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Citation: 56 Nat. Resources J. 55 2016

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RECLAIMING A PRESENCE IN ANCESTRAL LANDS: THE RETURN OF NATIVE PEOPLES TO THE NATIONAL PARKS

ABSTRACT

For Native peoples, sacred sites and other traditional cultural properties are of critical importance to the preservation of their culture, society, and overall tribal sovereignty. Often these traditional cultural resources are part of present day national park landscapes. Today, tribes have unprecedented opportunities to reclaim a presence on their aboriginal lands, and in turn the National Park Service has an opportunity to ensure that parks remain a sanctuary for the practice of native traditions by accommodating and prioritizing native interests in the implementation of Indian policies and government-to-government obligations. This Article provides an overview of the tribal-NPS relationship, a discussion of the National Park Service Indian policies, and the application of trust obligations to accommodate tribal interests in the national parks. This Article advocates that the National Park Service should prioritize tribal interests to enable tribal peoples to access aboriginal lands where time-honored traditions and practices are celebrated and life is renewed.

I. INTRODUCTION

A sense of place provides all people with an understanding and appreciation of themselves, their past, and their relationship with the natural world. So, too, for tribal people, land constitutes cultural identity. Many tribes identify their origin as distinct people with a particular geographic site, such as a river, mountain, or valley, which becomes a central feature of the tribe's cultural worldview, traditions and customs.¹ For centuries, native peoples inhabited and flourished in their aboriginal and cultural landscapes where creation stories formed their very being and natural world. The mountains, foothills, canyons and meadows provided shelter from winter storms and summer heat, sustained herds of game animals, plants and medicines, and served as places for tribal gatherings, and religious celebrations. These were landscapes that had been shaped by thousands of years of native use and habitation.

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1. VINE DELORIA JR., *GOD IS RED* 81 (1973).

Many of these tribal awe inspiring, pristine, holy landscapes were later “discovered” by explorers and federal representatives whose “wilderness” and “preservationist” ideologies led to the establishment of the national parks like Yellowstone, Glacier, Mesa Verde, and Yosemite in the late 1800s. An idyllic “uninhabited wilderness” preserve for recreationists, vacationing tourists and visitors, however, left no room for native peoples, and accordingly, they were forcibly removed to Indian reservation lands, arrested for exercising their traditional hunting, fishing and gathering rights, practicing their cultural traditions, and largely excluded from the newly designated wilderness areas.

Over the last century the National Park Service’s (NPS) policies and regulations have forbidden the use of the parks by native people. Beginning in the Indian Self-Determination Era, and particularly the Clinton administration, however, a transformation in federal policy has enabled native peoples to return and revitalize their relationship to their homelands, sacred places, and to begin using the resources of the national parks as they previously had for thousands of years. This reconnection is critical to native peoples’ continuing political and social wellbeing. And, this reconnection plays a crucial link to cultural identity and tribal sovereignty.

Indeed, today, the tribes’ ability to access sacred areas, gather medicine plants, and worship in their ancestral lands often rests in the hands of NPS managers. This Article examines the relationship of the NPS and Indian tribes, and critiques how the NPS has developed the government-to-government policies initiated in the Clinton administration, and the implementation of policies that begin to respect tribal communities and traditions, and their use of national park lands. Finally, it discusses and proposes additional policy changes and actions that should be taken by the NPS to further preserve the rights of Indian tribes who know the national parks as home.

II. TRIBAL HABITATION AND PRESERVING THE WILDERNESS

Let me begin with a story. In the summer of 2008, the Yellowstone National Park (YNP) cultural anthropologist contacted me to request information about the cultural significance of certain sites in the YNP. She asked if some Shoshone and Bannock elders would be willing to make a trip to YNP and visit certain sites and advise the park officials about the areas. About twenty elders from Fort Hall and I took several trips to meet with the YNP officials.

Several events during the trips remain with me. First, the NPS’s recognition that the Shoshone and Bannock were original inhabitants of YNP, and the desire of the park officials to seek tribal ecological knowledge, place names, and wisdom about cultural areas. Second, the recitation of the official YNP policy declaration to the elders advising them that the park’s resources were federal property and were not to be removed, disturbed, or impacted in any manner.² Third, many elders’ telling

2. This declaration fell on deaf elder ears who either did not hear the declaration, did not understand the detailed English rules, or preferred an elder’s interpretation who told the others in the Shoshone language that the park was Shoshone and Bannock lands, and they were welcome to gather what they wished on the trip. The third version was preferred by all, and when the bus stopped at the first park site and the elders pulled out their gathering bags, the cultural anthropologist was horrified. And, so, the YNP and tribal relations began.

me that they had never been to the YNP as they were told they were prohibited.³ Fourth, the beginning of a collaborative and cooperative relationship with park officials that remains today. These events have prompted me to think about the relationship the YNP has established with the Shoshone-Bannock Tribes and what the future holds for tribes returning to their original landscapes, the national parks.

A. Tribal Tenure

The history of the relationship between Indian tribes and the NPS is complex and tenuous. Before the NPS was created as a bureau within the Department of Interior's (DOI) in 1916, before it became a vacation haven for tourists, before the United States even acquired lands for the park system, the lands were inhabited by native peoples. Thus, land and its ownership, and the nineteenth century attitudes toward land in the West, established an ongoing antagonism between Indian tribes and the NPS. This section provides a brief history of Indian tribes' early residence in today's parks, the formation of the NPS, and the interaction and conflict between the two.⁴

To begin, one must understand that the historical relationship between the United States and Indian tribes is marked by an ever-shifting swing between the federal government's willingness to protect and preserve tribal sovereignty and independence on one hand, and forced assimilation of Indians into mainstream society on the other.⁵ Each period of Indian policy throughout history reflects how Congress and the President have dealt with Indian tribes and Indian affairs. In the nineteenth century, the overriding policy of the federal government was marked by two federal Indian policy periods: removal (1830–1860) and reservation (1860–1887).⁶ During these two periods, the federal government removed tribal people from the eastern and southern states to isolated lands of smaller size known as reservations, and entered into treaties with western tribes to reduce their aboriginal land holdings.

Following the Revolutionary War and the adoption of the Constitution, the federal government was specifically designated to manage Indian affairs. Article I, section 8, clause 3 of the Constitution delegated Congress the exclusive authority to regulate commerce with Indian tribes.⁷ Congress implemented its Indian policy by entering into negotiated treaties with Indian tribes and enacting laws, beginning in

3. The elders who had never entered the park were thoroughly awestruck at the spiritual "power" of the area as they distinctly knew their creation story and others that made the YNP the center of their worldview. Although they had never been to the park, they could identify sites and areas from century-old stories told by their parents or grandparents. It was totally amazing to hear their depth of knowledge, see their humbleness, and listen to their prayers and songs.

4. For a comprehensive review of the history of the national parks, *see* MARK DAVID SPENCE, *DISPOSSESSING THE WILDERNESS: INDIAN REMOVAL AND THE MAKING OF THE NATIONAL PARKS* (1999); *see also* PHILIP BURNHAM, *INDIAN COUNTY, GOD'S COUNTRY: NATIVE AMERICANS AND THE NATIONAL PARKS* (2000); *see also* PETER NABOKOV & LAWRENCE LOENDORF, *AMERICAN INDIANS AND YELLOWSTONE NATIONAL PARK: A DOCUMENTARY OVERVIEW* (2002).

5. For a discussion of these federal Indian policies, *see generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §§ 1.01-.07 (Nell Jessup Newton et al. eds., 2012) [hereinafter COHEN'S HANDBOOK] (discussing the background and history of federal Indian policy).

6. *Id.* §§ 1.03-.04.

7. U.S. CONST. art. I, § 8, cl. 3.

1790s, regulating the sales, leases, and other conveyances of Indian laws and trade with Indian tribes.⁸ Treaty-making recognized tribes as sovereigns with the ability to govern their own affairs and territory, securing a separatism for tribal nations from non-Indian settlements.⁹ Despite the treaties and federal laws, Whites continually trespassed and encroached on Indian lands. White citizens, particularly in the southern states, desired to control treaty-reserved Indian lands located within their state borders.¹⁰ Initially, the removal period began slowly, with the federal government encouraging Indian tribes to remove westward through agreements and treaties.¹¹

In 1828, newly-elected President Andrew Jackson supported a forced removal policy of relocating eastern and southern tribes to the West. This removal policy became the dominant federal Indian policy of the nineteenth century, which led to early Indian law cases in which the Cherokee Tribe sought to resist state statutes seeking to appropriate their lands and extend laws into their territory.¹² Congress in 1830 passed the Indian Removal Act,¹³ and between 1832 and 1843, many Indian tribes were removed west of the Mississippi River or forced to live on smaller reservations in the East. Removal to the Indian Territory, now eastern Oklahoma, was accomplished through treaties.¹⁴

Soon after, gold and other precious metals were found in the West, bringing thousands of miners, businesses, and settlers who then began appropriating Indian lands.¹⁵ The transcontinental railroad facilitated the continuing western settlement. In 1862, Congress supported this westward movement by enacting the Homestead

8. Congress also enacted a series of federal laws "to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontier." FRANCIS PAUL PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS* 2 (1962). The Trade and Intercourse Act of 1790 and subsequent laws prohibited private or state negotiated cessions of Indian lands without congressional approval, regulated and licensed non-Indian traders. *Id.* at 137-138.

9. The President has the power to make treaties with the advice and consent of the Senate. U.S. CONST. art. II, §. 2, cl. 2.; see *Worcester v. Georgia*, 31 U.S. 515, 559 (1832) (explaining that tribes are "independent political communities, retaining their original natural rights" and not dependent on federal law for their powers of self-government).

10. Georgia enacted laws designed to harass the Eastern Cherokee Tribe including extending state laws into Cherokee territory, abolishing Cherokee government, and laws forbidding tribal members to gather. See F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 81 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN].

11. For example, in a treaty with the U.S. government in 1817, the Cherokee Tribe ceded land to the United States to remove to lands west of the Mississippi River. Treaty with the Poncea, Cherokee-U.S., July 8, 1817, 7 Stat. 156. However, not all members of the Tribe agreed to removal and remained in the southeastern United States, and it created years of conflict within the Tribe and the United States.

12. See *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) (recognizing that the Cherokee nation was a sovereign and independent state); see also *Worcester v. Georgia*, 31 U.S. 515 (1832) (declaring Georgia laws unconstitutional and void, and affirmed the sovereignty of the Cherokee Tribe). Despite the Cherokee's victory in the United States Supreme Court, the Executive Branch forcibly removed the Cherokee from their homeland known as the infamous Trail of Tears.

13. Indian Removal Act, 4 Stat. 411, 411 (May 28, 1830). The act authorized the President to exchange United States territory west of the Mississippi River for the eastern lands of tribes.

14. See, e.g., Treaty with the Creeks, Creeks-U.S., Feb. 14, 1833, 7 Stat. 417; Treaty with the Shawnee, Shawnee-U.S., Aug. 8, 1831, 7 Stat. 355; Treaty with the Chickasaw, Chickasaw-U.S., May 24, 1834, 7 Stat. 450; Treaty with the Choctaw, Choctaw-U.S., Sept. 27, 1830, 7 Stat. 333.

15. See COHEN, *supra* note 10, at 97.

Act that awarded 160 acres of public domain to anyone (except Indians) who would make improvements on it and pay a nominal filing fee.¹⁶ This rapid settlement by non-Indians caused the federal government to begin entering into treaties which explicitly reserved land for permanent tribal occupancy, freeing up their former land for homesteading.

Basically, the reservation policy was a form of removal by another name. It did, however, often recognize the geographical aboriginal areas of tribes and isolated them on small areas in states.¹⁷ Over 400 treaties were signed between Indian tribes and the United States.¹⁸ Nearly all treaties promised a permanent homeland, federal promises to provide food, clothing, and services to tribes. In exchange for peace, the United States promised to respect the tribe's sovereignty and to provide for the well-being of tribal members.¹⁹ It was during this reservation period that some of the major Indian wars were fought by the federal military to force Indian tribes onto reservations, or to keep them on reservations, once treaties were signed.

The federal reservation policy isolated tribes from non-Indian settlers, and it also established tribal geographic and political lines that remain today. Tribes gave up millions of acres of their aboriginal lands in exchange for a much smaller isolated area to reside. In return, the federal government agreed to protect and preserve the reservation homelands through a local federal agency known as the Bureau of Indian Affairs.²⁰ The dispossession of tribal peoples from their original lands had a devastating impact on their lives, societies, traditions and well-being. Yet, they persevered, and the memories and stories of their ancestral lands remain.

B. Creating National Parks

The federal policy of reducing the landholding of Indian tribes in the West coincides with the federal movement to preserve large areas of land for the national good. Indeed, the NPS benefitted from the removal of tribes from their aboriginal

16. See Homestead Act, 75 Stat. 392 (May 2, 1862); see also Desert Land Act, 107 Stat. 377 (March 3, 1877); see also 43 U.S.C. § 321 (1877).

17. Today, reservations contain tribally-owned land or allotted lands held by individual Indians, held in trust by the United States with the beneficiary interest residing in the tribe or individual Indian allottees. The actual origin of Indian title as construed by the judiciary is a complex one. See Nell Jessup Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215, 1216 (1980).

18. Treaties entered into between the United States and Indian tribes are considered the law of the land under the Supremacy Clause of the Constitution. See U.S. CONST. art. VI, cl. 2.

19. See CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 14–15 (1987).

20. The executive branch of the United States has assumed the primary responsibility for establishing relations between the federal government and Indian tribes. These federal responsibilities, known as “trust obligations,” are the primary cornerstones of federal Indian law. See COHEN, *supra* note 10, at 225–28. Its central force is to protect tribal lands, resources, native people and their way of life. The trust doctrine evolved judicially and stands independent of treaty obligations owed to tribes. *Id.* at 220. As articulated by the Supreme Court in *Worcester v. Georgia*, “This relation [between the Cherokee Nation and the United States] was that of a nation claiming and receiving protection of one more powerful; not that of individual’s abandoning their national character, and submitting, as subjects, to the laws of the master.” 31 U.S. 515, 555 (1832). The duty of protection, central to the trust doctrine over two centuries ago, is just as important today.

lands, thus freeing up the unspoiled nature west of the 100th meridian.²¹ There are several different philosophies justifying or supporting the founding of national parks in the United States. George Catlin, an artist who traveled through the Missouri River area and west, painting and writing about tribal life in the 1830s, is one of the founders of the national park idea. He envisioned parks where Indians and buffalo would live as they had for centuries. Catlin thought national parks would be “where the world could see for ages to come, the native Indian in his classic attire, galloping horse . . . amid the fleeting herds of elks and buffaloes.”²² Such an area, according to Catlin, would be a “*nation’s Park* containing man and beast, in all the wild and freshness of their nature’s beauty!”²³ Catlin’s view of the wilderness and its future reflects the romantic ideals of the nineteenth century.

Historian Alfred Runte offered that the first parks were intended as cultural patrimony of America whose monuments were created by nature.²⁴ Americans sought out these locations because they possessed a certain “monumentalism,” a quality that evoked a sense of natural wonder and national pride.²⁵ Natural beauty thus rivaled the cathedrals and wonders in Europe. As Ralph Waldo Emerson insisted, “we have listened too long to the courtly muse of Europe” and must turn to the American landscape for inspiration.²⁶

A third line of philosophy was the preservation of wilderness based upon the thinking of Henry David Thoreau, George Perkins Marsh, and later John Muir. The growing appreciation for western landscapes and conservation of resources was bolstered by the publication of *Man and Nature*, which advocated for conservation of natural resources and limited economic expansion.²⁷ In 1864, Marsh promoted the preservation of large natural areas to preserve present ecosystems and remain in a primitive state. He noted that such a space would be a “garden for the recreation of the lover of nature,” and it would be an “asylum where indigenous tree, and humble plant . . . and fish and fowl and four footed beast, may dwell and perpetuate their kind. . . .”²⁸

In 1916, the NPS was established for the purpose “to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”²⁹ The actual establishment of national parks, however, preceded the NPS being established. For instance, the first

21. The longitudinal demarcation of the 100th meridian is often used as the division between the eastern and western states.

22. Spence, *supra* note 4, at 10 (quoting GEORGE CATLIN, LETTERS AND NOTES ON THE MANNER, CUSTOMS, AND CONDITIONS OF THE NORTH AMERICAN INDIAN (1844)).

23. *Id.*

24. ALFRED RUNTE, NATIONAL PARKS, THE AMERICAN EXPERIENCE 30 (2d rev. ed., 1987).

25. *Id.* at 29.

26. Spence, *supra* note 4, at 13 (quoting RALPH WALDO EMERSON, THE AMERICAN SCHOLAR, IN THE COLLECTED WORKS OF RALPH WALDO EMERSON: NATURE, ADDRESSES, AND LECTURES 69 (Robert Spiller & Alfred R. Ferguson eds., 1971)).

27. Spence, *supra* note 4, at 35–36 (quoting GEORGE PERKINS MARSH, MAN AND NATURE 43 (1965)).

28. *Id.* at 36.

29. Organic Act, 16 U.S.C. § 1 (2012).

park, Hot Springs Reservation in Arkansas, was created in 1832.³⁰ Then came Yosemite National Park, initially reserved to the state of California for management in 1864.³¹ YNP was established in 1872,³² and Glacier National Park in 1910.³³ Only the forest, rivers, valleys and monumental awe-inspiring landscapes were to exist for tourists to visit and view. The NPS ideals meant that park land was to be vacant of any people, including tribal people who inhabited the lands.

When Congress established the national parks it did so without consideration of the treaties and agreements it had entered into with many tribes who inhabited the lands. For example, the eastern half of Glacier National Park was once part of the Blackfeet Reservation. The Blackfeet Tribe maintains that an 1895 agreement with the United States permanently reserved certain usufructuary rights within the park.³⁴ From a tribal perspective, the park is the “backbone of the world.”³⁵ The NPS, however, argues the act establishing the park extinguished all tribal claims to the mountains beyond the western boundary of the reservation. Certainly, from a NPS perspective, tribal hunting and gathering in the park was in direct conflict with the ideals of wilderness preservation. This conflict continues today.³⁶

Similarly, the federal government stipulated in two 1868 treaties with the Crow Tribe and the Eastern Shoshone and Bannock Indians that tribal members had “the right to hunt on the unoccupied lands of the United States so long as game may

30. Stat. at Large, Vol. 4, ch. 70, 505 (enacted 27th Cong., 1st Sess., Ch. 70) (April 20, 1832).

31. On June 30, 1864, Yosemite Valley and Mariposa Grove of Giant Sequoias were granted to the State of California to “be held for the use, resort, and recreation.” 26 Stat. at Large, ch. 1263, 650–52 (codifying 38th Cong., 1st Sess., Ch. 183–184, 385 (1864)). On October 1, 1890, Congress established Yosemite National Park as a “forest reservation” to preserve and protect “from injury all timber, mineral deposits, natural curiosities, or wonders.” A joint resolution of Congress on June 11, 1906, placed Yosemite Valley and the Mariposa Grove within the park. H.R.J. Res. 118, 59th Cong., Sess. 1 (1906); Pub. L. No. 59-27, 34 Stat. at Large 831.

32. Yellowstone Park Act of March 1, 1872, 17 Stat. 32.

33. Glacier Park Act of May 11, 1910, ch. 226 § 1, 36 Stat. 354.

34. Usufructuary rights are use rights, or non-possessory interests in land. That is, they are interests in lands owned by others. The courts have long recognized such interests in land, labeling them as easements or profits a prendre. Easements are rights to cross another’s land; profits a prendre are rights to go on another’s land and take and remove a resource. For tribal people these include a myriad of rights like hunting, fishing, gathering of plants, roots, berries, and resources. See JUDITH ROYSTER, MICHAEL BLUMM AND ELIZABETH KRONK, NATIVE AMERICAN NATURAL RESOURCES LAW 459 (2013).

35. For a comprehensive discussion of the Blackfeet Tribe and the NPS, see Spence, *supra* note 4, at 71–82. The Glacier National Park is the creation or birth place of the Blackfeet people and is the foundation for its teachings, values, and culture. It is the center for tribal renewal, ceremonies, and prayer.

36. Several scholars have discussed the importance of co-management and agreements between indigenous people and federal agencies to resolve these conflicts. The author agrees there are numerous positive alternatives that the NPS should seriously consider and pursue with Indian tribes. See Brett Kenney, *Tribes as Managers of Federal Natural Resources*, 27 NAT. RES. & ENV’T. 47 (2012); Martin Nie, *The Use of Co-Management and Protected Land Use Designations To Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands*, 48 NAT. RESOURCES J. 585 (2008); Mary Christina Wood and Zachary Welcker, *Tribes as Trustees Again (Part I): The Emerging Tribal Role in the Conservation Trust Movement*, 32 HARV. ENVTL. L. REV. 373 (2008); Maureen Sanders, *Ecosystem Co-Management Agreements: A Study of Nation Building or a Lesson on Erosion of Tribal Sovereignty?*, 15 BUFF. ENVTL. L.J. 97 (2008); Jeremy Baker, *The Waikato-Tainui Settlement Act: A New High-Water Mark for Natural Resources Co-Management*, 24 COLO. J. INT’L ENV’T L. & POL’Y 163 (2013).

be found thereon.”³⁷ Because the park remained “unoccupied lands of the United States” the tribes continued to exercise their treaty rights in YNP. The federal park officials then elicited the help of the military, Indian agency directives, and federal court actions to remove and prohibit the tribal members from using the park.³⁸

These are only a few examples of the historical and present day conflicts between the NPS and Indian tribes. Today, “six units of the NPS are on, or contain trust land; one national park has been designated by Congress as Indian Country; twelve park units are on Indian reservations but do not contain trust land; and thirteen park units in Alaska contain land belonging to twenty-eight distinct Alaska Native groups.”³⁹

III. A CHANGING RELATIONSHIP

After several cyclical swings, the 1960s ushered in the current federal Indian policy known as the Self-Determination Era,⁴⁰ designed to strengthen tribal sovereignty, transfer control of Indian programs from federal to tribal governments, and protect tribal lands. This era has encouraged tribal economic development, control of reservation environments, and protection of tribal cultural resources. It has promoted revitalization for tribal communities and people and has enabled tribes to reclaim and develop governance strategies to make decisions to control lands, natural resources, and economic growth and determine their future on their own terms. This energy has spurred Indian tribes to seek preservation and protection of a critical valuable natural and cultural resources on and off-reservation lands, including many lands that are federal lands such as national parks. Additionally, a wealth of federal statutes and policies encourage the protection and preservation of tribal lands, including all its natural and cultural attributes, guaranteed by treaties, executive orders and statutes.

During the Clinton Administration in the 1990s, the federal government renewed formal government-to-government relations between Indian tribes and the federal government. On April 29, 1994, President Clinton convened the first ever meeting at the White House between the leaders of over 550 tribal governments across the United States and the President. President Clinton was the first president to invite tribal leaders to the White House to discuss and develop Indian policy.⁴¹

37. Treaty with the Crows, Crow-U.S., art. 4, May 7, 1868, 15 Stat. 649; Treaty between the U.S. and the Eastern Band of Shoshones and the Bannock Tribe of Indians, art. 4, Feb. 24, 1869, 15 Stat. 673.

38. See Spence, *supra* note 4, at 41–70. The ongoing conflict of tribal access to national parks has resulted in other court decisions. In *United States v. Hicks*, 587 F. Supp. 1162, 1165–66 (W.D. Wash. 1984), the court considered the Stevens Treaty hunting claim and concluded that “[l]ands cease to be ‘open and unclaimed’ when they are put to uses incompatible with hunting.” Accordingly, the court determined that Olympic National Park was not open and unclaimed for hunting purposes when the area became a national park. *Id.* at 1167.

39. Mary Ann King, *Co-Management or Contracting? Agreements Between Native American Tribes and the U.S. National Park Service Pursuant to the 1994 Tribal Self-Governance Act*, 31 HARV. ENVTL. L. REV. 475, 482 n. 31 (2007).

40. President Richard M. Nixon is credited with reversing the decades of assimilationist and termination policies toward tribes by announcing a new era of “Self Determination” in his message to the Congress. Special Message on Indian Affairs, PUB. PAPERS 564–67, 576 (July 8, 1970).

41. President Clinton stated, “In every relationship between our people, our first principle must be to respect your right to remain who you are and to live the way you wish to live . . . I pledge to fulfill the

President Clinton signed a directive at the April 29th summit entitled “Government-to-Government Relations with Native American Tribal Governments,” requiring all federal agencies and departments (including the NPS) to deal with tribes on a “government-to-government” basis and to consult with the affected tribes when federal actions impact tribal lands and resources.⁴² Additionally, at the historic event the President signed another policy directing all federal agencies to improve their processes for distributing eagle feathers found on federal lands to native religious leaders for ceremonial purposes.⁴³ The NPS and other federal agencies send eagle remains found in national parks to the federal repository where tribal people may obtain an eagle or eagle parts for religious use and ceremonies.⁴⁴

A. President Clinton’s Directives

President Clinton signed multiple executive orders requiring agencies to consult with tribes when making decisions affecting sacred sites. In 1996, President Clinton signed Executive Order 13307,⁴⁵ that under Section 1 directs federal agencies having responsibility for the management of federal lands to (a) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (b) avoid adversely affecting the physical integrity of such sacred sites to the extent practicable, permitted by law, and not clearly inconsistent with clearly essential agency functions. Under Section 2 of the Executive Order, agencies are directed to implement procedures for carrying out the provisions of Section 1. Section 2 also provides that federal agencies are to give reasonable notice of proposed federal actions that may restrict access to or ceremonial use of, or may adversely affect, sacred sites.⁴⁶

President Clinton also issued Executive Order 13175 in 2000, “to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that has tribal implications, [and] to strengthen the

trust obligations of the Federal Government.” Remarks to American Indian and Alaska Native Tribal Leaders, 30 WEEKLY COMP. PRES. DOC. 941 (April 29, 1994).

42. Memorandum for the Heads of Executive Departments and Agencies, Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22951 (April 29, 1994).

43. Policy Concerning Distribution of Eagle Feathers for Native American Religious Purposes, 59 Fed. Reg. 22953 (April 29, 1994). *See* United States v. Abeyta, 632 F. Supp. 1301 (D.N.M. 1986), (holding the taking of a golden eagle for religious purposes by a member of the Pueblo of Isleta did not violate the Eagle Protection Act).

44. *See* 50 C.F.R. § 22.22 (1999).

45. Exec. Order No. 13007, 61 Fed. Reg. 26771 (May 24, 1996). Earlier, President Clinton issued an order with respect to environmental justice. In a February 11, 1994 executive order the President directed all federal agencies to confront environmental justice issues in minority and low income populations. Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 11, 1994). While the order does not specifically address the need of Indian communities, it does highlight the need to protect populations who rely on fish for subsistence consumption as many tribal people do. *Id.* at § 4–4.

46. Section 4 limits the Executive Order by providing that it is “intended only to improve the internal management of the executive branch and it not intended to, nor does it, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies, officer, or any person.” One of the recommendations was to consider the broader concept of sacred places including cultural landscapes, traditional cultural properties, sacred sites and others.” Exec. Order No. 13007, 61 Fed. Reg. 26771 at § 4 (May 24, 1996).

United States government-to-government relationships with Indian tribes.⁴⁷ Many federal agencies, including the NPS, have developed policies for tribal consultation under EO 13175.⁴⁸

These executive orders and policies reinforce the Executive Office's commitment to its trust obligation to Indian tribes.⁴⁹ They are critical because the executive branch defines and implements the activities, duties, and terms of the federal government's relationship with tribal governments. It is the executive branch agencies and departments that fulfill the day-to-day management of Indian lands and resources and federal lands. The DOI, of which the NPS is an agency, is the primary federal department responsible for managing tribal lands and activities and probably has the greatest impact on tribes.⁵⁰ Finally, the executive branch agencies also hold the discretion and decision-making authority over tribal requests for access and use of federal lands, and are responsible for protecting such vital resources used by tribal members.

It has been 21 years since President Clinton directed the federal agencies to develop a government-to-government relationship with Indian tribes. Each succeeding administration has embraced the 1994 policies. Over the past two decades, federal executive agencies have defined their trust responsibilities to tribes through policy directives and guidance documents. Certainly, a challenge in issuing such policies is that no policy can fully address the myriad of issues and circumstances that arise for tribes across the country involving multiple treaties, agreements, executive orders, distinct land bases, and populations. However, the development and implementation of such trust policies make federal officials more aware of their trust responsibilities to tribes, and to take actions that are more protective of tribal interests. These policies have also prompted and supported tribal efforts to urge federal agencies to protect tribal cultural and natural resources.

The 1994 pledge by President Clinton to uphold the trust obligations of the federal government to Indian tribes was a momentous event. The basic duties in the

47. On November 5, 2009, President Obama issued a Memorandum for the Heads of Executive Departments and Agencies on Tribal Consultation directing each executive agency to develop and submit a plan of action to implement the policies and directives of EO 13175, and annually thereafter to provide a progress report on the status of actions included in the plan. Tribal Consultation, 74 Fed. Reg. 57881 (Nov. 5, 2009).

48. For example, *see* U.S. DEP'T OF THE INTERIOR, Order No. 3317, POLICY ON CONSULTATION WITH INDIAN TRIBES (Dec. 1, 2011), ENVTL. PROT. AGENCY, POLICY ON CONSULTATION AND COORDINATION WITH INDIAN TRIBES (May 4, 2011). As part of this effort, the Congress passed and the president signed the Tribal Self-Governance Act of 1994, which redirects federal funding from the Bureau of Indian Affairs to tribes, supporting tribal governments to administer their own programs on reservation lands. Indian Self-Determination Contract Reform Act of 1994, Pub. L. No. 103–413, §§201–204, 401–407, 108 Stat. 4270 (1994).

49. The trust responsibility is one of the cornerstones of federal Indian law. *See* COHEN'S HANDBOOK, *supra* note 5, § 5.04(3)(a). This long-established doctrine recognizes the federal government's duty to protect tribal people, their lands and resources. Each federal agency is bound by the trust responsibility. COHEN'S HANDBOOK, *supra* note 5, § 5.05(3)(c). *See also* Nance v. E.P.A., 645 F.2d 701, 710 (9th Cir.), *cert. denied*, 454 U.S. 1081 (1981) (explaining the trust duty in implementing the Clean Air Act).

50. For a review of the Bureau of Indian Affairs's role, *see* COHEN'S HANDBOOK, *supra* note 5, § 5.03(1). In addition to the NPS, there are other agencies, the Bureau of Indian Affairs, the Bureau of Reclamation, the U.S. Fish and Wildlife Service, and the Bureau of Land Management.

trust obligations owed to tribal nations are well recognized, yet they had been lost in the overwhelming law and administrative statutes carried out by federal agencies. The trust obligation is an important legal means to protect native rights against adverse agency action because general federal statutes do not often protect native interests.⁵¹ President Clinton redirected his executive agencies' attention to the trust responsibilities and Indian law principles that are separate from federal law and treaty requirements. The trust responsibilities charge the United States with the "highest responsibility and trust" in the federal government's dealing with tribes and peoples.⁵² And in carrying out these obligations, the federal government must adhere to "the most exacting fiduciary standards."⁵³ The duty of protection is central to the trust doctrine and remains just as important today.

It is imperative NPS representatives utilize the trust doctrine when making decisions affecting tribal access to the park, and protection of trust resources such as sacred sites, plants, and resources. Indeed, because culture, religion and traditions play such a critical role in the overall sovereignty of tribes, the trust duty to protect cultural vitality becomes even more important.⁵⁴ The practice of native ceremonies often emphasize spatial context, and are located in area such as the national parks, where tribal creations occurred, certain events took place and sacred sites are located. The ceremonies performed at these sites are cyclical occurring in certain seasons of the year⁵⁵ and necessitate protections during a particular period of the year, which is certainly less of an accommodation than the weekly Christian practices held in national parks. The centrality of the natural areas to Indian traditions supports serious consideration of providing access and impacts arising from NPS actions through the use of the trust doctrine.

IV. TODAY'S NATIONAL PARK SERVICE

The NPS must abide by many laws, policies, and regulations relating to tribal access for gathering of plants, protection and access to sacred sites, confidentiality, consultation, and generally following the trust obligations owed to tribes. This section reviews the current NPS Indian policies and actions during the Self-Determination Era, offers a general critique of the NPS,⁵⁶ and makes suggestions and recommendations for further NPS actions and policies for tribes.

51. Professor Wood discusses the promise of the trust doctrine and how it should be used to more fully protect tribal interests. See Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1491 (1994).

52. *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942). For a comprehensive discussion of the trust doctrine, see Reid P. Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975).

53. *Seminole Nation*, 316 U.S. 286, 296 (1942).

54. See Richard Herz, Note, *Legal Protection for Indigenous Cultures: Sacred Sites and Communal Rights*, 79 VA. L. REV. 691, 703–04 (1993).

55. For an excellent discussion comparing indigenous religions with Christian religions, see VINE DELORIA, JR., *GOD IS RED*, 71–74, 91–109 (1973).

56. Mary C. Wood offered a critique of several federal agencies in her article, *Fulfilling the Executive's Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance*, 25 ENVTL. L. 733 (1995). She, however, did not review the NPS policies and performance under the trust doctrine.

A. Indian Policy

On December 1, 2011, Secretary Ken Salazar issued the DOI most recent Policy on Consultation with Indian Tribes.⁵⁷ In addition to the DOI policy, the NPS has developed policies relating to American Indians, Alaska Natives and Native Hawaiians that are incorporated and addressed throughout its general Management Policies.⁵⁸ NPS begins its statement of relationship with Indian tribes with, “the [NPS] has a unique relationship with American Indian tribes, which is founded in law and strengthened by a shared commitment to stewardship of the land and resources.”⁵⁹ It further adds,

[t]he formal legal rationale for the relationship between the [NPS] and tribes is augmented by the historical, cultural, and spiritual relationships that American Indian tribes have with park lands and resources. As the ancestral homelands of many American Indian tribes, parks protect resources, sites, and vistas that are highly significant for the tribes. Therefore, the Service will pursue an open, collaborative relationship with American Indian tribes to help tribes maintain their cultural and spiritual practices and enhance the [NPS]’s understanding of the history and significance of sites and resources in the parks.⁶⁰

This is a significant statement because the NPS recognizes that the parks are the ancestral lands of many Indian tribes.⁶¹ Indeed, the park lands and the resources they hold are key elements in maintaining tribal traditional connections to sacred sites, cultural resources and a traditional way of life.

Next, the NPS sets forth a government-to-government relationship statement committing to “work directly with appropriate tribal government officials whenever plans or activities may directly or indirectly affect tribal interests, practices, and/or traditional use areas such as sacred sites.”⁶² The statement does not offer any specific principles defining its trust responsibilities to protect resources, but makes a commitment to work directly with tribes when “activities may directly or indirectly affect tribal interests.”

As recently stated by President Obama in 2010 at the White House Tribal Leaders Summit, “the aspirations it [the United Nations Declaration on the Rights of Indigenous Peoples] affirms – including the respect for the institutions and rich cultures of Native peoples – are one we must always seek to fulfill . . . [w]hat matters

57. THE SEC’Y OF THE INTERIOR, ORDER NO. 3317: DEPARTMENT OF THE INTERIOR POLICY ON CONSULTATION WITH INDIAN TRIBES (2011), *available at* <https://www.fws.gov/nativeamerican/pdf/secretarial-order-3317.pdf>.

58. NAT’L PARK SERV., MANAGEMENT POLICIES: THE GUIDE TO MANAGING THE NATIONAL PARK SYSTEM (2006), *available at* <http://www.nps.gov/policy/MP2006.pdf> [hereinafter MANAGEMENT POLICIES]. The American Indian Liaison Office has compiled excerpts and sections from the Management policies relating to American Indians, Alaska Natives, and Native Hawaiians.

59. *Id.* § 1.11.

60. *Id.*

61. Prior to the Indian Policy, NPS documents were void of any recognition that park lands are the ancestral lands of many tribal nations.

62. *Management Policies*, *supra* note 54, § 1.11.1.

far more than any resolution or declaration – are actions to match those words.” So too, the federal policies and guidance documents issued by the NPS are significant, but what is more important is the NPS’s “actions to match” its words. Strong NPS actions implementing the trust obligations and its protection of tribal people and resources will certainly go a long way to ensuring the continuing practice of tribal traditions for the next generations.

A major step to meeting the trust obligations for NPS personnel, particularly park staff and liaisons, is to understand Indian people and their culture. It is, therefore, vital that a collaborative working relationship be built with tribes who are associated with a park area. This partnership should consist of training for agency line staff, enforcement officers, concessionaires about Indian tribes, cultural sensitivity, and the laws surrounding protecting Indian sacred sites is critical. Tribes should be included in the development of any visitor center interpretation materials or exhibits. Additionally, an agreement between the NPS and tribes can create and maintain ongoing communications and meetings, provide for joint monitoring of sites to ensure protection, establish dialogues, training, workshops, and opportunities for tribal youth involvement. All of these collaborative efforts serve as a foundation to further NPS and tribal relations.

B. Consultation

The NPS, like other federal agencies, agrees to consult with tribal governments. Unfortunately, this consultation commitment is merely procedural in nature and fails to reflect the full trust responsibility.⁶³ In other words, there is no prioritization of tribal interests commensurate with the trust obligations; rather the tribal interests in most instances will be weighed against the NPS mission and other majority interests. The NPS Consultation section states:

Mutually acceptable consultation protocols to guide government-to-government relationships will be developed at the park and program levels with assistance from regional and support offices as needed. The protocols will be developed with an understanding of special circumstances present at individual parks. These protocols and the actual consultation itself will be informed by national, regional, and park-based subject matter experts.

NPS managers will be open and candid with tribal governments during consultations so that the affected tribes may fully evaluate the potential impact of the proposal and the Service may fully consider tribal views in its decision-making processes. This means that government-to government consultation should begin at the earliest possible stages of planning.⁶⁴

63. See Mary Wood, *supra* note 52, at 753–761, (finding that most federal agencies have developed consultation provisions as part of their Indian policies, but fail to provide for any substantive rights to Indian tribes).

64. *Management Policies*, *supra* note 54, § 1.11.2. The section also references Consultation 5.2.1; Ethnographic Resources 5.3.5.3; Director’s Order #66: FOIA and Protected Resource Information as beneficial sources

Instead of national, regional, and park experts, the consultation process should be defined through agreements with tribes. The primary difficulty for tribes participating in a consultation process that does not prioritize tribal interests is that it does not always achieve the goals of the tribes in securing access to sacred sites, gathering plants and medicines, and generally being able to worship the way they need to on NPS lands. Often, during consultation, federal agencies must take into account non-Indian and other political influences. Indeed, federal agencies have broad discretionary power in making decisions about lands, environment and nature.⁶⁵ Unfortunately, federal agencies regularly use permitting provisions under federal statutes to permit harm to water, air, forests, species, wetlands and parks adversely affecting tribal interests.⁶⁶

Consultations can be quite overwhelming for tribes. All the federal agencies within the DOI have consultation requirements with tribes. Consequently, there are a number of ongoing consultation hearings across the country, posted on the internet, and through mailings, to which tribes must review and respond.⁶⁷ For many tribes who have limited staff and resources reviewing the documents and conferring with the necessary tribal representatives is a daunting responsibility. Certainly, it is important to provide public comments on federal rulemaking, but for tribal consultation, each tribe should have the opportunity to define how consultation with the agency is conducted through an agreement or protocol. This is true government-to-government relations. Consultation with tribes should also begin early in the project, plan or activity that may affect sacred sites. Federal agencies plan years in advance to secure funding and federal internal approvals. Including tribal leaders, spiritual leaders and elders in the decision-making process prior to any federal register notice is a must. Face-to-face discussions are also critical to have effective and meaningful consultation.

To this end, the NPS has a policy which provides, the “[NPS] will regularly and actively consult with American Indian tribal governments . . . regarding planning, management, and operational decisions that affect subsistence activities, sacred materials or places, or other resources with which historically associated.”⁶⁸ The NPS also states “superintendents will establish and maintain consulting relationships with potentially affected American Indian tribes or traditionally associated groups.”⁶⁹ These are two key policies in building effective communications and relationships between the NPS and tribes. This commitment by the NPS is basic to honoring the federal trust responsibility, and should include information sharing, tribal-NPS memorandum of agreements, in-person meetings, and quarterly or annual meetings.

65. See *Chevron U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

66. See MARY CHRISTINA WOOD, *NATURE’S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE* 68–81 (2014) (discussing the politics of discretion).

67. In 2010, the Secretary of Agriculture directed its Office of Tribal Relations and the USFS to dialogue with Indian tribes to find way to better accommodate and protect American Indian sacred sites consistent with its multiple use mission. A final report entitled “*USDA Policy and Procedures Review and Recommendations: Indian Sacred Sites*” was issued in December 2012. Many of the recommendations are presented here because they are relevant to the NPS’s consultation with tribes.

68. *Management Policies*, *supra* note 54, § 8.5.

69. *Id.*

A good example of consultation gone amiss is the case involving a challenge to the United States Forest Service's (Forest Service) decision to authorize upgrades to the facilities at the Arizona Snowbowl ski area, *Navajo Nation et al. v. U.S. Forest Service*.⁷⁰ The Forest Service made a "Finding of Adverse Effect," and sought ways to avoid, minimize or mitigate the adverse effects.⁷¹ Through consultation with the Advisory Council, SHPO and tribes, a Memorandum of Agreement (MOA) was reached among the required parties. Four Indian tribes, including the Navajo Nation, named plaintiff, signed the MOA.⁷² The court held the "MOA adequately describes the steps to mitigate the potential adverse effects of the proposed projects; therefore, it fully satisfied the Forest Service's obligations under the NHPA."⁷³ The court noted:

throughout the tribal consultation process, the Forest Service made over 200 phone calls, held 41 meetings, and exchanged 245 letters with tribal representatives. Although the consultation process did not end with a decision that tribal leaders supported, this does not mean that the Forest Service's consultation process was substantially or procedurally inadequate.⁷⁴

On appeal, the Hopi Tribe argued that the consultation with Forest Service was meaningless and the decision was predetermined.⁷⁵ The Ninth Circuit, however, found the Forest Service met its obligations and affirmed the district court's decision with regard to the NHPA claims.⁷⁶ In the end, the Forest Service met its procedural consultation requirements, but the interests of the tribes fell victim to majority views of economic development, unwillingness to recognize the tribal beliefs, and agency discretion. In this instance the discretion that agencies enjoy under statutes like the NHPA overrode the trust obligations owed to Indian tribes. There needs to be better

70. 408 F. Supp. 866, 879 (D. Ariz. 2006), *aff'd in part, rev'd in part, remanded*, 479 F.3d 1024 (9th Cir. 2007), 535 F.3d 1058 (2008) (en banc), *cert. denied*, 129 S. Ct. 2763 (2009).

71. *See id.* (stating that "[a]n 'effect' occurs under the National Historic Preservation Act (1) whenever any condition of the undertaking causes or may cause any change, beneficial or adverse, in the quality of the historical, architectural, archeological or cultural characteristics that qualify the property for the National Register, or (2) when an undertaking changes the integrity of location, design, setting, materials, workmanship, feeling, or association of the property that contributes to its historic significance. When an effect is identified, the federal agency, in consultation with SHPO must determine if the effect would be adverse. The agency applies the criteria of adverse effect which includes, (1) destruction or alteration of all or part of a property; (2) isolation from or alteration of a property's surrounding environment; (3) introduction of visual, audible, atmosphere elements that are out of character with the property or alter its setting.") (internal citations removed).

72. *Navajo Nation v. U.S. Forest Service*, 408 F. Supp. 866, 879 (D. Ariz. 2006).

73. *Id.* at 880 (stating that the MOA required the Forest Service to continue to consult with tribes to mitigate any adverse effects, and to guarantee access to the Peaks for traditional cultural activities such as, "(1) access before, during and after construction; (2) protection and regeneration of plants of traditional importance; (3) that the Forest Service must protect shrines; (5) that tribes must be provided water-quality information; and (6) where practicable, projects must take advantage of previously disturbed areas.") (footnote omitted).

74. *Id.* at 879 n.11.

75. *Navajo Nation et al. v. U.S. Forest Service* 479 F.3d 1024, 1059 (9th Cir. 2007).

76. *Id.* at 1060–61.

consultation under the NHPA, and there needs to be a strong commitment on NPS to make the process better, including achievement of better outcomes.

Through the consultation process, NPS should take the time to listen and hear the stories and knowledge that Tribal people seek to share. This education process can be time-consuming and frustrating for federal government staff because they often want quick answers to specific questions, relationships, and pin-pointing areas and designating isolated boundaries of cultural significance. The consultation process is not always an easy process. However, tribal-federal engagement on these important cultural resource issues is imperative to fully understand and appreciate the burdens of federal governmental actions on tribal cultural resources. It is through this engagement that solutions can be crafted.

C. Sacred Sites

The NPS has recently recognized the need to protect sites that are sacred to native peoples. For instance, the NPS management policies recognizes site-specific worship for tribal members and provides “the Service will be as unrestrictive as possible in permitting Native American tribes access to park areas to perform traditional religious, ceremonial, or other customary activities at places that have been used historically for such purposes.”⁷⁷ These policies are in addition to the federal statutes and executive orders protecting sacred sites.⁷⁸ What qualifies as a sacred site, however, is defined narrowly: sacred sites are defined in Executive Order 13007 as “any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian Tribe, or Indian individual determined to be an authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, and Indian religion.”

To date, this is the federal government’s clearest policy statement on sacred sites. This policy, however, should be revisited and revised to incorporate a broader Indian perspective of sacred sites. The government’s definition of sacred sites is plainly a narrow one and demonstrates a lack of understanding of tribal sacred sites. The NPS should not be constrained by this limited definition and should utilize the consultation process with tribes to ensure that sacred landscapes identified by tribes are fully protected.

Identifying and managing sacred sites or tribal cultural properties can be challenging for tribes and federal managers for several reasons. First, the tribal cultural landscapes, which form a sacred living place and are recognized for the powers inherent therein, do not have neatly established boundaries. Or, there may be specific plants that grow in a certain area that are used in tribal ceremonies. It is often

77. *Management Policies*, *supra* note 54, § 8.5.

78. See American Indian Religious Freedom Act, 42 U.S.C. § 1996 (stating that its federal policy to protect Native American sacred sites and traditional forms of worship); see also Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-13 (requiring federal land managers to protect Native American graves, consult with tribal governments concerning sacred sites and objects, and repatriate cultural and religious items on federal lands or institutions receiving federal funds); Exec. Order No. 13007, 61 Fed. Reg. 26771 at § 4 (May 24, 1996) (directing federal agencies, “to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, to: (1) accommodate access to and ceremonial use of Indian sacred sites, by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites”).

difficult for federal agencies to identify these sites because they manifest themselves in the natural environment and landscape. There is generally nothing built on the environment or any physical remains to evaluate. Unlike other historic properties or archaeological sites, sacred sites or tribal cultural properties cannot be determined solely by historians, ethnographers, or archeologists.

The significance of traditional cultural properties is and must be determined by the tribal community who values them and whose oral traditions and practices give them meaning. Despite EO 13007 stating a tribe will identify the site, federal agencies often have difficulty accepting tribal assertions about the significance of a place and sometimes refer to these sacred sites as “intangible” and therefore not eligible for protection or a listing on the National Register. Any written historical accounts that tribes possess would be valuable at this stage because, unfortunately, federal agencies often give more weight to the written word as opposed to oral traditions.⁷⁹ Ongoing conversations between federal managers and tribes are critical because they will enable agency staff to have a better understanding of sacred sites and their meaning to the tribe. Again, an established government-to-government relationship, prior to any sacred site identification, cannot be overemphasized because it builds familiarity, trust, cooperation, and collaboration.

There is also a common misconception concerning sacred sites. Many sites are part of the physical landscape and natural formations and are therefore tangible. While the tribal beliefs and values associated with the site, which give the area cultural and historical significance, may be intangible the physical elements of the site such as a river area or cliff itself and related natural features are not. Unless someone (federal manager or surveyor) conducting a cultural survey or evaluation, through the consultation process, has access to or knowledge of the tribal cultural beliefs or values associated with a particular site they may never realize its significance as a sacred site. The importance of tribal engagement with a local NPS manager is imperative so that a NPS cultural anthropologist or surveyor can be contacted or accompanied by a tribal representative who can educate the surveyor about the area, or establish potential interviews with keepers of such knowledge or provide ethnographic studies.

Non-Indians have challenged two NPS decisions relating to the protection or access to tribal sacred sites. In a significant decision in 1995, the NPS issued a Final Climbing Management Plan for the Devils Tower National Monument. The management plan asked recreational rock climbers to voluntarily refrain from climbing on Devils Tower in the month of June, a month when tribal people travel there to perform religious ceremonies. The rule was issued after two years of consultation with Indians, rock climbers, environmentalists, and others. Most rock climbers have shown respect for the Indian religious practitioners and have

79. Jordan Paper, *Through the Early Darkly: The Female Deity in Native American Religions*, in *RELIGION IN NATIVE NORTH AMERICA* (Christopher Vecsey ed., 1990) (stating that, “[t]he cultural context of Western scholarship develops from religions centered on sacred literature: truth is delineated by written text. Accordingly, in the study of oral traditions, reliance is placed on literary descriptions from outside the tradition under study. For those adhering strictly to the logic of traditional Western scholarship, the native mind . . . was effectively blank prior to contact. This perspective assumes that the ideology of oral tradition can be known only from ethnohistorical sources, and further assumes that ethnohistorical sources can be tainted by ethnocentrism.”).

supported the NPS's decision.⁸⁰ Several rock climbers, however, challenged the NPS's rule in *Bear Lodge Multiple Use Assn. v. Babbitt*, arguing the action violated the Establishment Clause of the First Amendment to the Constitution.⁸¹ The 10th Circuit Court of Appeals ruled the rock climbers did not have standing to challenge the regulations since they failed to show any injury. The court upheld the voluntary accommodation for a temporary period of time to permit tribal members to practice their time honored religious practices.⁸²

A second NPS policy requested visitors to Rainbow Bridge National Monument in Arizona to voluntarily refrain from walking under the bridge out of respect for the sacred nature of the area to tribal nations.⁸³ The court held there was no violation of the Establishment Clause and the accommodation was permissible since it was voluntary and had two secular purposes – educating the public about different cultures, and “fostering the preservation of the historical, social, and cultural practices of Native Americans.”⁸⁴

Certainly, this is a positive step by the NPS toward protection of tribal practices, but there should be more than a temporary voluntary accommodation. After all, in the Bear Lodge situation the NPS Final Climbing Management Plan provided for the seasonal closure of trails to protect raptor nests.⁸⁵ Additionally, the NPS is closed on certain Christian holidays⁸⁶ and prohibits rock climbing on certain NPS monuments.⁸⁷ In many national parks, the NPS owns or leases churches. The NPS also permits groups to conduct religious services on park lands, and it prohibits recreational and other activities that would conflict with the religious services.⁸⁸ In fact, the NPS has established many bans in the parks based upon adverse impacts to preserving the integrity of the park.

It is quite astonishing that the NPS does not take a stronger position on behalf of tribes. Perhaps the NPS is fearful that a total ban on non-Indian activities

80. See *Bear Lodge Multiple Use Ass'n. v. Babbitt*, 175 F.3d 814, 820-821 (10th Cir. 1999); see also George Linge, Note, *Ensuring the Full Freedom of Religion on Public Lands: Devil's Tower and the Protection of Indian Sacred Sites*, 27 B.C. ENVTL. AFF. L. REV. 307, 331 n.45 (2000) (stating that that compliance with the NPS Final Climbing Management Plan has “been roughly 85%, meaning the number of people climbing in June since the voluntary ban was implemented in 1996 is 85% less than the number of people who climbed in June 1995.”).

81. *Bear Lodge Multiple Use Ass'n.*, 175 F.3d 814, 815-16 (10th Cir. 1999).

82. *Id.* at 822.

83. *Nat. Arch & Bridge Soc'y v. Alston*, 209 F.Supp.2d 1207, 1214-15 (D. Utah 2002), *aff'd*, 98 Fed. Appx. 711 (10th Cir. 2004).

84. *Id.* at 1223-24.

85. *Bear Lodge Multiple Use Ass'n.*, 175 F.3d 814, 819 (10th Cir. 1999).

86. For example, several national parks and monuments or their visitor centers (Mount Rushmore, Petrified Forest, Gettysburg, Rocky Mountain) are closed on Christmas, and other majority society celebrations such as Thanksgiving and New Years Day. See, e.g., NAT'L PARK SERV., MOUNT RUSHMORE, OPERATING HOURS AND SEASON, <http://www.nps.gov/moru/playourvisit/hours.htm>.

87. For example, climbing Mount Rushmore is prohibited. See 36 C.F.R. § 7.77(a) (2006).

88. Cathedral of the Sacred Heart is located in Grand Teton National Park, and Yosemite Valley Chapel is located in Yosemite National Park; the Christian Ministry has been offering Christian services in national parks for over 60 years. See A CHRISTIAN MINISTRY IN THE NAT'L PARKS, *About Us*, www.acmnp.com. See also the list of religious services offered at national parks at <http://www.acmnp.com/news-events/service>.

impacting tribal worship, even for a day, will not withstand judicial challenge.⁸⁹ Perhaps the NPS does not fully embrace the policy of tribes accessing sacred sites in the national parks. The access and uses that tribes seek, however, are consistent with the NPS mission and can be tied to those secular historical, cultural purposes. Indeed, the 10th Circuit in the Rainbow Bridge National Monument case found two secular purposes -- educating the public about different cultures, and fostering the preservation of the historical, social, and cultural practices of Native Americans. Certainly, as the original trustees, tribes for millennia used, managed, and safeguarded the ecosystems now owned by the NPS.

Indeed, the NPS has a more compelling position than other federal land agencies in restricting activities affecting tribal sacred sites because of its statutory mandate.⁹⁰ Under the NPS Organic Act, the NPS is authorized to “conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”⁹¹ This singular mandate of conserving natural and historic objects, as opposed to federal agencies, which have multiple use mandates, should give the NPS broad latitude to accommodate Indian religious practitioners to access sacred sites and participate in century-old ceremonies. Moreover, based upon its trust responsibility to tribes, the NPS has a duty and extra obligation to protect tribal interests. So too, the case law developed under the Establishment Clause involving Indian tribes should give enough discretion for NPS decision-makers to work with tribes to develop accommodations for traditional practitioners to access and protect sites sacred to them.

Following the *Bear Lodge* district court decision, the Attorney General’s office issued a Memorandum Opinion to the Secretary of Interior advising the NPS and federal land managers of their obligations under the Establishment Clause.⁹² The Memorandum Opinion begins with an analysis of the principles governing accommodation under the Establishment Clause; it then discusses the application of those principles to the accommodation of sacred sites.⁹³ The Attorney General states “the accommodation doctrine . . . ordinarily prohibits the government from enacting regulations that prefer one religion over others, that foster excessive entanglement with religion, or that lift privately imposed burdens. However, these general principles do not apply to regulations that accommodate the religious practices of federally recognized Indian tribes.”⁹⁴ The Memorandum Opinion employs the trust

89. The district court in *Bear Lodge Multiple Use Ass’n*, decided the NPS Plan met constitutional muster. *Bear Lodge Multiple Use Ass’n v. Babbitt*, 2 F. Supp. 2d 1448, 1456-57 (D. Wyo. 1988). The 10th Circuit, however, did not reach the First Amendment issues. *See Bear Lodge Multiple Use Ass’n*, 175 F.3d 814, 822 (10th Cir. 1999) (concluding that “we believe the Climbers’ lack of standing is dispositive”).

90. For example, the Forest Services must consider multiple uses when managing national forests, such as “outdoor recreation, range, timber, watershed, and wildlife and fish purposes.” 16 U.S.C. § 528 (2006). *See also* Michelle Kay Albert, *Obligations and Opportunities to Protect Native American Sacred Sites Located On Public Lands*, 40 COLUM. HUM. RTS. L. REV. 479, 519 (2009).

91. 16 U.S.C. § 1 (2006).

92. Permissible Accommodation of Sacred Sites, 20 Op. Off. Legal Counsel 331 (U.S. Dep’t of Interior Sept. 18, 1996) [hereinafter *Permissible Accommodation*].

93. *Id.* at 1.

94. *Id.* at 3.

doctrine and the Supreme Court decision of *Morton v. Mancari* to support preferential treatment based on the political status of tribes.⁹⁵ It relies upon two Court of Appeals decisions that extend the rationale of *Mancari* to the Establishment Clause circumstances involving the possession of eagle feathers and peyote.⁹⁶

These cases and the trust relationship supported the Attorney General's opinion declaring that the accommodation of tribal religious practices or sacred sites is "not religious preferences in the usual sense of that term. Rather, they are political preferences conferred by the federal government on a quasi-sovereign in furtherance of the federal government's duty to promote tribal self-determination in all of its forms."⁹⁷ The Memorandum Opinion advises that "*Morton* leaves the government with broad latitude to accommodate tribal religious practices." Given this opinion by the Attorney General to its federal land agencies, it is important for the NPS to utilize the trust obligations and its relationship to tribes when making decisions affecting sacred sites. As declared in *Peyote Way Church of God*: "the governmental objective of preserving Native American culture . . . is fundamental to the federal government's trust relationship with tribal Native Americans."⁹⁸

Under the establishment clause test, a NPS action that may promote tribal culture and traditions should be permissible for several reasons. First, it has a secular purpose of promoting tribal sovereignty. Second, it has a primary effect which supports tribal culture and sovereignty. Third, it does not foster governmental entanglement; rather, it simply supports the Indian way of life as established by the tribe's traditions.

Unlike the NPS voluntary accommodations, the Forest Service issued a total, mandatory ban on recreational rock climbing on Cave Rock, located on the eastern shore of Lake Tahoe, Nevada. This is a sacred feature of the Washoe Tribe's religion. The federal action, taken after the Memorandum Opinion requiring accommodation of religious tribal practices, was challenged by the rock climbers in

95. *Id.* at 4-5. *See also* *Morton v. Mancari*, 417 U.S. 535 (1974) (upholding employment preferences for Indians within the Bureau of Indian Affairs pursuant to the Indian Reorganization Act, 25 U.S.C. §§ 461-494, against an equal protection challenge, finding such preferences were rationally tied to the Congress's unique obligation toward Indians, and did not constitute racial discrimination).

96. Permissible Accommodation, *supra* note 88, at 4. In *Rupert v. Dir., U.S. Fish and Wildlife Serv.*, 957 F.2d 32 (1st Cir. 1992) (per curiam), the First Circuit upheld the exemption for federally recognized Indian tribes from the federal criminal ban on the possession of eagle feathers. The court stated the principles from *Mancari* govern "where the government has treated Native Americans differently from others in a manner that arguably creates a religious classification." *Id.* at 35. Similarly, in *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991), the Fifth Circuit considered a challenge by non-Indians to the federal and state exemptions from criminal law for Native American use of peyote. The group contended that the preferential treatment for Native Americans violated both the Equal Protection Clause and Establishment Clause. *Id.* at 1214-17. The Fifth Circuit upheld the exemptions finding they were political not religious classifications based upon the unique relationship between Indian tribes and the federal government. *Id.* at 1217.

97. Permissible Accommodation, *supra* note 88, at 337. It further states, "[t]he fact that the accommodated rituals might be viewed as religious in some sense . . . is not dispositive when the government benefits from those rituals in order to promote tribal self-determination. *See id.* at 337.

98. *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1216 (5th Cir. 1991) (footnote omitted).

Access Fund v. USDA.⁹⁹ However, the Ninth Circuit upheld the Forest Service decision. The Court found that the Forest Service in approving the ban acted pursuant to a secular purpose—the preservation of a historic and cultural area—and concluded that “even if the ban on climbing were enacted in part to mitigate interference with the Washoe’s religious practices, this objective alone would not give rise to a finding of an impermissible religious motivation.”¹⁰⁰ The Ninth Circuit noted that “the Constitution . . . affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.”¹⁰¹ The Supreme Court has recognized “the government may (and sometimes must) accommodate religious practices, and . . . it may do so without violating the Establishment Clause.”¹⁰²

Ten years prior to the Forest Service’s ban, the site had been listed as a historic site on the National Register of Historical Places, as a traditional cultural property.¹⁰³ Unlike the *Bear Lodge* case, the federal action was tied to a secular purpose, which “served permissible secular goal of protecting cultural, historical and archeological feature of Cave Rock.”¹⁰⁴ The Court’s holding in *Access Fund* lends support for the NPS requiring not only voluntary but mandatory bans or actions to protect sacred sites. To say the least, the NPS must work closely with tribes to fully understand sacred sites, and to fully protect the religious practices of tribal peoples as they seek to revitalize their traditions practiced for millennia in today’s parks.

There is no doubt that the challenges faced by the NPS and other federal land managers concerning protection of sacred sites have become quite daunting; particularly given the state of the law, the requests by tribes to fully implement the trust doctrine policies, and perhaps the uneasiness by agencies to fully implement the trust obligations with regard to sacred sites. These concerns echoed by federal managers and tribes has prompted four federal departments (the Department of Defense, DOI, Department of Agriculture, and Department of Energy), as well as the Advisory Council on Historical Preservation, to launch a 2012 initiative on protecting tribal sacred sites. Two documents were released: first, the Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites (MOU),¹⁰⁵ and second, the Action Plan to Implement the Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites.¹⁰⁶

99. *Access Fund v. U.S. Dep’t. of Agric.*, 499 F.3d 1036, 1039–42 (9th Cir. 2007). See also Michelle Kay Albert, *Obligations and Opportunities to Protect Native American Sacred Sites Located on Public Lands*, 40 COLUM. HUM. RTS. L. REV. 479, 506–9 (2009) (reviewing the issues and opportunities to protect Native American sacred site on public lands, including an in-depth review of *Access Fund*).

100. *Access Fund v. United States Dep’t. of Agric.*, 499 F.3d 1036, 1044 (9th Cir. 2007).

101. *Id.* at 1042 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984)).

102. *Id.* at 1042 (quoting *Hobbie v. Unemployment Appeal Comm’n*, 480 U.S. 136, 144–45 (1987)).

103. *Id.* at 1040.

104. *Id.* at 1044.

105. MEMORANDUM FROM THE U.S. DEP’T OF DEF., U.S. DEP’T OF THE INTERIOR, U.S. DEP’T OF AGRIC., U.S. DEP’T OF ENERGY, AND THE ADVISORY COUNCIL ON HISTORIC PRES., MEMORANDUM OF UNDERSTANDING REGARDING INTERAGENCY COORDINATION AND COLLABORATION FOR THE PROTECTION OF INDIAN SACRED SITES (Dec. 5, 2012), www.achp.gov/docs/SacredSites-MOU_121205.pdf [hereinafter MOU]. The MOU is in effect until 2017.

106. U.S. DEP’T OF DEF., U.S. DEP’T OF THE INTERIOR, U.S. DEP’T OF AGRIC., U.S. DEP’T OF ENERGY, AND THE ADVISORY COUNCIL ON HISTORIC PRES., ACTION PLAN TO IMPLEMENT THE

The MOU's purpose is to "improve the protection of and tribal access to Indian sacred sites through enhanced and improved interdepartmental coordination and collaboration."¹⁰⁷ It contains eleven actions including: (1) training and education of federal staff on legal protections regarding accommodation of, access to, and protection of sacred sites, and consulting effectively with Indian tribes to address the sacred sites; (2) developing best practice for managing sacred sites; (3) identifying impediments to protecting sacred sites, etc.¹⁰⁸ The Action Plan creates working groups comprised of the participating agencies to: (1) review the laws and executive orders relating to sacred sites; (2) identify training programs; (3) develop guidance on management of sacred sites; (4) create a website; (5) review confidentiality standards; and (6) develop interagency expertise and contracting with tribes.¹⁰⁹ Both the MOU and the Action Plan delineate affirmative methods to accommodate tribal interests, and federal agencies' working committees are charged with the task to make changes in current policies and better address tribal needs.

The need to protect sacred sites has never been greater, especially on federal lands; thus, the MOU and Action Plan are necessary now more than ever. There is continuing pressure on NPS and other land managers to disregard tribal interests, balance competing stakeholder interests, and consider economic and political issues in protecting sacred sites. Therefore, it is critical that the Action Plan for the NPS and other federal agencies not be a futile exercise, or a rehash of past talking points issued by the federal departments, and that it is completed in a timely manner.¹¹⁰

When making decisions that affect park lands and other resources, there are three federal laws that the NPS is required to adhere to:¹¹¹ the National Historic Preservation Act (NHPA),¹¹² the Native American Graves Protection and Repatriation Act of 1990,¹¹³ and the Archeological Resources Protection Act of 1979

MEMORANDUM OF UNDERSTANDING REGARDING INTERAGENCY COORDINATION AND COLLABORATION FOR THE PROTECTION OF INDIAN SACRED SITES (2013), *available at* www.doi.gov/news/upload/SS-MOU-Action-Plan-March-5-2013.pdf [hereinafter ACTION PLAN].

107. MOU, *supra* note 101, at 1.

108. *Id.* at 2–3.

109. ACTION PLAN, *supra* note 102, at 3–4.

110. See U.S. DEP'T OF DEF., U.S. DEP'T OF THE INTERIOR, U.S. DEP'T OF AGRIC., U.S. DEPT'T OF ENERGY, AND THE ADVISORY COUNCIL ON HISTORIC PRES., PROGRESS REPORT ON THE IMPLEMENTATION OF THE MEMORANDUM OF UNDERSTANDING REGARDING INTERAGENCY COORDINATION AND COLLABORATION FOR THE PROTECTION OF INDIAN SACRED SITES (2014), *available at* <http://www.achp.gov/docs/SacredSitesWorkingGroup-2013ProgressReport.pdf>. Later the same year, the National Congress of American Indians passed a resolution calling on the federal departments to take action on the MOU and to address longstanding issues of confidentiality, training, and consultation. See NATIONAL CONGRESS OF AMERICAN INDIANS RESOLUTION, CALL FOR FEDERAL ENTITIES TO TAKE ACTIONS ON SACRED "SITES" MEMORANDUM OF UNDERSTANDING, (National Congress of American Indians eds., 2014), *available at* <http://www.ncai.org/resources/resolutions/call-for-federal-entities-to-take-actions-on-sacred-sites-memorandum-of-understanding>.

111. For a comprehensive discussion of these federal laws and the role of tribes, see Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 VT. L. REV. 145 (1996).

112. See National Historic Preservation Act, Pub. L. No. 89–665, 80 Stat. 916 (codified as amended in scattered section of 54 U.S.C.).

113. See Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. § 3001–3013, 18 U.S.C. § 1170 (2015). The NAGPRA requires consultation with tribes and Native Hawaiian organizations prior to the removal of human remains or cultural items from Federal land, and it requires

(ARPA).¹¹⁴ Indeed, the NPS states in its policies, “when authorized under National Historic Preservation Act, the Archeological Resources Protection Act or other provisions of law, the Service will protect sacred resources to the extent practicable and in a manner consistent with the goals of American Indian tribes or other traditionally associated groups.”¹¹⁵ Consequently, tribes are one of the many parties of interest or stakeholders in the consultation process.

Many tribal activities in parks, however, do not impact non-Indian interests nor do they amount to federal undertakings; therefore, they should not be subject to federal consultation under the NHPA or ARPA. Such activities include gathering of plants and resources for traditional purposes. For example, some plants may no longer be available outside park settings due to contamination, overuse, destruction by development, or threatened extinction of the species. There are some cultural resources that are so closely connected to tribal creation sites that they are not available anywhere else. In these instances, the NPS should enter into agreements with tribes for specific purposes or issue a rulemaking on the matter.¹¹⁶

D. Traditional Cultural Properties

Prior to the Clinton administration’s policies supporting protection of tribal resources, the NPS developed the 1990 National Register Bulletin No. 38, “Guidelines for Evaluating and Documenting Traditional Cultural Properties,” (“Bulletin 38”). It is important for Indian tribes because it provides that “traditional cultural properties” (“TCPs”) may be eligible for inclusion in the National Register and used under the NHPA Section 106 review process.¹¹⁷ TCPs describe a subset of historic properties, and places that have religious or cultural significance to a tribal community.¹¹⁸ Under Bulletin No. 38, natural objects or landscapes “associated with the traditional beliefs of a Native American group about its origins, its cultural history, or the nature of the world” may be National Register eligible, and subject to

the consent of the appropriate tribe or Native Hawaiian organization when the removal is to be from tribal land. Intentional Archaeological Excavations, 43 C.F.R. 10.3(c).

114. Archeological Resources Protection Act of 1979 (ARPA), 16 U.S.C. § 470aa–470mm (2015). ARPA protects archeological resources and sites on federal and tribal lands. It requires a permit any archeological activities, and provides no person may sell, purchase, transport, etc. any archeological resource taken in violation of any state law.

115. *Management Policies*, *supra* note 54, § 8.5, at 111.

116. On April 20, 2015, the NPS issued a proposed rule entitled “Gathering of Certain Plants or Plant Parts by Federally Recognized Indian Tribes for Traditional Purposes.” 80 Fed. Reg. 21674 (Apr. 20, 2015). The proposed rule would allow only members of federal recognized tribes that have traditional associations with specific park areas to gather and remove plants and plant parts for traditional uses. *Id.* at 21674. The rule calls for agreements between the NPS and tribes that would “identify who within the tribes is designated to gather and remove; how such individuals will be identified; what plants or plant parts may be gathered and removed; and limits on size, quantities, seasons, or locations where the gathering and removal may take place.” *Id.* at 21677.

117. See 16 U.S.C. § 470 a(d)(6)(A); *see also* 36 C.F.R. § 800.2(c)(2)(B)(ii)(E); 36 C.F.R. Part 60 (2012).

118. See PATRICIA L. PARKER & THOMAS F. KING, NAT’L PARK SERV., NATIONAL REGISTER BULLETIN 38, GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES (1990, rev. 1992, 1998).

NHPA protection.¹¹⁹ However, tribes have their own definitions of a TCP. Areas like mountain peaks, valleys, and buttes may be considered traditional cultural properties. Some of the locations that tribes seek to protect as a TCP fit within the broad definition. There are, however some places that did not fit as a TCP. In these situations, the NPS should still consult with tribes. Accordingly, in implementing its Indian policy and supporting tribal self-determination, the NPS should consider using a tribal definition and list certain areas as TCPs despite the eligibility for the National Register. In fact, the NPS should revise its Bulletin 38 to clarify that all federal agencies should consult with tribes and the section 106 review process is not limited to TCPs.¹²⁰

An essential component of the identification effort is the requirement that federal agencies seek information from Indian tribes to identify historic properties. The Section 106 process must be “initiated early in the undertaking’s planning, so that a broad range of alternatives may be considered,”¹²¹ which means that federal agencies in consultation with interested Indian tribes, must “make a reasonable and good faith effort” to identify TCPs within the project’s area of potential effect prior to any undertaking.¹²² If there is a potential for TCPs within the area of potential effect, the properties must be evaluated for historic significance.¹²³

The regulations provide criteria for determining whether a public or private property, including TCPs, is eligible for listing on the National Register of Historic Places; the criteria considers whether: (1) it is “associated with events that have made a significant contribution to the broad patterns of our History;” (2) it is “associated with the lives of persons significant in our past;” (3) it “embod[ies] the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction;” or (4) it has “yielded, or may be likely to yield, information important in prehistory or history.”¹²⁴

E. Confidentiality

The NPS’s statement on confidentiality provides that “certain kinds of information” will be kept confidential. It further notes “[s]uch information will be deemed confidential when authorized by law, regulation, or policy. . . . Culturally sensitive information will be collected and recorded only to the extent necessary to support sound management decisions and only in consultation with tribal

119. *Id.* at 1.

120. On August 10, 2012, the NPS published a notice in the Federal Register seeking comments on its initiative to revise its National Register of Historic Places guidance for “identifying, evaluating, and documenting properties that are historically significant as TCPs and/or Native American landscapes,” and consulted with tribes on the initiative. 77 Fed. Reg. 47875 (2012).

121. 36 C.F.R. § 800.1(c) (2005); *accord* Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768, 787 (9th Cir. 2006).

122. 36 C.F.R. § 800.4(b)(1) (2011); *see* Pueblo of Sandia v. United States, 50 F.3d 856, 859–63 (10th Cir. 1995); PARKER & KING, *supra* note 114, at 6–10.

123. 36 C.F.R. § 800.4(c) (2011); PARKER & KING, *supra* note 114, at 11–18.

124. 36 C.F.R. § 60.4 (2012).

representatives.”¹²⁵ This statement is limited. It conditions that information may only be deemed confidential when authorized under law, which means that in many cases the NPS may be compelled under the Freedom of Information Act (FOIA)¹²⁶ to disclose information provided to them by Indian tribes that does not fall into one of the nine exemption categories of FOIA.

Thus, a decision to submit a nomination or information for eligibility in the National Register process or in general is not an easy one. Some tribal traditional practitioners and elders have serious reservations about disclosing information about religious and cultural practices they consider sensitive and private.¹²⁷ Tribes may also be concerned about the nomination form being a public document and being subject to Freedom of Information Act requests.¹²⁸ The tribal need for confidentiality is a critical factor. Often, tribes must provide information otherwise a sacred place will be damaged or destroyed. This is a difficult decision for tribes to make, because if such information is released, it becomes public and will forever remain so.

TCPs and other sacred sites are a fact of life. NPS representatives should acknowledge this and be prepared to work cooperatively with tribes so that the culturally significant sites can be identified and protected. However, the tribes and the NPS need to address tribal desires to minimize disclosure of sensitive cultural and religious information. At the same time, the tribes must meet the NPS’s need evaluate the site by providing a minimum amount of information about the nature of the site and the tribal values associated with it. It may take some time to resolve these issues, but doing so can result in a certain level of trust by both parties. Additionally, protection of the confidentiality of a site location is critical, not only to the religious and cultural beliefs of affected Indian tribes in the proposed project area, but also to protecting the integrity of the site—the principal purpose of the ARPA.¹²⁹ Any disclosure of the locations of an archeological site would represent a serious danger to the site. It is a well-known fact that archeological sites are the subject of unpermitted excavations, looting, and pot hunting.

To resolve this dilemma, the parties may seek to use existing published historical and anthropological data or information to minimize the amount of sensitive information they would have to disclose in order to demonstrate a site’s eligibility for access and protection. The oral information provided by tribal elders and spiritual leaders can supplement, correct, and explain the existing data or ethnographic study. Another means to reduce the likelihood of disclosure or release of tribal information considered sensitive and private, in the case of a National Register request, is to submit the documentation directly to the administrator of the

125. *Management Policies*, *supra* note 54, § 1.11.2, at 19.

126. Freedom of Information Act, 5 U.S.C. § 552 (2011).

127. See *Pueblo of Sandia v. United States*, 50 F.3d 856, 861 (noting that Pueblo’s reticence to share information about cultural and religious sites with outsiders was to be expected, and that federal government knew tribe would typically not answer general requests for information).

128. In *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1 (2001), the Supreme Court interpreted the Freedom of Information Act to require the disclosure of records concerning legal theories and analyses for water claims that were obtained in the course of a federal agency’s work with an Indian tribe. These records could then be used against the tribe by opponents seeking rights to the same resources. *Id.* at 13. The Court expressly rejected the government’s argument that its trust responsibilities to the tribe protected the documents from disclosure. *Id.* at 15–16

129. 16 U.S.C. §§ 470aa, 470cc, 470ee (2011).

National Register for a determination of eligibility. This streamlined process can be used when both the federal agency and the SHPO agree that a site is eligible. The SHPO would agree not to retain copies for its records. All the documentation would be retained by the administrator of the National Register in Washington, D.C. The administrator would then agree to return the original eligibility documentation to the tribe after they reviewed it. A summary document prepared by the tribe and National Register staff would contain a minimum amount of information necessary to justify its determination regarding eligibility.¹³⁰ In a similar situation, the federal agency may agree to accept a document marked "DRAFT" which would be returned to the tribe or placed in the federal archive with a "DO NOT DISTRIBUTE" notice.¹³¹

V. CONCLUSION

The executive orders of the 1990s mandated better cooperation, respect and recognition of the government-to-government relationship between federal land managers and Indian tribes. Over the past 20 years, the NPS has sought to implement these tribal policies, and like other federal land managers it has struggled to fulfill these policies and reflect the full trust responsibility and its obligations to protect tribal interests. Certainly, there has been some progress to assist tribal religious practitioners and protect sacred sites. Yet, the NPS has much work to do to fully meet its trust obligations to tribes as envisioned in the executive orders.

Setting the legal principles and policies aside, it is hoped that through communications, cooperation and collaboration with tribes the NPS will begin to understand, recognize, respect, and accept the uniquely native worldview: one espousing reverence for nature, a will for conservation, and a desire to practice their centuries old sacred traditions on their ancestral lands. Parks remain a place of hope, a place of vision, a place of refuge, a special holy place where the Creator speaks with us. These places are our sacred places, our homes.

130. This streamlined process was used by the Confederated Salish and Kootenai Tribes in 1989 when the Montana Department of Transportation proposed to widen a highway in Western Montana threatening a traditional spiritual use site known as the Medicine Tree Site.

131. The author used this process in providing sensitive information to YNP managers.