental questions lead me into a more pragmatic line of inquiry. What could we do to bring about an America in which sacred places and the people who carry on tribal religions are treated with respect? Over the last several years, I have invested quite a lot of thought looking for answers to this question, searching for pragmatic solutions. My thinking has been shaped by conversations with quite a number of people, including Indian people and their advocates who are involved in trying to protect particular sacred places, federal and state agency staff people who are charged with carrying out federal cultural resources laws, and people in the broader historic preservation and environmental communities.

What I am coming around to is the notion that we should broaden our focus. (At this point, by "we" I mostly mean Indian and other Native people, although those who consider themselves our allies are welcome to consider themselves included within this term.) Knowing the federal laws discussed in this Article and having some kind of tribal program in place to make use of these laws can get a tribe a place at the table where decisions are made. The law of the larger American society, however, does not allow us to go into court and get a federal judge to tell a federal

377. See Williams, *supra* note 63, at 1163-64 (noting that University of Arizona scientists showed a tendency to snicker when discussing Apache religious beliefs about Mount Graham).

agency that it cannot run bulldozers through a sacred place (if the agency has followed the required procedures before deciding to go ahead). Perhaps we ought to focus our efforts on persuasion. How can we persuade "them" that they really ought to leave some places alone?

Maybe we would achieve better outcomes from our points of view if we learned to focus more on their interests. If we were to focus on "their" interests, maybe we could help bring increasing numbers of them around to seeing that, in many cases, their interests and ours can be mutually reinforcing. In other words, maybe we should approach the people who have the authority to make decisions that affect tribal sacred places by asking ourselves what we have to offer that will serve their interests. Rather than focusing on just the tribal interests at stake, tribal representatives could try to frame the issues in ways that show how broader public interests converge with tribal interests.

What I would like to see happen is for tribes, federal agencies, and SHPOs to put some serious efforts into documenting the histories of particular tribes in particular units of the federal public lands. Given the mandates of NHPA, this necessarily would include identifying places of historic significance that are eligible for the National Register. However, these efforts should go well beyond this. In addition, there should be programs and exhibits to inform the broader public of the ways in which tribal cultures lived in what are now the public lands. Moreover, to the extent that tribal cultures still make use of particular areas of public lands, this should be explained as well.³⁷⁸

What I envision are educational partnerships among federal agencies, tribes, SHPOs, and others to present information about tribal cultures to the public at large, or more specifically, the people who visit or otherwise make use of public lands. Such partnerships would pursue an integration of natural history, ethnohistory, ethnography, and other academic disciplines with tribal oral tradition and cultural knowledge about the natural world. By using such a combination of approaches to explain the ways in which particular tribal cultures lived, and continue to live, in particular areas, an educational partnership could present this information with vibrancy and relevance.

In presenting this information to the larger American society, we should, of course, make use of modern communications technology, but

378. See Ann M. Hooker, *American Indian Sacred Sites on Federal Public Lands: Resolving Conflicts between Religious Use and Multiple Use at El Malpais National Monument*, 19 AM. INDIAN L. REV. 133, 147-52 (1994) (describing a management plan that accommodates Indian religious practices and that includes interpretive programs to inform visitors about how tribal cultures fit into the landscape).

we also must feature some good old-fashioned storytelling. Stories hold one's attention and capture one's imagination, and we have some of the best stories anywhere. Some of our stories hold and convey some of our most basic values. Some of these values, conveyed in the setting of particular parts of North America, can add richness to anyone's concept of environmental stewardship. I think we need to share these stories and these values with people in the larger society. There is a resonance in our stories that I believe will come back to us in a good way. Our stories may be some of the best means we have to animate federal agency land management decisionmaking processes so that federal decisions reflect some of our values. As we help the larger society to understand the important ways in which our cultures fit into the North American environment, I hope that an increasing number of them will come to believe that our sacred places really ought to be off limits for development and that our religions are entitled to be treated with respect.

CONCLUSION

America needs its tribal peoples, not just as tragic chapters in American history, but as living communities, vibrant strands in the fabric of the living America—now and in the future. This Article has focused on one aspect of America's need for tribal peoples—the need for the care of federal public lands to be informed by tribal cultural values relating to the land. These values may be brought to bear most effectively through tribal voices telling tribal stories. A second, though no less important theme of this Article has been that tribal governments should perform the lead role in carrying out federal cultural resources management laws within reservation boundaries and other lands under tribal jurisdiction.

In using the national historic preservation program to ensure that federal agency decisions are informed by tribal cultural values, we also will be helping the larger American society to learn about the histories of America's relationships with tribal peoples, and how these relationships have been played out in particular parts of the American landscape. Perhaps a heightened awareness of these histories will contribute to a broader and deeper commitment on the part of the larger American society to support the right of each Indian tribe to continue to exist as a distinct and self-governing community. If so, such a commitment will work to the benefit of all of us. America can learn a great deal from the stories of its Indian peoples, especially if Indian people are still around to do the storytelling.