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# Effects of Historic and Cultural Resources and Indian Religious Freedom on Public Lands Development: A Practical Primer

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## ABSTRACT

*Management of cultural resources and historic properties located on public and Indian land is of increasing importance to federal tribal land managers and persons interested in the use or development of those lands. This paper examines the host of cultural resources management statutes affecting federal and Indian lands, including the National Historic Preservation Act and the Native American Graves Protection and Repatriation Act. The authors present a practice-oriented discussion to facilitate compliance with applicable cultural and historic resources management statutes and regulatory schemes.*

## I. INTRODUCTION, HISTORICAL PERSPECTIVE, AND SCOPE

Federal cultural and historic resources management and preservation policies play an important role in the planning processes associated with public lands management and development.[1] This article will examine the role federal cultural resources management and other statutes play in the preservation and management of cultural and historic resources on the public lands.[2] While the terms "cultural resource" or "historic resource" are defined in various statutes and regulations,[3] views differ as to whether a particular site or object is, or should be, subject to

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1. *See generally* G. Glasier, *Cultural Resource Preservation: A Consideration before Mineral Development*, 28 Rocky Mtn. Min. L. Inst. 636 (1982).

2. We focus primarily on public domain and National Forest lands managed by the U.S. Forest Service, Department of Agriculture, and the U.S. Bureau of Land Management, Department of the Interior, respectively. Much of the paper, however, is applicable to other contexts and lands, including Indian lands. Project planners and government officials should review definitional terms in various statutes to understand the proper geographic applicability of a statute or statutory program.

3. *See, e.g.*, National Historic Preservation Act, 16 U.S.C. § 470w(5) (1988 & Supp. IV 1992).

the protection of a particular regulatory scheme. Justice Potter Stewart's words about obscenity may be equally applicable to the identification of cultural resources: "I could never succeed in intelligibly [defining pornography]. But I know it when I see it . . . ."[4]

The ultimate identification of a resource worthy of protection varies substantially from person to person, and from interest group to interest group. To some, the stray potsherd or obsidian chip may represent insights into a native civilization, necessitating preservation, or at least consideration under historic preservation laws, to permit study of the interrelationship between the object and other objects or sites in the vicinity.[5] To others, the suggestion that a few flakes of chert or a single arrowhead trigger cultural resource management protection is absurd.[6] Some may argue that historic mine workings are cultural resources worthy of protection,[7] while others would contend the workings are a scar that should be reclaimed. The broad variance in views presents management difficulties but counsels federal agencies and developers to consider cultural resource issues in consultation with all interested persons, including Indian tribes, and other entities involved in the planning process.

This article examines the statutes and regulations imposing cultural resources management requirements, which may, at times, overlap or conflict.[8] The statutes generally impose procedural requirements that should be undertaken early in the planning stages of a project. While federal agencies shoulder the direct cultural resources management burden, the ultimate impact of the regulatory obligations is felt by the private entities planning projects on the public lands.

The existing patchwork of cultural resources regulation stems perhaps from the inattention to the subject by Congress and the Public

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4. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).

5. *See* K. Rogers, *An Overview of the Law & Dilemmas in its Application*, 5 NRLI News No. 1, 6 (Jan. 1994).

6. Notwithstanding these potential differences, U.S. Bureau of Land Management sources estimate 3 to 5 million cultural resources properties are present on the public domain. *See* J. Muhn & H. Stuart, *Opportunity and Challenges: The Story of BLM* 203 (Sept. 1988) (*citing* John G. Douglas, BIA, Washington, D.C.)

7. The National Register of Historic Places includes old mines, and the National Park Service is developing guidelines for the evaluation of mining properties for National Register eligibility. *See* J. Townsend, *Evaluating and Documenting Traditional Cultural Properties* 19 National Park Service (1992).

8. For example, the National Historic Preservation Act [hereinafter NHPA], discussed *infra* Part II, and the Archaeological Resources Protection Act [hereinafter ARPA], *see* Part V, *infra*, "treat Indian issues in opposite ways." Holt, *Archeological Preservation on Indian Lands: Conflicts and Dilemmas in Applying the National Historic Preservation Act*, 15 Envtl L. 413, 438 (1985). Prior to 1992, NHPA statutory language virtually ignored tribes, while ARPA grants tribes a role in certain archaeological investigations.

Land Law Review Commission (PLLRC).[9] As part of its work, the PLLRC commissioned roughly 34 studies of land management and related issues, ranging from "Withdrawals and Reservations of Public Domain Lands" to "Public Lands Timber Policy" to "Forage Resources of the Public Lands."[10] No study, however, was devoted to cultural resources management matters. The PLLRC Report, *One Third of the Nation's Land*, made 137 specific recommendations for long-range goals, objectives and guidelines for the improvement of public lands management.[11] None of these recommendations, however, specifically addressed cultural resources management issues.[12]

Cultural resources management emerged as a public lands issue with passage of the Antiquities Act in 1906.[13] Since then, Congress has enacted other statutes to increase the protection afforded historic and cultural resources, culminating in the enactment of the National Historic Preservation Act (NHPA) in 1966.[14] As discussed below, regulatory schemes addressing cultural resources management on the public lands continue to evolve.

This article discusses the National Historic Preservation Act, the Native American Graves Protection and Repatriation Act, and the other key statutory and regulatory schemes affecting or implementing cultural resources management schemes on the public lands. We also address the roles of the First Amendment to the Constitution and related statutes concerning Native American religious freedom and public lands management. Finally, we address the applicability of state cultural resource protection laws to federal lands. Through this discussion we hope to provide a practical analysis of the cultural resources management obligations of developers and federal agencies.

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9. Congress established the Public Land Law Review Commission in the Act of September 19, 1964, 78 Stat. 982, *formerly codified* at 43 U.S.C. §§ 1391-1400, Pub L. No. 88-606 (1964) & Supp. IV (1969), *inter alia*, to "study existing statutes and regulations governing the retention, management, and disposition of the public lands" 78 Stat. at 983. We do not fault Congress or the PLLRC for inattention to cultural resources issues.

10. PLLRC Report, *One Third of the Nation's Land*, 318-19 (1970).

11. *See Id.* at 9-16.

12. *See Id.*

13. 16 U.S.C. §§ 431-33 (1988).

14. *See* Part II *infra*.

## II. THE NATIONAL HISTORIC PRESERVATION ACT MANDATES PROCEDURAL PROTECTION FOR HISTORIC AND CULTURAL RESOURCE PROPERTIES

### *A. Operation and Scope of the NHPA*

"The purpose of the National Historic Preservation Act (NHPA) is the preservation of historic resources."[15] Enacted in 1966, and amended significantly in 1980 to codify additional preservation policies reflected in Executive Order No. 11593,[16] the NHPA was implemented "to encourage the preservation and protection of America's historic and cultural resources."[17] The NHPA was amended again in 1992 to provide, among other things, enhanced opportunities for tribes to manage federal cultural resources programs on Indian lands. While preceded by several federal cultural and historic preservation schemes,[18] the NHPA has emerged as the cornerstone of federal historic and cultural preservation policy. "Congress, in enacting NHPA, took the key step of protecting not only 'nationally significant' properties but also properties of 'historical, architectural, or cultural significance at the community, state or regional level . . . against the force of the wrecking ball.'"[19]

To achieve the basic goal of historic and cultural resource preservation, Congress identified three principal purposes for the NHPA: (1) strengthen and broaden the process of inventorying historic and cultural sites, and establish a National Register of sites significant in state, local, regional, and national history, culture, architecture, or archaeology; (2) enhance and encourage state, local, national, and tribal interest in historic preservation; and (3) establish the Advisory Council on Historic Preservation (ACHP) to oversee matters relating to preservation of historic properties, to coordinate preservation efforts, and to promulgate regulations to outline federal, state, and now tribal obligations regarding consideration of sites that may be affected by federal, or federally-controlled, activities.[20]

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15. National Indian Youth Council v. Watt, 664 F.2d 220, 226 (10th Cir. 1981); see also Lee v. Thornburgh, 877 F.2d 1053, 1055 (D.C. Cir. 1989) (NHPA "encourages historic preservation"); Attakai v. United States, 746 F. Supp. 1395, 1405 (D. Ariz. 1990).

16. 36 Fed. Reg. 8921 (May 13, 1971) (President Richard M. Nixon).

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

18. *See, e.g.*, parts IV & V, *infra*.

19. WATCH v. Harris, 603 F.2d 310, 321 (2d Cir. 1979), *cert. denied*, 444 U.S. 995 (1979) (*quoting* H.R. Rep. No. 1916, 89th Cong., 2d Sess.(1966), *reprinted in* U.S.C.C.A.N. 3307, 3309 (1966).

20. *See* 16 U.S.C. §§ 470-470w-6 (1988 & Supp. IV 1992); H.R. Rep. No. 1916, U.S.C.C.A.N. 3307-08.

For activities on the public lands, Sections 106 and 110 are the two most significant parts of the NHPA.[21] Section 106 and its implementing regulations[22] describe the obligations imposed on federal agencies prior to taking any action that may affect cultural or historic properties. Section 110 represents the codification of portions of President Nixon's Executive Order No. 11593, and imposes the following obligations on federal agencies:

> (1) [t]he heads of all Federal agencies shall assume responsibility for the preservation of historic properties which are owned or controlled by such agency.[23]
> (2) Each agency shall undertake, consistent with the preservation of such properties and the mission of the agency, any preservation, as may be necessary to carry out this section.[24]
> (3) [Each] Federal agency shall establish a program to locate, inventory, and nominate to the Secretary [of the Interior] all properties under the agency's ownership or control . . . , that appear to qualify for inclusion on the National Register.[25]
> (4) Consistent with the agency's missions and mandates, all Federal agencies shall carry out agency programs and projects (including those under which any Federal assistance is provided or any Federal license, permit, or other approval is required) in accordance with the purposes of [the Act].[26]

Under the 1992 NHPA amendments, federal agency preservation-related activity is also to be "carried out in consultation with Indian tribes".[27]

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21. 16 U.S.C. §§ 470f and 470h-2 (1988 & Supp. IV 1992), respectively.

22. 36 C.F.R. Part 800 (1993). The ACHP promulgated these regulations pursuant to 16 U.S.C. 470s (Supp. IV 1992). On October 3, 1994, the ACHP published a Notice of Proposed Rulemaking to implement the 1992 NHPA Amendments. 59 Fed. Reg. 50396 (Oct. 3, 1994). The proposed regulations represent a comprehensive rewrite of the existing ACHP regulations found regulations will be subject to comment and revision.

23. 16 U.S.C. § 470h-2(a)(1) (Supp. IV 1992). "Historic property" is defined as "any prehistoric or historic district, site, building, structure or object included in, or eligible for inclusion on the National Register; such term includes artifacts, records, and remains which are related to such a district, site, building, structure, or object." 16 U.S.C. § 470w(5) (1988).

24. 16 U.S.C. § 470h-2(a)(1) (Supp. IV 1992).

25. *Id.* § 470h-2(a)(2) (Supp. IV 1992).

26. *Id.* § 470h-2(d). The "missions and mandates" provision is not defined in the statute or regulations, and has not been the subject of reported judicial decisions. Presumably, the Forest Service's and BLM's missions and mandates are those spelled out in the agencies' respective organic acts and other legislation. *See, e.g.*, Multiple Use—Sustained Yield Act, 16 U.S.C. §§ 528-31 (1988); National Forest Management Act, 16 U.S.C. §§ 1600-14 (1988); Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-84 (1988).

27. *See* 16 U.S.C. § 470a(d)(2) (Supp. IV 1992). SHPO responsibilities are discussed *infra* at Part II.E.

The 1992 NHPA amendments, among other things, permit tribes to assume responsibilities formerly reserved to State Historic Preservation Officers or SHPOs concerning tribal lands.[28] Tribal assumption of such authority, as with federal environmental regulatory schemes,[29] will depend on approval by the Secretary of the Interior of a tribal plan which demonstrates the tribe is fully capable of performing the functions and responsibilities of a historic preservation program.[30] However, with respect to non-Indian fee lands, the SHPO may exercise historic preservation responsibilities concurrently with the tribal preservation official, at the request of the property owner.[31] While these provisions address tribal lands activities, the 1992 NHPA Amendments generally promote greater tribal involvement in cultural resources management.

Unfortunately, the NHPA provides little guidance as to how its historic preservation policies are to be balanced with the pre-existing mission of a federal agency. Moreover, there is a paucity of NHPA litigation addressing public land management questions.[32] Given the lack of precise standards, federal agencies have some latitude in implementation of the NHPA.[33]

### *B. NHPA Theoretically Imposes Only Procedural Obligations*

Courts and commentators uniformly view the NHPA as a procedural statute. For example, in *Morris County Trust for Historic Preservation v. Pierce*,[34] the U.S. Court of Appeals for the Third Circuit stated: "NHPA, like NEPA, is primarily a procedural statute, designed to

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28. "Tribal lands" are defined to include "all lands within the exterior boundaries of any Indian reservation" and "all dependent Indian communities." 16 U.S.C. § 470w (14)(A),(B).

29. *E.g.*, Clean Water Act, 33 U.S.C. § 1377(e)(3)(1988); Safe Drinking Water Act, 42 U.S.C. § 300j-11 (1988).

30. 16 U.S.C. § 470a(d)(2) (Supp. IV 1992). Under this provision, tribes may assume some or all of the functions served by the applicable SHPO. The division of responsibility between tribe and SHPO, if the tribe assumes less than all of the SHPO's duties, must be spelled out carefully.

31. 16 U.S.C. § 470a(d)(2)(D)(iii) (Supp. IV 1992). As with most other statutes of this nature, Congress did not address split estate issues—where surface and minerals are owned by different entities.

32. G.C. Coggins, *Public Natural Resources Law* § 15.04[5][c] (1993).

33. *See* Indiana Coal Council, Inc. v. Lujan, 774 F. Supp. 1385, 1393 (D.D.C. 1991) (procedures are mandatory; decisions made are discretionary); see also McMillan Park Comm. v. Nat'l Capital Planning Comm'n, 759 F. Supp. 908, 914 (D.D.C. 1991), *rev'd on other grounds*, 968 F.2d 1283 (D.C. Cir. 1992). However, discretion is not unfettered. "Discretion to decide does not include the right to act perfunctorily or arbitrarily . . . . The agency must not only observe the prescribed procedural requirements and actually take account of the factors specified, but it must also make a sufficiently detailed disclosure." Ely v. Velde, 451 F.2d 1130, 1138 (4th Cir. 1971), quoted in McMillan Park Comm., 759 F. Supp. at 914.

34. 714 F.2d 271 (3d Cir. 1983).

ensure that Federal agencies take into account the effect of Federal or Federally-assisted programs on historic places as part of the planning process for those properties."[35] Similarly, in *Benton Franklin Riverfront Trwy. & Bridge Comm. v. Lewis*,[36] the district court upheld the Secretary of Transportation's decision to tear down a bridge previously declared eligible for National Register status. The court concluded the Secretary had decided properly that no prudent alternatives to demolition existed.[37] Thus, the NHPA is not an action-forcing statute, but rather is a statutory mandate imposing only procedural requirements on federal agencies to promote the preservation of "the historical and cultural foundations of the Nation."[38,39]

Professor George Coggins acknowledges the procedural nature of NHPA requirements.[40] "Federal agencies cannot approve projects that would affect [cultural] properties without complying with certain procedures . . . . The Act does not contain an enforceable substantive mandate, however. The federal agency need only 'take into account the effect of [an action on a] . . . site.'[41] Accordingly, the uniform view is that the NHPA imposes only procedural requirements on federal agencies.[42]

While the "letter of the law" demonstrates that NHPA's requirements are only procedural, those requirements are "mandatory."[43]

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35. *Id.* at 278-79.

36. 529 F. Supp. 101 (E.D. Wash. 1981), *aff'd in part, rev'd in part on other grounds*, 701 F.2d 784 (9th Cir. 1983).

37. 529 F. Supp. at 103, *aff'd in part, rev'd in part on other grounds*, 701 F.2d 784 (9th Cir. 1983). The Ninth Circuit's reversal was on grounds that do not disturb this part of the district court's ruling.

38. 16 U.S.C. 470(b)(2) (1988).

39. See United States v. 162.20 Acres of Land, 639 F.2d 299, 302, 304 (5th Cir.), *cert. denied*, 454 U.S. 828 (1981) (NHPA does not forbid destruction of historic sites; while assertion of NHPA non-compliance as a defense in a condemnation action may seem to "promote the purposes of the NHPA by creating a means of enforcement to give it 'teeth,' it is manifestly apparent that only Congress can make such a judgment"); Hough v. Marsh, 557 F. Supp. 74, 87 (D. Mass. 1982); Paulina Lake Historic Cabin Owners Ass'n v. U.S.D.A. Forest Service, 577 F. Supp. 1188, 1192 and n.1 (D. Ore. 1983); Evans v. Train, 460 F. Supp. 237, 245-46 (S.D. Ohio 1978) (federal officials were required to do no more than consult with historic preservation officials); Pennsylvania v. Morton, 381 F. Supp. 293, 299 (D.D.C. 1974) (if the Secretary of the Interior deviated from the recommendation of the Advisory Council on Historic Preservation, "the Secretary was authorized to do so in his discretion by the express terms of the statute").

40. *See* G.C. Coggins, *Public Natural Resources Law*, 15.04[4] (1992).

41. *Id.*, *citing* 16 U.S.C. 470f; *see also* Ely v. Velde, 451 F.2d 1130, 1138 (4th Cir. 1971).

42. *See also* Holt, *Archeological Preservation on Indian Lands: Conflicts and Dilemmas in applying the National Historic Preservation Act*, 15 Envtl. L. 413, 425 (Winter 1985).

43. *See* United States v. 162.20 Acres of Land, 639 F.2d at 302 ("While the act may seem to be no more than a 'command to consider,' it must be noted that the language is

Failure to follow NHPA strictures will render a project vulnerable to judicial challenges and the imposition of mandatory injunctive relief.[44] Moreover, the NHPA and implementing regulations provide agencies with ample opportunity to reach agreements with state officials and other interested parties to provide substantive protection for National Register and eligible properties.[45] Applicants for federal permits, leases, or other federal approvals should maintain good communications with involved federal officials to determine whether such substantive agreements are contemplated. Moreover, developers should consider negotiating for the protection of sites if such protection is warranted, and if the negotiations will permit the project to move forward unfettered by further NHPA procedural hurdles. Such an approach may engender support for, or at least allay the concerns of potential opposition to, the project.

### *C. The Procedural Obligations Apply to All "Undertakings" as the Term is Used in NHPA's Section 106*

Section 106 obligations apply to any "proposed Federal or federally assisted undertaking," and must be completed "prior to the approval of the expenditure of any Federal funds . . . or prior to the issuance of any license. . . ."[46] An "undertaking," which triggers the procedural steps of the NHPA, is defined under the 1992 NHPA Amendments as:

> [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.[47]

The regulations implementing Section 106, adopted prior to the 1992 Amendments, define "undertaking" as:

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mandatory . . .").

44. *See, e.g.*, Attakai v. United States, 746 F. Supp. 1395, 1405-09 (D. Ariz. 1990); Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425 (C.D. Cal. 1985); *cf.* Warm Springs Dam Task Force v. Gribble, 378 F. Supp. 240, 251 (N.D. Calif. 1974), *aff'd*, 621 F.2d 1017 (9th Cir. 1980); *see also* Part II.G., *infra*.

45. *See infra* Part II.E.

46. 16 U.S.C. § 470f (Supp. IV 1992).

47. 16 U.S.C. § 470w(7) (Supp. IV 1992).

> [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.[48]

The new statutory definition appears broader than the regulatory definition. Nonetheless, the following discussion addresses authority arising under the existing regulatory definition. The old regulatory definition likely will be refined in regulatory amendments arising from the 1992 NHPA Amendments.[49]

Thus, any ground-disturbing activity under the jurisdiction or control of any federal agency, including the U.S. Forest Service and the Bureau of Land Management, constitutes an "undertaking" triggering NHPA § 106 compliance requirements.[50] "Undertakings" may include without limitation: (a) non-federal activities carried out pursuant to a federal permit, lease or license;[51] (b) the approval of a grant or loan of federal funds;[52] (c) promulgation of regulations;[53] (d) federal approval of a state regulatory program under federal regulatory statutes such as

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48. 36 C.F.R. § 800.2(o) (1993).

49. The ACHP has not issued draft or final regulations implementing the 1992 NHPA Amendments.

50. *See, e.g.*, Wilson v. Block, 708 F.2d 735, 738-39, 753-756 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983); Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425, 1434-35 (C.D. Cal. 1985).

51. 36 C.F.R. § 800.2(o) (1993); see also Colorado River Indian Tribes, 605 F. Supp. at 1434 n.6 (placement of rip-rap in the Colorado River was an NHPA "undertaking;" activity was subject to Army Corps of Engineers dredge and fill permit requirements); Lee v. Thornburgh, 877 F.2d 1053, 1056 (D.C. Cir. 1989); but see Nat'l Indian Youth Council v. Andrus, 501 F. Supp. 649, 675-678 (D.N.M. 1980), *aff'd*, 664 F.2d 220 (10th Cir. 1981) (approval of an Indian lands lease, requiring subsequent federal approval of a mining plan, does not trigger the detailed NHPA compliance work that may be required at the mine plan stage); Solicitor's Opinion, *"Legal Responsibilities of BLM for Oil and Gas Leasing and Operations on Split Estate Lands,"* 4 (April 1988) (approval of an application for permit to drill ("APD") is the triggering event for NHPA clearance matters; issuance of the oil and gas lease may not be an "undertaking" if further approvals are required before on-the-ground activities may be initiated).

52. WATCH v. Harris, 603 F.2d 310, 316 n.8, 319 (2d Cir.), *cert. denied*, 444 U.S. 995 (1979) (where approvals are given in stages, NHPA procedures apply at each stage). *WATCH* provides an excellent review of the legislative history of Section 106. *See* 603 F.2d at 320-325. *See also* 36 C.F.R. § 800.2(o) (referring to "new and continuing projects"); Lee v. Thornburgh, 877 F.2d 1053, 1056 (D.C. Cir. 1985).

53. Cf. Indiana Coal Council, Inc. v. Lujan, 774 F. Supp. 1385, 1387-88 (D.D.C. 1991).

the Surface Coal Mining and Reclamation Act;[54] (e) development of management plans;[55] (f) approval of an application for permit to drill on an oil and gas lease;[56] (g) approval of a mine plan on federal lands;[57] and (h) issuance of permits by state agencies pursuant to a delegation of authority from a federal agency.[58] Activities under nationwide permits issued under the Rivers and Harbors Act, however, are not "licenses" which trigger NHPA compliance obligations.[59]

The level of federal involvement necessary to trigger NHPA compliance obligations is a minimal threshold. "[W]here the federal agency's role is so insignificant as to allow no more than a recommendation," the NHPA "is plainly inapplicable."[60] However, in most other circumstances, NHPA requirements apply. Even if federal involvement is "indirect," the NHPA may apply.[61] In *Indiana Coal Council, Inc. v Lujan*, for example, the district court held that SMCRA permits issued by state regulatory agencies under a delegation from OSM triggered NHPA compliance requirements.[62] Because OSM's involvement is not "*de minimis*,"[63] given OSM's oversight and funding of state regulatory programs, the "state permitting process is a federal undertaking. . . ."[64]

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54. *Id.* at 1400 (Office of Surface Mining Reclamation and Enforcement ("OSM") and other Interior Department officials conceded NHPA applies to federal approvals of State SMCRA programs). OSM also conceded that consideration of state plan amendments triggers NHPA compliance requirements. *Id.*

55. McMillan Park Comm. v. Nat'l Capital Planning Comm'n, 759 F. Supp. 908, 913-915 (D.D.C. 1991), *rev'd on other grounds*, 968 F.2d 1283 (D.C. Cir. 1992) (consideration of amendment to District of Columbia Comprehensive Plan triggers Section 106 compliance procedures). Modifications to management plans that lessen the adverse impacts on historic resources do not trigger NHPA compliance review. *See* Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 604 (N.D. Cal. 1983), *aff'd in part, vacated in part*, 764 F.2d 581 (9th Cir. 1985), *rev'd on other grounds*, 485 U.S. 439 (1988).

56. Solicitor's Opinion, U.S. Department of Interior, *Legal Responsibilities of BLM for Oil and Gas Leasing and Operations on Split Estate Lands*, 4 (April 1988).

57. Nat'l Indian Youth Council, Inc. v. Andrus, 501 F. Supp. at 675-78.

58. *Indiana Coal Council*, 744 F. Supp. at 1401-03.

59. *See* Vieux Carre Property Owners, Residents, & Associates, Inc. v. Brown, 875 F.2d 453 (5th Cir. 1989), *cert. denied*, 493 U.S. 1020 (1990).

60. *Indiana Coal Council*, 774 F. Supp. at 1401, *citing* Techworld Dev. Corp. v. D.C. Preservation League, 648 F. Supp. 106, 117 (D.D.C. 1986).

61. 16 U.S.C. § 470f (Supp. IV 1992); *Indiana Coal Council*, 774 F. Supp. at 1403.

62. 774 F. Supp. at 1401-03. Plainly, the 1992 definition of "undertaking" encompasses this type of activity.

63. *De minimis* federal involvement will not trigger the NHPA. For example, a contribution of federal funds for the planning and research of a highway bridge project is not a NHPA "undertaking." Los Ranchos de Albuquerque v. Barnhart, 906 F.2d 1477, 1482, 1484 (10th Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991) (where only federal funds utilized were part of a preliminary study, prior to any NEPA analysis, the project was not under the "direct or indirect jurisdiction" of a federal agency).

64. *Indiana Coal Council*, 774 F. Supp. at 1401.

Presumably, the same analysis would apply to other federal regulatory schemes which authorize delegation of regulatory primacy to tribes or states. In any event, with limited exceptions, the NHPA Section 106 compliance process applies to activities in which the federal government plays a permitting or oversight role. For actors on public lands, this authority translates into an obligation, in most circumstances, to meet NHPA compliance standards.[65],[66]

### *D. NHPA and NEPA Compliance Obligations Compared*

Questions arise as to whether NEPA's environmental impact statement (EIS) obligations coincide with NHPA Section 106 compliance requirements. While no unanimous opinion has developed, the better reasoned view is that different thresholds exist for triggering NHPA and NEPA EIS obligations. An EIS is required under NEPA for "major Federal actions significantly affecting the quality of the human environment,"[67] while the NHPA applies to any "Federal or federally assisted undertaking."[68] Certain NEPA compliance work, however, such as preparation of an Environmental Assessment (EA) and a Finding of No Significant Impact (FONSI), will be required for most any proposal for federal action, unless categorically excluded.[69]

Further, the NHPA provides that it should not "be construed to require the preparation of an environmental impact statement where such a statement would not otherwise be required" under NEPA.[70] The language of the statutes reflect, therefore, a potentially incongruent scope. Compliance with NEPA will not necessarily translate into NHPA compliance;[71] compliance with NHPA requirements does not necessarily equate to NEPA compliance.[72] Accordingly, independent analysis of NEPA and

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65. Of course, technically, the compliance obligations apply to the federal agency, not the developer. *See* 36 C.F.R. Part 800 (1981). However, the permit applicant must anticipate the time commitments and planning associated with NHPA compliance. Moreover, as discussed *infra* at Part II.F., the permittee likely will foot the bill for NHPA compliance. *See* 16 U.S.C. § 470h-2(g) (1988).

66. 16 U.S.C. § 470v provides the ACHP with authority to promulgate regulations or guidelines providing for exemptions from some or all of the requirements of the NHPA.

67. 42 U.S.C. § 4332(2)(C) (Supp. IV 1992). A "major federal action" is one "with effects that may be major." *See* 40 C.F.R. § 1508.18 (1992).

68. 16 U.S.C. § 470f (Supp. IV 1992). This section applies to any activity that affects historic properties. *See id.*

69. *See* 40 C.F.R. § 1508.4 (1993) (definition of "categorical exclusion"); 40 C.F.R. § 1507.3 (1993).

70. 16 U.S.C. § 470h-2(i) (1988).

71. *See* Warm Springs Dam Task Force v. Gribble, 378 F. Supp. 240 (N.D. Cal. 1974); *cf.* Stop H-3 Ass'n v. Coleman, 533 F.2d 434, 444-45 (9th Cir.), *cert. denied*, 429 U.S. 999 (1976).

72. *See* Goodman Group, Inc. v. Dishroom, 679 F.2d 182, 186 (9th Cir. 1982); Preservation

NHPA compliance obligations is required.[73] Many federal actions will require compliance with both statutes.[74]

Despite the differing standards of the NHPA and NEPA,[75] federal agencies may comply with both statutes in a single document.[76] Current NEPA and NHPA regulations "envision that both statutes may be applied simultaneously."[77] Simultaneous compliance with NEPA and NHPA makes sense not only from a cost-efficiency standpoint, but also from the standpoint of the policies expressed in NEPA and its implementing regulations.[78] Section 101(b) of NEPA provides that federal agencies coordinate plans and programs, consistent with other policy considerations, in a manner to "preserve important historic, cultural, and natural aspects of our national heritage . . . ."[79] Moreover, NEPA's implementing regulations demonstrate a commitment to consideration of cultural resources.[80]

### *E. Procedures for Cultural Resources Management Compliance for an NHPA "Undertaking"*

The procedures to be followed to insure NHPA compliance for any "undertaking" can be time consuming and somewhat frustrating for the developer, unless the work is initiated early in the planning process, often-times in conjunction with NEPA clearance obligations.[81] Even then,

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Coalition, Inc. v. Pierce, 667 F.2d 851, 858-59 (9th Cir. 1982) (NEPA and NHPA "each mandate separate and distinct procedures, both of which must be complied with when historic buildings are affected").

73. *See* Indiana Coal Council, Inc. v. Lujan, 774 F. Supp. at 1402 n.13.

74. D. Mandelker, *NEPA Law and Litigation*, § 2.20 (1984); *see, e.g.*, Nat'l Indian Youth Council v. Watt, 664 F.2d 220 (10th Cir. 1981).

75. Interestingly, federal defendants in two cases conceded that NHPA and NEPA obligations derive from equivalent standards. *See* Ringsred v. City of Duluth, Minn., 828 F.2d 1305, 1309 (8th Cir. 1987); *McMillan Park Comm. v. Nat'l Capital Planning Comm'n*, 759 F. Supp. 908, 915 (D.D.C. 1991), *rev'd on other grounds*, 968 F.2d 1283 (D.C. Cir. 1992). The concessions may have derived from the federal nature of the projects, rather than their significance.

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

77. *Id.*

78. Arguments that NHPA compliance represents the "functional equivalent" of NEPA, rendering NEPA inapplicable where the NHPA applies, have been rejected. *See* WATCH v. Harris, 603 F.2d 310, 318-19, 327 (2d Cir.), *cert. denied*, 444 U.S. 995 (1979).

79. 42 U.S.C. § 4331(b)(4) (1988).

80. *See* 40 C.F.R. § 1502.16(g) and § 1508.27(b)(8) (1992).

81. In McMillan Park Comm. v. Nat'l Capital Planning Comm'n, 759 F. Supp. 908, 916 (D.D.C. 1991), *rev'd on other grounds*, 968 F.2d 1283 (D.C. Cir. 1992), the district court described the Section 106 process as "not an expensive or an unduly cumbersome process, and it allows for an informed decision to be made." With thoughtful planning, the court's

developers should be flexible in their planning to accommodate cultural and historic resources present in the vicinity.[82] This section of the paper will walk through the procedural steps one must follow once a determination has been made that the project constitutes an "undertaking" under Section 106.

Section 106 of the NHPA 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 sections 470i to 470v of this title a reasonable opportunity to comment with regard to such undertaking.[83]

As provided by the NHPA,[84] the Advisory Council on Historic Preservation promulgated regulations implementing this provision.[85] Unless states or federal agencies have executed agreements with the ACHP, 36 C.F.R. Part 800 controls the process.[86] At the outset, the ACHP regulations grant flexibility to the land management agency: "[t]he Council recognizes that . . . these regulations may be implemented . . . in a flexible manner relfecting [sic] differing program requirements, as long as the purposes of Section 106 of the Act and these regulations are met."[87]

Prior to the initiation of any ground-disturbing activities, the Section 106 process must be completed.[88] Further, the process must be

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statements can apply.

82. "The procedure is not designed to inhibit development; rather, its purpose is to assure that land development takes place in a manner which reflects the historic and cultural interest[s]" in our country. *McMillan Park Comm.*, 759 F. Supp. at 918.

83. 16 U.S.C. § 470f (1988).

84. 16 U.S.C. § 470s (1988 & Supp. IV 1992).

85. *See* 36 C.F.R. Part 800 (1993).

86. *See* 36 C.F.R. §§ 800.3, 800.7 (states), 800.13 (federal agencies). *See* Part II.E.5., *infra*.

87. 36 C.F.R. § 800.3(b) (1993). It is not clear what this means. In Attakai v. United States, 746 F. Supp. 1395, 1405 (D. Ariz. 1990), the district court stated the regulations are "designed to accommodate historic preservation concerns and the needs of federal undertakings . . . ." However, the court applied the regulations with little flexibility apparent. *See id.*

88. 36 C.F.R. § 800.3(c) (1993); *see* McMillan Park Comm. v. Nat'l Capital Planning

completed before any license or permit is issued, and before approval of any federal funding expenditures.[89] However, any agency may spend money or authorize "non-destructive planning activities preparatory to an undertaking" before the Section 106 process is complete.[90] Moreover, phased compliance with Section 106 is permissible.[91] Finally, the agency should develop a Section 106 process schedule to facilitate completion of the process in a manner "consistent with the planning and approval schedule for the undertaking."[92]

*1. Literature search and initial consultation.*

Once a project is identified as constituting an "undertaking" within the NHPA, the agency has specific regulatory obligations.[93] First, the agency "shall": (a) review all existing information on cultural or "historic properties" that may be affected potentially by the undertaking;[94],[95] (b) consult with the State Historic Preservation Officer to identify further work that may be necessary to identify any other historic properties in the area;[96] and (c) consult with local governments, tribes,

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Comm'n, 759 F. Supp. 908, 910 (D.D.C. 1991), *rev'd on other grounds*, 968 F.2d 1283 (D.C. Cir. 1992). The process also should be initiated at an early stage. *Id.* at 910, 913.

89. 36 C.F.R. § 800.3(c) (1993).

90. *Id.*

91. *Id.*; *see also WATCH*, 603 F.2d 310 (2d Cir. 1979).

92. 36 C.F.R. § 800.3(c) (1993).

93. These obligations are designed first to determine whether the undertaking involves historically significant properties. *See McMillan Park Comm.*, 759 F. Supp. at 914.

94. "Historic property" is defined in 36 C.F.R. § 800.2(e) (1993), and includes any site or object in, or eligible for inclusion in, the National Register of Historic Places. *Id.*; *see also* 36 C.F.R. § 800.2(l); 36 C.F.R. Part 60 (1991). While a full discussion of the criteria for determining eligibility for the National Register is beyond the scope of this paper, sites over 50 years old possessing "integrity of location, design, setting, materials, workmanship, feeling, and association," and which are distinctive or are associated with important events or people, may be eligible. *See* 36 C.F.R. § 60.4 (1993).

95. "Area of potential effects" is defined to mean "the geographic area or areas within which an undertaking may cause changes in the character or use of historic properties, if any such properties exist." 36 C.F.R. § 800.2(c) (1993).

96. Under the NHPA, each state is to appoint a State Historic Preservation Officer to administer the state's Historic Preservation Program. 16 U.S.C. § 470a (1988). The SHPO's duties are prescribed generally in 16 U.S.C. § 470a(b)(3) (1988). Those duties include, without limitation, the conduct of statewide historic property inventories and maintenance of that information, development of a statewide management plan, and the identification and nomination of eligible properties to the National Register of Historic Places. While regulations are not yet promulgated under the 1992 NHPA Amendments, the SHPO's responsibilities may be supplanted by a tribal preservation officer on tribal lands, as discussed *supra* at Part II.A. However, the ACHP also must determine that the tribal program will provide Section 106 consideration equivalent to the ACHP regulatory scheme. 16 U.S.C. § 470a(d)(5) (Supp. IV 1992).

or organizations "likely to have knowledge of or concerns with historic properties in the area."[97] In any split estate situations, with federal minerals and fee surface, the agency should consider the views of the surface owners as well.[98] Once this initial literature review and consultation process is complete, the agency should determine whether further field surveys or other action is necessary to identify historic properties.[99]

2. *Inventory requirements and eligibility determinations.*

In consultation with the SHPO, the agency then must make a "reasonable and good faith effort to identify historic properties that may be affected by the undertaking.[100] "Historic properties" include properties either on or eligible for inclusion in the National Register. The "reasonable and good faith effort" standard requires the agency to "gather sufficient information to evaluate the eligibility of the properties for the National Register."[101] Once the inventory process is complete, the ACHP regulations require the agency and the SHPO to apply the National Register criteria for eligibility "to properties that *may be* affected. . . ."[102] Even properties previously evaluated may have to be reevaluated because the "passage of time or changing perceptions of significance may justify reevaluation. . . ."[103] If the agency and SHPO agree on eligibility or ineligibility of the property, the Section 106 process moves

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97. 36 C.F.R. § 800.4(a)(iii) (1993); *see* Attakai v. United States, 746 F. Supp. 1395, 1408-09 (D. Ariz. 1990) (members of Navajo Tribe entitled to participate as "interested persons" in identification of historic properties).

98. *See supra* note 56, at 6. A cultural resource survey and evaluation must be undertaken on such private lands also. *Id.* at 8-9. In the event the surface owner refuses access for such purposes, the Solicitor indicates court action to obtain access is required to fulfill NHPA obligations. *Id.* at 9.

99. Given the potential for delays that might arise later in project development, one should consider whether an exhaustive on-the-ground survey makes sense at the outset. The additional expense may save time and money in the long run and will buy some peace of mind.

100. 36 C.F.R. § 800.4(b) (1993) (emphasis added). This process may involve on-the-ground survey work. *See, e.g.*, Wilson v. Block, 708 F.2d 735, 754 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983) (100% surveys may not be required; in certain circumstances, partial surveys are sufficient); Romero-Barcelo v. Brown, 643 F.2d 835, 860 (1st Cir. 1981), *rev'd on other grounds*, 456 U.S. 305 (1982).

101. *Id.*

102. 36 C.F.R. § 800.4(c)(1) (1993) (emphasis added). All properties within the area of the undertaking's potential environmental impact must be identified. That area is defined as the "geographic area or areas within which an undertaking may cause changes" in the qualities and characteristics of the site. 36 C.F.R. § 800.2(c) (1993). *See also* Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425, 1435 (C.D. Cal. 1985) (discussion of entire Section 106 process).

103. *Id.*

on to the next step.[104] If the agency and SHPO disagree, or the ACHP or Secretary of the Interior (Secretary) request, the agency must submit the matter to the Secretary for an eligibility determination.[105]

If no "historic properties" are found through the process described, the agency may conclude its investigation. Its only remaining duty in the Section 106 process is to notify the SHPO and any interested parties of that circumstance.[106] Not surprisingly, if "historic properties" are found, the Section 106 process moves on to the next phase.[107]

*3. Determinations of an undertaking's "effect" and "adverse effect" on properties and resulting procedural requirements.*

Recalling that previous procedures consider all "historic properties" that *may* be affected, the process now assesses the "effect" of the "undertaking" on these properties.[108] Again, hand in hand with the SHPO, the federal agency, also in consultation with any "interested persons," applies "effect" and "adverse effect" criteria to each property.[109] An undertaking has an "effect" when it "may alter characteristics of the property that may qualify the property for inclusion in the National Register."[110] Alteration of the setting, location, or use of the property may be relevant to determining whether the "undertaking" has an "effect."[111]

An undertaking has an "adverse effect" when it "may diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association."[112] "Adverse effect" includes, but is not limited to: (a) physical destruction, damage, or alteration; (b) isolation of the property from its setting or alteration of the setting when the setting contributes to the property's character and qualification for National Register listing; and (c) lease or sale of the property.[113] "Introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting" also are considered

104. 36 C.F.R. § 800.4(c)(2), (3) (1993).
105. 36 C.F.R. § 800.4(c)(4) (1993).
106. 36 C.F.R. § 800.4(d) (1993).
107. 36 C.F.R. § 800.4(e) (1993).
108. *See* 36 C.F.R. § 800.5, 800.9 (1993).
109. *Id.*
110. 36 C.F.R. § 800.9(a) (1993); *Wilson v. Block*, 708 F.2d 735, 755-56 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 956 (1983) (court rejected contention that ski development would have "effect" to trigger further Section 106 procedures because the "effect" had no bearing on the characteristics of the property which made it eligible for National Register status.)
111. 36 C.F.R. § 800.9(a) (1993).
112. 36 C.F.R. § 800.9(b) (1993).
113. 36 C.F.R. § 800.9(b) (1993).

"adverse effects."[114] "Effects" otherwise "adverse" may not be if the archaeological, historical, or architectural value of the property "can be substantially preserved through the conduct of appropriate research" and the research is completed in a professional manner.[115]

Where the agency finds no "effect," the agency must notify the SHPO and any interested persons known to the agency and make any documentation available.[116] If no one objects within 15 days, the Section 106 process is complete.[117] If the SHPO objects, the agency follows the same process required where an "effect" is found by the agency itself.[118]

When the agency discovers the undertaking will have an "effect," the "adverse effect" determination described above must be made.[119] If the agency finds no adverse effect, the federal official shall either: (a) obtain SHPO or tribal concurrence and forward the documentation to the ACHP; or (b) submit the finding to the ACHP for a 30-day review and notify the SHPO.[120] If the ACHP does not object, the Section 106 process is complete.[121] In the event the ACHP disagrees, the effect is considered "adverse" and the Section 106 process continues, unless the agency and ACHP reach an accommodation.[122]

*4. The "adverse effect" consultation process.*

When the agency finds an "adverse effect," it must notify the ACHP and consult the SHPO and others to seek ways to avoid or reduce the effects on historic properties."[123] The agency is to provide participants in the consultation process with documentation regarding the properties at issue and the potential effects of the undertaking.[124] The public is also to have the opportunity to comment.[125] If, as a result of

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114. *Id.*

115. 36 C.F.R. § 800.9(c)(1) (1993). If the property is being rehabilitated to preserve its historical value or if the property is sold or leased subject to conditions designed to preserve the character of the property, then the "effects" are similarly not "adverse." *Id.*

116. 36 C.F.R. § 800.5(b) (1993).

117. *Id.*

118. *Id.* The regulations are not clear of the effect of someone objecting other than the SHPO. The safe course at that point would be to follow the same procedures as if the SHPO objected.

119. 36 C.F.R. § 800.5(c) (1993).

120. 36 C.F.R. § 800.5(d) (1993).

121. *Id.* The regulations are silent on the procedure to follow if the SHPO objects, but the ACHP does not.

122. *Id.*

123. 36 C.F.R. § 800.5(e) (1993). Local government and tribal representatives are to be invited to participate in the consultation process, along with the permit applicant. *Id.*

124. *Id.; see also* 36 C.F.R. § 800.8(b) (1993).

125. 36 C.F.R. § 800.5(e)(3) (1993).

the consultation process, the agency and SHPO agree on "how the effects will be taken into account, they shall execute a Memorandum of Agreement."[126] Others, including the ACHP, may be parties to the agreement.[127] Once the ACHP approves the Memorandum of Agreement, the agency's Section 106 obligations are fulfilled.[128] If no agreement can be reached through consultation, the agency or SHPO "may state that further consultation will not be productive and thereby terminate the consultation process."[129] At that point, the agency must request ACHP input and notify interested parties of the request.

Following agency submittal to the ACHP of documentation regarding the properties at issue and the proposed undertaking, together with notice that no agreement has been reached, the ACHP must provide comments within 60 days of receipt of the information.[130] Copies of ACHP comments are delivered to the agency head, SHPO and other interested parties.[131] The agency is required to "consider" the ACHP comments "in reaching a final decision on the proposed undertaking."[132] Once the agency makes a decision, it must notify the ACHP, preferably prior to initiating the undertaking.[133] At that point, the agency may make its decision, issue the lease, approve the mine plan, or take any course of action it chooses. Under the 1992 NHPA Amendments, however, the head of the federal agency involved has a non-delegable duty to "document any decision" under Section 106 "which adversely affects any property included in or eligible for inclusion in the National Register, and for which . . . [the] agency has not entered into an agreement with the [ACHP]."[134]

*National Indian Youth Council v. Andrus*,[135] represents one of few cases raising NHPA compliance issues arising from a proposed mine development project. Although addressing a project on Indian lands, the lessons of the decision are instructive for public lands projects. The coal

126. *Id.* According to one court, "[I]n most cases where adverse effects are found, the [ACHP] has been successful at bringing the agency, the developer . . . and other interested parties together in order to draft the Memorandum Agreement." *McMillan Park Comm.*, 759 F. Supp. at 911. A good example of an NHPA Memorandum of Agreement is discussed in *Nat'l Indian Youth Council*, 501 F. Supp. at 676-78.

127. 36 C.F.R. § 800.5(4) (1993). If the ACHP is not a party, the ACHP has an opportunity to comment, approve, or disapprove. See 36 C.F.R. § 800.6(a) (1993).

128. 36 C.F.R. § 800.6(c) (1993). Of course, the Memorandum of Agreement is binding on the parties to it. *See McMillan Park Comm.*, 759 F. Supp. at 911.

129. *Id.*

130. 36 C.F.R. § 800.6(b) (1993).

131. *Id.*

132. 36 C.F.R. § 800.6(c)(2) (1993).

133. *Id.*

134. 16 U.S.C. § 470h-2(l) (Supp. IV 1992).

135. 501 F. Supp. 649 (D.N.M. 1980), *aff'd*, 664 F.2d 220 (10th Cir. 1981).

mining lease at issue, negotiated between the Navajo Tribe and a venture including El Paso Natural Gas Company and Consolidation Coal Company, was executed in 1976.[136] As required by statutes governing the leasing of Indian lands, the Secretary of the Interior approved the lease on August 31, 1977.[137] Notwithstanding that governing regulations required the submittal and approval of a mining plan prior to the conduct of any on-the-ground activities under the lease,[138] the Youth Council argued that NHPA required a complete inventory and analysis of all historic properties within the 40,286 acre leasehold prior to approval of the original lease.[139] Federal defendants, El Paso and Consolidation Coal argued NHPA Section 106 compliance was not required until the mining plan received final approval. They also argued that compliance "may be accomplished in phases as long as compliance for each particular phase is completed prior to any land-disturbing activity in that area."[140]

The court rejected the Youth Council's position. It stated that to require a complete inventory and analysis of all historic properties in the leased area, without any assurance a lease would be granted and with other procedural impediments still to be removed before any on-the-ground activities would begin, "would be unreasonable and wasteful."[141] While concluding that "a mining project entered into pursuant to a federally-approved lease" is an "undertaking,"[142] the court held the mining plan approval to be the "'license' which required prior compliance with Section 106 and NHPA. . . ."[143] The court also held that Section 106 clearance procedures could be employed on a phased basis as mining activity progressed through the leased area.[144] The approach approved by the district court appears sound, and was affirmed by the Tenth Circuit.[145]

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136. *Id.* at 653.

137. Id. at 654.

138. *See id.* at 653, *citing* 25 C.F.R. Part 117 (now codified at 25 C.F.R. Part 216 (1993)).

139. 501 F. Supp. at 674. Plaintiffs also argued NHPA requires dual compliance: once before the lease was approved, and again before the mine plan was approved. *Id.* at 675 n.53.

140. *Id.* at 674.

141. *Id.* at 676.

142. *Id.*

143. *Id.*

144. *Id.* at 676-78.

145. 664 F.2d 220 (10th Cir. 1981). The Tenth Circuit found a technical defect in NHPA compliance, but excused the error inasmuch as the ACHP believed the NHPA compliance obligations were met and the court found no substantive effect on historic properties arising from the technicality. *Id.*

*5. Special provisions regarding Section 106 clearance procedures.*

*a. Properties discovered following initiation of undertaking.*

The regulations make provision for historic properties discovered during the conduct of an undertaking.[146] The agency "is encouraged" to develop a plan to address such matters, and include it in any Memorandum of Agreement reached with the SHPO.[147] When such a plan is developed, the agency must follow the plan in order to comply with the Section 106 process insofar as newly discovered properties are concerned.[148] If no plan was drafted to address undiscovered properties, the agency must, upon a discovery, provide the ACHP an opportunity to comment or, if the property has principally archaeological value, comply with the requirements of the Historic and Archaeological Data Preservation Act.[149],[150]

The Section 106 process does not require the agency to stop work on the undertaking in the circumstances.[151] However, the regulations are ambiguous as to whether one who chooses to comply with the HADPA procedures must cease any activity during the HADPA process. One would be wise to consider the potential delays, if the HADPA process is considered. Given the policies reflected in the federal legislation promoting cultural resource protection, the agency and other interested parties would have a fair argument that the HADPA process requires a cessation of activity.[152]

If the ACHP comment process is chosen, the ACHP comments are due promptly, to be consistent with whatever schedule the agency official may have.[153] The agency may also seek an approach agreeable to the SHPO to address the newly discovered property.[154]

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146. See 36 C.F.R. § 800.11 (1993).

147. *Id.* The developer may wish to seek a provision addressing the treatment of compliance costs associated with newly discovered sites.

148. 36 C.F.R. § 800.11(b) (1993).

149. *See* 36 C.F.R. § 800.11(b)(2) (1993).

150. 16 U.S.C. §§ 469-469c-2 (1988). As discussed in Part IV, *infra*, the Historic and Archaeological Data Preservation Act (HADPA) contemplates survey and collection work necessitating delay in the project.

151. 36 C.F.R. § 800.11(b)(3) (1993).

152. *See* Part IV, *infra*.

153. 36 C.F.R. § 800.11(c) (1993).

154. *Id.*

*b. National Historic Landmark properties.*

If an "historic property" is a National Historic Landmark, as designated by the Secretary of the Interior,[155] the ACHP regulations provide for a greater degree of ACHP involvement in the Section 106 assessment and mitigation discussions.[156]

*c. Programmatic Agreements between states and federal agencies.*

Programmatic Agreements are available under Section 106 of the NHPA.[157] Agencies, SHPOs and the ACHP may develop an agreement to fulfill and perhaps streamline Section 106 obligations for a specified undertaking or series of undertakings.[158] Such agreements are "programmatic agreements." In certain circumstances, Programmatic Agreements can simplify the NHPA Section 106 process.[159] Developers should consider recommending this approach in appropriate circumstances. Of course, one should determine whether the regulating or permitting agency has any applicable Programmatic Agreements which might govern a planned project.

*6. Editorial comments on the procedural nature of the regulatory requirements.*

As this discussion reflects, the NHPA and its regulations impose only procedural obligations on the agency. There is no obligation on the agency actually to preserve or mitigate damage to any historic property arising from the statute or regulations.[160] Nevertheless, the procedural obligations can be time consuming, and possibly disruptive to the development schedule. Accordingly, one may wish to work with the agency, the SHPO, and interested parties to develop an acceptable

155. The criteria for National Landmark status are described in 36 C.F.R. Part 65 (1991).

156. 36 C.F.R. § 800.10 (1993).

157. *See* 36 C.F.R. § 800.13 (1993).

158. *Id.* This section spells out the requirements for developing Programmatic Agreements. *See also Walsh v. United States Army Corps of Engineers*, 757 F. Supp. 781, 786-89 (W.D. Tex. 1990); *Nat'l Center for Preservation Law v. Landrieu*, 496 F. Supp. 716, 738-42 (D.S.C.), *aff'd*, 635 F.2d 324 (4th Cir. 1980). Presumably, "tribes" will appear in the revision to this regulation following the 1992 NHPA Amendments.

159. The BLM and New Mexico SHPO developed an effective Programmatic Agreement to facilitate expeditious development of natural gas gathering systems necessitated by the development of coal seam gas discovered in New Mexico's San Juan Basin. While certain matters are not addressed, the agreement may be a useful prototype for other projects.

160. Programmatic Agreements or other agreements may commit agencies to substantive protection measures. A developer should ferret out any such agreements.

mitigation agreement to protect cultural and historic sites within the area affected by the undertaking. While this may be unpalatable to some, because it puts teeth into an otherwise procedural scheme, the benefits of time-savings and public relations may outweigh the down-side to any such agreement. One may also be able to use such an agreement to accommodate all the concerns of parties which otherwise might oppose a project. In fact, the ACHP regulations encourage the agency and the SHPO to integrate Section 106 compliance with NEPA studies, and to use Section 106 agreements to facilitate compliance with other applicable cultural resources management statutes, such as the HADPA and the Archaeological Resources Protection Act.[161]

The ACHP has not yet promulgated draft or final regulations implementing the 1992 NHPA Amendments. According to ACHP staff, regulations are not expected to be published in the Federal Register until October, 1994 at the earliest.[162]

### *F. Developers are Liable for NHPA Compliance Costs.*

The NHPA permits federal agencies to charge NHPA compliance costs associated with an undertaking to the permit applicant.[163] No court has explored the scope of this feature of the NHPA. Accordingly, permit applicants should incorporate the anticipated costs associated with NHPA compliance into the project budget.[164]

### *G. Judicial Review of Agency NHPA Compliance and Decision-making.*

As noted, failure to comply with the procedural strictures of the NHPA and its implementing regulations subjects the offending agency, together with the permit applicant, to the threat of an injunction.[165] In *Attakai v. United States*,[166] the U.S. District Court in Arizona enjoined a range management project in the area used jointly by the Hopi and

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161. *See* 36 C.F.R. § 800.14 (1993).

162. Telephone interview with Ms. Stephanie Woronowicz, Information Assistant, Office of Communications and Publications, ACHP, June 27, 1994.

163. *See* 16 U.S.C. § 470h-2(g) (1988).

164. For a discussion of chargeable project costs under the Federal Land Policy and Management Act and other land management statutes, *see* K. Clark, "Public Land Rights-of-Way: Who Pays for the Environmental Studies," 2 *Natural Resources & Environment* 3 (Spring 1986).

165. We do not address the issue of standing to sue under the NHPA. Standing questions under the NHPA will be controlled, in all likelihood, by *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990), and *Sierra Club v. Morton*, 405 U.S. 727 (1972).

166. 746 F. Supp. 1395 (D. Ariz. 1990).

Navajo Tribes for failure to follow portions of the Section 106 procedures presented in the ACHP regulations.[167] In *Attakai*, the Bureau of Indian Affairs (BIA) followed its "standard practice" to identify historic properties potentially affected by a fence construction project: it completed a 100 percent field survey, consisting of "a walkover of the entire project line . . . to inspect the area for cultural and archaeological remains which lie in the project line, or sufficiently close that incidental impact might be expected."[168] The surveys were completed prior to clearance and final approval of the project.[169] Each survey disclosed historic properties, and the survey teams, not always including an archaeologist or anthropologist, recommended realignment of the project to avoid potential impacts on the sites.[170] The realignments were adopted and, following the determination by the Area Archaeologist that the project would have no effect on historic properties, an archaeological clearance was issued.[171]

Because the BIA failed to consult with the Arizona SHPO, the court concluded the BIA violated the NHPA and issued an injunction mandating compliance with Section 106.[172] The court rejected the BIA's arguments that its action met the spirit of Section 106 and the regulations, and that the regulations themselves expressly permit flexible implementation, despite the testimony of the Arizona SHPO that the BIA action probably constituted "proper avoidance of historic propert[ies]."[173] The court stated the regulations "rely on consultation, particularly with the SHPO, as the principal means of protecting historical resources."[174] The court also stated that the BIA is required to consult with Indian tribes,[175] and the failure to do so constituted an additional basis for injunctive relief.[176] In short, injunctive relief is available against federal agencies which attempt to shortcut the NHPA process.[177] Accordingly,

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167. *Id.* at 1406, 1413.

168. *Id.* at 1406.

169. *Id.*

170. *Id.* at 1406-07.

171. *Id.* at 1407.

172. *Id.* at 1408, 1413.

173. *Id.* at 1407.

174. *Id.* at 1408, citing 36 C.F.R. § 800.1(b).

175. 746 F. Supp. at 1408, *citing* 36 C.F.R. § 800.1(c)(2)(iii) (for undertakings on non-Indian lands that may affect properties of historic value to a neighboring tribe, the tribe is an interested party; if an undertaking is on Indian land, the tribe is a consulting party). Consulting parties may participate in any Memorandum of Agreement executed, while interested parties generally may not. See 36 C.F.R. § 800.5(e)(4) (1993).

176. 746 F. Supp. at 1409.

177. *See also Colorado River Indian Tribes*, 605 F. Supp. at 1441.

agencies and developers should ensure careful compliance with NHPA requirements.[178]

### *H. NHPA Compliance Obligations and Other Federal Statutory Requirements.*

#### *1. The Federal Surface Mining Control and Reclamation Act.*

The federal Surface Mining Control and Reclamation Act (SMCRA) flatly prohibits surface coal mining operations which will affect adversely "places included in the National Register of Historic Sites . . . ."[179] Moreover, SMCRA provides additional protection for a potentially broader class of historic properties: Interested persons may petition the appropriate regulatory authority, either the Office of Surface Mining Reclamation and Enforcement (OSM) or the State Regulatory Authority (SRA), to designate as unsuitable for mining areas where "operation could result in significant damage to important historic [and] cultural. . . values. . . ."[180] Regulations promulgated by OSM in 1987 authorize SRAs to require field surveys and investigations for historic or cultural properties, and to impose mitigation measures on mining operations to protect sites.[181] Similar protections are afforded National Register listed properties during the exploration phase, and exploration permit applicants must identify all known archaeological resources and all cultural and historic resources eligible for National Register listing.[182] Coal mining entities must address the substantive protections afforded historic properties under SMCRA.

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178. Careful compliance work may not immunize a project from challenge. Recently, the Jemez Pueblo and other Indian groups, in addition to seeking protection for significant, identifiable sites, claimed the entire Jemez Ranger District of the Santa Fe National Forest constituted a "natural church" worthy of NHPA protection. *See Save the Jemez v. Block*, U.S.D.C. Cause No. CIV 84-1150, Complaint (D.N.M.). On the other hand, not every NHPA violation will result in entry of injunctive relief halting a project. *See, e.g., Aluli v. Brown*, 437 F. Supp. 602, 612 (D. Haw. 1977), *rev'd on other grounds*, 602 F.2d 876 (9th Cir. 1979).

179. 30 U.S.C. § 1272(e)(3); *see also* 30 C.F.R. § 761.11(c) (1991). This prohibition does not apply where: (a) operations existed prior to August 3, 1977; or (b) the regulatory agency and the state, federal or local agency with jurisdiction over the site jointly approve the mining activity. *Id. See generally Indiana Coal Council, Inc. v. Lujan*, 774 F. Supp. 1385, 1389, 1397-400 (D.D.C. 1991).

180. 39 U.S.C. § 1272(a)(8)(B), (c); *see* 30 C.F.R. §§ 762.5 (definition of "historic lands"), 762.11 (1991); 43 C.F.R. § 3461.5 (1991).

181. 30 C.F.R. §§ 780.31 (surface), 784.17 (underground) (1991), issued February 10, 1987, 52 Fed. Reg. 4262. The U.S. District Court for the District of Columbia upheld these regulations against an industry challenge. *See Indiana Coal Council, Inc.*, 774 F. Supp. at 1397-98, 1404.

182. *See* 30 C.F.R. § 772.12(e), (d) (1991); *see also* 43 C.F.R. § 3410.2-2 (1991).

## 2. *Federal regulation of oil and gas and mining operation and rights-of-way.*

### *a. Oil and gas leasing.*

Oil and gas leasing regulations and directives under the Mineral Leasing Act of 1920[183] impose cultural and historic resource protection requirements consistent with the NHPA.[184] On-shore Oil and Gas Order No. 1 describes the duties of oil and gas lessees or operators relative to cultural resource protection measures.[185] Prior to submission of an Application for Permit to Drill (APD) or a Notice of Staking (NOS), the operator should contact the applicable regulatory authority "to determine whether any actions are necessary to locate and identify historic and cultural resources."[186] Survey work by the operator may be required if the agency believes National Register-eligible or listed properties are present in the area of potential effect.[187] Survey work will be required even if the surface is privately owned.[188] Finally, operations plans may be subject to substantive modification by the agency as may be necessary to protect surface resources, such as historic properties.[189]

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183. 30 U.S.C. § 181-263 (1988).

184. *See, e.g.*, 43 C.F.R. § 3101.1-2 (authorizing lease stipulations and imposing restrictions on lessees "deriving from specific, nondiscretionary statutes"), 3162.1(a) (subjecting operators to applicable laws, On-Shore Oil and Gas Orders, and Notices to Lessees ("NTL") that control operation and protect other natural resources and environmental quality), 3164.1, 3164.2, 3162.5-1(a) (1991).

185. 48 Fed. Reg. 48916, 56226 (effective November 21, 1983). Revisions to this Order are presently under consideration by the BLM. *See* 57 Fed. Reg. 32756 (July 23, 1992).

186. *Id.* Stipulations to this effect are usually incorporated into lease terms. *See* BLM Instruction Memorandum No. 83-333; *see also, e.g., Robert and Frances Kunkel*, 84 IBLA 140, 143 (1984). The Cultural Resource Protection Stipulation in Kunkel speaks in mandatory terms regarding contact with BLM officials of the need for a survey. *See id.*

187. Presumably, although the Order does not state so specifically, the agency would initiate the proper consultation process with the SHPO and any consulting parties to comply with the NHPA Section 106 process. The operator should ensure the agency complies with the NHPA, lest one wishes to risk an injunction such as that issued in *Attakai v. United States*, discussed *supra*.

188. *See, e.g., General Crude Oil Co.*, 28 IBLA 214, 83 I.D. 666 (1976) (oil and gas lease); *Cominco American, Inc.*, 26 IBLA 328 (1976) (phosphate lease); *see generally* Solicitor's Opinion, *"Legal Responsibilities of BLM for Oil and Gas Leasing and Operations or Split Estate Lands."* 4-6 (April 1988).

189. *See* NTL-6, 41 Fed. Reg. 18116, 18118 (April 30, 1976). Operations plans are required under 43 C.F.R. § 3162.3-1 (1993).

*b. Leasing of solid minerals other than coal and operations on mining claims.*

Regulations governing leasing of solid minerals other than coal or oil shale incorporate the same unsuitability criteria described in SMCRA relative to cultural resources,[190] and leases or permits issued under this authority will be issued in conformity with "a comprehensive land use plan . . . ."[191] Presumably, the land use plan will include provisions regarding cultural resources management and protection. More importantly, the BLM regulations require operators to "take such action as may be needed to avoid, minimize or repair . . . [d]amages to . . . historical . . . values of the lands."[192] Operators must protect "archaeological resources" also.[193]

Operations on claims located pursuant to the 1872 Mining Law[194] are not immune from cultural resources regulation. Plans of operations, which require approval of the land management agency, trigger NHPA clearance procedures.[195] Moreover, operators "shall not knowingly disturb, alter, injure, destroy or take . . . any historical, archaeological, or cultural district, site, structure, building or object."[196] Upon discovery of such properties, the operator is to notify the agency (authorized official) of the discovery.[197] The agency then has 10 days to evaluate the site and determine an appropriate course of action; salvage work will be at government expense.[198]

*c. Rights-of-way grants.*

Rights-of-way across public lands also trigger NHPA compliance requirements.[199] Moreover, right-of-way regulations permit federal officials to impose substantive conditions or stipulations on rights-of-way "designed to control or prevent damage to . . . cultural and environmental

190. *See* 43 C.F.R. § 3500.7 (1993).

191. *Id.*

192. 43 C.F.R. § 3591.1(b) (1993).

193. *Id.*

194. 30 U.S.C. §§ 22 *et seq.* (1988).

195. 43 C.F.R. § 3802.1-5(d)(3), (f) (1993). Here, under the regulation, the operator is not required to perform or pay for the inventory. *Id.* Mitigation measures in an approved plan of operation, however, are at the operator's expense. *Id. See also* 43 C.F.R. §§ 3809.1-6, 3809.1-2-2(e) (1993).

196. 43 C.F.R. § 3802.3-2(f)(1) (1993). As discussed below, this provision is consistent with the Historic and Archaeological Data Preservation Act. *See* Part III.

197. 43 C.F.R. § 3802.3-2(f)(2)(1993).

198. *Id.*

199. *See generally*, 43 C.F.R. §§2800.0-1-2808.6 (1993).

values . . . ."[200] A question arises whether Section 106 survey requirements apply to adjacent private lands across which a right-of-way runs. In *Western Slope Gas Co.*,[201] the Interior Board of Land Appeals held that the inventory process applied, as a mandatory matter, only to those portions of a right-of-way to be used by an intrastate pipeline regulated by the State of Colorado that crossed federal lands.[202] Shortly thereafter, the Deputy Solicitor at Interior issued an opinion that the IBLA decision was wrong, and that in certain circumstances the NHPA requires the survey of private lands for cultural resources properties.[203] According to the Solicitor's office, the survey of private lands is even necessary where an "undertaking" is exclusively on adjacent public lands, but an "effect" may occur on the fee property.[204]

## III. THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT: SPECIFIC MANAGEMENT PRESCRIPTIONS FOR NATIVE AMERICAN BURIAL REMAINS AND CULTURAL OBJECTS

In words oft-quoted, Chief Seattle of the Duwamish peoples answered in the winter of 1854 an offer of treaty with the United States. His reported reply presages an historic conflict:

> We will ponder your proposition, and when we have decided we will tell you. But should we accept it, I here and now make this the first condition: That we will not be denied the privilege, without molestation of visiting at will the graves of our ancestors and friends.[205]

The Native American Graves Protection and Repatriation Act (NAGPRA)[206] specifically protects Native American graves and certain cultural artifacts on federal and tribal lands from uncontrolled distur-

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200. 43 C.F.R. § 2801.2(b)(3) (1993).

201. 40 IBLA 280, *reconsideration denied*, 43 IBLA 259 (1979).

202. 40 IBLA at 288-90. BLM, however, has discretion to require inventory on private lands, as long as the obligation is just an unreasonable burden. *Id.* at 290-91, *citing Grindstone Butte Project*, 24 IBLA 49 (1976).

203. 87 I.D. 27, 28 (December 6, 1979) (suggesting a "rule of reason" regarding the scope of any such survey of private lands); *see also Central Valley Electric Cooperative, Inc.*, 128 IBLA 126 (1993). The Solicitor's Opinion relies on *Hall County Historical Soc'y v. Georgia Dep't. of Transp.*, 447 F. Supp. 741, 752 (N.D. Ga. 1978), and *Thompson v. Fugate*, 347 F. Supp. 120, 124-125 (E.D. Va. 1972), addressing primarily federally-funded highways. *See* 87 I.D. at 30.

204. *Id.*; *see also* Solicitor's Opinion, *"Legal Responsibilities of BLM for Oil and Gas Leasing and Operations on Split Estate Lands,"* (April 1988); *see* Part III.E., *supra*.

205. Wilson, *What Chief Seattle Said*, 22 Lewis & Clark Envt'l Law 1451 (1992).

206. 25 U.S.C. § 3001-3013 (Supp. IV 1992).

bance. NAGPRA also accords to living descendants or culturally related tribes certain rights to ownership and control of burial remains and cultural items discovered on federal or Indian lands after NAGPRA's date of enactment.[207] Unlike other cultural resources management statutory schemes discussed in this paper, NAGPRA prescribes substantive protection for certain cultural artifacts.

NAGPRA likely will affect federal public lands activities in several ways. It singles out for protection Native American burial remains and cultural items,[208] and it establishes a hierarchy of ownership interests in protected remains and artifacts discovered on public or Indian lands.[209] It prescribes procedures to be applicable when cultural items are inadvertently discovered during implementation of a project[210] and for excavation or removal of cultural items from federal or tribal lands.[211] Some specific NAGPRA provisions require special attention on Indian lands.[212] NAGPRA also defines interrelationships between its provisions and other applicable statutes that suggest avenues to minimize delay or interruption of a project through early planning.[213]

NAGPRA seeks to resolve a long history of tension and conflict arising from the disturbance and removal of Native American graves and cultural items, primarily to museums, scientific research programs, and private collections.[214] This treatment accorded Native American graves conflicts with common law traditions: American jurisdictions uniformly hold that, once human remains are decently buried, they should not be disturbed for "less than what are considered weighty, and sometimes compelling reasons."[215] NAGPRA was intended to ensure that "human

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207. This article will address the provisions of NAGPRA that may affect use of the public lands. Much already has been written about NAGPRA's provisions governing museum collections and burial remains and artifacts held in collections or storage by federal agencies. *See, generally,* J. Trope & W. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History,* 24 Ariz. St. L. J. 35 (1992); *see also* National Museum of the American Indian Act, 20 U.S.C. §§ 80q-1-15 (Supp. IV 1992).

208. 25 U.S.C. § 3002(a) (Supp. IV 1992); *see infra* Part III. A. and B.

209. *Id.*; *see infra* Part III. C.

210. 25 U.S.C. § 3002(d) (Supp. IV 1992); *see infra* Part III.D.

211. 25 U.S.C. § 3002(c) (Supp. IV 1992); *see infra* Part III.E.

212. *See infra* Part III. F.

213. *See infra* Part III. G.

214. *See Trope and Echo-Hawk, supra* note 207 at 2-12; between 100,000 and 2 million deceased Native Americans have been dug up from their graves for storage or display. *See also* Note: "Respect for the Living and Respect for the Dead: Return of Indian and Other Native American Burial Remains," 39 J. Urban & Contemp. L. 195, 196-97 (1991); note M. Bowman, *The Reburial of Native American Skeletal Remains: Approaches to the Resolution of a Conflict,* 13 Harv. Env. L. Rev. 147-56 (1989).

215. J. Trope & W. Echo-Hawk *supra* note 207, at 6, *quoting* annotation, *Removal and Reinternment of Remains,* 21 A.L.R.2d 472, 475-76 (1950) (citations omitted); *see generally* Note: *Respect for the Living and Respect for the Dead: Return of Indian and Other Native American Burial*

remains must at all times be treated with dignity and respect"[216] and to protect Native American rights of possession to objects needed to preserve or renew traditional culture and religion.[217]

### *A. The Reach of the Statute*

NAGPRA's land management prescriptions apply to intentional excavation and removal or inadvertent discovery of Native American human remains and "cultural items" on federal and Indian lands. NAGPRA defines "Native American" to mean "of, or relating to, a tribe, people, or culture that is indigenous to the United States."[218] The burial remains and cultural artifacts of all Native American tribes, bands, or groups are covered, and there is no prerequisite that the remains or cultural items be associated with a tribe, band, or group now federally recognized. NAGPRA generally affects activities and artifacts on federal and Indian lands; it does not affect artifacts found on state or private lands after its date of enactment.[219] The definition of "federal lands" includes "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. . . ."[220] Tribal lands include "all lands within the exterior boundaries of any Indian reservation" and "all dependent Indian communities."[221] These definitions suggest that federal public lands, not administered for the benefit of tribes, may be deemed tribal lands under NAGPRA, if they lie within reservation boundaries or in areas that may be considered "dependent Indian communities."

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*Remains*, 39 J. Urban & Contemp. L. 195, 213-23 (1991); and M. Bowman, *supra* note at 214.

216. S. Rep. No. 473, 101st Cong., 2d Sess. at 9, 7 (1990).

217. *Id.*

218. 25 U.S.C. § 3001(9) (Supp. IV 1992). The statute comprehensively includes in its coverage Alaskan Native and Native Hawaiian groups. NAGPRA defines Native Hawaiian as "any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii." NAGPRA 2(10), 25 U.S.C. § 3001(10). In this paper the terms, "Native American," and "Indian" include Native Hawaiian and Native Alaskan peoples.

219. *See* Remarks of Sen. McCain, 139 Cong. Rec. S17176 (daily ed. Oct. 26, 1990); *but see infra*. Part III.F., concerning the description of "tribal lands."

220. 25 U.S.C. § 3001(5) (Supp. IV 1992). Federal public lands in which no Indian tribe or individual Indian has a beneficial interest, if located within reservation boundaries or in a dependent Indian community, apparently could be classed as "tribal land" under NAGPRA. *See* 25 U.S.C. § 3001(5). We do not suggest, however, that non-Indian lands may be part of a "dependent Indian community."

221. 25 U.S.C. § 3001(15) (Supp. IV 1992). "Dependent Indian communities" are defined in cases arising under 18 U.S.C. § 1151 (1988). *See infra* Part III.E. The requirements of NAGPRA 3(c) that the tribe consent to the excavation of cultural items discovered on "tribal lands" may give tribes expanded land use planning powers over certain Federal lands.

The Department of the Interior issued a Notice of Proposed Rulemaking for NAGPRA regulations in May of 1993.[222] In the 60 day comment period that followed, roughly 80 comments were received, equally divided among tribes, museums, federal agencies, and miscellaneous sources. The Interior Department estimates final regulations will be promulgated in approximately mid-1994, although further regulatory development will be necessary to fully implement NAGPRA.

### *B. Cultural Items Defined*

NAGPRA § 2(3) defines four classes of Native American cultural items: "human remains," "funerary objects," "sacred objects," and objects of "cultural patrimony."[223] These will be described in turn below.

#### *1. "Human remains"*

NAGPRA does not define "human remains," however, the National Park Service has taken the position that "all Native American human remains are covered."[224] Whether or not Native American human remains were found in a burial site, such remains are covered by the statute as even isolated human bones that may have been found away from a burial site apparently are still subject to NAGPRA.[225] Under the NAGPRA NPRM, "human remains" also are broadly defined, excluding only remains freely given by the individual and remains incorporated into cultural items.[226]

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222. 58 Fed. Reg. 31,122 (May 28, 1993). The draft regulations exclude privately owned lands from the definition of "tribal lands."

223. The proposed NAGPRA regulations issued on May 28, 1993, *see* 58 Fed. Reg. 31,122, while not seeking to change statutory requirements (even if they could), have redefined terms to exclude "human remains" from the definition of "cultural items." This change of usage addresses the offense some have taken to defining "human remains" as "items." 58 Fed. Reg. at 31,122.

224. Memorandum, Departmental Consulting Archaeologist, National Park Service, October 30, 1991 ("Departmental Consulting Archaeologists Memorandum") at 10. Aside from the May 28, 1993 Notice of Proposed Rulemaking of NAGPRA regulation, 58 Fed. Reg. 31,122 ("NAGPRA NPRM"), the Departmental Consulting Archaeologist Memorandum is the only existing agency guidance to the public on NAGPRA compliance. The NPS Departmental Consulting Archaeologist is the Interior Department official having lead responsibility for coordinating Interior Department policies and actions to protect historic and archaeological properties and objects.

225. *Supra* note 224, at 11. The statutory definition provides only that the "associated funerary objects" and human remains both "are presently in the possession or control of a Federal Agency or museum." Associated funerary objects also include "other items exclusively made for burial purposes or to contain human remains . . . ." *Id.*

226. *Supra* note 222, at 31,122, 31,126.

2. *"Funerary objects"*

Funerary objects are objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later.[227] Funerary objects may be either "associated" or "unassociated." Associated funerary objects "still retain their association with human remains that can be located."[228] Under the NAGPRA NPRM, associated funerary objects include: (a) museum or federal agency-controlled items that are "reasonably believed to have been placed intentionally at the time of death or later with or near individual human remains;" and (b) items "reasonably believed to have been made exclusively for burial purposes or to contain human remains."[229] "Unassociated funerary objects," conversely, are items reasonably believed to have been part of a burial site but that "can no longer be associated with the human remains of a specific burial."[230] Unassociated funerary objects, under the NAGPRA NPRM, are those items within the first category of "associated" objects described earlier in this paragraph, except that the items are not in the possession or custody of a museum or federal agency.[231] Consequently, all objects that were part of, or were intended to be part of, a burial site at the time of burial "or later" are either associated funerary objects or unassociated funerary objects.

3. *"Sacred objects"*

Sacred objects refers to "specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religion by their present day adherents."[232] The operative test is not whether they are considered sacred in the eyes of an individual, but whether the objects "were devoted to a traditional Native American religious ceremony or ritual and which have

227. 25 U.S.C. § 3001(3)(A) and (B) (Supp. IV 1992).

228. Departmental Consulting Archaeologist Memorandum, at 11. See 25 U.S.C. § 3001(3)(A) (Supp. IV 1992). The statutory definition provides only that the "associated funerary objects" and the human remains both "are presently in the possession or control of a Federal agency or museum." Associated funerary objects also include "other items exclusively made for burial purposes or to contain human remains . . . ." *Id.*

229. *Supra* note 222, at 31,126, proposed 43 C.F.R. § 10.2(b)(3).

230. Departmental Consulting Archaeologist Memorandum, at 11. *See* 25 U.S.C. § 3001(3)(A).

231. *Supra* note 222, at 31,126, proposed 43 C.F.R. § 10.2(b)(4).

232. 25 U.S.C. § 3001(3)(C) (Supp. IV 1992); *see also* 58 Fed. Reg. at 31,126, proposed 43 C.F.R. § 10.2(b)(5).

religious significance or function in the continued observance or renewal of such ceremony."[233]

*4. "Objects of cultural patrimony"*

Objects of cultural patrimony are objects "having ongoing historical, traditional or cultural importance central to the Native American group or culture itself."[234] They must be objects that may not be alienated or appropriated by any individual group member. Cultural patrimony objects would include items central to the preservation of a group culture, such as the Zuni War Gods and the Confederacy Wampum Belts of the Iroquois.[235]

These definitions may be of little help to the operator of heavy machinery building a drill site. The prudent course would be to consider any human remains in an area that may contain Native American burial sites, and any artifacts found with them as potentially subject to NAGPRA. Objects not associated with human remains will present more difficult questions. The prudent course would be to consider any artifact or object probably Native American in origin to be protected potentially under NAGPRA and to have it examined by a knowledgeable archaeologist to evaluate whether it is a NAGPRA cultural item.

### *C. Native American Ownership or Control of Cultural Items*

NAGPRA proclaims that Native American cultural items excavated or discovered on federal or tribal land after the date of enactment shall be owned and controlled by the Indians or Indian tribes having the closest relationship to the cultural items. It also establishes a hierarchy of ownership interest covering all classes of cultural items. NAGPRA's ownership scheme is important to public lands developers because it determines the tribe or tribes which are entitled to notice and consultation with respect to cultural items inadvertently discovered and that must be excavated or removed from a project area, and which tribe or tribes must approve excavation.

Ownership of and right to notice concerning newly discovered human remains and associated funerary objects is in the lineal descendants of the deceased Native American whose remains or burial items are found.[236] In cases where lineal descendants cannot be ascertained, and

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233. *Supra* note 224, at 5; *see also* 58 Fed. Reg. at 31,126, proposed 43 C.F.R. § 10.2(b)(5).

234. 25 U.S.C. § 3001(3)(D) (Supp. III 1991); *see also* 58 Fed. Reg. at 31,126, proposed 43 C.F.R. § 10.2(b)(6).

235. *Supra* note 216, at 8.

236. 25 U.S.C. § 3002(a)(1) (Supp. IV 1992); "lineal descendant" is not defined, the

with respect to unassociated funerary objects, sacred objects, and objects of cultural patrimony, NAGPRA, § (3)(a)(2) specifies that ownership and control is:

> (A) in the Indian tribe . . . on whose tribal land such objects or remains were discovered;
> (B) in the Indian tribe . . . which has the closest cultural affiliation with such remains or objects and which, upon notice, states a claim for such remains or objects; or
> (C) if the cultural affiliation of the objects cannot be reasonably ascertained and if the objects were discovered on federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of some Indian tribe—
> 1. the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered, if upon notice, such tribe states a claim for such remains or objects, or
> 2. if it can be shown . . . that a different tribe has a stronger cultural relationship with the remains or objects . . . , in the Indian tribe that has the strongest demonstrated relationship, if upon notice, such tribe states a claim for such remains or objects.[237]

With respect to cultural items on federal lands, "cultural affiliation" likely will be the most common determinant of the tribe entitled to ownership. Legislative history suggests that evidence bearing on cultural affiliation may include "geographical, kinship, biological, archaeological, anthropological, linguistic, oral tradition, or historical evidence or other relevant information or expert opinion."[238] While NAGPRA incorporates a "requirement of continuity between present day Indian tribes and materials from historic or prehistoric Indian tribes . . . ," a claim "should not be precluded solely because of gaps in the record."[239]

NAGPRA contemplates disputes between tribes over priority of right to ownership of NAGPRA cultural items and unclaimed cultural items. Conflicting claims between two or more tribes to the same cultural item could be considered by the seven member review committee created

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Departmental Consulting Archaeologist Memorandum interprets this to mean "a direct genetic or familial tie reasonably established between generations of an extended family, clan, or lineage." Departmental Consulting Archaeologist Memorandum, at 5.

237. 25 U.S.C. § 3002(2)(A), (B), and (C) (Supp. IV 1992); *see also* 58 Fed. Reg. at 31,128-29, proposed 43 C.F.R. § 10.6.

238. *Supra* note 216, at 9; *see also* Departmental Consulting Archaeologist Memorandum at 5-6.

239. *Supra* note 216, at 9.

by NAGPRA, § 8.[240] NAGPRA, § 15 provides jurisdiction in the United States district courts over any action brought by any person alleging a violation of this Act and vests the court with authority to issue orders necessary to enforce NAGPRA.[241] The record and findings made by the review committee may be admissible in such an action.[242]

### *D. Procedures Governing Inadvertent Discovery of Cultural Items*

NAGPRA is most likely to affect natural resource development on public lands through its procedures governing inadvertent discovery of cultural items.[243] NAGPRA specifies ostensibly straightforward requirements when "any person . . . knows, or has reason to know, that such person has discovered Native American cultural items on federal or tribal lands . . . ."[244] Those procedures are:

> (1) The discoverer must notify the Secretary of the Interior or other federal agency head ("Department head") having primary jurisdiction over the lands involved; with respect to tribal lands, if known or readily ascertainable, the discoverer also must notify the responsible tribal official of the appropriate Indian tribe, or Native Hawaiian organization or Alaskan Native corporation or group.
> (2) If the discovery occurred in connection with an on-going activity, "including (but not limited to) construction, mining, logging, and agriculture," the discoverer must:
> (a) "cease activity in the area of the discovery,"
> (b) "make a reasonable effort to protect the items discovered before resuming such activity;" and

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240. 25 U.S.C. § 3006 (Supp. IV 1992). The review committee shall, upon the request of any affected party, review and make findings related to the identity or cultural affiliation of cultural items or the return of such items and facilitate the resolution of disputes among tribes, lineal descendants, and federal agencies, "including convening the parties to the dispute if deemed desirable." NAGPRA 8(C)(3) and (4).

241. 25 U.S.C. § 3013 (Supp. IV 1992).

242. 25 U.S.C. § 3006(d) (Supp. IV 1992).

243. For a look at prior procedures in comparable circumstances see National Park Service Staff Directive 84-5, December 18, 1984, Establishment of Service-Wide Procedures for Responding to Notification Under Public Law No. 93-291 that Unanticipated Scientific, Prehistorical, Historical or Archaeological Data Have Been Discovered During Construction of a Federal Undertaking and Are Being Irrevocably Lost or Destroyed. NPS Staff Directive 84-5 outlines inter-agency procedure to address compliance with the Historic and Archaeological Date Preservation Act, *see infra* Part IV, assuming the agency complied with Section 106 of the National Historic Preservation Act in approving the project, *see supra* Part II.E.

244. 25 U.S.C. § 3002(d) (Supp. IV 1992); *see also* 58 Fed. Reg. at 31,127, proposed 43 C.F.R. § 10.4.

(c) "provide notice under this subsection" to the Department head and, if applicable, known or ascertainable tribes or groups.[245]
(3) Significantly, project activity may resume 30 days after notification has been received under NAGPRA § 3(d).[246] And,
(4) The disposition and control of cultural items found is governed by the ownership hierarchies, described above, set forth in NAGPRA § 3.[247]

The statutory 30-day moratorium on projects runs from the date of "certification by the Secretary [or other agency head] *or* the appropriate Indian tribe . . . ."[248] Consequently, to avoid unanticipated delays, the person discovering cultural items should immediately notify at least the appropriate federal agency head by a method that ensures certification of receipt.[249] Even on federal lands, an inadvertent discoverer also should consider sending notice in the same manner to any tribe which may claim ownership of the artifacts.

Under the NAGPRA NPRM, project activity may resume as provided under NAGPRA § 3(d) following any inadvertent discovery "if the resumption" is otherwise lawful.[250] Alternatively, project activity may resume "at any time that a written, binding agreement is executed between the necessary parties that adopts a recovery plan for the removal, treatment, and disposition of the human remains or cultural

245. 25 U.S.C. § 3002(d) (Supp. IV 1992). The person discovering cultural items "shall notify, in writing, the Secretary of the Department [or head of other applicable agency] having primary management authority with respect to Federal lands and the appropriate Indian tribe or Native Hawaiian organization with respect to tribal lands." *Id.* (Emphasis added.) *See also* Departmental Consulting Archaeologist Memorandum at 21; *see also* 58 Fed. Reg. at 31,127, proposed 43 C.F.R. § 10.4(d).

246. *Id.* The awkward statutory language, "may resume after 30 days of such certification [of receipt of notice]," probably should be read "may resume 30 days after such certification."

247. *See supra* Part III. C.

248. 25 U.S.C. § 3002(d) (Supp. IV 1992).

249. Legislative history supports that notice of a discovery on Federal lands should be to the Secretary, but that the Secretary should notify appropriate tribes. *See* Senate debates, Remarks of Sen. McCain, 136 Cong. Rec., at S17176 (daily ed. Oct. 26, 1990) (party uncovering object must "notify the Secretary . . . of department with authority over those lands."; development can resume "30 days after such notice has been received by the Secretary." However, the 30 day notification period is intended to provide Indian tribes "an opportunity to intervene in development activity on Federal lands in order to safeguard and to provide for appropriate disposition of culturally affiliated items found on Federal lands."). The House Report on H.R. 5237, however, suggests that notification must be given to the applicable Department head and Indian tribe. H. Rep. No. 877, 101st Cong., 2d Sess. at 9, 17 (1990).

250. 58 Fed. Reg. at 31,127, proposed 43 C.F.R. § 10.4(e).

items in accordance with their ownership."[251] Although it is not stated, we presume that project activities could resume under such an agreement even if less than 30 days has passed from the date of notification. Presumably, however, implementation of the recovery plan could result in further project delays. Of course, these provisions are in draft regulations; one should watch for final regulations.

### *E. Provisions Applicable on Tribal Lands*[252]

As the discussion of the scope of "federal lands"[253] reflects, NAGPRA defines "tribal lands" to include "all lands within the exterior boundaries of any Indian reservation" and "all dependent Indian communities."[254] These definitions ostensibly empower tribes to control excavation and removal of cultural items on all lands, without regard to ownership, within reservation boundaries or in "dependent Indian communities," off-reservation areas having, among other qualities, predominantly Indian population and land ownership.[255] Indian reservations, particularly those open to settlement and entry under the allotment acts of the late 19th century, often include within the exterior boundaries of the reservation, substantial acreage in which the tribe has no beneficial interest.[256] Similarly, "dependent Indian communities," located outside reservation boundaries, may reflect a hodgepodge of land titles including federal and state public lands and private fee lands. No statutory language appears to limit "tribal lands" to those in which a tribe or tribal member has a beneficial interest. Curiously, the legislative history, far from hinting at such a result, disclaims regulation of state or fee lands.[257] Conversely, tribal lands apparently would not include land that an Indian tribe owns or in which it has a beneficial interest unless

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251. *Id.*

252. "Tribal lands," under NAGPRA, is a broader category than the name implies, and it may well include Federal public lands, state public lands, and fee lands. While the NAGPRA NPRM excludes private lands for all purposes, the final rules are not published.

253. *See supra* Part III. A.

254. 25 U.S.C. § 3001(15)(A) and (B) (Supp. IV 1992).

255. *See Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387 (10th Cir.), *cert. denied*, 498 U.S. 1012 (1990); *United States v. Martine*, 442 F.2d 1022 (10th Cir. 1971).

256. *See, e.g., Solem v. Bartlett*, 465 U.S. 463 (1984); *Seymour v. Superintendent*, 368 U.S. 351 (1962).

257. Legislative history uses the term "tribal lands" repeatedly without discussing the "tribal lands" definition. During floor debate, Senator McCain calmed concerns that the Act would preclude collectors from hiking and collecting artifacts, that "[t]he definition of cultural items in the bill only applies to those objects discovered after enactment on Federal or tribal lands. Private collectors will still be able to pursue their hobbies on state or private lands." 139 Cong. Rec. S17176 (daily ed. Oct. 26, 1990.).

the land were within reservation boundaries or a dependent Indian community.

If lands are "tribal," rather than "federal," NAGPRA requires additional notice to, consultation with, and, possibly, consent of tribes. A person inadvertently discovering a cultural item on tribal land has a clear duty to notify the appropriate Indian tribe, "if known or readily ascertainable."[258] Before cultural items can be excavated or removed from tribal lands, and after consultation with the appropriate tribe, the person discovering the cultural items must obtain the "consent of the appropriate (if any) Indian tribe . . ." and provide "proof" of such consent.[259] NAGPRA does not specify the consequence of a tribe's refusing to consent to excavation or removal. In a case where the problem arises because of an inadvertent discovery of cultural items, the specific terms of NAGPRA § 3(d), allowing no more than a 30 day cessation of activity in the event of an inadvertent discovery of cultural items, probably would control over the more general provisions governing intentional excavation and removal of cultural items for any purpose.[260]

The more difficult question will arise when the specific provision of NAGPRA § 3(d), which governs discovery in connection with an ongoing activity, are not applicable, and the cultural items are located on public or private lands in which a tribe has no interest.[261] In this setting, does NAGPRA empower a tribe to withhold consent to any excavation or removal of cultural items, thereby requiring that the items remain *in situ*, and potentially thwarting development of non-Indian lands? NAGPRA's evident intent not to effect a taking, and legislative history disclaiming an intent to affect fee lands would suggest an interpretation that avoids this impact. However, the potential impact of this ambiguity counsels for regulatory or legislative clarification.

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258. 25 U.S.C. § 3002(d) (Supp. IV 1992). The statute suggests there is no duty to notify the head of the federal agency having primary management authority in the case of a discovery on tribal lands; however, notification to a federal agency exercising management authority probably would be desirable.

259. 25 U.S.C. § 3002(c) (Supp. IV 1992).

260. *Supra* note 216, at 10 ("the Committee does not intend this section to operate as a bar to the development of Federal or tribal lands on which human remains or objects are found. Nor does the Committee intend this section to significantly interrupt or impair development activities on Federal or tribal lands").

261. A "savings" provision is incorporated in the definition of "right of possession," which means possession obtained with the voluntary consent of an individual that had authority to alienate the cultural object. Under the savings clause, that definition would not apply if it would result in a Fifth Amendment taking by the United States. 25 U.S.C. § 3001(13). That savings clause would not seem to limit the requirement that the applicable tribe consent to an excavation or removal to which a tribe refused consent, yet a Fifth Amendment taking may result.

### *F. Excavation and Removal of Cultural Items*

There doubtless will be situations where the 30 day cessation of activity period seems inadequate to identify the appropriate tribe and decide upon the disposition of the remains. The appropriate tribe or tribes must be notified and given full particulars of the discovery. However, it may be necessary to determine which tribe or tribes are entitled to receive notice.[262] More than one tribe may claim ownership, raising a question as to who can authorize the appropriate disposition of discovered cultural artifacts.

Prior to any excavation, a permit must be issued under the Archaeological Resources Protection Act (ARPA).[263] Actual excavation pursuant to an ARPA permit will take additional time. Careful project planning and close coordination with the applicable agency and appropriate tribe will be necessary to minimize resulting delays.

NAGPRA, § 3(c) specifies procedures governing the excavation and removal of cultural items from federal or tribal lands. These statutory steps could be set in motion either when the cultural resource inventory is prepared during initial stages of the project or when NAGPRA-protected cultural items are discovered inadvertently in project activities. NAGPRA requires the following steps to be completed before cultural items may be excavated:

> (a) A permit under ARPA § 4, "which shall be consistent with [NAGPRA]," must be issued to govern the excavation or removal;
> (b) The items may not be excavated or removed until "after consultation with or, in the case of tribal lands consent of the appropriate (if any) Indian tribe . . .";
> (c) The ownership and control of disposition shall be as provided in NAGPRA §§ 3(a) and (b); and
> (d) Proof of tribal consultation or consent must be shown.[264]

The NAGPRA statutory text does not address several important issues that may arise during the 30 day period following notification. For example, what happens if the ARPA permit process takes more than 30 days? What if the appropriate tribe cannot be identified or tribal consultation cannot be completed within 30 days of the Department head's receipt of notice?

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262. *See infra* Part III. C.

263. *See* Archaeological Resources Protection Act, 1979, 16 U.S.C. § 470aa-ll (1988); 16 U.S.C. § 470cc (1988); *see infra* Part V.

264. 25 U.S.C. § 3002(c) (Supp. IV 1992).

If, for any reason, a certificate of "consultation" with the appropriate tribe for activities on federal land cannot be obtained in a timely fashion, the most practical approach may be to obtain an ARPA permit and to excavate or remove the cultural items pursuant to the permit. The agency may agree to accept custody of the cultural items while attempts continue to consult with tribes over disposition of the objects.[265] NAGPRA does not appear to sanction delaying project implementation for extended periods which may be necessary to determine conflicting tribal rights to cultural items or, with respect to federal lands, to allow tribes to impose conditions upon excavation or removal that materially impair execution of the project.[266]

### G. *Planning for NAGPRA Compliance*

The project applicant and federal agency can minimize project delay and disruption by effective planning during early stages. Cultural resources in a proposed project area should be evaluated carefully under NEPA, NHPA, and possibly, other statutes.[267] NAGPRA-protected cultural resources also should be evaluated in the reviews under these statutes, and the project proponent should seek to reach agreements concerning NAGPRA compliance as part of a coordinated consultation process.[268] At the planning stage, the developer also should consider the potential applicability of state statutes protecting grave sites.

Cultural resource inventories prepared under NHPA at the project proposal stage should directly address NAGPRA-protected cultural items. Impacts on NAGPRA-protected sites or cultural items should be considered in environmental assessments or environmental impact statements under NEPA[269] and may be pertinent to "adverse

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265. The Departmental Consulting Archaeologist Memorandum refers to "consultation with Tribes, or documented evidence of attempts to consult . . . ." Departmental Consulting Archeologist Memorandum at 20. Consequently, the agency and project developer should keep accurate records of all attempts to notify tribes and to consult with any tribes indicating an interest in cultural items.

266. However, Senator McCain, a principal NAGPRA sponsor, admonished that:

> Development of the site could continue 30 days after such notice has been received by the Secretary. This section of the bill is not intended as a bar to the development of Federal or tribal lands on which cultural items are found. Nor is this bill intended to significantly interrupt or impair development activities on Federal or tribal lands.

139 Cong. Rec. S17176 (daily ed. Oct. 26, 1990); *see also* Sen. Rep. No. 473, 101 Cong., 2d Sess. at 16 ("the activity may resume 30 days after certification that the notice provided for under this section has been received.")

267. *See supra* Part II.E.; *see also infra* Parts IV and V.

268. *See* 36 C.F.R. § 800.4(b); *see also supra* Part II. E. 4.

269. *See supra* Part II. D.

effect" determinations under NHPA.[270] The notice and consultation processes under NAGPRA and NHPA also should be coordinated where possible.[271]

NAGPRA compliance will be facilitated if, early in project planning, the project developer and agency seek to identify and consult with tribes or groups that may own or control cultural items under NAGPRA. Identification of potentially interested tribes at an early stage also will facilitate prompt decisions over disposition or removal of cultural items inadvertently discovered during the project. The consultation participants should aim for agreements between developer, agency, and affected tribes over ownership and control of cultural items, excavation or removal methods, and custody of cultural items immediately following removal. Such an agreement will go a long way toward effectuating NAGPRA's requirement that certain projects not be delayed more than thirty (30) days by an inadvertent discovery of cultural items.

Project planning also must accommodate requirements of ARPA that apply to excavation and removal of NAGPRA-protected cultural items.[272] NAGPRA prescribes that excavation and removal of cultural items be pursuant to an ARPA permit.[273] ARPA also covers "graves" and "human skeletal materials"[274] and requires notice of proposals to excavate cultural or religious sites to tribes which may consider the site important.[275] ARPA regulations requires that applicable tribes be notified 30 days before issuance of an ARPA permit and contemplate consultation between agency and tribes upon tribal request.[276] The project proponent should coordinate ARPA compliance at an early stage in the project, with agencies and tribes.

Lastly, a look to state law is necessary to avoid unanticipated conflicts. Increasing numbers of states have enacted statutes protecting Indian burial sites and related items.[277] Where NAGPRA and state law

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270. *See supra* Part II. E.

271. *See supra* Parts II. E. 4 and VIII. E.

272. *See* Archaeological Resources Protection Act, 1979, 16 U.S.C. § 470aa-11 (1988); *see also supra* Part V.

273. *See supra* Part VIII.E.

274. 16 U.S.C. § 470bb (1988).

275. 16 U.S.C. § 470cc (1988); 43 C.F.R. § 7.7 (1993).

276. *See* 43 C.F.R. § 7.7 (1993). For excavation on "Indian lands," ARPA requires written consent from Indian landowners and the Indian tribe having jurisdiction over the lands. 43 C.F.R. § 7.8 (a)(5) (1993). ARPA defines "Indian lands" more narrowly than does NAGPRA, as lands of Indian tribes or individuals held by the United States in trust or subject to federal restraints or alienation. 43 C.F.R. § 7.3(e) (1993).

277. *See* Note: *Respect for the Living and Respect for the Dead: American Burial Remains*, 39 J. Urban & Contemp. L. 195, 213-18 (1991).

conflict, NAGPRA likely will control; however, state law may be applicable if not inconsistent with federal law.

## IV. THE HISTORIC AND ARCHAEOLOGICAL DATA PROTECTION ACT OF 1974 AND RESERVOIR SALVAGE ACT OF 1960

The Historic and Archaeological Data Protection Act (HADPA)[278] and Reservoir Salvage Act (RSA)[279] combine to authorize collection and preservation of historic and cultural resource data and remains discovered both prior to dam construction and filling, and following initiation of any ground-disturbing activities on public and Indian lands.[280] These statutes are not a significant factor in public and Indian lands development,[281] presumably because NHPA compliance obligations nearly always disclose historic properties and appropriate measures are taken before initiation of a project.[282]

HADPA and RSA provide that a federal agency must notify the Secretary if it discovers or is notified by appropriate authorities of the existence of significant historic data that may be irrevocably lost or destroyed as the result of a project.[283] If the Secretary agrees, he or she must survey or investigate the area, and recover or preserve the data which should, in the public interest, be recovered.[284] The survey or recovery work must be initiated within 60 days of notice to the Secretary,[285] and the Secretary is required, absent an agreement to the contrary, to "compensate any person . . . damaged as a result of delays in construction or as a result of the temporary loss of the use of private or nonfederally owned land."[286] The Secretary's data recovery work is intended to cause "as little disruption or delay as possible."[287] Notwithstanding the potential for some compensation, the disruption and expense potentially caused by discovery of sites after initiation of the construction

278. P.L. 93-291, 88 Stat. 174, 16 U.S.C. §§ 469-469c (1988). This statute broadened the applicability of the preexisting Reservoir Salvage Act.

279. P.L. 86-523, 74 Stat. 220, 16 U.S.C. §§ 469-469C (1988).

280. 16 U.S.C. § 469-469a-3; *see also Attakai v. United States*, 746 F. Supp. at 1410; *Nat'l Indian Youth Council v. Andrus*, 501 F. Supp. at 675 n.53, 680.

281. *See* G.C. Coggins, *Public Natural Resources Law*, 15.04[4] (1993).

282. *But see Sierra Club v. Morton*, 431 F. Supp. 11, 20 (S.D. Tex. 1975) (if properties eligible for inclusion in the National Register are discovered in dam construction activities, construction work would be stopped until salvage work is done).

283. 16 U.S.C. § 469a-1 (1988); *Attakai v. United States*, 746 F. Supp. at 1410.

284. 16 U.S.C. § 469a-2 (1988); *Attakai*, 746 F. Supp. at 1410.

285. 16 U.S.C. § 469a-2(c) (1988).

286. *Id.* at § 469a-2(d) (1988).

287. *Id.* at § 469a-3(a) (1988).

phase of a project counsel in favor of insuring the agency undertakes and completes its NHPA compliance work comprehensively. Under HADPA, recovery work may be charged as project costs, and billed to the permittee.[288]

## V. THE HISTORIC SITES ACT OF 1935

The Historic Sites Act of 1935 (HSA)[289] is designed to protect a narrow class of historic resources: sites, buildings, and objects of national significance.[290] The Act declared a "national policy to preserve for public use historic sites . . . of national significance for the inspiration and benefit of the people . . . ."[291] The other statutes discussed to this point have a broader scope, being designed to protect sites of local, regional and national significance.[292] Accordingly, the HSA has a relatively narrow scope.

The HSA delegates to the Secretary the authority to survey historic and archaeologic sites, buildings and objects to determine which possess "exceptional value as commemorating or illustrating the history of the United States."[293] The Secretary also is authorized to acquire nationally significant properties, and to contract with states or others to protect such properties.[294] Generally, the HSA has no peculiar significance to public lands development. Of course, if a National Historic Site is in the vicinity of a project, NHPA standards will apply.

## VI. THE ANTIQUITIES ACT OF 1906 AND THE ARCHAEOLOGICAL RESOURCES PROTECTION ACT OF 1979

The Antiquities Act of 1906[295] and the Archaeological Resources Protection Act of 1979 (ARPA)[296] work in tandem to protect and preserve historic and cultural properties through a permit system authorizing scholarly study and excavation of cultural properties, and a severe penalty provision for unauthorized use, removal, or damage to

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288. *Id.* at § 469c-2 (1988).

289. 16 U.S.C. § 461-467 (1988 & Supp. IV 1992).

290. 16 U.S.C. § 461. National Historic Sites include places such as Bent's Old Fort in Colorado, Golden Spike National Historic Site near Promontory Point, Utah, and Hubbell Trading Post in Ganado, Arizona. *See* 16 U.S.C. § 461, Historical and Statutory Notes.

291. *Id.* Regulations implementing the HSA are found at 36 C.F.R. Part 65 (1991). NHPA regulations also provide special protection for National Landmarks. *See supra* Part II.E.

292. *See supra* Parts II and III.

293. 16 U.S.C. § 462(b) (1988).

294. *Id.* at § 462(d), (e).

295. 16 U.S.C. §§ 431-433 (1988 & Supp. IV 1992).

296. Pub. L. 96-95, 93 Stat. 721, 16 U.S.C. § 470aa - 470ll (1988).

any archaeological resource.[297] Generally speaking, these statutes do not impose conditions on development projects.[298] For example, the district court in *Attakai v. United States* rejected arguments that the range improvement projects there required ARPA permits: "ARPA is not applicable to the projects and construction activities in this case . . . the act is clearly intended to apply specifically to purposeful exploration and removal of archaeological resources, not excavation which may, or inadvertently do, uncover such resources."[299] ARPA, however, will come into play in circumstances where archaeological resources are uncovered during project execution and must be excavated or removed.[300] ARPA will govern the qualifications of personnel involved in excavation and the methods used.[301] If project implementation will require excavation of archaeological sites, the developer should incorporate ARPA planning into the permit process. Developers also are advised not to do any amateur collecting without an ARPA permit, by virtue of violation of ARPA's permit requirements.[302]

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297. 16 U.S.C. §§ 432-33, 470cc; *see also* 43 C.F.R. Parts 3 and 7 (1991) (Department of Interior); 36 C.F.R. Part 296 (1991) (Department of Agriculture); 25 C.F.R. Part 262 (1993) (Bureau of Indian Affairs regulations specific to "Indian lands"); Kemrer, *The Protection of American Antiquities*, 21 Nat. Res. J. 935 (1981). Federal land managers must notify any Tribe "which may consider [a site to be excavated or studied] as having religious or cultural importance." 16 U.S.C. § 470cc(c).

298. 16 U.S.C. § 470kk. However, ARPA has been used to help defeat development projects on federal lands. As part of NHPA compliance procedures, an applicant for a federal license to construct a hydroelectric power project in Montana sought an ARPA permit to conduct test excavations of historic properties on National Forest lands. Pursuant to regulations, the Forest Service notified affected tribes of its intent to issue the permit. The tribes objected, and the Forest Service denied the ARPA permit. The tribes then argued that NHPA compliance was impossible and the power license should not be issued. For a variety of reasons, the project ultimately died. *See generally Northern Lights, Inc.*, 27 FERC (CCH) 63,024, 65,080-85 (1984); FERC, Dept. of Energy, Final Environmental Impact Statement, Kootenai River Hydroelectric Project No. 2752 - Montana (1981).

299. 746 F. Supp. at 1410. The court stated NHPA and HADPA address inadvertent discoveries. *Id.*; *see also* 43 C.F.R. § 7.5(c) (1992). However, an ARPA permit may be required to conduct NEPA compliance work. *See* 16 U.S.C. § 470cc (1988).

300. This may be true even if discoveries occur on private lands. *See United States v. Gerber*, 20 Ind.L.Rep. 2127 (7th Cir. 1993).

301. *See* 43 C.F.R. § 7.1-7.37 (1991); careful compliance with ARPA regulations is necessary. ARPA is specifically applicable under the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 2001.

302. *See, e.g., United States v. Austin*, 902 F.2d 743 (9th Cir.), *cert. denied*, 498 U.S. 874 (1990) (affirming conviction of multiple ARPA violations); *United States v. Smyer*, 596 F.2d 939 (10th Cir.), *cert. denied*, 444 U.S. 843 (1979) (Antiquities Act convictions affirmed).

## VII. THE FEDERAL LAND POLICY AND MANAGEMENT ACT PROVIDES A FRAMEWORK FOR CULTURAL AND HISTORIC RESOURCES MANAGEMENT ON PUBLIC DOMAIN LANDS

The Federal Land Policy and Management Act (FLPMA)[303] provides a framework for cultural resources management on public domain lands.[304] Congress' policy declaration in FLPMA provides that "public lands be managed in a manner that will protect the quality of . . . historical . . . and archaeological values."[305] Of course, that policy must be balanced with sometimes conflicting or competing management policies, such as the policy to manage the public domain recognizing the "need for domestic sources of minerals, food, timber, and fiber from the public lands . . . ."[306] Obviously, multiple-use management concepts are applicable to public domain management.[307]

The land use planning process established under, and required by, FLPMA includes consideration of cultural and historic properties.[308] Resource Management Plans developed under FLPMA invariably contain a cultural resources management section. That section generally describes both primary and support roles for the BLM. Primary roles focus on the affirmative protection of historic properties, while the support role addresses NHPA compliance obligations.[309]

Regulations promulgated pursuant to FLPMA "to establish procedures for the orderly and timely processing of proposals for non-federal use of public lands" provide for NHPA compliance measures.[310] Land use authorizations under these regulations require terms and conditions which shall "[m]inimize damage to scenic, cultural and aesthetic values . . . and otherwise protect the environment . . . ."[311]

The BLM Manual includes extensive provisions concerning implementation of cultural resource management statutes.[312] Parts 8100

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303. 43 U.S.C. §§ 1701-1783 (1988).

304. "Public lands" is defined in FLPMA as lands administered by the BLM except Outer Continental Shelf lands and lands held for the benefit of Indian tribes. *See* 43 U.S.C. § 1702(e). FLPMA also authorizes regulation of National Forest lands in conformity with the purposes of FLPMA. *See* 43 U.S.C. § 1740.

305. 43 U.S.C. § 1701(a)(8).

306. 43 U.S.C. § 1701(a)(12).

307. *See e.g.*, 43 U.S.C. § 1732(a).

308. *See generally* 43 C.F.R. Part 1600 (1991); 1601.0-5(a), (k).

309. *See, e.g.*, Farmington, New Mexico Resource Management Plan, 2-28 to 2-31 (July 1988).

310. *See, e.g.*, 43 C.F.R. § § 2920.0-1, 2929.5-1 (1991); *see generally*, 43 C.F.R. Part 2920 (1991).

311. 92 Stat. 469, 42 U.S.C. § 1996; (1988) or 43 C.F.R. § 2920.7 (1991).

312. BLM Manual Part 8100 (1988). Of course, manual provisions, not having been subject to notice and comment under the Administrative Procedure Act, do not necessarily have the force or effect of law. *See Morton v. Ruiz*, 415 U.S. 199, 235 (1974).

and 8130 of the BLM Manual provide procedures for including a cultural resources management component in overall resource management and other plans developed under FLPMA.[313] Cultural Resources Management Plans serve as a refinement of resource management plans (RMPs), and constitute a "bridge between broad RMP objectives and specific project plans."[314] The cultural resources management plans establish management prescriptions for specific properties or areas. Manual provisions also implement ARPA, NHPA, HADPA and other statutes governing cultural resources management. In addition to considering Manual provisions, one should also determine whether the agency has any "Instruction Memoranda," which the BLM issues from time to time, that may shed further light on the administrative interpretation of cultural resources protection requirements.

## VIII. THE NATIONAL FOREST MANAGEMENT ACT PROVIDES A FRAMEWORK FOR CULTURAL AND HISTORIC RESOURCES MANAGEMENT ON NATIONAL FOREST LANDS

The National Forest Management Act (NFMA) and related statutes address cultural resources management matters on National Forest lands.[315] NFMA requires the development of resource management plans using a "systematic interdisciplinary approach to achieve integrated consideration of physics, biological, economic, and other services."[316] Implementing regulations for NFMA require that forest planning, which provides a framework for use and development of National Forest lands, includes the identification, protection and "management of significant cultural resources" in association with other forest resource management.[317] Further, specific management prescriptions shall be "assessed prior to project implementation for potential . . . cultural . . . impacts and for assisting with multiple uses planned for the general area.[318] In short, National Forest planning and "undertakings" on lands the Forest Service manages are subject to cultural resource

313. BLM Manual, § 8100.03, .04, 8130.02 (1988).

314. *Id.* at § 8130.07 (1988); *see generally Id.* at 8131 (1988).

315. 16 U.S.C. §§ 1600-1614 (1988). *See also* Multiple Use-Sustained Yield Act of 1960, 16 U.S.C. § 528-531 (1988); Forest and Rangeland Renewable Resources Planning Act, 16 U.S.C. §§ 1600-1614 (1988).

316. 16 U.S.C. § 1604(b).

317. 36 C.F.R. 219.27 (1991).

318. *Id.* at § 219.27 (1991).

preservation programs.[319] As with the BLM, one should refer not only to Forest Service regulations, but also to the Forest Service Manual.[320]

## IX. THE AMERICAN INDIAN RELIGIOUS FREEDOM ACT AND THE FREE EXERCISE CLAUSE: PUBLIC LANDS MANAGEMENT AND NATIVE AMERICAN RELIGION

Federal Indian policy regarding traditional Native American religions has waxed and waned from indifference to hostility to protectionism.[321] The American Indian Religious Freedom Act of 1978 (AIRFA)[322] is the generally applicable federal statute reflecting current policy. In a single, broadly phrased section, AIRFA proclaims:

> . . . it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express and exercise the traditional religions . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonial and traditional rites.[323]

AIRFA vests no substantive rights in Native Americans; rather, it requires consideration of effects of public lands development on Indian religion.[324] Consideration of effects on Native American religion may also be necessary under other planning or management statutes.[325] Substantive protection of Native American religious uses of public lands would exist, if at all, under the Free Exercise Clause of the First Amendment.[326] Early identification and consideration of potentially significant sites is the best approach for accommodating AIRFA-protected interests.[327]

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319. *See, e.g.*, 36 C.F.R. § 261.9 (1991) (Prohibiting removal, destruction, or damage to historic or archaeological structure or artifact).

320. *See, e.g.*, Forest Service Manual Part 2360, 2361.03 (1990). Section 2361.31 of the Manual provides a step-by-step flow chart for NHPA Section 106 compliance.

321. *See* Note: "Respect for the Living and Respect for the Dead: Return of Indian and Other Native American Burial Remains," 39 J. Urban & Contemp. L. 195, 213-21 (1991).

322. 92 Stat. 469, 42 U.S.C. § 1996 (1988).

323. *Id.*; a second, uncodified section of AIRFA required preparation of a report evaluating federal policies in regard to Native American religions. 92 Stat. 470. The Federal Agencies Task Force Report was completed in 1979.

324. *See infra* Part IX.A.

325. *See infra* Part IX.C.

326. *See infra* Part IX.C.

327. *See infra* Part IX.D.

### A. *AIRFA Rights and Duties Under Lyng*

Any discussion of AIRFA's effect on activities on the public land must begin with *Lyng v. Northwest Indian Cemetery Protective Association.*[328] In *Lyng*, the U.S. Forest Service planned to upgrade and pave a road through a remote, high country known as the Chimney Rock section of the Six Rivers National Forest.[329] Individual Indians and Indian organizations challenged the plan under AIRFA and the Free Exercise Clause, among other grounds. It was undisputed that the Chimney Rock area was central to the Indian peoples' traditional religion, and the increased use of the area that would follow completion of the road would be incompatible with historic religious uses.[330] While the Forest Service considered substantial evidence of the effects the road would have on religious practices, it decided to build, nonetheless.[331]

The United States Supreme Court rejected claims under both the Free Exercise Clause and AIRFA. *Lyng* holds that AIRFA creates no new or additional substantive rights and raises questions as to whether AIRFA creates procedural rights or duties.[332] Justice O'Connor's majority opinion found legislative history to support that the absence of action-forcing statutory language reflected a Congressional intention not to create enforceable rights. The law "has no teeth in it."[333] AIRFA clearly does not enlarge Native Americans' substantive rights under the Free Exercise Clause to practice traditional religions on public lands.

Whether AIRFA creates enforceable procedural rights that survive the *Lyng* decision is perhaps a closer question. *Lyng* quotes legislative history supporting that federal agencies should not impede Indian religions practices "without a clear decision on the part of Congress or the administrators that such religious practices must yield to some higher consideration."[334] However, *Lyng* and cases applying it suggest that enforcement of procedural rights to require agencies to consider impacts on traditional religion will have to be asserted under NEPA or other land management or planning statutes.[335] At least one court has held that

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328. 485 U.S. 439 (1988); *see also* Hester, *Protection of Sacred Sites and Cultural Resources on Obstacle to Mineral Development*, Institute on Mineral Development on Indian Lands (Rocky Mtn. Min. L. Fndn. 1989).

329. *Id.* at 443.

330. *Id.* at 447-48.

331. *See id.*, 454-55.

332. 485 U.S. at 455 ("Nowhere in the law is there so much as a hint of any intent to create a cause of action or any judicially enforceable rights.").

333. *Id.*; *quoting* Representative Udall, 124 Cong. Rec. 2144-45 (1978).

334. *Id.*

335. *Id.*; *see, e.g., Havasupai Tribe v. United States*, 752 F. Supp. 1471, 1485-86 (D. Ariz. 1990), *aff'd*, 943 F.2d 32 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1559 (1992) (AIRFA creates no

AIRFA created no procedural duties or cause of action with respect to specific federal actions.[336]

### B. *Consideration of Impacts on Native American Religion Under NEPA*

After *Lyng*, claims to require procedural consideration of impacts of a federal action on Indian religion likely will be asserted under NEPA. There is some question whether NEPA requires consideration of impacts on Indian religious practices.[337] NEPA does bring within its reach impacts on "historic, cultural and natural aspects of our national heritage." 42 U.S.C. § 4331(b) (1988). Federal land managers likely have discretion to consider impacts on native religions, but the consequences of a failure to address such impacts in NEPA documents are unclear.[338]

### C. *Free Exercise of Traditional Native American Religions*

After *Lyng*, any claim to restrict federally authorized use of public lands to accommodate Indian religious uses appears untenable. Over a strongly worded dissent, the *Lyng* majority rejected the proposition that federal lands be subject to a "religious servitude" to accommodate even the most central religious practices of a tribe.[339] The *Lyng* majority gleaned from prior Free Exercise decisions a two-pronged test to govern Free Exercise claims: (1) the government action must "coerce" affected individuals into "violating their religious beliefs;" or (2) it must "penalize

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enforceable rights; but the court performed full review under NEPA of consideration in environmental impact statement of impacts on traditional religion The Havasupai court rejected contentions that *Lyng* is inapplicable to private activity on government land. *Id.* at 1486.

336. *Lockhart v. Kenops*, 927 F.2d 1028, 1036 (8th Cir.), *cert. denied*, 112 S. Ct. 186 (1991) (rejecting claims that agency violated AIRFA by not consulting with Indian religious leaders over land exchange).

337. *Compare Havasupai Tribe v. United States*, 752 F. Supp. 1471, 1485-1500 (D. Ariz. 1990), *aff'd*, 943 F.2d 32 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1559 (1992); *Goodman Group, Inc. v. Dishroom*, 679 F.2d 182, 184-85 (9th Cir. 1982) (impact on "cultural environmental" theoretically may require preparation of EIS); *Sierra Club v. Adams*, 578 F.2d 389, 396 (D.C. Cir. 1978) (cultural impact on Indians discussed in FEIS); *with Lockhart v. Kenops*, 927 F.2d 1028, 1036-37 (8th Cir. 1991) (NEPA "does not mandate consideration of a proposal's possible impact on [Indian] religious sites or observances.").

338. Consideration of impacts on Native American religion or culture may also be necessary under other land management or planning statutes. *See United States v. Means*, 627 F. Supp. 247 (D.S.D. 1985), *rev'd*, 858 F.2d 404 (8th Cir. 1988), *cert. denied*, 492 U.S. 910 (1989).

339. 485 U.S. at 452-453 ("No disrespect for these practices is implied when one notes that such beliefs could easily require de facto [Indian] beneficial ownership of some rather spacious tracts of public property").

religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens."[340]

Courts applying *Lyng* have rejected Free Exercise claims to a protected religious use of public lands.[341] Following *Lyng*, even "extremely grave" impacts on Native American religion cannot foreclose federally authorized uses of public lands.[342]

The enactment of the Religious Freedom Restoration Act of 1993 (RFRA)[343] may affect this analysis. In RFRA, Congress sought to restore recognized standards protecting Free Exercise of religion that were "virtually eliminated" in the U.S. Supreme Court decision, *Oregon Employment Division v. Smith*.[344] Section 3 of RFRA provides:

> (a) IN GENERAL.-Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
> (b) EXCEPTION.-Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person.
> (1) is in furtherance of a compelling governmental interest; and
> (2) is the least restrictive means of furthering that compelling governmental interest.

It is not clear whether this legislation will have any impact on the *Lyng* analysis of the Free Exercise clause.

### *D. Planning to Accommodate Native American Religious Uses*

Public lands developers should strive to identify areas of Indian religious significance at an early stage. Consultation with tribal officials or traditional religious leaders may lead to minor project modifications that resolve potential disputes and avoid delays. Attention to the NEPA process within the agency and to the content of NEPA documents prepared with respect to the project also may avoid delays resulting from NEPA litigation.

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340. *Id.* at 449.

341. *Kenops v. Lockhart*, 927 F.2d at 1036; *United States v. Means*, 858 F.2d 404 (8th Cir. 1988), *cert. denied*, 492 U.S. 910 (1989); *Havasupai Tribe v. United States*, 752 F. Supp. at 1485 (Free Exercise clause claim rejected though proposed mine will allegedly "destroy" traditional religion).

342. 485 U.S. at 451.

343. Pub. L. 103-141, 107 Stat. 148.

344. RFRA, Section 2.

## X. STATE CULTURAL RESOURCES PRESERVATION LAWS APPLICABILITY ON FEDERAL LANDS

The United States Supreme Court holds that states may enforce their civil and criminal laws on federal lands "so long as those laws do not conflict with federal law."[345] Given the policies expressed in the NHPA, it appears that state regulation of cultural resources protection on federal lands is permissible, within certain confines. To the extent state cultural resources programs are approved by the Secretary and include regulation of activities on public lands, regulations under those programs appear permissible.[346] However, it is far from clear whether states are authorized to impose more stringent substantive protection. While such provisions arguably further the purpose of preserving our historic and cultural heritage, they also would conflict with the concept that the NHPA is a procedural statute only.[347] Unlike federal statutes in the environmental protection context which authorize state regulatory programs no less stringent than federal standards,[348] the NHPA does not include such authorization.

However, the NHPA promotes state involvement in historic preservation.[349] Congress declared it federal policy that the government would, "*in partnership with the States* . . . administer federally owned, administered or controlled prehistoric and historic resources in a spirit of stewardship . . . ."[350] Moreover, under NHPA-authorized programs, states may cooperate with, advise and assist federal agencies: (a) in surveys and inventories of historic properties; (b) in carrying out agency responsibilities; and (c) to insure "historic properties are taken into consideration at all levels of planning and development . . . ."[351]

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345. *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580 (1987) ("*Granite Rock*"), *citing Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976).

346. *See* 16 U.S.C. § 470a(B)(3) (1988). No case law or other opinions or commentary address whether state programs may include regulation of federal lands. One may argue that the federal regulatory responsibility described in NHPA Sections 106 and 110 occupies the field insofar as federal lands management is concerned.

347. *See supra* Part II.

348. *See, e.g., Union Elec. Co. v. United States Envtl. Protection Agency*, 515 F.2d 206, 213 (8th Cir. 1975), *aff'd*, 427 U.S. 246 (1976) (addressing Clean Air Act); Clean Water Act, 33 U.S.C. § 1370 (1982).

349. *See* 16 U.S.C. §§ 470-1, 470a(b)(3)(E) and (F).

350. 16 U.S.C. § 470-1(3), (emphasis added).

351. 16 U.S.C. § 470a(b)(3)(A), (E) and (F). This authority suggests Congress did not contemplate that states would be able to impose requirements more stringent than federal regulation. States may assist agencies in carrying out federal agency obligations, presumably as spelled out in federal regulation. And, that states can assist federal agencies to ensure they "take historic properties into" consideration" does not suggest states can impose substantive teeth where none are contemplated at the federal level.

The policies reflected in the NHPA demonstrate that Congress has not evidenced an intention that federal law occupy the field of public lands regulation of historic properties. Therefore, state laws addressing the subject can apply unless they conflict with federal law, "it is impossible to comply with both state and federal law . . . or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress . . . ."[352] Given that Congress anticipated implementation of NHPA in a fashion consistent with the "missions and mandates" of the federal agencies,[353] substantive provisions of state law sought to be imposed on federal lands are likely unenforceable as impermissible "obstacles."[354] Nevertheless, there is no statement in the statute or the ACHP regulations that imposes any express limitation on state regulatory authority. The absence of such a statement would support state regulations.[355] Of course, the state regulatory scheme could not operate to prohibit activities on federal lands.[356]

## XI. CONCLUSION

Compliance with cultural and historical resource management laws involves an understanding of several different and interrelated regulatory schemes. Efficient and cost-effective compliance requires that same understanding, coupled with knowledge of how cultural resource management prescriptions fit with other public lands management programs and with NEPA compliance. Careful planning of cultural resource compliance is a must.

Federal land managers and developers alike should undertake cultural resource management compliance obligations as early as possible in the planning process. Failure to do so can result in delay and waste. All involved in public land use and management must plan sufficiently far in advance to meet historic resource obligations and permit efficient use of natural resources. Moreover, all involved in the control of public land development, including federal agencies, environmental groups, Indian tribes, developers, and others must keep their collective eye on the big picture. Public lands natural resources development should provide for the reasonable needs of today's society without sacrificing the past that is reflected in the historic and cultural resources located on public lands.

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352. *Granite Rock*, 480 U.S. at 581 (citations omitted).

353. 16 U.S.C. § 470h-2.

354. Of course, through the normal Section 106 clearance process, the SHPO has ample opportunity to propose substantive requirements.

355. *Granite Rock*, 480 U.S. at 582-83.

356. *Id.* at 581.