

**Mining the Sacred: The Struggle to Protect Oak Flat as Illustrating the Need to Increase the Authority of Native Americans in the Review of Sacred Places Located on Non-Tribal Lands Under the Section 106 Process**

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## I. INTRODUCTION

*Wisdom sits in places. It's like water that never dries up. You need to drink water to stay alive, don't you? Well, you also need to drink from places. You must remember everything about them. You must learn their names. You must remember what happened at them long ago. You must think about it and keep on thinking about it. Then your mind will become smoother and smoother. Then you will see danger before it happens. You will walk a long way and live a long time. You will be wise. People will respect you.*

In his ethnographic work examining the significance of place in the Apache culture, Keith Basso records this remarkable answer of Dudley, an Apache man, to Basso's question, "What is wisdom?"<sup>1</sup> Dudley's words express the centrality of particular places to the practice of Apache beliefs; this inextricable relationship between religion and the land is common to nearly every Native American tribe.<sup>2</sup> While Native American belief systems vary widely, a nearly universal feature of each system is the notion of a spiritual center rooted to a precise geographic location.<sup>3</sup> This sacred center moors native practitioners in a sense of place, enabling them "to look out along the four dimensions and locate their lands, to relate all historical events within the confines of this particular land, and to accept responsibility for it."<sup>4</sup> Sacred places may be specific areas of land or landscape features such as a river, mountain, plateau, valley, or other natural feature.<sup>5</sup> Native American religion often counsels the tribes to maintain a symbiotic relationship with their sacred land.<sup>6</sup> Obtaining this spiritual symbiosis with the lands is achieved through ecological as well as traditional and ritual practices.<sup>7</sup>

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<sup>1</sup> KEITH BASSO, *WISDOM SITS IN PLACES: LANDSCAPE AND LANGUAGE AMONG THE WESTERN APACHE* 127 (1996).

<sup>2</sup> See Michelle Kay Albert, *Obligations and Opportunities to Protect Native American Sacred Sites Located on Public Lands*, 40 COLUM. HUM. RTS. L. REV. 479, 481 (2009).

<sup>3</sup> *Id.*

<sup>4</sup> VINE DELORIA JR., *GOD IS RED* 66 (3d ed. 2003) (1973).

<sup>5</sup> See Albert, *supra* note 2, at 481.

<sup>6</sup> Robert Charles Ward, *The Spirits Will Leave: Preventing the Desecration and Destruction of Native American Sacred Sites on Federal Land*, 19 ECOLOGY L.Q. 795, 800 (1992).

<sup>7</sup> *Id.*

**A. THE PAST AND PRESENT SUBJUGATION OF NATIVE AMERICANS NECESSITATES THAT THE GOVERNMENT WORK TO REMEDY THESE WRONGS**

The contemporary reality that there are numerous Native American sacred places on non-tribal land bespeaks the dark history of the treatment of Native Americans by the United States (“U.S.”). Native Americans have been stripped of their lands by force, and later by law.<sup>8</sup> Under modern notions of justice, the manner by which Native Americans were systematically forced from their lands is abhorrent. In 2012 the United Nations Special Rapporteur on the rights of indigenous peoples, James Ayana, came to the U.S. to examine the treatment of Native Americans.<sup>9</sup> *The Guardian* reported on his trip noting Ayana “encountered people who suffered a history of dispossession of their lands and resources, the breakdown of their societies and ‘numerous instances of outright brutality, all grounded on racial discrimination.’”<sup>10</sup> Ayana concluded his trip by calling upon the U.S. government to return some of the land taken from Native American tribes as a step towards remedying the long and ongoing history of systematic racial discrimination.<sup>11</sup> Despite the normative justice found in Ayana’s recommendation, the legal and administrative hurdles of pursuing the restoration of wrongfully dispossessed sacred lands to Native Americans may render this solution untenable. However, in recognition of the serious transgressions the government perpetrated against Native Americans in wrongfully taking their lands, at a minimum, the government should ensure that tribes are accorded agency in the management of sacred sites located on non-tribal lands.

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<sup>8</sup> For example, the Dawes General Allotment Act of 1887 authorized the transfer of almost ninety million acres of tribal land to non-Native Americans. SARA C. BRONIN & J. PETER BYRNE, *HISTORIC PRESERVATION LAW* 505-506 (2012) (citing 24 Stat. 388 (1887) (codified at 25 U.S.C. § 331 et seq.)).

<sup>9</sup> Chris McGreal, *US should return stolen land to Indian tribes, says United Nations*, *THE GUARDIAN* (May 4, 2012), <http://www.theguardian.com/world/2012/may/04/us-stolen-land-indian-tribes-un>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

**B. PROTECTION FOR SACRED PLACES UNDER THE NHPA AND PROFFERED JUSTIFICATIONS FOR THE LIMITED ROLE OF NATIVE AMERICANS IN THE SECTION 106 PROCESS**

Native American sacred places found on non-tribal lands are commonly eligible for protection under National Historic Preservation Act (“NHPA”) through the Section 106 Process. Under the Section 106 Process, federal agencies are mandated to take into account the effects of a federal undertaking on historic properties, and afford the Advisory Council on Historic Preservation (“ACHP”) a reasonable opportunity to comment.<sup>12</sup> The agency must identify historic properties within the area of potential effect and identify the adverse effects of the undertaking on these historic properties.<sup>13</sup> If there are adverse effects of the undertaking, the agency begins consultation to seek ways to avoid, minimize, or mitigate the adverse effects.<sup>14</sup> The Section 106 Process holds the potential to protect Native American sacred places. However, the treatment of Native American sacred places under the Section 106 process has a pockmarked history due to the process’s failure to accord due authority to the tribes in reviewing sacred places located on non-tribal lands.

In reviewing sacred places found on non-tribal land, the Section 106 Process must be altered to accord appropriate authority to Native American tribes in determining the findings and outcomes of the consultation process and protecting confidential information. The relegation of the tribes to merely a party with whom the federal agency must consult accords tribe insufficient authority in making decisions regarding the management of their sacred places. Additionally, the disclosure requirements of the Section 106 Process can conflict with the beliefs of a Native American tribe which requires protecting the confidentiality of certain elements of a sacred place.

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<sup>12</sup> 36 C.F.R. § 800.1 (2014).

<sup>13</sup> 36 C.F.R. § 800.4-800.5 (2014).

<sup>14</sup> 36 C.F.R. § 800.6 (2014).

Several justifications are offered to defend the current limited role of Native Americans in managing places they hold sacred which fall outside of their tribal lands. Generally, property law dictates that the land owner has sole discretion in determining the use and conveyance of land. Any consideration paid to the interests of Native Americans through historic preservation or environmental law deviates from this standard. Therefore, the limited inclusion of Native Americans in the Section 106 Process's review of lands they hold sacred is unwarranted, or at least should be constrained at the current level. Additionally, protecting Native American sacred places may conflict with the wishes of the property owner to exploit the site for financial gain by foreclosing activities such as mining, mineral extraction, and development. An argument can also be raised that prohibiting lucrative activities on Native American sacred places fails to serve the public interest by denying the public the economic benefits associated with the activity. Protecting sacred sites found on public lands might also require limiting access to the land, thereby closing the land to recreational use. Finally, it can be argued that tribes do not internalize the costs of protecting sacred places that they do not own, and therefore they have an incentive to take extreme positions. However, the long history of the treatment of Native Americans by the government and its recent track record of neglecting the interest of Native Americans in protecting their sacred places and excluding tribes from decisions regarding the management of these places affirms the necessity of increasing the authority of the tribes in managing sacred places located on non-tribal lands.

**C. THE FRAMEWORK OF THIS ARTICLE'S ARGUMENT FOR INCREASING THE AUTHORITY OF NATIVE AMERICANS IN THE SECTION 106 PROCESS OF SACRED PLACES LOCATED ON NON-TRIBAL LAND**

This article examines the issues of the role of the tribes as a consulting party and upholding necessary confidentiality in the treatment of Native American sacred places located on

non-tribal land under the Section 106 Process, and proposes solutions to remedy the identified shortcomings. First, I call attention to the current struggle of the San Carlos Apache in their fight to protect Oak Flat from the devastating impact of copper mining in order to illustrate some of the flaws of the Section 106 Process and highlight the urgency of ameliorating the process to accord Native Americans more agency. Second, I review the protection of Native American sacred places as Traditional Cultural Properties under the NHPA. Third, I argue that domestic and international legislation mandates that the U.S. adopt a rights based approach to the treatment of Native American sacred places. Fourth, I use case studies to illustrate the flaws in the Section 106 Process's treatment of sacred places and propose solutions to remedy the issues of consultation and confidentiality. Finally, I conclude with a discussion of the prospects of according sufficient protection to Oak Flat through the Section 106 Process and the extreme vulnerability of the sacred place under the Land Exchange Act.

## **II. BARTERING AWAY SACRED OAK FLAT THROUGH THE LAND EXCHANGE ACT**

### **A. THE PASSAGE OF THE LAND EXCHANGE ACT**

In December of 2014 Congress passed the Southeast Arizona Land Exchange and Conservation Act of 2013 ("Land Exchange Act").<sup>15</sup> The legislation authorized the transfer of 2,400 acres of National Forest, including land held sacred by the San Carlos Apache, to Resolution Copper Mining ("Resolution Copper") in exchange for 5,000 acres in parcels

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<sup>15</sup>Gale Courey Toensing, *San Carlos Apache Leader: 'What was a struggle to protect our most sacred site is now a battle,'* INDIAN COUNTRY TODAY MEDIA NETWORK (Jan. 27, 2015), <http://indiancountrytodaymedianetwork.com/2015/01/27/san-carlos-apache-leader-what-was-struggle-protect-our-most-sacred-site-now-battle-158878>.

scattered around Arizona.<sup>16</sup> The San Carlos Chairman Terry Rambler expressed the deep sadness, anger, and frustration felt by many San Carlos Apache, but emphasized his tribe's commitment to fight the land exchange stating, “We're not giving up on our sacred land... What was a struggle to protect our most sacred site is now a battle.”<sup>17</sup>

The Land Exchange Act was attached as a rider to the annual must pass 2015 National Defense Authorization Act (“Defense Act”).<sup>18</sup> Pro-mining congressmen had attempted to pass the Land Exchange Act for nearly a decade to no avail.<sup>19</sup> The deal to hide the Land Exchange Act in the National Defense Authorization Act was negotiated behind closed doors; details of the land swap were first revealed shortly before midnight on the night before the 1,600 page bill was up for consideration in the House of Representatives.<sup>20</sup> The Defense Act, with its ominous rider, was passed by the Senate on December 11, 2014, and despite the Obama administrations opposition to the Land Exchange Act, signed into law by President Obama on December 19, 2014.<sup>21</sup> The Secretary of the Interior Sally Jewell criticized the last minute addition of the Land Exchange Act, calling its passage “profoundly disappointing” and further stated, “The

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<sup>16</sup> Gale Courey Toensing, *San Carlos Apache Leader Seeks Senate Defeat of Copper Mine on Sacred Land*, INDIAN COUNTRY TODAY MEDIA NETWORK (Dec. 8, 2014), <http://indiancountrytodaymedianetwork.com/2014/12/08/san-carlos-apache-leader-seeks-senate-defeat-copper-mine-sacred-land-158181>.

<sup>17</sup> Toensing, *San Carlos Apache Leader: ‘What was a struggle to protect our most sacred site is now a battle,’ supra* note 15.

<sup>18</sup> *Id.*

<sup>19</sup> *Oak Flat / Apache Leap*, EARTHWORKS, [https://www.earthworksaction.org/voices/detail/oak\\_flat\\_apache\\_leap#.VutH84SeNTd](https://www.earthworksaction.org/voices/detail/oak_flat_apache_leap#.VutH84SeNTd) (last visited 14 Apr. 2016).

<sup>20</sup> Serene Fang, *In Arizona, a controversial federal land swap leaves Apache in the lurch*, ALJAZEERA AMERICA (Feb. 20, 2015), <http://america.aljazeera.com/watch/shows/america-tonight/articles/2015/2/20/in-arizona-the-governments-copper-grab-leaves-apaches-in-the-lurch.html>.

<sup>21</sup> Toensing, *San Carlos Apache Leader: ‘What was a struggle to protect our most sacred site is now a battle,’ supra* note 15.

preference on public lands bills is that they go through a typical process of public lands bills and they get debate and discussion.”<sup>22</sup>

#### **B. THE SACRED NATURE OF OAK FLAT AND THE PLAN TO BLOCK CAVE MINE THE LAND**

The 2,400 acres of land subject to the Land Exchange Act is part of the Tonto National Forest, which was put under federal protection from mining in a 1955 Executive Order of President Eisenhower and is managed by the Forest Service.<sup>23</sup> The land includes Oak Flat.<sup>24</sup> Oak Flat, known to members of the San Carlos Apache as *Chich'il Bildagoteel*, is a sacred place upon which dances and ceremonies are hosted, and food and medicinal plants are gathered.<sup>25</sup> Nizhoni Pike, 14, spoke off her sense of personal loss over opening Oak Flat to mining, “I prayed about having my sunrise dance (a womanhood ceremony) there. I grew up going there, praying there.”<sup>26</sup>

Oak Flat sits atop one of the world’s largest deposits of copper ore.<sup>27</sup> Resolution Copper, a subsidiary of the British-Australian mining conglomerate of Rio Tinto and BHP Billiton, has sought ownership of the land for over a decade.<sup>28</sup> In 2014 alone the mining behemoths behind

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<sup>22</sup> Reid Wilson, *Jewell ‘profoundly’ disappointed by land exchange at sacred Native American sites*, WASHINGTON POST (Dec. 6, 2014), <https://www.washingtonpost.com/blogs/govbeat/wp/2014/12/06/jewell-profoundly-disappointed-by-land-exchange-at-sacred-native-american-sites/>

<sup>23</sup> *How the Land Exchange Act Will Benefit the Public*, RESOLUTION COPPER MINING, <http://resolutioncopper.com/in-the-community/how-the-land-exchange-will-benefit-the-public/> (last visited Apr. 16, 2016).

<sup>24</sup> Toensing, *San Carlos Apache Leader Seeks Senate Defeat of Copper Mine on Sacred Land*, *supra* note 16.

<sup>25</sup> *Id.*

<sup>26</sup> Carina Dominguez, *San Carlos Apache tribe protests future copper mine*, AZ CENTRAL (Feb. 6, 2015), <http://www.azcentral.com/story/money/business/2015/02/06/san-carlos-apache-tribe-protest-future-copper-mine/22997123/>.

<sup>27</sup> Fang, *supra* note 20.

<sup>28</sup> Fang, *supra* note 20; Julian Brave NoiseCat, *John McCain Fought for Native Religious Freedom, Then Sold Sacred Oak Flat*, HUFFINGTON POST (Sept. 28, 2015),

Resolution Copper spent over \$1.3 million lobbying congress.<sup>29</sup> Senator John McCain, who orchestrated the addition of the Land Exchange Act as a rider, was a top recipient of Rio Tinto campaign contributions.<sup>30</sup> McCain justified the Land Exchange Act on economic grounds, touting job creation and added economic value.<sup>31</sup>

The most controversial component of the Resolution Copper project is the company's declaration that it will mine using the block cave method, thus obliterating the surface of the land.<sup>32</sup> Resolution Copper refused to use a more traditional, less destructive, form of subterranean mining claiming to do so would be too expensive.<sup>33</sup> Block cave mining requires blasting a massive gouge into the surface of the land.<sup>34</sup> The result of the mining operations will be a huge crater, two miles wide and up to 1,000 feet deep.<sup>35</sup> Additionally, block cave mining will generate nearly a cubic mile of mine waste, which the company plans to leave on a parcel of Forest Service land near the town of Superior, Arizona.<sup>36</sup>

### C. THE SAN CARLOS APACHE'S FIGHT TO PROTECT OAK FLAT

The San Carlos Apache have fought vehemently to protect their ancestral sacred lands. In February of 2015, the tribe organized a 44 mile protest march from their San Carlos tribal headquarters to Oak Flat where they held a Gathering of the Nations Holy Ground Ceremony.<sup>37</sup>

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[http://www.huffingtonpost.com/entry/john-mccain-fought-for-native-religious-freedom-then-he-sold-sacred-oak-flat\\_us\\_5605990ce4b0768126fd7b70](http://www.huffingtonpost.com/entry/john-mccain-fought-for-native-religious-freedom-then-he-sold-sacred-oak-flat_us_5605990ce4b0768126fd7b70).

<sup>29</sup> NoiseCat, *supra* note 28.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Lee Allen, *Hundreds Gather at Oak Flat to Fight for Sacred Apache Land*, INDIAN COUNTRY (Feb. 9, 2015), <http://indiancountrytodaymedianetwork.com/2015/02/09/hundreds-gather-oak-flat-fight-sacred-apache-land-159119>.

Over 300 people gathered to protest the privatization of Oak Flat, including members of the Apache, Chippewa, Navajo, Lumbee, Paiute, Havasupai, and representatives of the National American Indian Movement and the National American Indian Veterans group, as well as environmentalists and recreationalists.<sup>38</sup> In June of 2015, Representative Raúl Grijalva (D-Ariz.) introduced legislation that would reinstate protection of the land from mining.<sup>39</sup> The bill has received support from the Sierra Club, National Congress of American Indians, and tribes throughout the country, however, its passage remains a long shot.<sup>40</sup> In July of 2015, the Apache organized a cross country march from Arizona to Washington, D.C. which culminated in a rally on the lawn of the Capital Building.<sup>41</sup> In an open letter to tribal leaders everywhere, Rambler summarized the deleterious consequences of the loss of Oak Flat:

We have a dream that one day our children and their children to follow may freely practice the religious ceremonies that come from our Creator. We must stand together and fight those, like Resolution Copper, that seek to take our religious freedom, our most human right. If we do not, our beliefs, our spiritual lives, the very foundation of our language, our culture and our belief will no longer be in balance, and we will become undone. If we do not, the taking of one peoples' human right threatens all human and religious rights.<sup>42</sup>

Confronted with the dire reality that their sacred land is at risk of being detonated into rubble, the San Carlos Apache stand with their backs against the wall.

Before the land exchange transferring the 2,400 acres from the federal government to Resolution Copper can be actuated, the lands must be evaluated under the Section 106 Process of

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<sup>38</sup> *Id.*

<sup>39</sup> Julian Brave Noisecat, Dayana Morales Gomez, *Apaches Rally at Capital, Vowing to Continue Fight for Sacred Oak Flat*, HUFFINGTON POST (July 22, 2015), [http://www.huffingtonpost.com/entry/apaches-and-allies-rally-at-capitol-to-save-sacred-oak-flat-from-massive-mine\\_us\\_55aff2f9e4b08f57d5d3747d](http://www.huffingtonpost.com/entry/apaches-and-allies-rally-at-capitol-to-save-sacred-oak-flat-from-massive-mine_us_55aff2f9e4b08f57d5d3747d).

<sup>40</sup> *Id.*

<sup>41</sup> NoiseCat, *supra* note 28.

<sup>42</sup> Toensing, *San Carlos Apache Leader: 'What was a struggle to protect our most sacred site is now a battle,' supra* note 15.

the NHPA and an Environmental Impact Statement (“EIS”) must be completed pursuant to the National Environmental Protection Act (“NEPA”).<sup>43</sup> The Section 106 Process will likely be folded into the extensive analysis of the EIS. Though the Section 106 Process of Oak Flat may not raise all of the issues discussed in this article, the normative injustice of the treatment of the San Carlos Apache by the government highlights the ongoing denial of agency suffered by Native Americans in determining the management of their sacred places. Additionally, the pending Section 106 Process of Oak Flat bespeaks the urgency of remedying the Section 106 Process to accord adequate authority to the tribes in the consultation process and suitably protect the confidentiality of sensitive information.

### **III. PROTECTING TRADITIONAL CULTURAL PROPERTIES UNDER THE NHPA**

#### **A. THE OBLIGATION TO IDENTIFY AND PROTECT TRADITIONAL CULTURAL PROPERTIES**

In 1992 the NHPA was amended to protect Native American sacred places by listing them on the National Register providing that “[p]roperties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register.”<sup>44</sup> Sacred places protected under this provision are known as traditional cultural properties. The National Register Bulletin No. 38, *Guidelines for Evaluating and Documenting Traditional Cultural Properties* (“Bulletin No. 38”) is a non-binding, though influential source of authority which addresses the designation and governance of traditional cultural properties.<sup>45</sup> Bulletin No. 38 defines traditional cultural properties as those associated

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<sup>43</sup> *Frequently Asked Questions*, RESOLUTION COPPER MINING, <http://resolutioncopper.com/land-exchange/faq/> (last visited Mar. 18, 2016).

<sup>44</sup> 54 U.S.C. § 302706(a) (2014).

<sup>45</sup> Patricia L. Parker & Thomas King, *Guidelines for Evaluating and Documenting Traditional Cultural Properties* 1 (Nat’l Park Serv., Nat’l register Bull. No. 38, 1998) [hereinafter Bulletin No. 38].

“with cultural practices that (a) are rooted in that community’s history, and (b) are important in maintaining the continuing cultural identity of the community.”<sup>46</sup> The addition of the category of traditional cultural properties to the NHPA was a significant step towards according federal protection for Native American sacred places.

Traditional cultural properties found in the 2,400 acres subject to the Land Exchange Act will be identified through the obligation placed upon federal agencies to proactively denote eligible sites. The NHPA extends protection to properties that are “included in or eligible for inclusion” on the National Register.<sup>47</sup> The ACHP regulations require that an “agency official shall take steps necessary to identify historic properties within the area of potential effects.”<sup>48</sup> This duty upon federal agencies to proactively seek and identify eligible properties, including traditional cultural properties, substantially expands the scope of the NHPA’s application.<sup>49</sup>

Under the Section 106 Process, the Forest Service – the federal agency engaged in the undertaking at Oak Flat – must “consult” appropriate stakeholders, including the state historic preservation officer (“SHPO”) and the tribal historic preservation officer (“THPO”).<sup>50</sup> The Section 106 Process is procedural in nature; it imposes no substantive requirement on the federal agency to protect a traditional cultural property. However, the stated goal of the Section 106 Process is to engage in consultation “to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.”<sup>51</sup> Consultation is defined as “the process of seeking, discussing, and

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<sup>46</sup> *Id.*

<sup>47</sup> 54 U.S.C.A. § 306108 (2014).

<sup>48</sup> 36 C.F.R. § 800.4(c)(2) (2014).

<sup>49</sup> BRONIN & BYRNE, *supra* note 8, at 67-68.

<sup>50</sup> *Id.* at 502-503.

<sup>51</sup> 36 C.F.R. § 800.1 (2014).

considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process.”<sup>52</sup>

#### **B. THE CONSTRAINED AUTHORITY OF THE TRIBES UNDER THE SECTION 106 PROCESS**

The THPO stands as an important tribal official in ensuring the protection of traditional cultural properties. Under the statute, the THPO can assume the duties of the SHPO on tribal lands if Secretary of Interior approves of the plan outlining the THPO’s duties.<sup>53</sup> As of 2012, 118 tribes (including the San Carlos Apache)<sup>54</sup> currently have THPOs recognized by the Department of the Interior as capable of assuming the duties of the SHPO for tribal lands.<sup>55</sup> However, the THPO only has authority if the tribe has proved its ability to manage its own historic sites, and, most significantly, the THPO has no jurisdiction over non-tribal lands.<sup>56</sup> Tribes can also enter into an agreement with the ACHP which enables a tribe to substitute their own historic preservation regulations in place of the ACHP regulations for the review of federal undertakings on tribal lands.<sup>57</sup> However, on non-tribal lands such as Oak Flat the authority of the THPO and tribe is severely constrained. The statute provides only that a non-Indian property owner owning lands which are island of non-tribal land within a reservation can request that the SHPO and THPO share responsibilities.<sup>58</sup> Therefore, for lands such as Oak Flat which are non-tribal lands and do not meet the definition of an “island,” the NHPA provides no means through which the tribe can manage the preservation of the site.

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<sup>52</sup> 36 C.F.R. § 800.16(f) (2014).

<sup>53</sup> 54 U.S.C. § 302702 (2014).

<sup>54</sup> The San Carlos Apache THPO is Vernelda Grant. *Find a THPO*, NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS, <http://nathpo.org/wp/thpos/find-a-thpo/#az> (last visited Apr. 14, 2016).

<sup>55</sup> BRONIN & BYRNE, *supra* note 8, at 505-506.

<sup>56</sup> *Id.*

<sup>57</sup> 54 U.S.C. § 302705 (2014).

<sup>58</sup> 54 U.S.C. § 302702(4)(C) (2014).

#### **IV. DOMESTIC AND INTERNATIONAL LAW MANDATES A RIGHTS BASED APPROACH**

The U.S. has recently manifested its intent, both domestically and internationally, to more fully recognize and protect the autonomy of Native American Tribes; in line with this movement, the U.S. should accord Native American tribes greater authority over the management of sacred places located on non-tribal lands. In 1990, the U.S. enacted the Native American Grave Protection and Repatriation Act (“NAGPRA”) to address the governance of Native American human remains and artifacts.<sup>59</sup> In the international law sphere, in 2010, the U.S. formally announced its support for the United National Declaration on the Rights of Indigenous People (“UNDRIP”).<sup>60</sup> NAGPRA and UNDRIP manifest a move by the U.S. government towards adopting a rights-based approach to addressing Native American issues. In recognition of the increased primacy placed on ensuring the human rights of Native Americans, the Section 106 Process should be amended to give Native American tribes increased agency in the treatment of Native American sacred places on non-tribal land.

##### **A. NAGPRA’S PROTECTION FOR CULTURAL PATRIMONY CAN CONCEPTUALLY BE UNDERSTOOD TO ENCOMPASS SACRED PLACES**

The NAGPRA’s protection of “cultural patrimony” recognizes that some objects are owned by the tribe as a whole, and therefore inalienable from the tribe by the acts of an individual.<sup>61</sup> In the landmark 10<sup>th</sup> Circuit case, *United States v. Corrow*, a dealer of native

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<sup>59</sup> 25 U.S.C. § 3001 (2014).

<sup>60</sup> Valerie Richardson, *Obama adopts U.N. manifesto on rights of indigenous peoples*, THE WASHINGTON TIMES (Dec. 16, 2016), <http://www.washingtontimes.com/news/2010/dec/16/obama-adopts-un-manifesto-on-rights-of-indigenous-/?page=all>.

<sup>61</sup> 25 U.S.C. § 3001(3)(d) (2012). Cultural patrimony is defined as an “object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the

American artifacts was held criminally liable for trafficking in Native American items when he arranged for the sale of a Navajo ceremonial mask, protected as cultural patrimony, to an undercover agent posing as a collector.<sup>62</sup> *Corrow* is significant because it affirmed the autonomy of tribes to define property as they wish, even when concepts such as the sanctity of an object or communal ownership are unfamiliar to mainstream American notions of property.<sup>63</sup>

The NAGPRA's recognition of certain objects as inalienable from the tribe as cultural patrimony suggests that tribes should be accorded greater rights in the governance of sacred places on non-tribal lands. Native Americans had inhabited Oak Flat since prehistoric times.<sup>64</sup> The Forest Service details how Native Americans were forced from their lands writing, "A twenty-year struggle with the U.S. Army ensued (approximately 1866-1886), resulting in the removal of both the Apache and Yavapai to reservations at San Carlos and Fort Apache."<sup>65</sup> The manner by which the Apache were forced from Oak Flat offends modern notions of justice.

Sacred places can be likened to cultural patrimony in that the both have "ongoing historical, traditional, or cultural importance."<sup>66</sup> If the definition of "cultural patrimony" was expanded to include sacred places, the outcome would be the recognition that sacred places could have never been legitimately alienated from the tribe because the place's sacred nature is "central to the Native American group or culture itself."<sup>67</sup> Additionally, as *Corrow* evidences,

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individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group."

<sup>62</sup> 119 F.3d 796 (10<sup>th</sup> Cir. 1997).

<sup>63</sup> See Mariam Hai, *Selling the Sacred: An Examination of Sacred Objects in Legal Contexts*, 24 DEPAUL J. ART, TECH & INTELL. PROP. L. 207 (2003).

<sup>64</sup> *Tonto National Forest, History and Development*, USDA FOREST SERVICE, [http://www.fs.usda.gov/detail/tonto/home/?cid=fsbdev3\\_018924](http://www.fs.usda.gov/detail/tonto/home/?cid=fsbdev3_018924) (last visited Apr. 17, 2016).

<sup>65</sup> *Id.*

<sup>66</sup> 25 U.S.C. § 3001(3)(d) (2012).

<sup>67</sup> 25 U.S.C. § 3001(3)(d) (2012).

the NAGPRA establishes a repatriation regime for the return of cultural patrimony.<sup>68</sup> Therefore, if sacred places were recognized as cultural patrimony, their rightful treatment under the statute would be to restore the lands to the tribe from which the lands was stolen. While this outcome is arguably infeasible in our modern reality, the sincerity of the notion that Native American sacred places were illegitimately taken at the very least requires that the Section 106 Process be adjusted to increase the agency of the Native American tribes in the governance of sacred places on non-tribal lands.

**B. UNDER THE UNDRIP, THE U.S. HAS COMMITTED TO RECOGNIZING THE RIGHT OF NATIVE AMERICANS TO PROTECT THEIR SACRED PLACES**

UNDRIP outlines the right of indigenous peoples to self-determination.<sup>69</sup> The preamble of the document speaks directly to the right of indigenous groups to manage their own lands. The preamble states, “Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs.”<sup>70</sup> This affirmative statement directly supports the notion that Native Americans should be accorded increased agency under the Section 106 Process in managing sacred places which fall outside of tribal lands.

Additionally, several articles of the UNDRIP, read together, establish that indigenous people have domain over, and a right to protect, their cultural property as an exercise of self-

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<sup>68</sup> 25 U.S.C.A. § 3005 (2012).

<sup>69</sup> United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter UNDRIP].

<sup>70</sup> *Id.*

determination.<sup>71</sup> Article 3 confers on indigenous peoples the right to “freely determine their political status and freely pursue their economic, social and cultural development.”<sup>72</sup> Under Article 11, the right to the free development of indigenous culture includes “the right to maintain, protect and develop the past, present and future manifestations of their cultures.”<sup>73</sup> States are called upon to provide redress—including restitution—for cultural, religious, and spiritual property taken from indigenous groups without informed consent or in violation of their laws, traditions, and customs.<sup>74</sup> Article 31 outlines the right of indigenous peoples to maintain, control, protect, and develop their cultural heritage.<sup>75</sup> Therefore, the UNDRIP can be read to recognize the right of tribes to protect sacred sites as a manifestation of their culture.

The broad rights of indigenous peoples to protect their cultural heritage espoused in the UNDRIP reaches sacred places. The spirit and purpose of the treaty manifest a clear intention of encouraging states to recognize the autonomy of indigenous people. An element of this autonomy is the right of indigenous people to protect their sacred places as part of their identity and culture. The UNDRIP is a persuasive soft law instrument; it is not legally binding on states and does not confer enforceable legal rights. The UNDRIP’s value lies in its ability to align signatories towards a shared goal of recognizing and protecting the human rights of indigenous peoples, which includes the right to practice and protect their culture. As a signatory of UNDRIP, the U.S. should ensure that the rights of Native Americans recognized under the instrument are protected; this duty entails recognizing the right of Native Americans to protect

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<sup>71</sup> See Matthew H. Birkhold, *Cultural Property at Auction: the Trouble with Generosity*, YALE J. INT’L L. ONLINE 89, 91 (2014), <http://www.yjil.org/docs/pub/o-39-birkhold-cultural-property-at-auction-the-trouble-with-generosity.pdf>.

<sup>72</sup> UNDRIP, *supra* note 69, at art. 3.

<sup>73</sup> *Id.* art. 11(1).

<sup>74</sup> *Id.* art. 11(2).

<sup>75</sup> *Id.* art. 31(1).

their sacred places, or at minimum, be a party to decisions regarding the management of sacred places.

**V. THE CONSULTATION PROCESS MUST BE AMENDED TO INCREASE THE AUTHORITY OF NATIVE AMERICANS IN MAKING DECISIONS REGARDING THE MANAGEMENT OF SACRED PLACES ON NON-TRIBAL LANDS**

Despite the fact that the statutory definition of a traditional cultural property hinges on a property's religious or cultural importance to a Native American tribe, tribes are largely left as outsiders to the process of making decisions regarding the adverse effects of an undertaking and in making decision on land management. Under the NHPA, a federal agency conducting the Section 106 Process on non-tribal lands is only obligated to "consult" with the THPO or tribe. The requirement that a federal agency engage in consultation with a tribe is strictly procedural.<sup>76</sup> The reality of a procedural consultation requirement is that tribes are denied any real authority in the Section 106 Process. As the controversy surrounding the development of a ski area on the San Francisco Peaks illustrates, a federal agency can trample over the interests of a tribe in protecting a sacred place, and yet fully comply with the Section 106 Process.

**A. THE BLATANT DISREGARD OF THE INTERESTS OF THE TRIBES IN PROTECTING THE SAN FRANCISCO PEAKS EVIDENCES THE FAILURE OF THE CONSULTATION PROCESS TO ACCORD APPROPRIATE AUTHORITY TO THE TRIBES**

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<sup>76</sup> The ACHP regulations outline the procedural requirements for the consultation with tribes when reviewing traditional cultural properties on non-tribal lands. Generally, the federal agency must provide the tribe with the opportunity to advise on identifying historic properties, identify its concerns, about historic properties and participate in the resolution of adverse effects. The federal agency must recognize the sovereignty of the tribe and government-to-government relationship between the federal government and the tribe. The regulations acknowledge that the lands under review are often the aboriginal lands of the tribe and instruct that the agency "consider" this fact. The agency also has the option of entering an agreement with the tribe regarding confidentiality, the responsibilities of each party. 36 C.F.R. § 800.2(c)(2)(ii)(A)-(F) (2014).

The controversy surrounding the conflict between the Forest Service and the Hopi, Navajo, and several other tribes over the management of the San Francisco Peaks illustrates the devastating repercussions of the current denial of the NHPA to grant tribes any real authority in the consultation process. The San Francisco peaks are sacred to 13 different tribes.<sup>77</sup> To the Hopi, the Peaks are the home of deities known as *Kachinas* who play an influential role in the religious and cultural practices of the tribes.<sup>78</sup> The Navajo regard the Peaks as the “sacred mountain of the west” and a boundary site – one of the “sacred places where the earth brushes up against unseen world.”<sup>79</sup> Joe Shirley Jr., the President of the Navajo Nation described the sanctity of the Peaks stating:

The San Francisco Peaks is the essence of who are are. It is a Holy place of worship that was placed in the West for our sacred prayers and worship. It is a place where several of our Navajo people have placed their and that of their children’s umbilical cords, and is the Holy house of our sacred deities whom we pray to and give our offerings.<sup>80</sup>

Despite the spiritual importance of the mountains to several tribes, the Forest Service approved permits for the construction and subsequent expansion of Snow Bowl ski area in the early 1980’s.<sup>81</sup>

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<sup>77</sup> *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1081 (9th Cir. 2008) (Fletcher, J., dissenting).

<sup>78</sup> *San Francisco Peaks*, NATIONAL TRUST FOR HISTORIC PRESERVATION, <http://www.preservationnation.org/issues/diversity/native-american-heritage-in-preservation/threatened-places/san-francisco-peaks.html#.VsiyBYRQITc> (last visited Apr. 16, 2016).

<sup>79</sup> *San Francisco Peaks*, SACRED LAND FILM PROJECT, <http://www.sacredland.org/index.html@p=466.html> (last visited Apr. 16, 2016) (quoting Yavapai-Apache Chairman Vincent Randall).

<sup>80</sup> *Final Environmental Impact Statement for Arizona Snowbowl Facilities Improvements, Response to Comments on the Draft Environmental Impact Statement*, Coconino National Forest, FS 367 (Vol. 2, Feb 2005) [hereinafter FEIS for Snowbowl].

<sup>81</sup> *San Francisco Peaks*, NATIONAL TRUST FOR HISTORIC PRESERVATION, <http://www.preservationnation.org/issues/diversity/native-american-heritage-in-preservation/threatened-places/san-francisco-peaks.html#.VsiyBYRQITc> (last visited Apr. 16, 2016).

The controversy over the management of the San Francisco Peaks reignited in 2005 when the Forest Service approved Snowbowl’s proposal to use reclaimed sewage water to produce artificial snow.<sup>82</sup> The San Francisco Peaks traditional cultural property site consists of 74,380 acres of Forest Service land, including the 777 acres under Special Use Permit to Snowbowl.<sup>83</sup> Pursuant to Snowbowl’s request to make snow from reclaimed sewage water, the Forest Service undertook preparing an EIS which included a Section 106 analysis of adverse effects of the undertaking.<sup>84</sup> The tribes who hold the Peaks sacred informed the Forest Service of the devastating impact of using reclaimed sewage water. Joe Shirley Jr. wrote, “The United States of American will commit genocide by allowing the desecration of the essence of our way of life.”

The Forest Service had a long established relationship with the 13 tribes who hold the Peaks sacred that dated back to the 1970s and openly acknowledged the immense significance of the Peaks to the tribes’ religion and traditions.<sup>85</sup> The Forest Service wrote, “[t]he Navajo consider the Peaks to be a living entity ... To alter the landscape then would harm this living being. The amount of harm is not an issue; any harm to the Peaks will affect all the living things that reside there.”<sup>86</sup> Furthermore, the Record of Decision for the Forest Supervisor noted that “the cultural impacts will be difficult, if not impossible, to fully mitigate and that all of the alternatives would potentially result in adverse effects to the traditional cultural values of the Peaks.”<sup>87</sup>

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<sup>82</sup> *Id.*

<sup>83</sup> MELISSA L. TATUM & JILL KAPPUS SHAW, LAW, CULTURE & ENVIRONMENT 85 (2014).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Brief of Petitioner-Appellant at 35, Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1063 (9th Cir. 2008).

<sup>87</sup> TATUM & SHAW, *supra* note 83, at 86.

Despite the unequivocal acknowledgement by all parties that the use of reclaimed sewage water would have a significant negative impact on the cultural value of the San Francisco Peaks, under the ACHP regulations, the Forest Service upheld its obligation to “consult” with the tribes regarding the undertaking. The Forest Service met its procedural obligation by meeting with the tribes and seeking their input. Additionally, under 36 C.F.R. 800.2(c)(2)(ii)(E), the Forest Service prepared a Memorandum of Agreement (“MOA”) with the SHPO and the ACHP proposing mitigation measures to address the identified adverse effects.<sup>88</sup> The tribes were then “invited to sign the MOA as concurring parties.”<sup>89</sup> Unsurprisingly, only four tribes have signed the MOA, likely indicating their dissatisfaction with the MOA as providing any meaningful protection for the sacred Peaks.<sup>90</sup>

The Navajo and Hopi brought suit against the Forest Service alleging violations of the Religious Freedom Restoration Act, the NEPA, and the NHPA. After nearly a decade of litigation, including an appeal all the way up to the Supreme Court, the courts determined that the Forest Service fulfilled its obligations under the NEPA and the NHPA, and that the use of reclaimed sewage would not substantially burden the free exercise of religion<sup>91</sup> by tribal

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<sup>88</sup> FEIS for Snowbowl, *supra* note 80, at 29.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> The court supported their finding of no substantial burden on the tribe’s religion stating, “The only effect of the proposed upgrades is on the Plaintiffs' subjective, emotional religious experience. That is, the presence of recycled wastewater on the Peaks is offensive to the Plaintiffs' religious sensibilities. To plaintiffs, it will spiritually desecrate a sacred mountain and will decrease the spiritual fulfillment they get from practicing their religion on the mountain. Nevertheless, under Supreme Court precedent, the diminishment of spiritual fulfillment—serious though it may be—is not a “substantial burden” on the free exercise of religion.” *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008). While it is outside the scope this paper, the court’s holding has incited a public outcry and a movement is still underway to halt the use of reclaimed sewage water at Snowbowl. For more information, watch the video found here: <http://www.truesnow.org>.

members.<sup>92</sup> By simply identifying and disclosing the concerns of the tribes, and proposing mitigation measures (however futile the tribes may regard these measure to be), the Forest Service met its burden to engage in consultation. The controversy surrounding Snowbowl and the use of reclaimed sewage water on the Peaks illustrates how the current regulations enable a federal agency to fully comply with the procedural consultation requirement while disregarding the tribes' clear articulation that the undertaking will have a devastating impact on a place they hold sacred.

**B. THE CONSULTATION PROCESS SHOULD BE AMENDED SUCH THAT IN THE REVIEW OF SACRED PLACES LOCATED ON NON-TRIBAL LAND THE SHPO AND THE THPO HAVE JOINT AUTHORITY, THE TRIBE CAN DENOTE THE ADVERSE EFFECTS OF AN UNDERTAKING, AND THE TRIBE IS A REQUIRED SIGNATORY TO ANY MOA**

The best hope for giving due weight to the tribes in making decisions regarding places they hold sacred is to amend the Section 106 process to increase the authority of the tribes in the consultation process. As the upsetting legal outcome of the Peaks controversy indicates, under the existing ACHP regulations, the statements of a tribe can be ignored as long as the federal agency tasked with consulting with the tribes can demonstrate that they went through for formulaic steps of seeking the tribe's opinions and meeting with the tribe.

The first regulatory change that should be made is to expand the role of the THPO to mirror that of a SHPO when the area under review contains places the THPO's tribe holds sacred. Under the current regulations, if the undertaking occurs on non-tribal lands, the federal agency must consult with the tribe, however the tribe's role is not formalized.<sup>93</sup> The proposed change of giving the THOP and SHPO joint authority in the Section 106 Process would ensure

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<sup>92</sup> *Save the Peaks Coal. v. U.S. Forest Serv.*, 669 F.3d 1025 (9th Cir. 2012); *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008) (en banc decision overruling 3 panel decision in *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, (9<sup>th</sup> Cir. 2007).

<sup>93</sup> 36 C.F.R. § 800.2(c)(2)(ii)(A)-(F) (2014).

that tribes are given a seat at the table and that their views and interests are represented throughout the Section 106 Process.

Second, under 36 C.F.R. § 800.5(a) the THPO or the tribe should be given the authority to denote adverse effects relating to the sacred nature of the sacred place under review. The tribe who holds the site sacred is best positioned to understand the impact of an undertaking on the sacred nature of a site. This change is supported by the regulatory framework addressing disagreement among consulting parties about the finding of an adverse effect outlined in 36 C.F.R. § 800.5(a)(2). This existing framework provides a system in which disagreement between the parties can be resolved by consultation with one another, or the ACHP can be brought in to review the findings. Therefore, the tribes are appropriately given the authority to identify likely damage to a place they hold sacred, and the federal agency is afforded a procedure to reach a resolution if they disagree with the tribe's findings.

The final and most important regulatory change that should be made is to amend 36 C.F.R. § 800.6 to designate the THOP or tribe as a required signatory for any memorandum of agreement concluding the Section 106 Process for a sacred place on non tribal land. This change would remedy the current situation where tribes can be iced out of agreements reached by the agency, the SHPO, the ACHP (should they choose to participate). Additionally, the established process for terminating consultation under 36 C.F.R. § 800.7 cabins the power of all the parties and effectively ensures that the tribes can not unduly burden the federal agency in their completion of the Section 106 Process.

The proposed expansion of the authority of the THPO and tribe in the consultation process finds strong support in international law. After finding no relief for the spiritual harm suffered from the use of reclaimed sewage water on the sacred San Francisco Peaks, the Navajo

brought their plight to the U.N. Special Rapporteur on the Rights of Indigenous Peoples for review.<sup>94</sup> The Rapporteur poignantly articulated the insufficiency of the current Section 106 Process in respecting the rights of the tribes.<sup>95</sup> The UNDRIP article 19 calls upon the U.S. to “consult and cooperate in good faith” with the tribes in order to “obtain their free prior and informed consent before adopting and implementing any legislative measure that affects them.”<sup>96</sup> The Rapporteur outlined how the Section 106 Process fails to meet this international law obligation stating, “Simply providing indigenous peoples with information about a proposed decision and gathering and taking into account their points of view is not sufficient in this context. Consultation must occur through procedures of dialogue aimed at arriving at consensus.”<sup>97</sup> Additionally, the Rapporteur reiterated that tribes have “internationally-protected collective or individual rights including the right to maintain and practice religion in relation to sacred sites.”<sup>98</sup> Even if an undertaking is determined not to violate the Constitutional and statutory right of Native Americans to religious freedom, the international law commitments of the U.S. to protect the religious rights of the tribes can be read to mandate broader protection. In recognition of the international human rights law to which the U.S. has pledged its support, and in keeping with the movement towards recognizing a rights based approach to working with Native American tribes, the proposed changes to the consultation process should be made to ensure the rights of the tribes are respected.

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<sup>94</sup> TATUM & SHAW, *supra* note 83, at 89.

<sup>95</sup> *Id.* at 90 (citing Report of the UN Special Rapporteur on the Rights of Indigenous Peoples, *Annex X: United States of America: Situation of the Native Americans in Relation to Artificial Snowmaking from Recycled Wastewater in the San Francisco Peaks* (September 1, 2011)).

<sup>96</sup> UNDRIP *supra* note 69, at art. 19.

<sup>97</sup> TATUM & SHAW, *supra* note 83, at 90.

<sup>98</sup> *Id.*

## **VI. NATIVE AMERICANS SHOULD BE ACCORDED AUTHORITY TO PROTECT FROM DISCLOSURE INFORMATION THAT CULTURAL TENANTS MANDATE MUST BE KEPT CONFIDENTIAL**

Native American tribes are often confronted with an agonizing dilemma when their sacred places are threatened by a federal undertaking: Native American religion may dictate that the secrecy of a place must be protected, while according a site protection as a traditional cultural property requires disclosing information on the site. The turmoil engendered by a conflicting need to disclose information to protect a sacred place, and maintain the secrecy of a sacred place should can not be underestimated. As Bulletin No. 38 notes, “In some cultures it is sincerely believed that sharing information inappropriately with outsiders will lead to death or severe injury to one’s family or group.”<sup>99</sup> While the NHPA and the Section 106 Process regulations acknowledge the necessity of protecting the confidentiality of a sacred place, the mechanisms it outlines for doing so are vague and weak.

The NHPA addresses the need to protect the confidentiality of Native American sacred places stating, “The head of a Federal agency, or other public official receiving grant assistance pursuant to this division, after consultation with the Secretary, shall withhold from disclosure to the public information about the location, character, or ownership of a historic property if the Secretary and the agency determine that disclosure may... impede the use of a traditional religious site by practitioners.”<sup>100</sup> The ACHP regulations reinforce and give greater detail to the the statutory exemption from public disclosure.<sup>101</sup> However, this exemption from public

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<sup>99</sup> Bulletin No. 38, *supra* note 45, at 19.

<sup>100</sup> 54 U.S.C.A. § 307103(a)(3) (2014).

<sup>101</sup> 36 C.F.R. § 800.11(c)(1) (2014). “Authority to withhold information. Section 304 of the act provides that the head of a Federal agency or other public official receiving grant assistance pursuant to the act, after consultation with the Secretary, shall withhold from public disclosure information about the location, character, or ownership of a historic property when disclosure may cause a significant invasion of privacy; risk harm to the historic property; or impede the use

disclosure of information pertaining to sacred places is insufficient to adequately protect the confidentiality of Native American sacred places. There are two notable flaws in the NHPA confidentiality exemption for sacred sites: Native American tribes are accorded an inadequate role in determining when the exemption applies, and the exemption from the public disclosure of information does not meet the full needs of the tribe to protect sensitive information. In remedying these flaws, the disclosure exemption of the NHPA should become more workable by better protecting the confidentiality needs of tribes and providing a clearer process for federal agencies who are faced with a tribe's reticence to share information about a sacred place.

**A. *PUEBLO OF SANDIA V. UNITED STATES* EVIDENCES THE NECESSITY OF AMENDING THE NHPA DISCLOSURE REQUIREMENTS TO PROTECT THE CONFIDENTIALITY OF CULTURALLY SENSITIVE INFORMATION ABOUT SACRED PLACES**

The 10<sup>th</sup> circuit case of *Pueblo of Sandia v. United States* provides a case study which illustrates the unworkability of the NHPA's disclosure exemption for confidential information.<sup>102</sup> In this case, the Pueblo of Sandia brought suit against the Forest Service, alleging that the Forest Service failed to comply with the NHPA.<sup>103</sup> The Pueblo asserted that New Mexico canyon, part of the land under review by the Forest Service, contained numerous religious sites which met the definition of traditional cultural properties.<sup>104</sup> However, the Forest Service largely ignored the Pueblo, concluded that New Mexico canyon did not constitute a traditional cultural property, and instituted a new management strategy for it.<sup>105</sup> The 10<sup>th</sup> Circuit held that the Forest Service's

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of a traditional religious site by practitioners. When the head of a Federal agency or other public official has determined that information should be withheld from the public pursuant to these criteria, the Secretary, in consultation with such Federal agency head or official, shall determine who may have access to the information for the purposes of carrying out the act.”

<sup>102</sup> *Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995).

<sup>103</sup> *Id.* at 857.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

efforts to identify traditional cultural properties were neither reasonable nor in good faith.<sup>106</sup> In support of its holding, the court discussed that the Pueblo had indicated that it did not want to disclose specific details of the site locations or the activities that occurred on the traditional cultural properties.<sup>107</sup> The court cited the tribe's reticence to share information regarding the sacred nature of the sites with the Forest Service and their conclusory decision that the canyon contained no traditional cultural properties as illustrating the Forest Service's failure to reasonably seek to identify eligible properties.<sup>108</sup> While *Pueblo of Sandia* affirms to the importance of according due weight to a tribe's statement that their traditional beliefs dictate that they can not disclose the specifics of a traditional cultural property, the case fails to offer a procedurally based solution of how a federal agency should respond when faced with this significant barrier to identifying traditional cultural properties.

**B. THE DISCLOSURE EXEMPTION OF THE NHPA SHOULD BE AMENDED TO RECOGNIZE THE AUTHORITY OF TRIBES TO DETERMINE WHEN THE EXEMPTION IS INVOKED AND THE SCOPE OF THE EXEMPTION SHOULD BE FLEXIBLE**

In addressing the flaws of the NHPA disclosure exemption, first, tribes should be given final authority in determining when the disclosure exemption applies. Under section 307103 of the NHPA, the decision on when the disclosure exemption applies is made by the head of the Federal Agency, the Secretary, and the ACHP.<sup>109</sup> The only mention of the inclusion of the views of the tribe whose sacred place is at stake is in the regulations that dictate that the agency should include the views of the THPO and the tribe in its consultation with the ACHP as to whether to protect information pertaining to the site.<sup>110</sup> Thus, despite Bulletin No. 38's recognition that

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 861.

<sup>108</sup> *Id.* at 861-62.

<sup>109</sup> 54 U.S.C. § 307103(a)-(c) (2014).

<sup>110</sup> 36 C.F.R. § 800.11(c)(2) (2014).

maintaining the confidentiality of a sacred place's location and use may be of the utmost importance to the tribe,<sup>111</sup> the process for determining whether the disclosure exemption applies cuts out any direct authority in the matter by the tribe itself. The remedy for this flaw is to amend the ACHP regulations to give tribes final authority when the decision is made as to whether the NHPA disclosure exemption protects confidential information about a sacred place. This change would enable a tribe to enter into the consultation process without the fear that information they share during the process will ultimately be disclosed beyond their wishes if the Agency, Secretary, and ACHP eventually decide not to invoke the disclosure exemption. The authority of the tribes will be effectively cabined by the reality that if the tribe demands too much be kept confidential, the sacred place will be ineligible for protection under the NHPA because not enough information about the site will be known to effectively assess its spatial location and cultural significance.

Second, the disclosure exemption should be amended so as not to be limited to public disclosure, but to embrace protection from disclosure to the extent deemed necessary by the tribe. Bulletin No. 38 discusses the harsh choice some tribes currently face in which their traditional beliefs dictate that the sacred nature of a site can not disclosed to anyone outside of the tribe, and yet totally withholding information will deprive the site of the protections of the NHPA.<sup>112</sup> The disclosure exemption can be amended to save tribes from this trap. The regulations should be amended to allow tribes to exercise more flexibility in defining the extent of disclosure. There should be a process through which tribes can reach agreements with a SHPO, the ACHP, or a federal agency to negotiate the extent of the disclosure. Negotiation would enable the scope of the disclosure to be limited to certain designated individuals and

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<sup>111</sup> See Bulletin No. 38, *supra* note 45, at 19.

<sup>112</sup> *Id.*

protected from being shared with other agencies (such as the National Park Service) or published in the Federal Register.<sup>113</sup> Building more flexibility into the disclosure exemption of the NHPA accords the tribes increased authority in protecting the sanctity of their sacred places and alleviates them of the dilemma of having to choose between cooperating to have the site protected under the NHPA and violating a central tenant of their religious beliefs.

The proposed changes to the NHPA disclosure exemption find support in the 2008 Farm Bill and Executive Order No. 13007: Indian Sacred Sites (“E.O. 13007”). The 2008 Farm Bill gives the Forest Service increased authority to exempt certain types of culturally sensitive tribal information from disclosure under the Freedom of Information Act (“FOIA”).<sup>114</sup> This bill evidences a recognition by the legislature that general disclosure mandates may be inappropriate when sensitive tribal information is concerned. Thus the FOIA exemption of the Farm Bill supports according greater authority to tribes in the treatment of their cultural beliefs under the law. E.O. 13007, issued in 1996 by President Clinton, addresses the treatment of Native American sacred sites by executive branch agencies and specifically notes that “where appropriate, agencies shall maintain the confidentiality of sacred sites.”<sup>115</sup> The order’s broad confidentiality language suggests that it is appropriate for an agency to protect from disclosure the very existence of a Native American sacred place.<sup>116</sup> The expansive confidentiality recognized by E.O. 13007 lends support to increasing the flexibility of the scope of confidentiality possible under the NHPA disclosure exemption. Finally, this article’s proposed

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<sup>113</sup> Currently, Information may be shared with the National Park Service Keeper of the NRHP as part of the process for listing a property on the National Register of Historic Places. *Report to the Secretary of Agriculture, USDA Policy and Procedures Review and Recommendations: Indian Sacred Sites*, USDA Office of Tribal Relations and USDA Forest Service, USDA FS 41 (Dec. 2012).

<sup>114</sup> *Id.* at 70.

<sup>115</sup> Indian Sacred Sites, 61 FR 26771, Exec. Order No. 13007 (May 24,1996).

<sup>116</sup> *Id.* “Where appropriate, agencies shall maintain the confidentiality of sacred sites.”

amendments to the NHPA disclosure exemption provides increased guidance to federal agencies in their treatment of sacred places under the NHPA, this change increases the likelihood of an outcome that satisfies all parties and reduces the prospects of litigation.

## VII. CONCLUSION

The foregoing discussion illustrates the failure of the Section 106 Process to accord Native Americans appropriate authority in the management of sacred places located on non tribal lands. In the context of Oak Flat, the mistreatment of sacred places under the Section 106 Process elevates the risk that Oak Flat will be destroyed and the San Carlos Apache will be forced to endure a blow to their belief system. Rambler, the San Carlos Chairman, reflected on the devastating impact that such a loss would incur stating:

This land is where we go to pray, it's where we have our sunrise ceremony, our coming of age ceremony. It's where we get our food and where the Creator God put our water resources and there's going to be a hole there over an area of two miles in circumference...And that's what we'll leave our children – not just Apache children but all the children of the white people, the Mexicans, the African Americans who live there. That's what we'll leave all our children.<sup>117</sup>

In the context of Oak Flat, the Section 106 Process is of particular importance because it stands as a crucial review mechanism for an unusual, if not outright suspect, federal undertaking done through legislative prescription. The opposition of the Apache to opening Oak Flat to copper mining was utterly ignored in the Land Exchange Act. Under these circumstances, it is of particular importance that the Section 106 Process be conducted in such a way as to ensure that the interests of the Apache are appropriately considered and given their due weight. As argued in this paper, conducting an appropriate Section 106 Process on Oak Flats requires granting

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<sup>117</sup> Gale Courey Toensing, *San Carlos Apache Leader Seeks Senate Defeat of Copper Mine on Sacred Land*, INDIAN COUNTRY TODAY MEDIA NETWORK (Dec. 8, 2014), <http://indiancountrytodaymedianetwork.com/2014/12/08/san-carlos-apache-leader-seeks-senate-defeat-copper-mine-sacred-land-158181>.

increased authority to the tribe in the consultation process and respecting the needs of the tribe to keep certain information confidential.

While the proposed increase in a tribe's authority to participate in the consultation process and protect the confidentiality of information may seem overreaching, the increased authority of the tribes is effectively contained by the constraints built into the Section 106 Process and is normatively appropriate. The Section 106 Process anticipates the possibility of dissent among consulting parties and has the previously discussed regulatory mechanisms to resolve these conflicts. Additionally, the proposed expansion of the authority of Native Americans in the Section 106 Process for the review of sacred places on non tribal lands promotes social justice. Lands like Oak Flat carry with them the dark legacy of the subjugation of Native Americans by the U.S. governments. The San Carols Apache were pushed from Oak Flat by the government in an era when Native Americans suffered grave injustices. Therefore, the proposed expanded role of Native Americans in the Section 106 Process for lands such as Oak Flat represents a move towards reconciling this history with our current reality.

On March 18, 2016, the Forest Service published its notice of intent to prepare an EIS for the portion of the Tonto National Forest subject to the Land Exchange Act.<sup>118</sup> The Section 106 Process presents a crucial opportunity to advocate to ensure the protection of Oak Flat. However, alarmingly, the Land Exchange Act guarantees the transfer of the lands to Resolution Copper no matter what the study shows.<sup>119</sup> This term furthers the tangible sense of the injustice of the Land Exchange Act and risks undermining the legitimacy of the Section 106 Process as being of substantive worth. However, conducting a robust Section 106 Process on the lands

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<sup>118</sup> USDA FS Tonto National Forest; Pinal County, AZ; Resolution Copper Project and Land Exchange Environmental Impact Statement, 81 Fed. Reg. 53 (Mar. 18, 2016)  
<https://www.gpo.gov/fdsys/pkg/FR-2016-03-18/pdf/2016-05781.pdf>.

<sup>119</sup> Fang, *supra* note 20.

serves as the best method for pushing to protect Oak Flat to the greatest extent possible. In light of unlevel playing field on which the Section 106 Process for Oak Flat will be conducted, ensuring that the tribes are accorded appropriate authority takes on even greater urgency. The Section 106 Process provides the tribes, the THPO, the SHPO, the ACHP, and the Forest Service the opportunity to thoroughly document the adverse effects of block-cave mining on Oak Flat and to set a management plan which mitigates these effects to the greatest extent practicable. In the context of Oak Flat, the best recommendation may be to close the land and a surrounding buffer zone to mining. Though there is a high likelihood that Resolution Copper will find this decision unacceptable, documenting the recommended management of the land through the Section 106 Process may galvanize public outcry to such an extent that mining Oak Flat would incur prohibitive reputational costs for Resolution Copper and the government. While the future of Oak Flat is insecure, the strongest course of immediate action is to implement the recommended expansion of the tribes' authority under the Section 106 Process and conduct a rigorous Section 106 Process on the land subject to the Land Exchange Act.