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Indigenous Sacred Sites: Overview and Issues for Congress

SUMMARY

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In federal policy discussions, the term *sacred site* traditionally has been used to describe places of religious or spiritual importance to the Indigenous peoples who originally inhabited the North American continent prior to European colonization. Due, in part, to forced removal, treaty negotiations, and other historical events, Indigenous groups in the United States are often reliant on the federal government to both protect and provide access to sacred sites that they claim are necessary for exercising certain cultural and religious practices. The federal government's role and responsibility to ensure such protections or access have been long-standing legal and policy questions that raise issues related to federal land management, religious freedom, and the extent of the government's obligations to the Indigenous peoples of the United States.

Multiple statutes, executive orders, and regulations direct federal agencies to consider impacts to Indigenous sacred sites. Some of these authorities aim primarily at accommodating Indigenous religious practices by allowing access to sacred sites located on federal lands (e.g., Executive Order 13007, "Indian Sacred Sites"). Other authorities address the protection and preservation of historic and cultural properties more broadly, including properties that may be considered sacred to Indigenous peoples (e.g., the Antiquities Act [54 U.S.C. §§320301-320303], Archeological Resources Protection Act [16 U.S.C. §§470aa-470mm], Native American Graves Protection and Repatriation Act [25 U.S.C. §§3001 et seq.]). Certain laws also may require federal agencies also may to consult or coordinate with certain Indigenous groups prior to taking certain actions, including actions that may impact religious or cultural traditions (e.g., National Historic Preservation Act [54 U.S.C. §§300101 et seq.], National Environmental Policy Act [42 U.S.C. §§4321 et seq.]). In addition, Congress has enacted several laws aimed at expanding protection for religious exercise in general (e.g., Religious Freedom Restoration Act) or accommodating Indigenous religious practices (e.g., American Indian Religious Freedom Act [42 U.S.C. §§1996 et seq.]). Over the years, federal agencies also have issued various regulations and policies, entered into multiagency agreements, and published reports that address Indigenous sacred site protection and access.

Whether or to what degree current authorities adequately protect or consider the protection of Indigenous sacred sites has been a subject of debate and litigation. Indigenous peoples have challenged federal actions impacting sacred sites pursuant to various procedural statutes—including the National Historic Preservation Act and the National Environmental Policy Act—as well as religious protection laws such as the Religious Freedom Restoration Act (42 U.S.C. §2000bb et seq.). Other constitutional challenges have been brought under the Constitution's First Amendment, which provides that the government "shall make no law ... prohibiting the free exercise" of religion. To date, legal challenges brought under constitutional and/or statutory religious exercise authorities have been largely unsuccessful in procuring certain protections for Indigenous sacred sites.

Some Members of Congress and stakeholders have considered the adequacy of legal protections for Indigenous sacred sites, as well as how to evaluate sacred site access and protections against other statutory and congressional priorities. For example, some stakeholders have called for more expansive legislation to provide broad-based protections for sacred sites. Others have objected to prioritizing the protection of sacred sites above other authorized uses of federal lands such as recreation, energy and mineral development, grazing, and more. In addition, whether or how to define and identify Indigenous sacred sites has been of interest, with some Members and stakeholders advocating for increased deference to Indigenous groups when determining what constitutes a sacred site. Others have raised concerns that absent clear parameters for what constitutes a sacred site, large swaths of the federal estate could be closed off for the purposes of accommodating religious or traditional use by a selected group of individuals. Other policy and legislative issues include confidentiality and disclosure concerns related to the sharing of sensitive religious or cultural information and more general concerns related to agency and tribal capacity to address issues related to Indigenous sacred site management and protection.

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Introduction

Throughout history, people around the world have regarded certain landscapes, sites, and buildings as places of spiritual or religious significance. These places can include a wide range of geographical or physical formations that may be large or small, natural or man-made, terrestrial or aquatic. Collectively, these diverse places are often referred to as *sacred sites*.[1]

In federal policy discussions, the term *sacred site* traditionally has been used to describe places of importance to the *Indigenous peoples* who inhabited the North American continent prior to European colonization.[2] Many of these Indigenous peoples developed deep cultural, spiritual, and religious ties to sacred sites located on their ancestral homelands.[3] However, due to forced removal, treaty negotiations, and other historical events, many Indigenous peoples no longer live on or near these ancestral lands; instead, the federal government now owns and manages land where sacred sites exist.[4] As a result of this and other factors, Indigenous groups in the United States often are reliant on the federal government to both protect and provide access to sacred sites that these groups claim are necessary for exercising certain cultural and religious practices.

Congress and federal land management agencies (FLMAs) evaluate these interests against other statutory mandates and congressional priorities when determining how to manage federal lands.[5] Whether—and, if so, to what degree—the federal government is required to provide such protections or access have been long-standing legal and policy questions that raise issues related to federal land management, religious freedom, and the extent of the government's obligations to the various Indigenous peoples of the United States.

[1] Although the term *sacred site* is traditionally used in the policy and legal context to refer to a site of religious or spiritual importance to Indigenous peoples, other non-Indigenous peoples also may associate religious or cultural importance with geographical or physical formations in the United States. For examples, see Stephanie Hall Barclay and Michalyn Steele, "Rethinking Protections for Indigenous Sacred Sites," *Harvard Law Review*, vol. 134, no. 4 (February 2021), pp. 1303-1304 (hereinafter Barclay and Steele, "Rethinking Protections for Indigenous Sacred Sites"). Such non-Indigenous sites are outside the scope of this report.

[2] The term *Indigenous* is not consistently defined in the international or domestic legal context. Some entities, such as the United Nations, have developed general guidelines for identifying Indigenous groups based on various factors (see United Nations, "Who Are Indigenous Peoples?," fact sheet, https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf). Throughout this report, the term *Indigenous peoples* is used to refer to a diverse set of people in the United States that may be known or referred to by various terms. *Federally recognized Tribes* ("Tribes") are formally recognized as having a government-to-government relationship with the United States, which entails special rights, immunities, and privileges (25 C.F.R. §83.2). Additionally, Congress has enacted legislation relating to Indigenous entities other than Tribes, including Native Hawaiians, Native Hawaiian Organizations, and Alaska Native Villages and Corporations. Where appropriate, this report includes specific statutory definitions of these other Indigenous entities and indicates how and when federal law and policy applies to such groups.

[3] Monte Mills and Martin Nie, "Bridges to a New Era: A Report on the Past, Present, and Potential Future of Tribal Comanagement on Federal Public Lands," *Public Land & Resources Law Review*, vol. 44 (2021), p. 1, https://scholarworks.umt.edu/cgi/viewcontent.cgi?article=1741&context=plrlr (hereinafter Mills and Nie, "Bridges to a New Era").

[4] Although estimates vary, the federal government manages around 640 million acres, or about 28% of all land across the United States. See CRS Report R42346, *Federal Land Ownership: Overview and Data*, by Carol Hardy Vincent and Laura A. Hanson.

[5] For purposes of this report, the federal land management agencies (FLMAs) include the Bureau of Land Management (BLM), U.S. Fish and Wildlife Service (FWS), and National Park Service (NPS), all within the Department of the Interior (DOI); the Forest Service (FS) within the Department of Agriculture (USDA); and the Department of Defense (DOD). Together, these agencies administer roughly 96% of all lands owned by the federal government. The Bureau of Indian Affairs (BIA) holds land in trust on behalf of Tribes, but the BIA is not considered an FLMA for the purposes of this report.

This report begins with a discussion of how religious and cultural practices of Indigenous peoples in the United States may interact with non-Indigenous perceptions and practices. It examines what may constitute a sacred site from various Indigenous peoples' perspectives, as well as how the term has been defined in the legal and practical contexts. The report also provides an overview of federal statutory and administrative authorities related to Indigenous sacred site protection and access, with a particular emphasis on sacred sites located on federal lands. It also discusses the legal and policy considerations that have been raised when determining the right of an individual or group to utilize land owned by the federal government for religious or cultural purposes, including challenges brought under laws that protect religious exercise. Finally, the report discusses potential congressional considerations moving forward regarding Indigenous sacred site management, protection, and access.

Understanding Sacred Sites: An Overview

Determining what makes a particular place sacred to Indigenous peoples can be difficult for various reasons. Generally speaking, the term *sacred* is used to connote religious or spiritual significance. There is no single Indigenous religious tradition; instead, religious beliefs among Indigenous peoples often differ by location or group. A site considered sacred by one group for certain religious or cultural reasons may not carry the same spiritual significance for others. As a result, general statements regarding Indigenous religious or spiritual practices—and, in turn, what constitutes *sacredness*—can fail to accurately reflect the diversity of perspectives and beliefs.

This heterogeneity of religious or spiritual practices is reflected in the wide range of places considered sacred to various Indigenous peoples in the United States and the purposes for which such places are utilized for religious traditions. For example, a place may be sacred due, in part, to its role in religious narratives or oral traditions, as is the case with Bear Butte—a small mountain in the northeast corner of the Black Hills of South Dakota understood by many Indigenous peoples to be a place where their Creator communicates through visions and prayer.[6] For many Native Hawaiian families (*'ohanas*), burial sites are considered especially sacred grounds due to the spiritual importance of ancestral remains (*iwi kūpuna*).[7] In other instances, certain locations may be historic routes of pilgrimage or traditional hunting and gathering sites. For centuries, certain Indigenous peoples in the American Southwest have made annual pilgrimages to Zuni Salt Lake in New Mexico to harvest salt for ceremonial purposes.[8]

For some Indigenous groups, a sacred site can extend beyond just a physical location to include plants, animals, sound, light, viewsheds, and other sometimes intangible features.[9] Members of the Wampanoag Tribes of Massachusetts, for example, consider the entirety of Nantucket Sound—from the marine life to the submerged lands to the juncture of the water and rising sun—to be integral to their religious, cultural, and ceremonial practices (translated to English,

[6] Testimony of Charmaine White Face, Coordinator, Defenders of the Black Hills, Rapid City, SD, in U.S. Congress, Senate Indian Affairs Committee, *Native American Sacred Places*, 108th Cong., 1st sess., June 18, 2003, S.Hrg. 108-197 (Washington: GPO, 2003).

[7] For example, see Kathleen Kawelu, "In Their Own Voices: Contemporary Native Hawaiian and Archaeological Narratives About Hawaiian Archaeology," *The Contemporary Pacific*, vol. 26, no. 1 (December 31, 2013), pp. 31-62.

[8] Testimony of Malcom Bowekaty, Governor, Pueblo of Zuni, in U.S. Congress, Senate Indian Affairs Committee, *The Protection of Native American Sacred Places as They Are Affected by Department of Defense Undertakings*, 107th Cong., 2nd sess., July 17, 2002, S.Hrg. 107-519 (Washington: GPO, 2002).

[9] Advisory Council on Historic Preservation (ACHP), "The Protection of Indian Sacred Sites: General Information," July 2015, https://www.achp.gov/sites/default/files/2018-07/ThePro tectionofIndianSacredSitesGeneralInformationJuly2015.pdf (hereinafter ACHP, "Protection of Indian Sacred Sites").

Wampanoag means *People of the First Light* or *Dawn*).[10] Similarly, the entire region of the lower Colorado River and Gila River are major focal points in the cosmology of the Yuma Quechan Tribe, as well as other federally recognized Tribes (hereinafter referred to as *Tribes*) in the area.[11] Various geographic features along the river regions—from individual mountain peaks to the desert pavement floor—are considered by certain Indigenous peoples to have independent sacred qualities that together contribute to an interconnected sacred landscape.[12]

Another potential challenge in determining what constitutes an Indigenous sacred site is perceived differences between Indigenous spirituality and the dominant non-Indigenous religions in the United States.[13] For example, some scholars have suggested that many Indigenous religions tend to eschew the importance of precise chronological histories favored by some Judeo-Christian religions, instead emphasizing the importance of place (i.e., "what happened here") over time ("what happened then").[14] At times, this has led to misunderstandings of why certain sites that may appear to be no longer in use or regularly visited can still be important fixtures in Indigenous religious understanding; sacred places may not be considered abandoned, as such time distinctions may be irrelevant to Indigenous practitioners.[15] This can conflict with non-Indigenous perceptions of what makes a place spiritually significant. In other instances, the sacred significance of a place may conflict with non-Indigenous understandings of what constitutes a religious versus secular practice.[16] For example, non-Indigenous individuals may view the Confederated Tribes and Bands of the Yakama Nation's (Yakama's) connection to fishing for Chinook salmon in the Columbia River as a means to support the economic and nutritional needs of the Tribe. However, many of the Yakama view salmon as an integral part of their spiritual and cultural identity.[17] As a result, the Tribe sees the Columbia River, its waters, and the salmon that flow through it as sacred and requiring protection.[18]

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[10] Christopher E. Horrell, "Nantucket Sound, Massachusetts," National Register of Historic Places Inventory/Nomination Form, Minerals Management Service Federal Preservation Office, New Orleans, LA, January 4, 2010. There are two federally recognized Wampanoag Tribes: the Mashpee Wampanoag and the Wampanoag Tribe of Gayhead Aquinnah (BIA, "Indian Tribal Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs," 89 *Federal Register* 944-948, January 8, 2024).

[11] A *federally recognized Tribe* is an entity that is generally "eligible for the special programs and services provided by the United States to Indians because of their status as Indians" (25 C.F.R. §83.2). Some legal definitions of related terms (e.g., "Indian tribe") also include Alaska Native Corporations (see, e.g., 54 U.S.C. §300309).

[12] Testimony of Lorey Cachora, Housing Director, Consultant to the Culture Committee, Quechan Indian Tribe, Fort Yuma Reservation, in S.Hrg. 107-519.

[13] Anastasia P. Winslow, "Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites," *Arizona Law Review*, vol. 38 (1996), pp. 1291-1344 (hereinafter Winslow, "Sacred Standards").

[14] Vine Deloria Jr., *God Is Red: A Native View of Religion* (Golden, CO: Fulcrum Publishing, 1994), pp. 77, 97-98. See also Michelle Kay Albert, "Obligations and Opportunities to Protect Native American Sacred Sites Located on Public Lands," *Columbia Human Rights Law Review*, vol. 40, no. 2, (winter 2009) (hereinafter Albert, "Obligations and Opportunities").

[15] Suzanne J. Crawford and Dennis F. Kelley, *American Indian Religious Traditions: An Encyclopedia*, vol. 3 (Santa Barbara, CA: ABC-CLIO, Inc., 2005), pp. 945-955. For example, see Jonathan Thompson, "The Bid for Bears Ears," *High Country News*, October 16, 2016, https://www.hcn.org/issues/48-18/the-bid-for-bears-ears-national-monument/ for a discussion of ancestral homelands within Bears Ears National Monument.

[16] Amber L. McDonald, "Secularizing the Sacrosanct: Defining 'Sacred' for Native American Sacred Sites Protection Legislation," *Hofstra Law Review*, vol. 33, no. 2 (2004), pp. 751-783. See also Russel L. Barsh, "The Illusion of Religious Freedom for Indigenous Americans," *Oregon Law Review*, vol. 65, no. 2 (1986), pp. 375-376.

[17] For more information on the spiritual significance of salmon and the Columbia River to the Confederated Tribes and Bands of the Yakama Nation, as well as other Tribes in the area, see Columbia River Inter-Tribal Fish Commission, "Tribal Salmon Culture," https://critfc.org/salmon-culture/tribal-salmon-culture/.

[18] See CRS Report R48089, *Columbia River System Operations and the Future of the Lower Snake River Dams*, coordinated by Anna E. Normand, Pervaze A. Sheikh, and Erin H. Ward.

Although defining Indigenous sacred sites is challenging, the federal government has, at times, shown interest in the designation, management, and protection of such places. The following sections discuss the history of the federal government's role in managing and administering sacred sites, including the current statutory and administrative framework guiding federal agencies.

Sacred Sites and the Federal Government: Historical Foundation

Indigenous peoples have inhabited North America for millennia, developing deep cultural and spiritual ties to the landscape, some of which continue to exist today.[19] Centuries of federal policymaking have profoundly affected the ways in which Indigenous peoples have access to and interact with these lands, as well as Indigenous peoples' ability to practice their religious traditions. These historical foundations inform how some Indigenous peoples may claim access to, or seek to influence the management of, sacred sites located both on and off federal lands.

Throughout the 18th and early 19th centuries, the federal government took steps to reduce the Indigenous land base to make room for westward expansion. In some instances, the federal government and Indigenous peoples negotiated treaties that resulted in Indigenous peoples ceding their ancestral homelands to the United States in exchange for what would become tribal reservations.[20] At other times, the federal government directly annexed land or entered into settlement agreements with Indigenous peoples that often resulted in similar displacement or removal.[21] As a result, many Indigenous peoples no longer occupy the lands they traditionally used for religious and ceremonial purposes. Instead, many of the ancestral homelands previously occupied by Indigenous peoples, including lands containing Indigenous sacred sites, are now owned and managed by the federal government.

At the same time that Indigenous peoples were being removed from their ancestral homelands, the federal government was establishing formal policies aimed at curtailing or suppressing certain Indigenous religious practices.[22] For example, in 1883, the Commissioner of Indian Affairs issued a series of regulations that established Courts of Indian Offenses, which were responsible for administering civil and criminal law on Indian reservations.[23] These courts established prohibitions on certain Indigenous religious and cultural traditions, including the performance of communal ceremonies and dances, ritual acts of property destruction carried out in accordance

[19] Mills and Nie, "Bridges to a New Era," p. 1.

[20] The governments of the 13 original colonies and subsequently the United States negotiated treaties with Indigenous peoples until about 1871, when Congress ended this practice through the Indian Appropriations Act of 1871 (25 U.S.C. §71, Act of March 3, 1871, Ch. 120 §1, 16 Stat. 566). See also National Archives, "Native American Heritage: American Indian Treaties," https://www.archives.gov/research/native-americans/treaties.

[21] For example, in 1898, the U.S. government annexed the Hawaiian Islands (Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, J. Res. 55, 30 Stat. 750, 750 (1898)). In 1971, President Nixon signed into law the Alaska Native Claims Settlement Act (ANCSA), which extinguished claims by Alaska Natives to over 360 million acres of aboriginal lands on which they lived for generations in exchange for a settlement of roughly 45 million acres and payment of approximately $962.5 million. For more information on ANCSA, see CRS Report R46997, *Alaska Native Lands and the Alaska Native Claims Settlement Act (ANCSA): Overview and Selected Issues for Congress*, by Mariel J. Murray.

[22] Steve Talbot, "Spiritual Genocide: The Denial of American Indian Religious Freedom, from Conquest to 1934," *Wíčazo Ša Review*, vol. 21, no. 2 (fall 2006), pp. 7-39.

[23] For background, see Joseph A. Myers and Elbridge Coochise, "Development of Tribal Courts: Past, Present, and Future," *Judicature*, vol. 79, no. 3 (November-December 1995), pp. 147-149.

with tribal mourning customs, and other site-specific religious practices.[24] In addition, the federal government enacted laws in the late 19th and early 20th century allotting certain tribal lands to Christian missionaries.[25] According to some scholars, the goal of such laws was, in part, to supplant Indigenous religions with Christianity and to separate Indigenous peoples from their religious traditions.[26]

This complicated history has led to modern-day debates and challenges in federal decisionmaking related to Indigenous sacred sites and religious practices.[27] For example, various treaties reserved certain rights for Indigenous peoples still in place today. These include spiritually important rights to continue hunting, fishing, or gathering on lands ceded to the federal government.[28] In such instances, even if individual Tribes or Indigenous groups are no longer located near federal lands, they may have rights to access those lands. Other treaties provided for the retention of certain sacred lands by Tribes, but the federal government subsequently reclaimed ownership, often at the objection of tribal citizens.[29] Even in the absence of any existing treaty rights, some Indigenous peoples may still have a historical claim to or interest in certain federal lands containing sacred sites. For federal land managers, these historical and legal considerations may be considered alongside the various other purposes for which federal land is managed, including conservation, recreation, grazing, and energy development.[30]

More broadly, federal decisionmaking regarding Indigenous sacred sites occurs within the context of the government's *federal trust responsibility* to certain Indigenous peoples. The federal trust responsibility is a legal obligation under which the United States, through treaties, acts of Congress, and court decisions, "has charged itself with moral obligations of the highest responsibility and trust" toward Tribes.[31] The federal trust responsibility has been interpreted to

[24] Regulations of the Indian Office, effective April 1, 1904, Secretary of the Interior (Washington, DC: US. Government Printing Office, 1904), 102-103, accessed via https://narf.org/nill/documents/1904regulations.pdf. See also Allison M. Dussias, "Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases," *Stanford Law Review*, vol. 49, no. 4 (April 1997), pp. 773-852. For example, the Sun Dance—an integral religious ceremony for certain Sioux and Plains Tribes—was explicitly banned on certain tribal reservations.

[25] See 25 U.S.C. §348 (February 8, 1887, ch. 119, §5, 24 Stat. 389); 25 U.S.C. §280 (September 21, 1922, ch. 367, §3, 42 Stat. 995); 25 U.S.C. §§280a (June 6, 1900, ch. 786, §27, 31 Stat. 330).

[26] Walter R. Echo-Hawk, "Native American Religious Liberty: Five Hundred Years After Columbus," *American Indian Culture and Research Journal*, vol. 17, no. 3 (1993), pp. 33-52.

[27] Alex Tallchief Skibine, "Towards a Balanced Approach for the Protection of Native American Sacred Sites," *Michigan Journal of Race and Law*, vol. 17, no. 2 (April 18, 2012), pp. 269-302 (hereinafter Skibine, "Towards a Balanced Approach").

[28] For example, the Treaty Between the United States of America and the Nez Percé Indians, U.S.-Nez Perce Tribe, art. III, June 11, 1855, 12 Stat. 957, 958, gave the Tribe "the right of taking fish at all usual and accustomed places." In addition, in 1837, Ojibwe leaders expressly retained "usufruct" rights in the treaty process, meaning the rights to hunt, fish, gather, and otherwise "make a modest living" on lands ceded to the United States ("Treaty with the Chippewa, etc., 1829," July 29, 1829, 7 Stat., 320, https://treaties.okstate.edu/treaties/treaty-with-the-chippewa-etc-1829-0297).

[29] For example, in the 1868 Treaty of Fort Laramie, the United States recognized the Black Hills—land sacred to various Tribes—as part of the Sioux Reservation and set aside for the Sioux's exclusive use. (National Archives, "Treaty of Fort Laramie (1868)," https://www.archives.gov/milestone-documents/fort-laramie-treaty). However, in 1877, the federal government enacted legislation nullifying the 1868 treaty, seizing the Black Hills back from the Sioux Nation (Act of Feb. 28, 1877; 19 Stat. 254). In 1980, the Supreme Court ruled that the 1877 law constituted a "taking" pursuant to its power of eminent domain and therefore the Sioux were entitled to compensation. The Sioux have thus far refused such compensation.

[30] For an overview of these various purposes, see CRS In Focus IF10585, *The Federal Land Management Agencies*, by Carol Hardy Vincent et al.

[31] Seminole Nation v. United States, 316 U.S. 286, 296-297 (1942). The federal trust responsibility generally does not extend to Indigenous peoples who are not federally recognized Tribes, although those groups may have other rights.

include obligations to protect tribal treaty rights as well as lands, assets, and resources—including sacred sites—on behalf of Tribes.

The federal government grapples with a complex framework of historical treaties, court decisions, land use mandates, and administrative guidance—as well as the impact on religious exercise—when making decisions regarding use of federal land and the management and protection of Indigenous sacred sites located on lands under federal jurisdiction. The subsequent sections of this report provide an overview of this framework and background on how such factors traditionally have been considered in agency decisionmaking.

Selected Authorities Governing Indigenous Sacred Site Management

Many different statutes, executive orders, and regulations direct federal agencies to consider impacts to Indigenous sacred sites. Some of these authorities are aimed primarily at accommodating Indigenous religious practices by allowing access to sacred sites located on federal lands. Other authorities address the protection and preservation of historic and cultural properties more broadly, including properties that may be considered sacred to Indigenous peoples. In some instances, Congress also has required federal agencies to consult or coordinate with certain Indigenous groups prior to taking certain actions, including actions that may impact religious or cultural traditions.

Additionally, some federal laws address the protection of religious freedom either in general or more specifically directed toward the accommodation of Indigenous religious practices. Selected relevant authorities are discussed below. Also, certain historical treaties provide some Tribes with rights to access federal lands, including to gather plants and wildlife for religious or spiritual purposes (see "Sacred Sites and the Federal Government: Historical Foundation"). Some laws also contain site-specific management requirements related to Indigenous sacred sites at particular land units.[32] In addition, FLMAs have established agency policies that may guide the protection or consideration of Indigenous sacred sites, as outlined in "Selected Agency Policies and Actions Addressing Indigenous Sacred Sites."

Whether or to what degree these authorities adequately protect or consider the protection of Indigenous sacred sites or Indigenous religious practices has been a subject of debate. In addition, some stakeholders have advocated that protection of sacred sites must be considered within the context of other land management mandates established in law. For further discussion of the implementation of these authorities and mandates—as well as their impact on Indigenous sacred sites—see the "Issues for Congress" section of this report.

American Indian Religious Freedom Act

The American Indian Religious Freedom Act (AIRFA; codified at 42 U.S.C. §§1996 et seq.), enacted in 1978, establishes a policy of the United States "to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and

[32] See, for example, P.L. 105-261, §2906.

traditional rights."[33] AIRFA instructs the President to direct federal agencies to evaluate their policies and procedures (in consultation with native traditional religious leaders) to preserve Native American religious cultural rights and practices.[34] Pursuant to the law, a federal task force comprising more than 30 federal agencies issued a report to Congress in 1979 that detailed the history of the federal government's role in obstructing Indigenous religious practices and made recommendations for administrative procedures and future legislative actions to implement AIRFA.[35] Congress amended AIRFA in 1994 to include a provision protecting the use, purchase, transport, and possession of peyote for certain Indigenous religious purposes; no further related legislative action has been taken.[36]

AIRFA sets a broad policy of accommodating and protecting Indigenous religious practices and does not contain any enforcement mechanisms nor create any "judicially enforceable individual rights."[37] As a result, the degree to which AIRFA has been successful in adequately protecting Indigenous sacred sites or providing a guarantee of religious freedom has been controversial.[38]

Executive Order 13007, "Indian Sacred Sites"

In 1996, then-President Clinton issued Executive Order (E.O.) 13007, "Indian Sacred Sites," which requires FLMAs, to the extent practicable, to "accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and to avoid adversely affecting the physical integrity of such sacred sites."[39] The E.O. does not create any substantive or procedural rights or benefits enforceable by any party against the United States. Instead, the E.O. provides guidance to federal land managers when faced with balancing various land use mandates with the protection of and access to sacred sites.

E.O. 13007 defines the term *sacred site* as "any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion."[40] The E.O. further states that in order to be considered a sacred site, "an Indian tribe or individual determined to be

[33] 42 U.S.C. §1996. The term *Eskimo* is used due to its inclusion in and legal significance under federal laws. CRS recognizes that the term may be considered derogatory or offensive to some Alaska Native communities.

[34] 42 U.S.C. §1996 note.

[35] Federal Agencies Task Force, "American Indian Religious Freedom Act Report: P.L. 95-341," 1979, https://catalog.hathitrust.org/Record/000717365.

[36] 42 U.S.C. §1996(a). Specifically, the 1994 amendments allow the use, possession, or transportation of peyote "by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion." The term *Indian* means a citizen of a Tribe. The 1994 amendments were, in part, enacted in response to the Supreme Court's decision in *Employment Division, Oregon Department of Human Resources v. Smith*, 494 U.S. 872 (1990). In its ruling, the Court held that individuals fired from their jobs as private drug rehabilitation counselors for ingesting peyote as part of a sacrament of the Native American Church were not eligible for unemployment benefits because they had violated a state criminal statute.

[37] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 455 (1988).

[38] See Skibine, "Towards a Balanced Approach"; Barclay and Steele, "Rethinking Protections for Indigenous Sacred Sites"; for a more recent statement, see Prepared Statement of Ms. Shannon Keller O'Loughlin, Executive Director, Association on American Indian Affairs, in U.S. Congress, House Natural Resources Committee, Subcommittee for Indigenous Peoples of the United States, *Destroying Sacred Sites and Erasing Tribal Culture: The Trump Administration's Construction of the Border Wall*, 116th Cong., 2nd sess., February 26, 2020, H.Hrg. 116-32 (Washington: GPO, 2020), p. 33: "Unfortunately, AIRFA was found by the courts to be unenforceable and not much more than a policy statement, leaving tribes and their citizens with no way to protect sacred sites".

[39] 61 *Federal Register* 26771, May 29, 1996.

[40] Ibid.

an appropriately authoritative representative of an Indian religion" must inform the agency of its existence.[41] The E.O. defines *Indian tribe* to mean a federally recognized Tribe (including Alaska Native Tribes) and does not include other Indigenous peoples.

The E.O. also directs agencies to develop procedures to provide Tribes with reasonable notification of proposed actions or land management policies that may restrict access to or ceremonial use of, or that may adversely affect, sacred sites. Following the issuance of E.O. 13007, various federal agencies adopted guidelines and policies aimed at promoting the protection of sacred sites and establishing consultation procedures for when agency decisionmaking impacts such sites.[42]

Antiquities Act[43]

The Antiquities Act (54 U.S.C. §§320301-320303) was enacted in 1906 in response to the destruction of prehistoric ruins and other archaeological sites in the western United States, often by amateur archaeologists and treasure hunters.[44] The act authorizes the President to proclaim as national monuments "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" that are situated on federal lands.[45] When designating a national monument, the President may reserve parcels of land as part of the monument, so long as the parcels are limited to "the smallest area compatible with the proper care and management of the objects to be protected."[46] Once the President proclaims a national monument, use of the federal lands and resources within the monument's boundaries are subject to the provisions specified in the proclamation, as well as laws generally applicable to the agency or agencies identified by the President to manage the lands, among other authorities. Since 1906, Presidents have proclaimed more than 160 monuments, including in marine areas.[47]

The Antiquities Act has been used to protect a wide range of objects of historic or scientific interest. In some cases, the authority has been used to designate (or expand) national monuments that include sites sacred to Indigenous groups. For example, in August 2023, President Biden designated Baaj Nwaavjo I'tah Kukveni–Ancestral Footprints of the Grand Canyon National

[41] Ibid.

[42] For example, see U.S. Department of the Interior, "Implementation Report: Executive Order No. 13007, Indian Sacred Sites," May 23, 1997. For more information on tribal consultation processes, see CRS Report R48093, *Federal-Tribal Consultation: Background and Issues for Congress*, coordinated by Mariel J. Murray.

[43] For a more in-depth discussion of the Antiquities Act and its history, see CRS Report R41330, *National Monuments and the Antiquities Act*, by Carol Hardy Vincent, and CRS Report R45718, *The Antiquities Act: History, Current Litigation, and Considerations for the 116th Congress*, coordinated by Erin H. Ward.

[44] P.L. 59-209, 34 Stat. 225 (June 8, 1906). See also Richard H. Seamon, "Dismantling Monuments," *Florida Law Review*, vol. 70, no. 553 (2018), pp. 562-563: ("Both amateur and professional antiquity hunters—'pot hunters'—were removing antiquities from the public lands and vandalizing the sites on which they were located."); H.Rept. 58-3704, p. 2 (1905) ("These ruins have been frequently mutilated by people seeking the relics for the purpose of selling them. Such excavations destroy the valuable evidence contained in the ruins themselves, and prevent a careful and scientific investigation by representatives of public institutions interested in archaeology."); S.Rept. 59-8797, p. 1 (1906) ("[T]he historic and prehistoric ruins and monuments on the public lands of the United States are rapidly being destroyed by parties who are gathering them as relics.").

[45] 54 U.S.C. §320301(a).

[46] 54 U.S.C. §320301(b).

[47] Monuments created by Presidents from 1906 are listed on the NPS website at https://www.nps.gov/subjects/archeology/national-monument-facts-and-figures.htm. The information includes proclamations that designated monuments and proclamations that affected previously designated monuments, for instance to enlarge or diminish them. It also identifies the President who issued the proclamation; the acreage included in each proclamation; the current name of the area, including if no longer in monument status (e.g., areas redesignated by Congress as national parks); and the agency (or agencies) currently managing the area.

Monument, directing the relevant land management agencies to "ensure the protection of sacred sites and cultural properties and sites in the monument and ... provide access to Tribal members for traditional cultural, spiritual, and customary uses."[48] In some cases, designations made pursuant to the Antiquities Act also have included certain directives that provide for tribal input or consultation in management decisions. For example, in March 2023, President Biden designated the Avi Kwa Ame National Monument, a site of significant spiritual important to various Indigenous peoples.[49] In designating the monument, the proclamation directed the Secretary of the Interior to establish and maintain an advisory committee—the majority of which must comprise "members of Tribal Nations with a historical connection to the lands"—to help assist in the management of the site.[50]

Bears Ears National Monument

The use of the Antiquities Act authority to designate national monuments has, at times, generated controversy, lawsuits, statutory changes, and legislative proposals to limit the President's authority. For example, in 2016, President Obama designated Bears Ears National Monument in Utah pursuant to the Antiquities Act. In designating the more than 1.3-million-acre monument, President Obama highlighted the area's "sacred nature and living spiritual significance to indigenous people" (82 *Federal Register* 1139-1147, January 5, 2017). The proclamation also established a Bears Ears Commission with members from several Tribes "to provide guidance and recommendations on the development and implementation of management plans and on management of the monument."

Following its designation, President Trump issued a proclamation in 2017 reducing the Bears Ears National Monument by 1.15 million acres (82 *Federal Register* 58081-58087, December 4, 2017). Then, in 2021, President Biden issued a proclamation that generally reestablished the terms and boundaries of the 2016 President Obama proclamation, also highlighting the spiritual, cultural, prehistoric, and historic legacy of the area (86 *Federal Register* 57321-57334, October 15, 2021). Each of these proclamations was subject to legal challenges regarding the extent of the President's authority under the Antiquities Act (see The Wilderness Soc'y, et al. v. Trump, No. 1:17-cv-2587-TSC (D.D.C. Dec. 4, 2017) (consolidating two cases challenging President Trump's modification of the Grand Staircase-Escalante National Monument); Hopi Tribe, et al. v. Trump, No. 1:17-cv-2590-TSC (D.D.C. Dec. 4, 2017) (consolidating three cases challenging President Trump's modification of the Bears Ears National Monument); and Garfield County v. Biden, No. 4:22-CV-00059 (D. Utah August 24, 2022) (challenging President Biden's authority to enlarge the Bears Ears National Monument)). For an overview of some of these issues and litigation, see CRS Report R45718, *The Antiquities Act: History, Current Litigation, and Considerations for the 116th Congress*, coordinated by Erin H. Ward.

Archeological Resources Protection Act

The Archeological Resources Protection Act (ARPA; 16 U.S.C. §§470aa-470mm), enacted in 1979, regulates the excavation and removal of archaeological resources from public lands and Indian lands.[51] As defined under ARPA, *archaeological resources* are "any material remains of past human life or activities which are of archaeological interest as determined by uniform regulations" and specifically include "pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any piece or portion of the foregoing items."[52] Generally, ARPA requires that persons seeking to excavate or remove archaeological resources from public

[48] See White House, "Presidential Proclamation—Establishment of the Baaj Nwaavjo I'tah Kukveni-Ancestral Footprints of the Grand Canyon National Monument," August 8, 2023 (88 *Federal Register* 55331-55344, August 15, 2023).

[49] See White House, "Presidential Proclamation—Establishment of the Avi Kwa Ame National Monument," March 21, 2023 (88 *Federal Register* 17987-17998, March 27, 2023).

[50] Ibid.

[51] 16 U.S.C. §470ee.

[52] 16 U.S.C. §470bb(1).

lands or tribal lands first obtain a permit, subject to certain exceptions.[53] ARPA directs the Secretaries of the Interior, Agriculture, and Defense and the Chairman of the Board of the Tennessee Valley Authority, after consultation with Tribes and others, to issue implementing regulations.[54] ARPA provides for criminal penalties for knowing violations of the statute as well as potential civil penalties for violations of a permit or of implementing regulations issued under the statute.[55]

Certain Indigenous sacred sites located on federal and tribal lands may be considered archaeological resources under ARPA; however, not all sacred sites may meet the act's definition of this term. ARPA and its implementing regulations include certain consultation requirements for excavations that may adversely impact Indigenous sacred sites. Specifically, if a federal land manager determines that a permit issued under ARPA may result in "harm to, or destruction of" a "religious or cultural site," the manager must notify any Tribe "which may consider the site as having religious or culture importance" at least 30 days before issuing the permit.[56]

Native American Graves Protection and Repatriation Act

In 1990, the Native American Graves Protection and Repatriation Act (NAGPRA; 25 U.S.C. §§3001 et seq.) was enacted. Among other provisions,[57] NAGPRA provides for the regulation of the intentional or inadvertent discovery of Native American human remains and cultural items, including funerary objects, sacred objects, and objects of cultural patrimony from federal or tribal lands.[58] The law and implementing regulations outline a process for protecting such remains and cultural items and provide for potential repatriation to lineal descendants, Tribes, or other parties that can establish a *cultural affiliation*.[59]

NAGPRA requires that any person who wishes to excavate human remains and cultural items must first obtain a permit issued under ARPA.[60] For incidental discoveries, the activity that led to such a discovery (e.g., construction, logging, mining, etc.) must temporarily cease, and the person or entity must make a reasonable effort to protect the discovered items. The person or entity that makes a discovery must notify the relevant federal land manager as well as the appropriate *Indian*

[53] 16 U.S.C. §470cc.

[54] 16 U.S.C. §470ii.

[55] 16 U.S.C. §§470ee(d) and 470ff.

[56] 16 U.S.C. §470cc(c); 43 C.F.R §7.7(a). The regulations also authorize, but do not require, notification to "any other [non-federally recognized] Native American group ... known ... to consider sites potentially affected as being of religious or cultural importance" (43 C.F.R. §7.7(a)(2)).

[57] In addition to addressing the discovery of remains and cultural objects on federal and tribal lands, the Native American Graves Protection and Repatriation Act (NAGPRA; 25 U.S.C. §§3001 et seq.) also mandates the return or repatriation of certain remains and artifacts held by federal agencies and certain museums and institutions receiving federal funding to Indigenous peoples. For more information on repatriation requirements under NAGPRA, see CRS In Focus IF12523, *Repatriation of Native American Remains and Cultural Items: Requirements for Agencies and Institutions*, by Mark K. DeSantis and Nik Taylor.

[58] NAGPRA defines *Native American* to mean "of, or relating to, a tribe, people, or culture that is indigenous to the United States" (25 U.S.C. §3001(9)). See 25 U.S.C. §3001(3) for a definition of *cultural items*.

[59] NAGPRA defines *cultural affiliation* as "a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group" (25 U.S.C. §3001(2)).

[60] 25 U.S.C. §3002(c).

tribe[61] or *Native Hawaiian Organization* (NHO),[62] if known or readily ascertainable.[63] NAGPRA also provides for civil penalties for noncompliance with the law.[64]

NAGPRA does not specifically address sacred sites; however, certain Indigenous peoples may consider certain grave sites or burial grounds sacred for various reasons. For further discussion, see "Understanding Sacred Sites: An Overview."

National Historic Preservation Act

Enacted in 1966, the National Historic Preservation Act (NHPA; 54 U.S.C. §§300101 et seq.) requires federal agencies to review the potential impacts of federal or federally assisted actions on *historic properties* and to consult with interested parties to seek ways to avoid, minimize, or mitigate any adverse effects.[65] The NHPA defines a *historic property* as "any prehistoric or historic district, site, building, structure, or object" that is included on, or eligible for inclusion on, the National Register of Historic Places (National Register).[66] For properties not already included on the National Register, determination of eligibility is made during the Section 106 process and in consultation with relevant parties.[67] In 1992, Congress amended the NHPA to clarify that properties of traditional religious and cultural importance to a Tribe or NHO may be considered historic properties eligible for inclusion on the National Register.[68]

Section 106 of the NHPA contains the requirement for federal agencies to review impacts to historic properties, and reviews under this section are known as "Section 106 reviews."[69] For federal actions expected to occur on or affect historic properties on tribal lands, the agency must consult with the relevant tribal historic preservation officer (THPO) throughout the Section 106 review process.[70] In addition, federal agencies must consult with any Indian tribe or NHO that

[61] NAGPRA defines *Indian tribe* to include federally recognized Tribes and Alaska Native villages (25 U.S.C. §3001(7)).

[62] NAGPRA defines *Native Hawaiian organization* (NHO) as any organization that (1) serves and represents the interests of Native Hawaiians, (2) has as a primary and stated purpose the provision of services to Native Hawaiians, and (3) has expertise in Native Hawaiian Affairs (25 U.S.C. §3001(h)). The term includes the Office of Hawaiian Affairs of Hawaii and Hui Mālama I Nā Kūpuna O Hawai'i Nei, an organization incorporated under the laws of the State of Hawaii.

[63] 25 U.S.C. §3002(d).

[64] 25 U.S.C. §3007.

[65] 54 U.S.C. §306108. The ACHP oversees the National Historic Preservation Act (NHPA; 54 U.S.C. §§300101 et seq.) Section 106 review process. Created by NHPA, the ACHP is an independent agency consisting of representatives from federal, state, and tribal governments, as well as experts in historic preservation and members of the public.

[66] 54 U.S.C. §300308.

[67] Specifically, agencies apply the National Register criteria located at 36 C.F.R. Part 63 to properties identified within the area of potential effects that have not been previously evaluated and included on the National Register.

[68] P.L. 102-575, Title XL, §4006(a)(2), codified at 54 U.S.C. §302706. See NHPA's definition of *Indian tribe* at 54 U.S.C. §300309. In determining whether such properties are eligible for inclusion on the National Register, federal regulations specify that "Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them" (36 C.F.R. §800.4(c)(1)).

[69] For more information about Section 106, see CRS Report R47543, *Historic Properties and Federal Responsibilities: An Introduction to Section 106 Reviews*, by Mark K. DeSantis.

[70] 36 C.F.R. §800.2. A tribal historic preservation officer (THPO) is a tribal official appointed by an Indian Tribe's chief governing authority or designated by a tribal ordinance or preservation program (36 C.F.R. §800.16). THPOs advise federal agencies in carrying out their NHPA Section 106 responsibilities and review agency findings regarding the identification and assessment of a federal action's potential impacts on tribal historic properties. THPOs must be approved by the Secretary of Interior to assume the functions and responsibilities outlined in the NHPA (54 U.S.C. §302704). Not all Tribes have THPOs.

"attaches religious and cultural significance" to historic properties potentially affected by the undertaking, regardless of whether the potential property is located on or off tribal lands.[71] Although Section 106 review does not require an agency to select the option that best avoids adverse effects, the NHPA's implementing regulations outline potential ways to resolve situations in which adverse effects may occur.[72] This includes entering into formal agreements with THPOs, Indian tribes, NHOs, and other parties that establish mitigation or avoidance options for the project in question, documentation/survey requirements, community engagement stipulations, and other provisions.[73]

Locations meeting the definition of *sacred sites* under E.O 13007 are frequently understood by Indigenous peoples and federal agencies to also be *historic properties* of religious and cultural significance under the NHPA.[74] As a result, consideration of sacred sites and other requirements pursuant to E.O. 13007 are frequently raised during Section 106 review.[75] Although sacred sites and historic properties may overlap, E.O. 13007 and Section 106 of the NHPA impose separate and distinct requirements on federal agencies.

Numerous Indigenous sacred sites have been nominated for, and listed on, the National Register as *traditional cultural properties*, a specific type of historic property. For more information, see the text box below, "Traditional Cultural Properties and Sacred Sites."[76]

Traditional Cultural Properties and Sacred Sites

The National Register of Historic Places (or National Register) stands as the United States' "official list" of properties significant in "American history, architecture, archeology, engineering and culture" (54 U.S.C. §302101). Benefits of listing on the National Register include honorary designation, access to federal preservation grant funds for planning and rehabilitation activities, possible tax benefits, and—perhaps most importantly in the context of Indigenous sacred sites—review under Section 106 of the National Historic Preservation Act (NHPA; 54 U.S.C. §§300101 et seq.), should a federal or federally assisted action be expected to affect the property.

Pursuant to the NHPA, the Secretary of the Interior, acting through the National Park Service (NPS), is responsible for maintaining and developing guidelines and regulations for nominations and making determinations of properties' eligibility for inclusion on the National Register. Although the NHPA requires that potential properties be a "district, site, building, structure, or object," a wide range of property types may be eligible (36 C.F.R. §60.4). NPS has issued a series of bulletins that provide guidance on how certain types of properties can be evaluated under the National Register criteria. In 1990, NPS published "National Register Bulletin #38: Guidelines for Evaluating and Documenting Traditional Cultural Properties," which addressed a specific place type referred to as a "traditional cultural property," or TCP. Bulletin #38 defined a TCP as a place that is "eligible for inclusion on the National Register of Historic Places because of its association with cultural practices and beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community."

[71] 54 U.S.C. §302706(b) and 36 C.F.R. §800.4. In its NHPA implementing regulations, the ACHP defined *consultation* as "the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement" with them through this process (36 C.F.R. §800.16).

[72] 36 C.F.R. §800.6.

[73] ACHP, "Guidance on Agreement Documents," at https://www.achp.gov/initiatives/guidance-agreement-documents.

[74] A *sacred site*, as defined by Executive Order (E.O.) 13007, may not meet the National Register criteria for a *historic property* under the NHPA; conversely, a *historic property* under the NHPA may not meet the criteria for a *sacred site* under E.O. 13007.

[75] To address this overlap and clarify the intersection of the requirements of E.O. 13007 and Section 106 of the NHPA, the ACHP has issued guidance to federal agencies. See ACHP, "The Relationship Between Executive Order 13007 Regarding Sacred Sites and Section 106," April 24, 2018, https://www.achp.gov/digital-library-section-106-landing/relationship-between-executive-order-13007-regarding-indian.

[76] For examples, see Barclay and Steele, "Rethinking Protections for Indigenous Sacred Sites," pp. 1317-1318, and NPS, "National Register Bulletin #38: Guidelines for Evaluating and Documenting Traditional Cultural Properties," https://www.nps.gov/subjects/nationalregister/upload/NRB38-Completeweb.pdf (hereinafter NPS, Bulletin #38).

NPS has revised Bulletin #38 several times to address legislative changes and stakeholder concerns. Following its initial publication in 1990, the agency revised and reissued it in 1992 to address amendments to the NHPA providing that places of traditional religious and cultural importance to Indian Tribes or Native Hawaiian Organizations may be included in the National Register. Additional revisions were made in 1998 to clarify that TCPs are not a new property type nor an additional level of significance.

Since the initial publication of Bulletin #38, Indigenous sacred sites that have been nominated for inclusion in the National Register generally have been evaluated and categorized as TCPs. This categorization has been a subject of ongoing debate, with some stakeholders suggesting the current terminology and guidance for what constitutes a TCP exclude certain Indigenous sacred sites (for more information, see "Defining and Identifying Sacred Sites"). In response to some of these concerns, NPS began efforts to again revise Bulletin #38. In January 2024, NPS issued a request for comments on an updated draft of the guidelines (89 *Federal Register* 4988), and in December 2024, NPS formally adopted its updated guidance entitled, "National Register Bulletin: Identifying, Evaluating, and Documenting Traditional Cultural Places."

National Environmental Policy Act[77]

Enacted in 1970, the National Environmental Policy Act (NEPA; codified at 42 U.S.C. §§4321 et seq.) requires agencies to identify and evaluate the impacts of "major Federal actions significantly affecting the quality of the human environment" prior to finalizing decisions on those actions.[78] Although NEPA does not specifically refer to sacred sites, the law requires the consideration of impacts on "historic, cultural and natural aspects of our national heritage."[79] Potential impacts to sacred sites may be part of the effects considered in a NEPA review.

Agencies often coordinate NEPA reviews with other federal review processes, including Section 106 of NHPA. Federal agencies often use their broad environmental review process, carried out under NEPA, as an "umbrella" compliance process.[80] Accordingly, agencies have structured the NEPA review process to help ensure identification of impacts to the quality of the human environment that may trigger review under these other laws.

The First Amendment and the Religious Freedom Restoration Act

The U.S. Constitution and certain federal laws generally provide protection against government infringement of religious exercise. Constitutionally, the First Amendment's Free Exercise Clause forbids the federal government from "prohibiting the free exercise" of religion.[81] Over the years, the Supreme Court has established standards to determine when laws and governmental actions infringe on religious exercise under the First Amendment,[82] including regarding Indigenous sacred sites. Perhaps most notable in the Indigenous sacred site context is the Court's 1988

[77] For an overview of the National Environmental Policy Act (NEPA; codified at 42 U.S.C. §§4321 et seq.), see CRS In Focus IF12560, *National Environmental Policy Act: An Overview*, by Kristen Hite.

[78] P.L. 91-190, Title I, §102, Jan. 1, 1970, 83 Stat. 853.

[79] 42 U.S.C. §4331(b)(4). On February 25, 2025, the Council on Environmental Quality issued an interim final rule revoking all CEQ NEPA regulations, 90 *Federal Register* 10610, to take effect April 10, 2025.

[80] Regulations for the coordination of the Section 106 process with NEPA can be found at 36 C.F.R. §800.8. Discussion of NEPA as an "umbrella" compliance process can be found at ACHP, "Integrating NEPA and Section 106," https://www.achp.gov/integrating_nepa_106.

[81] U.S. Const. amend. I. Although the text of the First Amendment states that "Congress shall make no law," the Free Exercise Clause applies to both federal and state government action after it was made applicable to the states by incorporation into the Fourteenth Amendment. See Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 876–77 (1990) (citing Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)).

[82] See, for example, Congressional Research Service, *Laws Neutral to Religious Practice from the 1960s Through the 1980s*, Constitution Annotated, https://constitution.congress.gov/browse/essay/amdt1-4-3-2/ALDE_00013224/.

decision *Lyng v. Northwest Indian Cemetery Protective Association*.[83] In *Lyng*, the Court rejected a Free Exercise Clause challenge to federal government plans to allow road construction and timber harvesting on national forest land that would irreparably damage sacred areas traditionally used by several Tribes (Yurok, Karok, and Tolowa) for religious purposes.[84] Although the Court acknowledged that the activities "could have devastating effects on traditional Indian religious practices," it concluded that the federal government action at issue would not "prohibit" the free exercise of religion as contemplated by the First Amendment.[85] The *Lyng* decision has proven to be a difficult hurdle for Indigenous challengers to overcome in Free Exercise Clause cases involving federal land management actions that conflict with Indigenous peoples' utilization of the land for religious purposes. To date, Indigenous challengers generally have been unable to prevail in these cases.[86]

In 1993, Congress sought to expand protection for religious exercise, in part, through the enactment of the Religious Freedom Restoration Act (RFRA; 42 U.S.C. §§2000bb et seq.). Under RFRA, the federal government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the federal government can demonstrate that the burden is (1) "in furtherance of a compelling governmental interest" and (2) is "the least restrictive means of furthering that compelling governmental interest."[87] A "person" whose religious exercise has been burdened may assert a violation of RFRA as a claim or defense in a judicial proceeding.[88] Since its enactment, courts have interpreted RFRA to first require a plaintiff to demonstrate that the governmental action or law imposes a substantial burden on their religious exercise before the burden shifts to the government to show its action is the least restrictive means of furthering a compelling interest.[89]

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[83] 485 U.S. 439 (1988).

[84] *Lyng*, 485 U.S. at 441–42.

[85] *Lyng*, 485 U.S. at 451 (noting the "crucial word in the constitutional text is 'prohibit.' For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government").

[86] See, for example, Apache Stronghold v. United States, 101 F.4th 1036, 1055 (9th Cir. 2024):

> *Lyng* stands for the proposition that a disposition of government real property is not subject to strict scrutiny when it has 'no tendency to coerce individuals into acting contrary to their religious beliefs,' does not 'discriminate' against religious adherents, does not 'penalize' them, and does not deny them 'an equal share of the rights, benefits, and privileges enjoyed by other citizens.' ... In such circumstances, the essential ingredient of 'prohibiting' the free exercise of religion is absent, and the Free Exercise Clause is not violated. And because *Lyng*'s application of that rule in the context of that case cannot meaningfully be distinguished in this case, Apache Stronghold has no likelihood of success on its Free Exercise claim.

[87] 42 U.S.C. §2000bb-1.

[88] 42 U.S.C. §2000bb-1. The Religious Freedom Restoration Act (RFRA; 42 U.S.C. §§2000bb et seq.) does not statutorily define the term "person," but the Supreme Court has interpreted it according to the Dictionary Act, under which the word "person ... include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." See 1 U.S.C. §1; *Hobby Lobby*, 573 U.S. at 707.

[89] See Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 719 (2014) (explaining that after determining that RFRA applies to the plaintiffs, the Court's next question is whether the government mandate "'substantially burden[s]' the exercise of religion"). In evaluating whether there is a substantial burden on *religious exercise*, courts generally refrain from passing judgment on the "plausibility of a religious claim," or from determining if religious beliefs are "mistaken or insubstantial," and instead focus on whether the claimant has an "honest conviction." See ibid. at 725. See also Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 144 n.9 (1987) (quoting United States v. Ballard, 322 U.S. 78, 87 (1944) ("[i]n applying the Free Exercise Clause, courts may not inquire into the truth, validity, or reasonableness of a claimant's beliefs)); Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, 239 F. Supp. 3d 77, 90 (D.D.C. 2017) (noting "[c]ourts generally handle 'the sincerity inquiry … with a light touch, or 'judicial shyness'" (quoting Moussazadeh v. Tex. Dep't of Criminal Justice, 703 F.3d 781, 792 (5th Cir. 2012))).

RFRA has been used to challenge federal government actions that impact Indigenous sacred sites. In at least one instance, a federal trial court ruled in favor of a Tribe in an RFRA challenge to proposed government action on an Indigenous sacred site.[90] In that case, the Tribe sought to stop the federal government from constructing a military training center on land near a site that carried religious significance.[91] The trial court agreed that the construction would impose a substantial burden on the Tribe's religious practices, because the construction would obstruct the view of terrain that was "central to the spiritual experience" of the Tribe.[92] Despite the outcome in this case, most Indigenous sacred site challenges brought under RFRA have been unsuccessful.[93]

In 2008, for instance, the U.S. Court of Appeals for the Ninth Circuit issued a decision regarding RFRA's application to Indigenous sacred sites. In *Navajo Nation v. U.S. Forest Service*, a number of Tribes challenged the government's authorization of a ski resort's proposed use of recycled wastewater to create artificial snow on a ski slope operated on a national forest.[94] The Tribes argued that the use of the recycled water—which contained 0.0001% human waste—would desecrate the sacredness of the religious sites on the mountain.[95] In evaluating the RFRA claim, the court held that based on "the express language of RFRA and decades of Supreme Court precedent," the use of recycled wastewater did not impose a substantial burden on the Tribes' exercise of religion.[96]

More recently, the Ninth Circuit resolved a dispute brought by Apache Stronghold—an organization that represents the interests of certain citizens of the San Carlos Apache Tribe—regarding Oak Flat, an area located on federal land that is of "great spiritual value" to the San Carlos Apache and other Western Apache Tribes.[97] In 2014, Congress authorized the transfer of federal land, including Oak Flat, to a private company that intended to mine copper on the land using a technique that could eventually cause Oak Flat to collapse into a large crater.[98] After a number of years, access to Oak Flat would be prohibited because "it wouldn't be safe to have people accessing the land when it could subside."[99] In seeking to bar the land transfer, Apache Stronghold argued that the federal government action at issue would make it "impossible" for them to exercise their religion.[100] The Ninth Circuit rejected Apache Stronghold's RFRA claim, holding that, as in *Navajo Nation*, the federal government's transfer of land did not impose a substantial burden on the Tribes' exercise of religion.[101]

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[90] See Comanche Nation v. United States, No. CIV-08-849-D, 2008 WL 4426621 (W.D. Okla. Sept. 23, 2008).

[91] *Comanche Nation*, 2008 WL 4426621 at *1.

[92] Ibid. at *7.

[93] See, for example, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 239 F. Supp. 3d 77 (D.D.C. 2017); Snoqualmie Indian Tribe v. FERC, 545 F.3d 1207 (9th Cir. 2008); Slockish v. U.S. Fed. Highway Admin., No. 3:08-cv-011699-YY, 2018 WL 2875896 (D. Or. June 11, 2018).

[94] Navajo Nation v. U.S. Forest Service, 535 F.3d 1058, 1064 (9th Cir. 2008).

[95] Ibid. at 1062.

[96] Ibid. at 1068.

[97] Apache Stronghold v. United States, 101 F.4th 1036, 1044 (9th Cir. 2024).

[98] Ibid. at 104648.

[99] Ibid. at 1047–48.

[100] Ibid. at 1148 ("But Apache Stronghold does not argue that the destruction of Oak Flat merely 'frustrates' their ability to worship there; they argue—and the district court found—that worship there will be 'impossible,' and their spiritual practice will be eviscerated.").

[101] Ibid. at 1043. The Apache Stronghold plaintiffs have appealed the Ninth Circuit's decision to the Supreme Court and are waiting to hear whether the Court will review the case (Petition for Writ of Certiorari, Apache Stronghold v. United States, No. 24-291 (U.S. Sept. 11, 2024)).

Selected Agency Policies and Actions Addressing Indigenous Sacred Sites

In addition to statutory requirements, federal agencies have issued various regulations and policies, entered into multiagency agreements, and published reports that address Indigenous sacred site protection and access. For example, in 1998, the Department of the Interior (DOI) issued a new *Departmental Manual* (DM) chapter outlining staff responsibilities to protect or accommodate access to Indigenous sacred sites to implement E.O. 13007.[102] The DM requires all DOI bureaus to establish written guidance and procedures that ensure the protection and provision of access to Indigenous sacred sites "to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions."[103] The DM also requires such guidance to include provisions authorizing the use of written agreements with Tribes to provide access to sacred sites on federal lands, address confidentiality concerns, and outline processes for notice and dispute resolution.[104] Pursuant to the DM, various DOI bureaus have subsequently issued agency-specific policies. For example, NPS issued a policy stating that the agency "will, to the extent practicable, accommodate access to and ceremonial use of Indian sacred sites by religious practitioners from recognized American Indian tribes and Alaska Natives, and avoid adversely affecting the physical integrity of such sacred sites."[105] Similarly, FWS policy requires the agency to "meaningfully involve" Tribes when FWS actions may affect tribal cultural or religious interests, including archaeological resources, cultural resources, and sacred sites.[106]

In 2012, following a multiyear review and outreach process, the U.S. Department of Agriculture (USDA) issued a report evaluating Forest Service (FS) compliance with E.O. 13007, including agency procedures regarding the protection, interpretation, and appropriate access to Indigenous sacred sites on FS lands.[107] Following its publication, FS updated its agency policies, incorporating many of the recommendations included in the 2012 report.[108] Among its provisions, the updated policy requires FS employees to develop and maintain working relationship with Tribes "in achieving the common values of shared stewardship, promoting ecosystem health, protecting cultural resources and sacred places, providing appropriate access to sacred places, and benefitting tribal communities to the greatest extent practicable and permitted by law."[109] FS noted that the use of the term *sacred places* as opposed to *sacred sites* came from the 2012 recommendations that *sacred places* would be a more inclusive approach to use when

[102] DOI, *Departmental Manual*, Part 512 Chapter 3 (512 DM 3), "Departmental Responsibilities for Protecting/Accommodating Access to Indian Sacred Sites," June 5, 1998, https://www.doi.gov/sites/doi.gov/files/elips/documents/512-dm-3.pdf.

[103] Ibid. p. 2.

[104] Ibid. p. 3.

[105] NPS, *Management Policies 2006*, §5.3.5.3.2, pp. 71-72.

[106] FWS, *Service Manual*, Part 10 Chapter 1 (510 FW 1).

[107] USDA, *Report to the Secretary of Agriculture: USDA Policy and Procedures Review and Recommendations: Indian Sacred Sites*, December 2012, https://www.fs.usda.gov/spf/tribalrelations/documents/sacredsites/SacredSitesFinalReportDec2012.pdf (hereinafter USDA, *Report to the Secretary* (2012)).

[108] FS, *Forest Service Manual* (FSM), Chapter 1560, "State, Tribal, County, and Local Agencies; Public and Private Organizations," 2016.

[109] FS, FSM, chapter 1563.02.

determining what may be considered sacred to Indigenous people.[110] For further discussion of agency policies related to identifying sacred sites, see "Defining and Identifying Sacred Sites."

The Department of Defense (DOD) also has issued policies related to Indigenous sacred site protection, access, and management on lands under its jurisdiction. In September 2018, DOD updated its tribal consultation policy, "DOD Interactions with Federally Recognized Tribes," which requires DOD to consult with Tribes "whenever proposing an action that may have the potential to significantly affect protected tribal resources, tribal rights, or Indian lands."[111] Such consultation is to be conducted for "proposed actions, plans, or ongoing activities that may have the potential to significantly affect ... [a]ccess to sacred sites and treaty-reserved resources."[112] At that time, DOD also updated a similar policy related to consultation requirements, should a DOD action affect religious or cultural sites of importance to Native Hawaiians.[113] In addition, DOD has issued agency-level policies for certain DOD branches related to providing access to cultural sites in its policy guidance for consulting with Tribes. For example, the U.S. Navy issued a policy in 2005 that includes a recurring consultation requirement with Tribes for proposed actions, including consulting on "access to sacred sites, [and] access to subsistence and medicinal natural resources."[114]

More recently, the Biden Administration issued guidance on sacred sites protection and access through its focus on the tribal co-stewardship of federal lands. In 2022, DOI and USDA issued a joint secretarial order (S.O.) on co-stewardship that directed their agencies and bureaus to manage federal lands and waters to protect "the treaty, religious, subsistence, and cultural interests" of Tribes.[115] Pursuant to that S.O., several agencies issued guidance that included commitments to sacred sites access and protection.[116] For example, the NPS guidance stated that it would "avoid

[110] FS policy defines *sacred place* as "any specific location on National Forest System land, whether site, feature, or landscape, that is identified by an Indian tribe, or the religious societies, groups, clans, or practitioners of an Indian tribe, as having important spiritual and cultural significance to that entity, greater than the surrounding area itself" (FS, FSM 1563.04n). The 2012 report specified that FS "does not intend for the concept of sacred places to replace sacred sites in E.O. 13007, nor does the agency intend 'sacred places' to receive the same type of scrutiny as sacred sites, as it recognizes that sacred sites are limited to discrete, specific locations, while a sacred place might be a larger scale geographic feature." USDA, *Report to the Secretary* (2012), p. 18.

[111] DOD, *DOD Instruction 4710.02*, "DOD Interactions with Federally Recognized Tribes," September 24, 2018, https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/DODi/471002p.pdf.

[112] *DOD Instruction 4710.02*, Section 3.2.a.(7).

[113] DOD, *DOD Instruction 4710.03*, "Consultation with Native Hawaiian Organizations (NHOs)" (October 25, 2011, updated August 31, 2018), https://www.denix.osd.mil/na/denix-files/sites/42/2020/05/DoDI-4710.03.pdf.

[114] U.S. Navy (USN), *SecNav Instruction 11010.14A*, "Department of the Navy Policy for Consultation with Federally Recognized Indian Tribes," (October 11, 2005), Section 5.a., https://www.secnav.navy.mil/ADR/Documents/11010.14A.pdf.

[115] DOI and USDA, *Secretarial Order No. 3403*, "Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters," November 15, 2021, p. 1, https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3403-joint-secretarial-order-on-fulfilling-the-trust-responsibility-to-indian-tribes-in-the-stewardship-of-federal-lands-and-waters.pdf. For an analysis of tribal co-stewardship and co-management, see CRS Report R47563, *Tribal Co-management of Federal Lands: Overview and Selected Issues for Congress*, by Mariel J. Murray.

[116] See BLM, *Permanent Instruction Memorandum 2022-011*, "Co-Stewardship with Federally Recognized Indian and Alaska Native Tribes Pursuant to Secretary's Order 3403," September 13, 2022, https://www.blm.gov/policy/pim-2022-011; FWS, *Director's Order No. 227*, "Fulfilling the Trust Responsibility to Tribes and the Native Hawaiian Community, and Other Obligations to Alaska Native Corporations and Alaska Native Organizations, in the Stewardship of Federal Lands and Waters," September 8, 2022, https://www.fws.gov/policy-library/do227.

adversely affecting the physical and spiritual integrity" of Indigenous sacred sites and develop "mutually agreeable strategies" for providing access for Indigenous peoples.[117]

United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

In 2007, the General Assembly of the United Nations adopted the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). The UNDRIP recognized the "urgent need to respect and promote the inherent rights of Indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources." Article 12 of the declaration establishes the rights of Indigenous peoples to manifest, practice, develop, and teach their spiritual and religious traditions, customs, and ceremonies; to maintain, protect, and have access in privacy to their religious and cultural sites; to use and control their ceremonial objects; and to the repatriation of their human remains.

Initially, the United States was one of four states (including Australia, Canada, and New Zealand) to vote against the adoption of the UNDRIP. However, in 2011, the United States announced its support for the UNDRIP (U.S. Department of State, "Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples," January 12, 2011). In announcing support, the United States specified that the UNDRIP is a non-legally binding document and creates no new rights under U.S. or international law. Some federal agencies have acknowledged or expressed support for UNDRIP aspirations in agency policies related to the protection of Indigenous sacred sites. For example, Forest Service policy states that "Forest Service personnel should address the elements of the UNDRIP ... by applying their discretion in decision making and implementation in favor of protecting Indian sacred places whenever possible" (FSM 1563.02). In addition, the U.S. Fish and Wildlife Service has stated that its policy on tribal sovereignty and government-to-government relations is "adopted in the spirit of the [UNDRIP]" (510 FW 1.2). For more information on federal agency policies related to sacred sites, see "Selected Agency Policies and Actions Addressing Indigenous Sacred Sites."

Interagency Memorandum of Understanding

In 2012, five federal agencies (DOD, DOI, USDA, Department of Energy [DOE], and the Advisory Council on Historic Preservation [ACHP]) entered into a memorandum of understanding (MOU) to improve protection of, and access to, Indigenous sacred sites.[118] The MOU committed the agencies to (1) build agency capacity by improving training and guidance for federal staff, especially on collaborating with Tribes, (2) build tribal capacity to effectively address sacred sites issues, (3) increase outreach to the public and nonfederal partners about maintaining the integrity of sacred sites, (4) develop recommendations related to maintaining the confidentiality of information about sacred sites, and (5) develop recommendations to address challenges related to the protection of sacred sites.[119] A DOI-chaired working group was formed to oversee implementation of the MOU, and in March 2013, the group released an action plan that outlined how the agencies would implement the commitments.[120] Subsequently, the participating agencies issued a progress report outlining the tasks that had been accomplished and identifying

[117] NPS, "Fulfilling the National Park Service Trust Responsibility to Indian Tribes, Alaska Natives, and Native Hawaiians in the Stewardship of Federal Lands and Waters," Policy Memorandum 22-03, September 12, 2022, pp. 6-7, https://www.nps.gov/subjects/policy/upload/PM_22-03.pdf.

[118] "Memorandum of Understanding Among U.S. Department of Defense, U.S. Department of the Interior, U.S. Department of Agriculture, Department of Energy, Advisory Council on Historic Preservation on Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites," November 30, 2012, https://www.achp.gov/sites/default/files/2018-06/MoUfortheCoordinationandCollaborationfortheProtectionofIndianSacredSites2012.pdf.

[119] Ibid., pp. 2-3.

[120] Department of Defense, DOI, USDA, Department of Energy, ACHP, "Action Plan to Implement the Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites," March 5, 2013, https://www.doi.gov/sites/doi.gov/files/migrated/news/upload/SS-MOU-Action-Plan-March-5-2013.pdf.

next steps.[121] In 2016, the signatories amended the agreement to extend the MOU to December 31, 2024.[122]

In 2021, four of the five signatory agencies to the 2012 and 2016 MOUs (DOI, USDA, DOE, and ACHP), as well as four other agencies (Department of Transportation, Tennessee Valley Authority, U.S. Environmental Protection Agency, and White House Council on Environmental Quality), signed a new interagency MOU, which built on many of the goals identified in the 2012 and 2016 MOUs.[123] The latest MOU—which is reviewed annually—identifies opportunities for considering Indigenous sacred sites early in federal decisionmaking processes, adds a commitment to incorporate Indigenous knowledge when assessing the impacts of federal actions on sacred sites, and encourages public outreach on the importance of maintaining the integrity of sacred sites and the need for public stewardship to protect and preserve them. It also explicitly recognizes Native Hawaiian sacred sites not considered under the 2012 and 2016 MOUs and E.O. 13007. Pursuant to the 2021 MOU, the agencies published a best practices guide for working with Tribes and Native Hawaiians on the co-stewardship and co-management of sacred sites. These best practices include

- building sustainable relationships with Tribes and NHOs through consultation, engagement, and co-stewardship;
- supporting tribal and NHO capacity by offering financial and technical assistance;
- exercising discretion to accommodate sacred sites protection and access;
- physically protecting sacred sites;
- ensuring the confidentiality of Indigenous knowledge; and
- training the federal workforce and educating the public about issues related to the protection and accessibility of sacred sites.[124]

Issues for Congress

The federal role in sacred site management, protection, and access is of perennial interest to Congress. In recent years, congressional considerations have included how to evaluate Indigenous sacred site access and protections against other statutory and congressional priorities, the adequacy of legal protections for Indigenous sacred sites, whether or how to define and identify

[121] Department of Defense, DOI, USDA, Department of Energy, ACHP, *Progress Report on Implementation of the MOU Regarding Interagency Coordination and Collaboration for Protection of Indian Sacred Sites*, May 2014, https://www.achp.gov/sites/default/files/2018-06/ProgressReportonImplementationoftheMOURegardingInteragencyCoordinationandCollaborationforProtectionofIndianSacredSitesmay2014.pdf.

[122] "Memorandum of Understanding Among U.S. Department of Defense, U.S. Department of the Interior, U.S. Department of Agriculture, Department of Energy, Advisory Council on Historic Preservation on Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites," September 23, 2016, https://www.achp.gov/sites/default/files/2018-06/MoUfortheCoordinationandCollaborationfortheProtectionofIndianSacredSites2016.pdf.

[123] "Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Indigenous Sacred Sites," November 16, 2021, p. 3, https://www.doi.gov/sites/doi.gov/files/mou-interagency-coordination-and-collaboration-for-the-protection-of-indigenous-sacred-sites-11-16-2021.pdf (hereinafter 2021 Interagency MOU).

[124] White House Council on Native American Affairs, "Best Practices Guide for Federal Agencies Regarding Tribal and Native Hawaiian Sacred Sites," December 2023, https://www.bia.gov/sites/default/files/media_document/sacred_sites_guide_508_2023-1205.pdf (hereinafter White House Council on Native American Affairs, "Best Practices Guide").

such sites, concerns around confidentiality and disclosure of sensitive religious or cultural information, and general concerns related to agency and tribal capacity to address sacred sites issues. This section provides a brief overview of these issues, including discussion of stakeholder perspectives, past legislative initiatives, and recent congressional actions.

Defining and Identifying Sacred Sites

The federal government's ability or willingness to protect or provide access to Indigenous sacred sites often depends on first identifying what constitutes a sacred site. Whether and how to identify or define Indigenous sacred sites have been controversial issues among certain stakeholders. Debates have focused on the need to establish or define geographic limits of potential sacred sites, the contemporary usage or maintenance of such sites, and who gets to determine or identify a site as sacred.

E.O. 13007 defines *sacred sites* in the federal context as "any specific, discrete, narrowly delineated location" on federal land that is identified by a Tribe as sacred because of its "religious significance ... or ceremonial use."[125] Certain agency policies or guidance documents—such as the 2021 interagency MOU—have recognized that sacred sites "often occur within a larger landform or are connected through physical features or ceremonies to other sites or a larger sacred landscape."[126] Typically, however, such policies maintain the "specific, discrete, narrowly delineated" requirement established in E.O. 13007. Similar requirements apply to historic properties covered under the NHPA and its implementing regulations (for further discussion, see "Sacred Sites as Historic Properties").[127]

Some Indigenous peoples and other stakeholders have objected to attempts to define *sacred sites* or similar terms in law or in a regulatory context, instead suggesting agencies defer exclusively to Indigenous peoples in determining whether a site has religious or spiritual importance.[128] In defining *sacred sites*, some have claimed that federal agencies may interpret the term too narrowly, excluding certain Indigenous religious practices and sites based on a legal definition.[129] For example, places considered sacred to certain Indigenous peoples often lack clearly defined boundaries or physical markers and can include plants, animals, sound, light, viewshed, and other sometimes intangible features.[130] In addition, some Indigenous sacred sites may extend beyond

[125] E.O. 13077, "Indian Sacred Sites," 61 *Federal Register*, 26771, May 24, 1996. Pursuant to E.O. 13007, a sacred site also may be identified by an "Indian individual determined to be an appropriately authoritative representative of an Indian religion."

[126] 2021 Interagency MOU, p. 2.

[127] For example, submissions to the Keeper of the National Register for determinations of eligibility must include "specific boundaries" of the proposed property, as well as other pertinent information related to its listing (36 C.F.R. §63.3).

[128] For example, the Native American Sacred Lands Act (H.R. 2419, 108th Congress) would have defined *sacred land* as "any geophysical or geographical area or feature which is sacred by virtue of its traditional cultural or religious significance or ceremonial use, or by virtue of a ceremonial or cultural requirement, including a religious requirement that a natural substance or product for use in Indian tribal or Native Hawaiian organization ceremonies be gathered from that particular location." See Statement of Suzan Shown Harjo in S. Hrg. 108-197: "The number one objectionable element in legislation would be definition of the sacred ... we would like equal treatment when it comes to definition of the sacred. We don't want one."

[129] Statement of Suzan Shown Harjo in S. Hrg. 108-197 (describing requirements under E.O. 13007 for sacred sites to be "discrete" and "narrowly delineated" as "very limiting … and has caused a lot of problems").

[130] Ibid. See also ACHP, "Protection of Indian Sacred Sites"; Jeanette Wolfley, "Reclaiming A Presence in Ancestral Lands: The Return of Native Peoples to the National Parks," *Natural Resources Journal*, vol. 56, no. 1 (winter 2013), pp. 55-80.

terrestrial locations and include water and airspace areas.[131] Others have noted that because some Indigenous religious and spiritual traditions view the natural world as fundamentally interconnected, it may be difficult to distinguish one demarcated site as more sacred than another.[132] Others have pointed out that requiring Indigenous peoples to define what constitutes *sacredness* in the context of their religious beliefs is not a requirement generally placed on other religious traditions.[133]

Some scholars and stakeholders have countered that defined geographical boundaries are necessary to help identify, prioritize, and ultimately protect Indigenous sacred sites, while allowing the federal government to comply with its other statutory mandates.[134] Others have asserted that not limiting the scope of what constitutes a sacred site could lead to closing off large swaths of the federal estate for the purposes of accommodating religious or traditional use by a small group or a few individuals.[135] In particular, concerns have been raised around the degree of deference agencies should afford to Indigenous peoples in defining what constitutes a sacred site absent specific limitations and standards.[136]

Debates also have arisen around the process by which agencies identify Indigenous sacred sites, particularly in the context of land use planning and federal environmental or cultural reviews. In general, federal laws, regulation, and guidance encourage—if not require—consultation and collaboration with certain Indigenous groups (e.g., Tribes, NHOs, Alaska Natives) when identifying sacred sites. For example, regulations implementing Section 106 of the NHPA require federal agencies to "acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them."[137] However, the degree to which such acknowledgement of expertise is sufficient has been controversial, with some stakeholders pushing for increased deference to Indigenous identification of sacred sites.[138] Others have suggested that existing

[131] For example, see discussion of Nantucket Sound in "Understanding Sacred Sites: An Overview," above.

[132] Mark S. Cladis, "Sacred Sites as a Threat to Environmental Justice? Environmental Spirituality and Justice Meet Among the Diné (Navajo) and Other Indigenous Groups," *Worldviews: Global Religions, Culture, and Ecology*, vol. 23, no. 2 (2019), pp. 132-153.

[133] NCAI, "Res. SD-02-027, Essential Elements of Public Policy to Protect Native Sacred Places," November 10-15, 2002, https://sacredland.org/wp-content/uploads/2017/07/NCAI_Res_02-027-1.pdf.

[134] For example, see Skibine, "Towards a Balanced Approach"; Troy A. Rule, "Preserving Sacred Sites and Property Law," *Wisconsin Law Review*, vol. 129 (August 7, 2023), pp. 130-180; and Marcia A. Yablon-Zug, "Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian," *Yale Law Journal*, vol. 113 (April 23, 2004), pp. 1630-1633 (hereinafter, Yablon, "Property Rights and Sacred Sites").

[135] For example, the en banc majority in *Navajo Nation v. United States Forest Service* stated: "[i]n the Cococino National Forest alone, there are approximately a dozen mountains recognized as sacred by American Indian tribes.... New sacred areas are continuously being recognized by the Plaintiffs" (535 F3d 1058, 1066 n.7 (9th Cir. 2008)). The dissenting opinion noted: "The majority implies that if we hold, based on the sincerity of the Indians's religious belief, that there has been a substantial burden in this case, there is no stopping place. That is, since virtually everything is sacred, virtually any governmental action affecting the Indians 'sacred' land will be a substantial burden under RFRA." See also Skibine, "Towards a Balanced Approach"; House Committee on Natural Resources, "Hybrid Legislative Hearing on Three Bills," p. 1, https://naturalresources.house.gov/uploadedfiles/09.14.22_npfpl_legislative_hearing.pdf.

[136] Testimony of R. Timothy McCrum, Partner, Crowell & Moring LLP, on behalf of Glamis Imperial Corp., in U.S. Congress, House Resources Committee, *Regarding H.R. 5155, A Bill To Protect Sacred Native American Federal Lands*, 107th Cong., 2nd sess., September 25, 2002, S.Hrg. 107-153 (Washington: GPO, 2003).

[137] 36 C.F.R. §800.4(c)(1).

[138] Sarah A. Husk, "Scattered to the Winds?: Strengthening the National Historic Preservation Act's Tribal Consultation Mandate to Protect Native American Sacred Sites in the Renewable Energy Development Era," *Tulane Environmental Law Journal*, vol. 34, no. 2 (August 1, 2021), pp. 273-321.

consultation requirements have been successful in protecting sacred sites and accommodating the religious and cultural practices associated with them.[139]

Sacred Sites as *Historic Properties*

Issues related to the scope of Indigenous sacred sites also have been raised within the context of the NHPA and the consideration of Indigenous sacred sites as *historic properties*. As discussed above, many (though not all) Indigenous sacred sites may be eligible for or included in the National Register and therefore subject to review under Section 106 of the NHPA. Such properties typically have been categorized as *traditional cultural properties* (TCPs). Among other requirements, NPS guidelines in "Bulletin #38: Guidelines for Evaluating and Documenting Traditional Cultural Properties" specified that potential TCPs must include specific boundaries, though the guidelines recognize that defining such boundaries "can present considerable problems."[140] Bulletin #38 further stated that "purely intangible" cultural values are not covered by Section 106 "unless they are somehow related to a historic property."[141]

Some stakeholders have raised concerns regarding the applicability of TCP criteria to certain Indigenous sacred sites, particularly when potential sites include primarily natural features as opposed to architectural or archaeological structures or where sites are not limited to discrete locations with a specified geographic footprint.[142] In response to some of these concerns, NPS issued an updated version of Bulletin #38 in December 2024 following a multiyear revision process.[143] Among other changes, the new guidance changes the term *traditional cultural property* to *traditional cultural place.*[144] It also specifies that certain natural features, such as rocks, can qualify as historic under National Register criteria if they are "associated with a significant tradition or event."[145] The new guidelines, however, maintain the requirements for specified boundaries for any nominated place.[146] During the revision process, some stakeholders objected to this due, in part, to the difficulties of establishing clearly defined limits to certain sacred sites.[147]

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[139] For example, see Yablon, "Property Rights and Sacred Sites," p. 1638.

[140] NPS, Bulletin #38, p. 18.

[141] Ibid., p. 3.

[142] For example, see comments on revised Bulletin #38 draft from Daniel H. Sandweiss, PhD, RPA, President, Society of American Archaeology, to NPS, National Register of Historic Places, March 21, 2024. See also Wesley James Furlong, "'Subsistence Is Cultural Survival': Examining the Legal Framework for the Recognition and Incorporation of Traditional Cultural Landscapes Within the National Historic Preservation Act," *Tribal Law Journal*, vol. 22, no. 4 (June 1, 2023), pp. 51-120.

[143] NPS, "National Register Bulletin: Identifying, Evaluating, and Documenting Traditional Cultural Places," December 2024 (hereinafter NPS, Bulletin (2024)). NPS originally began work to update the traditional cultural property (TCP) bulletin in 2011, but these efforts were placed on hold in 2017. In 2021, the revision process was resumed, and an initial draft was issued in October 2022. A new draft was subsequently issued in November 2023 with the final version published in December 2024.

[144] Some stakeholders have pointed to the term *property* (as in, traditional cultural *property*) as connoting certain Euro-American conceptions of ownership and have stated that the term "implies a commodification of their [Indigenous people's] heritage." NPS, "[Draft Text] National Register Bulletin #38: Guidelines for Evaluating and Documenting Traditional Cultural Places," October 27, 2022, p. 11. See also Melissa Harm Benson, "Enforcing Traditional Cultural Property Protections," *Human Geography*, vol. 7, no. 2 (April 18, 2024), pp. 69-70, https://ssrn.com/abstract=2468350.

[145] NPS, Bulletin (2024), p. 42.

[146] Ibid., p. 84. The guidance reads: "A specific boundary description and justification for any nominated place, including those recognized as TCPs, must be included in a National Register nomination."

[147] For example, see NARF, "National Register Bulletin #38 Revisions Overview," April 2023,
(continued...)

Issues also have arisen regarding whether Indigenous peoples must show historic and continuous use of a site for it to be considered eligible for a National Register listing.[148] Prior to the revision process, Bulletin #38 defined TCPs as properties that "(a) are rooted in that community's history, and (b) are important in maintaining the *continuing* [emphasis added] cultural identity of the community."[149] Although the guidance specified that NPS did not require a property to have been in continuous use by a community to be eligible for listing on the National Register,[150] it had been noted that this definition may imply such a requirement.[151] Some stakeholders viewed this as potentially problematic in light of the forced removal of some Indigenous peoples from their homelands, which has made certain sites inaccessible or infrequently used for religious or ceremonial purposes, although the sites may still be spiritually significant.[152] In other instances, Indigenous peoples may be engaging in religious activity at a site, but outside observers are unaware of the ongoing use because there is little physical evidence of it.[153] This can be particularly challenging if identifying or disclosing ongoing religious use would violate cultural or spiritual beliefs (for more discussion of this issue, see "Confidentiality of Sacred Sites Information"). Separately, some stakeholders have objected to any categorization of sacred sites as *historic properties* under the NHPA, as such categorization suggests the sites are valued only for their historical importance rather than for their contemporary religious or cultural significance.[154]

Confidentiality of Sacred Sites Information[155]

How to treat potentially sensitive or culturally specific information about Indigenous sacred sites also has been raised as an issue. On the one hand, sacred sites can be hard to define and protect, because they often lack clearly defined boundaries or a physical marker. Information shared by Indigenous peoples is therefore often considered essential for the agency to identify areas for

https://www.nathpo.org/assets/pdf/Bulletin+38+Revisions_wjf+04.14.23/ (hereinafter NARF, "National Register Bulletin #38 Revisions Overview"): "Nothing in the NHPA or the regulations require a boundary to be drawn on a historic property to be listed on the National Register. Indeed, the NPS has repeatedly eschewed defining boundaries on TCPs for DOEs [Determinations of Eligibility] in the Section 106 process. The NPS needs to update its nomination process to allow for nominations without boundaries."

[148] See NARF, "National Register Bulletin #38 Revisions Overview."

[149] NPS, Bulletin #38, p. 1.

[150] NPS, Draft Bulletin #38, p. 23.

[151] ACHP, *Consultation with Indian Tribes in the Section 106 Review Process: A Handbook*, December 2012. ("Bulletin 38 has sometimes been interpreted as requiring an Indian tribe to demonstrate continual use of a site in order for it to be considered a TCP in accordance with Bulletin 38.").

[152] For example, see American Cultural Resources Association (ACRA), "ACRA Comments on NPS Bulletin 38 Proposed Changes," May 4, 2023, https://acra-crm.org/acra-comments-on-nps-bulletin-38-proposed-changes/.

[153] For example, in 1986, the Havasupai Tribe disputed a FS decision to permit the Canyon Uranium Mine (now the Pinyon Plain Mine) on the grounds that mining in the area would destroy Red Butte as a sacred site. In the record of decision approving the mine, the FS stated: "Although there is no physical evidence of Indian religious activity at the mine site itself, the Havasupai have recently stated that sacred camping and burial sites are present in the general area north of Red Butte, and perhaps at the mine site itself. However, the Havasupai Tribe refuses to disclose the location of the sites." FS, "Record of Decision – Canyon Mine Proposal," p. 8, https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5346658.pdf.

[154] Barclay and Steele, "Rethinking Protections for Indigenous Sacred Sites," pp. 1318-1319. ("Just as Indigenous people are not relics of a historical past, their places of religious exercise and identity ought not be limited in their value by their historical or archeological interest. They are important for contemporary, ongoing use and access by Indigenous peoples.").

[155] For a general discussion of confidentiality issues related to federal-tribal consultation and information sharing, see CRS Report R48093, *Federal-Tribal Consultation: Background and Issues for Congress*, coordinated by Mariel J. Murray.

protection.[156] Without this information, federal agencies may move forward with actions that inadvertently damage or result in the destruction of Indigenous sacred sites.[157] On the other hand, Indigenous groups are often hesitant to disclose information related to the location, use, and importance of sacred sites.[158] For example, some groups may want to prevent non-Indigenous peoples from accessing Indigenous sacred sites, or Indigenous religious, cultural, and societal norms may restrict them from sharing such information.[159] Some groups have raised concerns about the potential public release of agency maps depicting culturally sensitive or religious sites to the public.[160] More generally, historical distrust of the federal government—particularly with respect to Indigenous religious practices—has left many Indigenous groups reluctant to share sensitive information.[161]

In cases where sensitive information is shared with the federal government, federal officials have sometimes expressed concern about their ability to protect sacred sites while maintaining confidentiality.[162] This is because federal law and agency regulations vary regarding the disclosure or confidentiality of Indigenous religious or sacred site information. ARPA, NHPA, and NAGPRA all have statutory or regulatory confidentiality provisions that provide agencies with the authority to withhold from disclosure sensitive information related to Indigenous sacred sites.[163] However, this authority is often dependent on the agency determining whether such information meets the statutory or regulatory requirements for withholding. Similarly, E.O. 13007 directs agencies, "where appropriate, to maintain the confidentiality of sacred sites."[164] Furthermore, sites that are not covered under these laws, but are still considered sacred by certain Indigenous peoples, may not be afforded similar privacy or confidentiality. In some instances, agencies may be statutorily required to share information with the general public. For example, the Freedom of Information Act (FOIA; 5 U.S.C. §552) provides the public a right to access certain federal agency information.[165] Similarly, if an FLMA opts to temporarily close public

[156] Ibid. See also Statement of William Bettenberg, Director, Office of Policy Analysis, DOI, in U.S. Congress, Senate Committee on Indian Affairs, *Native American Sacred Places*, 108th Cong., 1st sess., 2003, S.Hrg. 108-197 (Washington: GPO, 2003), pp. 3-4.

[157] For a recent example of this issue, see B. "Toastie" Oaster, "In a Push for Green Energy, One Federal Agency Made Tribes an Offer They Had to Refuse," *ProPublica*, June 26, 2024, https://www.propublica.org/article/yakama-nation-green-energy-federal-government.

[158] See, for example, DOI, "Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions," pp. 44 and 58, January 2017, https://www.achp.gov/sites/default/files/reports/2018-06/ImprovingTribalConsultationandTribalInvolvementinFederalInfrastructureDecisionsJanuary2017.pdf. See also Statement of Suzan Shown Harjo in S. Hrg. 108-197; White House Council on Native American Affairs, Best Practices Guide, pp. 25-28.

[159] UCLA School of Law, Native Nations Law & Policy Center, "The Need for Confidentiality Within Tribal Cultural Resource Protection," December 2020, p. 6, https://law.ucla.edu/sites/default/files/PDFs/Native_Nations/239747_UCLA_Law_publications_Confidentiality_R2_042021.pdf (hereinafter UCLA School of Law, "Confidentiality Within Tribal Cultural Resource Protection").

[160] White House Council on Native American Affairs, Best Practices Guide, p. 12.

[161] Ethan Plaut, "Tribal-Agency Confidentiality: A Catch-22 for Sacred Site Management," *Ecology Law Quarterly*, vol. 36, no. 1, 2009, pp. 137-166.

[162] Statement of William Bettenberg in S.Hrg. 108-197.

[163] See ARPA (16 U.S.C. §470hh) and NHPA (54 U.S.C. §307103). NAGPRA has confidentiality provisions in its implementing regulations (43 C.F.R. Part 10.9). For a discussion of these laws and regulations, see UCLA School of Law, "Confidentiality Within Tribal Cultural Resource Protection," p. 9. Some agencies have committed to treating information received during federal-tribal consultation as confidential, if disclosure would negatively impact cultural or other sensitive resources. See, for example, DOI, "ANC Policy," p. 2.

[164] 61 *Federal Register* 26771, May 29, 1996.

[165] 5 U.S.C. §§552(a)-(b). For more information about the Freedom of Information Act, see CRS Report R46238, *The Freedom of Information Act (FOIA): A Legal Overview*, by Benjamin M. Barczewski.

access to a sacred site to allow for religious or cultural use, the agency may be required to develop a record supporting such a decision under the Administrative Procedure Act (5 U.S.C. §§551 et seq.) or other laws.

To address some of these concerns, certain agencies have established policies and guidance regarding the collection and storage of Indigenous sacred site data. For example, according to a report issued in 2023, the Federal Communication Commission maintains a system for confidentially managing sensitive site information and for considering that information in facility siting proposals.[166] An interagency working group formed pursuant to the 2022 Sacred Sites MOU (see "Interagency Memorandum of Understanding") also provided agencies with guidance related to confidentiality, including the recommendation that agencies "seek only the minimum information necessary to sufficiently support agency action."[167] Some federal agencies also have entered into agreements with Tribes that commit to developing communication protocols regarding the sharing and protection of sensitive or confidential information.[168]

Some stakeholders and scholars have recommended that Congress provide additional statutory directives to maintain the confidentiality of Indigenous information provided to agencies. For example, some Indigenous groups have suggested amending FOIA to exempt culturally sensitive information shared with agencies during consultation from public disclosure.[169] Although FOIA does provide for certain exemptions, including for information that is "specifically exempted from disclosure by [another] statute,"[170] not all sacred site information may fall within this requirement. Over the years, Congress has considered legislation that would exempt information shared by Indigenous peoples from FOIA,[171] as well as legislation requiring agencies to protect Indigenous knowledge when requested.[172] Such legislation may be considered in the context of perceived overuse of FOIA exemptions or assertions that the general public has a right to potentially sensitive information relevant to agency decisionmaking and the management of public resources.[173]

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[166] Interagency Working Group on Mining Laws, Regulations, and Permitting, *Recommendations to Improve Mining on Public Lands*, September 2023, p. 8, https://www.doi.gov/sites/doi.gov/files/mriwg-report-final-508.pdf.

[167] White House Council on Native American Affairs, Best Practices Guide, p. 25.

[168] See, for example, NPS, "Memorandum of Understanding Between the National Park Service and the Hoh Indian Tribe, Jamestown S'Kallam Tribe, Lower Elwha Klallam Tribe, Makah Indian Tribe, Quileute Indian Tribe, Quinault Indian Nation, Port Gamble S'Kallam Tribe, [and] Skokomish Indian Tribe—To Establish a Framework for Cooperative Government-to-Government Relationships," July 10, 2008, https://www.nps.gov/olym/learn/management/memorandum-of-understanding.htm.

[169] Statement of Suzan Shown Harjo in S. Hrg. 108-197, pp. 54-55. See also Sophia E. Amberson, "Traditional Ecological Disclosure: How the Freedom of Information Act Frustrates Tribal Natural Resource Consultation with Federal Agencies," *Washington Law Review*, vol. 92, no. 2 (June 1, 2017), pp. 937-981.

[170] 5 U.S.C. §552(b)(3). As discussed, certain exemptions regarding disclosure of sensitive information are provided in NHPA, ARPA, and other laws.

[171] For example, in 1976, a bill was introduced that would have prohibited the disclosure under the Freedom of Information Act (FOIA; 5 U.S.C. §552) of "information held by a Federal agency as trustee, regarding the natural resource or other assets of Indian tribes or band or groups or individual members thereof" (S. 2652). Similarly, the Native American Sacred Lands Act (H.R. 2419, 108th Congress) would have exempted "specific detail[s] of a Native American traditional cultural practice or religion, or the significance of an Indian or Native Hawaiian sacred land, or the location of that sacred land." For a more recent example, see the RESPECT Act, H.R. 3587, in the 117th Congress.

[172] See H.R. 8108 and S. 4421 in the 117th Congress and H.R. 6148 in the 118th Congress.

[173] For perspectives on the use of FOIA exemptions, see Nick Schwellenbach and Sean Moulton, "The 'Most Abused' Freedom of Information Act Exemption Still Needs to Be Reined In," Project on Government Oversight, February 6, (continued...)

Evaluating Sacred Site Protection Against Other Statutory Priorities

FLMAs generally manage lands under their jurisdiction for various purposes and uses pursuant to numerous directives, including statutory mandates, executive orders, agency regulations and policies, land management plans, and area-specific decisions. Permissible uses of some lands—such as energy development, mineral extraction, and recreation—may have the potential to impede access to, degrade, or destroy Indigenous sacred sites located on these lands.[174] Some activities pursued for national security reasons, such as some border protection activities, also could impact Indigenous sacred sites.[175] The degree to which FLMAs balance Indigenous interests in protecting or providing access to sacred sites with other land management uses and priorities has been a perennial issue of congressional interest.

While land managers have sometimes accommodated Indigenous interests in protecting or providing access to such sites, some stakeholders have called on federal agencies to be more proactive in their efforts.[176] However, FLMAs may find it challenging to evaluate these Indigenous interests against other statutory mandates or congressional and administrative priorities.[177] For example, in the past, FS has stated that laws such as the General Mining Law of 1872 limit the agency's discretion to deny permits for mineral exploration, "making it hard—perhaps impossible—to protect Native American Sacred Sites in the way the Tribes prefer."[178] Some have noted that the Wilderness Act of 1964, under which lands designated as wilderness are generally closed to motorized vehicles,[179] can create obstacles to Indigenous communities' engagement in traditional religious practices (e.g., for elders or disabled individuals, or for those

2020, https://www.pogo.org/analysis/the-most-abused-foia-exemption-still-needs-to-be-reined-in; Anne Weismann, "The FOIA Is Broken, But Is It Beyond Repair?," Citizens for Responsibility and Ethics in Washington, June 30, 2020, https://www.citizensforethics.org/reports-investigations/crew-investigations/the-foia-is-broken-but-is-it-beyond-repair/; Randall Chase, "Lawmakers Eye More Exemptions to Target 'Abuse' of FOIA," Associated Press, June 9, 2021, https://apnews.com/article/government-and-politics-01308df97ce01632451c8e4aacecda3c. For a broader discussion of FOIA exemptions, see CRS Report R41933, *The Freedom of Information Act (FOIA): Background, Legislation, and Policy Issues*, by Meghan M. Stuessy.

[174] For example, the authorization of certain energy or mining projects by BLM has raised concerns regarding the destruction or degradation of sacred sites. For recent examples, see Scott Sonner, "Nevada Tribe Says Coalitions, Not Lawsuits, Will Protect Sacred Sites as U.S. Advances Energy Agenda," APNews, December 24, 2023; Coral Davenport, "Biden Administration Bans Drilling Around Native American Cultural Site," *New York Times*, June 2, 2023.

[175] See Statement of Verlon M. Jose, Chairman, Tohono O'dham Nation, in U.S. Congress, House Committee on Natural Resources, Subcommittee on Oversight and Investigations, *Securing Our Border, Saving Our National Parks*, 118th Congress, 1st sess., October 18, 2023, p. 33 ("Most disturbing for us is the permanent damage that the border wall has inflicted on our sacred areas, culturally sensitive sites, and the negative impact on our religious rights and cultural practices. Construction of the wall destroyed human burial sites at Monument Hill and Oregon Pipe National Monument, a desecration that cannot be undone.").

[176] Martin Nie, "The Use of Co-Management and Protected Land-Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands," *Natural Resources Journal*, vol. 48, no. 3 (summer 2008), pp. 585-647. See also USDA, *Report to the Secretary* (2012), pp. Appendix D-8.

[177] See, for example, Ann M. Hooker, "American Indian Sacred Sites on Federal Public Lands: Resolving Conflicts between Religious Use and Multiple Use at El Malpais National Monument," *American Indian Law Review*, vol. 19, no. 1 (1994), pp. 133-158. For administrative considerations, also see USDA, *Report to the Secretary* (2012), p. 28: "From some employees, [FS] heard about the need for high-level support for land managers who might make a decision to protect and accommodate [American Indian and Alaska Native] use of sacred sites, but were concerned about repercussions from other local constituencies, Congress, or the Administration."

[178] USDA, *Report to the Secretary* (2012), pp. 9-10.

[179] 16 U.S.C. §1133(c).

engaged in hunting and gathering in designated wilderness).[180] In the case of Oak Flat, Congress required FS to transfer the land in question "not later than 60 days after" the publication of an environmental impact statement prepared pursuant to NEPA.[181]

Some have called for more expansive legislation to address sacred site protection and access.[182] For example, some stakeholders recommend amending existing procedural statutes, such as NHPA and NEPA, to provide additional protections for sacred sites.[183] Proponents contend that because such laws do not mandate agencies to avoid actions that could harm sacred sites, they are insufficient in protecting such resources.[184] Other scholars and stakeholders have advocated for amending AIRFA to give a specific cause of action for Indigenous groups attempting to protect sacred sites.[185] Congress has considered legislation that would establish certain protections for Indigenous sacred sites. For example, in the 117th Congress, the Tribal Cultural Protection Act (H.R. 8109 and S. 4423) would have established a Tribal Cultural Areas System made up of culturally significant sites on federal lands.[186] Other site-specific legislation to provide Indigenous sacred site access and protection has also been considered in past Congresses.[187] For example, the

[180] USDA, *Report to the Secretary* (2012), p. 22. See also Eric Freedman, "When Indigenous Rights and Wilderness Collide: Prosecution of Native Americans for Using Motors in Minnesota's Boundary Waters Canoe Wilderness Area," *American Indian Quarterly*, vol. 26, no. 3 (summer 2002), pp. 378-392.

[181] 16 U.S.C. §539p(c)(10).

[182] See, for example, statement of Suzan Shown Harjo, President, Morning Star Institute, in U.S. Congress, Senate Committee on Indian Affairs, *Native American Sacred Places*, 108th Cong., 1st sess., 2003, S. Hrg. 108-197 (Washington: GPO, 2003), pp. 8, 20, 54-55. See also Barclay and Steele, "Rethinking Protections for Indigenous Sacred Sites"; Skibine, "Towards a Balanced Approach"; Marincic, "National Historic Preservation Act"; Native American Rights Fund (NARF), "Sacred Places Protection," https://narf.org/cases/sacred-places/; U.S. Congress, House Committee on Natural Resources, Subcommittee on National Parks, Forests, and Public Lands, *Subcommittee Hearing: NPFPL Legislative Hearing*, 117th Cong., 2nd sess., September 14, 2022.

[183] For example, see Amanda M. Marincic, "The National Historic Preservation Act: An Inadequate Attempt to Protect the Cultural and Religious Sites of Native Nations," *Iowa Law Review*, vol. 103, no. 1 (2018), pp. 1777-1809 (hereinafter Marincic, "National Historic Preservation Act").

[184] For a discussion of NHPA perspectives, see CRS Report R45800, *The Federal Role in Historic Preservation: An Overview*, by Mark K. DeSantis. See also Debra Utacia Krol, "How Legal and Cultural Barriers Keep Indigenous People from Protecting Sacred Spaces off Tribal Land," *USA Today*, August 17, 2021; and Marincic, "National Historic Preservation Act". For a discussion of the judicial enforceability of tribal consultation, including NHPA consultation, see CRS Report R48093, *Federal-Tribal Consultation: Background and Issues for Congress*, coordinated by Mariel J. Murray.

[185] For example, see Skibine, "Towards a Balanced Approach." See also National Congress of American Indians (NCAI), "Resolution #ABQ-10-065, Calling for Legislation to Provide a Right of Action to Protect Native People's Sacred Places," November 2010, https://ncai.assetbank-server.com/assetbank-ncai/action/viewAsset?id=1255. Some scholars have discussed concerns that the First Amendment's Establishment Clause—which prohibits the government from making any law "respecting an establishment of religion"—may prevent lawmakers from passing legislation that provides "preferential treatment" for Indigenous people's exercise of religion. See also Winslow, "Sacred Standards"; Barclay and Steele, "Rethinking Protections for Indigenous Sacred Sites" ("Some government officials have refused to accommodate tribal members' access to sacred sites based on the argument that 'preferential treatment' of tribes risks violating the Establishment Clause's requirement of neutrality"). Recent Supreme Court Establishment Clause jurisprudence, however, has raised questions as to what standards the Court may apply in an Establishment Clause challenge. See Kennedy v. Bremerton School District, 597 U.S. 507, 510 (2022) ("the Establishment Clause must be interpreted by 'reference to historical practices and understandings'"). Thus, it is unclear how a court may review an Establishment Clause challenge to federal legislation designed to protect Indigenous peoples' religious exercise.

[186] For each congressionally designated Tribal cultural area, the Tribal Cultural Protection Act (H.R. 8109 and S. 4423) would have directed the Secretary of the Interior to prepare a comprehensive management plan and establish a tribal commission to provide recommendations to DOI. It also would have restricted activities such as new roads, mineral development, and grazing. As discussed above, some Indigenous peoples have asserted that some federal land designations, such as wilderness designations, are too restrictive and end up limiting tribal access to sacred sites.

[187] NCAI, "Resolution #ABQ-19-035, Supporting the Enactment of Federal Legislation to Permanently Protect the (continued...)

Katimiîn and Ameekyáaraam Sacred Lands Act (P.L. 117-353) addressed concerns about the ability of Karuk tribal citizens to conduct certain religious and cultural ceremonies by transferring 1,031 acres of FS lands located on the ancestral territory of the Karuk Tribe into trust, allowing for "traditional and customary uses for the benefit of the Karuk Tribe."[188] Similarly, Congress directed the Secretary of the Interior to provide access to certain portions of the El Malpais National Monument for "traditional cultural and religious purposes" while authorizing temporary closures to the general public "to protect the privacy of religious activities in such areas by Indian people."[189] In the 117th Congress, the proposed Grand Canyon Protection Act (S. 387) would have prevented mining within a part of the Grand Canyon that many local Tribes consider sacred. Congress also included provisions in the 2008 farm bill that permit the temporary closure of portions of national forests for tribal traditional cultural and religious purposes,[190] and the provision of trees, parts of trees, or forest products (free of charge) to Tribes for traditional and cultural purposes.[191]

Some Members of Congress and stakeholders have opposed new authorities to protect Indigenous sacred sites for various reasons. For example, some have questioned the need for new authorities, arguing that existing statutes already provide for the consideration of sacred site protection and access.[192] Others have posited that the current management and consultation requirements are appropriately flexible and provide preferable protections for sacred sites than what might be pursued through judicial or legislative approaches.[193] Some Members and stakeholders have cautioned that applying special designations to federal lands with Indigenous sacred sites could put sacred sites at risk, in that land use designations in sensitive areas may increase visitation and attention without additional funding needed for protection, such as enhanced law enforcement.[194] Other Members have objected to prioritizing the protection of sacred sites above other authorized

Badger-Two Medicine Area of Montana and Other Sacred Places Important to Tribal Nations," October 2019, https://ncai.assetbank-server.com/assetbank-ncai/action/viewAsset?id=253.

[188] P.L. 117-353, §2(f)(1). In report language for the House version of the bill, the House Natural Resources Committee stated (in H.Rept. 117-679):

> The lands ... are ceremonial areas and village sites located at the Karuk Tribe's "center of the world." These sites host the final series of the Tribes' annual Pik-ya-yish World Renewal ceremonies. Ameekyaaraam is located downriver from Katimiin and serves as the site of the Jump Dance and First Salmon ceremonies and the historical location of pre-contact intertribal fish harvesting. These sites remain essential to the Tribe's intergenerational cultural and environmental teachings ... The Tribe's access to these sacred sites is not always guaranteed. In recent years, tribal members have been interrupted by members of the public during private components of their ceremonies.

[189] P.L. 100-225, §507. The law specifies that "any such closure shall be made to affect the smallest practicable area for the minimum period necessary for such purposes."

[190] P.L. 110-234, §8104; codified at 25 U.S.C. §3054.

[191] Ibid., §8105; codified at 25 U.S.C. §3055.

[192] Statement of Rep. Fulcher, in U.S. Congress, House Committee on Natural Resources, Subcommittee on National Parks, Forests, and Public Lands, *Subcommittee Hearing: NPFPL Legislative Hearing*, 117th Cong., 2nd sess., September 14, 2022 (commenting that a bill on protecting sacred sites was "solutions in search of a problem"). See also House Committee on Natural Resources, "Hybrid Legislative Hearing on Three Bills," pp. 5-6, https://naturalresources.house.gov/uploadedfiles/09.14.22_npfpl_legislative_hearing.pdf.

[193] Yablon, "Property Rights and Sacred Sites," p. 1626.

[194] House Committee on Natural Resources, "Hybrid Legislative Hearing on Three Bills," pp. 7, https://naturalresources.house.gov/uploadedfiles/09.14.22_npfpl_legislative_hearing.pdf. See also Mark Eddington, "Utah Ranchers Hit Biden for Creating National Monument in Arizona," *The Salt Lake Tribune*, August 8, 2023: ("The notion that the national monument would protect indigenous people's culture and sacred sites a smokescreen because the government will lure thousands of people to the region through advertising, which will result in the land being desecrated with graffiti and human waste").

uses of federal lands, such as outdoor recreation, energy development, timber production, and grazing.[195] Further, some Members and some Indigenous groups have posited that prioritizing sacred site protection over other revenue-producing land uses could limit Indigenous economic opportunities.[196] Proponents of additional protections for Indigenous sacred sites also have acknowledged potential difficulties with establishing new federal land designations for Indigenous sacred sites due, in part, to concerns around potential confidentiality issues, agency and tribal capacity limitations, and the ability to define and limit what constitutes a sacred site.[197]

Energy and Mineral Development and Indigenous Sacred Sites

Over the years, large-scale, complex energy and mineral development projects located on or near Indigenous sacred sites have been of particular interest to Congress and other stakeholders. Because such projects often require various authorizations, cross multiple jurisdictions, and include both federal and nonfederal entities, the consideration or mitigation of potential impacts to Indigenous sacred sites can be potentially challenging. To address some of these challenges, Congress and other stakeholders have considered a variety of approaches and legislative proposals.

In some instances, agencies and developers have encouraged the utilization of voluntary agreements with Tribes, outside of their formal obligations under NEPA, NHPA, or other relevant statutes. These agreements—sometimes referred to as community benefit agreements (CBAs) or cultural resource stipulations (CRSs)—can address a variety of socioeconomic, environmental, and cultural concerns of Tribes regarding a particular project. For example, Lithium Americas, which is developing a mine near the Fort McDermitt Indian Reservation, signed a CBA with the Fort McDermitt Paiute and Shoshone Tribes, whereby the company hired tribal citizens as cultural monitors to help complete cultural assessments necessary for NEPA compliance. In Montana, Cloud Peak Energy Inc. provided personnel and funding to support the Crow Tribe's tribal historic preservation officer in surveying a potential coal project area on the Tribe's reservation, including inventorying cultural resources. After the review, the company and the Crow Tribe formalized CRSs where they agreed that mineral development would not occur in and around a sacred site and that the surrounding areas and artifacts would be subject to a cultural resource management plan.

Members and stakeholders also have considered legislative approaches that would employ different mechanisms to protect Indigenous sacred sites in the energy and mineral development context. For example, some stakeholders have recommended legislation to codify such incentives to encourage developers to obtain tribal consent or support through CBAs or CRSs before undertaking energy development or mining projects that may impact Indigenous sacred sites. In other instances, Members of Congress and stakeholders have called for amending the 1872 Mining Law to allow for more social and environmental safeguards in authorizing hardrock mining projects. At the same time, some—including some Indigenous groups—have opposed additional federal requirements for,

[195] Statements of Representatives Fulcher, Obernolte, and Herrell), in U.S. Congress, House Committee on Natural Resources, Subcommittee on National Parks, Forests, and Public Lands, *Subcommittee Hearing: NPFPL Legislative Hearing*, 117th Cong., 2nd sess., September 14, 2022. See also House Committee on Natural Resources, "Hybrid Legislative Hearing on Three Bills," p. 1, https://naturalresources.house.gov/uploadedfiles/09.14.22_npfpl_legislative_hearing.pdf. In response to legislation introduced in the 117th Congress that would have implemented certain protections for sacred sites on federal lands, some Members noted that such a policy would contradict "the multiple use mandate of many federal land management agencies who are charged with balancing various uses such as conservation, outdoor recreation, responsible energy development, timber production, and grazing."

[196] Statement of Rep. Fulcher, in U.S. Congress, House Committee on Natural Resources, Subcommittee on National Parks, Forests, and Public Lands, *Subcommittee Hearing: NPFPL Legislative Hearing*, 117th Cong., 2nd sess., September 14, 2022. See also debates around energy development in the Alaska National Wildlife Refuge (ANWR). Historically, Alaska Natives have been divided on the question of energy development in ANWR, a region of significant spiritual significance to certain Indigenous groups. Generally, the Alaska Natives along the North Slope (Iñupiat) have supported ANWR energy development, whereas the Alaska Natives of interior Alaska (Gwich'in) have opposed it, although neither group is unanimous. For historical background on the Iñupiat peoples, see the North Slope Bureau, "Inuit Cultural Orientation," https://www.north-slope.org/wp-content/uploads/2022/02/Inuit_Cultural_Orientationpg.pdf. For historical background on the Gwich'in, see Gwich'in Tribal Council, "Gwich'in History," https://www.gwichintribal.ca/history.html.

[197] For example, see Barclay and Steele, "Rethinking Protections for Indigenous Sacred Sites"; Skibine, "Towards a Balanced Approach."

or limits on, energy and mineral development in and around Indigenous sacred sites, noting that many Indigenous groups rely on such projects for economic growth.

Sources: Maxine Joselow, "On Stolen Land: Tribes Fight Clean-Energy Projects Backed by Biden," *Washington Post*, March 4, 2024; B. 'Toastie' Oaster, "In Green Energy Boom, One Federal Agency Made the Yakama Nation an Offer They Had to Refuse," *High Country News*, June 24, 2024; Susan Montoya Bryan, "Judge Dismisses Native American Challenge to $10B SunZia Energy Transmission Project in Arizona," *APNews*, June 6, 2024; Todd A. Myers and Solène Crawley, "Strategies to Reduce Legal and Political Risk," *Mining Magazine*, April 9, 2024, https://www.miningmagazine.com/community/news-analysis/4195172/strategies-reduce-legal-political-risk; Lithium Americas, "Indigenous and Community Engagement," https://lithiumamericas.com/esg-s/social/default.aspx; CRS In Focus IF12650, *Offshore Wind: The Bureau of Ocean Energy Management's Engagement with Federally Recognized Tribes*, by Mariel J. Murray, Laura B. Comay, and Anthony R. Marshak; Interagency Working Group on Mining Laws, Regulations, and Permitting, *Recommendations to Improve Mining on Public Lands*, September 2023, p. 102, https://www.doi.gov/sites/doi.gov/files/mriwg-report-final-508.pdf. See also Statement of the Honorable Melvin J. Baker, Chairman, Southern Ute Indian Tribal Council, in U.S. Congress, House Committee on Natural Resources, Subcommittee on Indian and Insular Affairs, *Tribal Autonomy and Energy Development: Implementation of the Indian Tribal Energy Development and Self-Determination Act*, 118th Congress, 1st sess., September 28, 2023, p. 2.

Agency and Tribal Capacity[198]

Stakeholders have raised concerns about agency and tribal capacity to address sacred site protection and access. Issues include staffing needs for federal agencies—as well as Tribes, NHOs, and Alaska Native groups—to adequately engage in Section 106 and NEPA consultations, budgetary limitations, and institutional training around sacred site management and protection. On the agency side, federal agencies have reported that staff engaging with Indigenous entities as part of government-to-government consultation often have limited understanding of the legal obligation agencies have to Indigenous groups.[199] For instance, staff may be undertaking such activities as a collateral duty (meaning the employees have other primary job assignments that may not include tribal consultation). Some Tribes have recommended requirements that federal employees and contractors receive mandatory training on tribal relations and the importance of sacred sites.[200] In particular, some Tribes have requested that training focus on how to handle sensitive Indigenous knowledge and cultural information.[201]

Similarly, some stakeholders have expressed a need for technical assistance, funding, and support for Indigenous peoples, as well as compensation for Indigenous expertise.[202] Indigenous groups and other stakeholders often have noted that funding and capacity constraints limit Tribes, NHOs, Alaska Natives groups, and others' ability to effectively engage in the Section 106 and NEPA consultation processes.[203] Some federal agency staff have cited limitations in prioritizing

[198] For additional discussions regarding agency and tribal capacity, see CRS Report R45800, *The Federal Role in Historic Preservation: An Overview*, by Mark K. DeSantis; and CRS Report R48093, *Federal-Tribal Consultation: Background and Issues for Congress*, coordinated by Mariel J. Murray.

[199] USDA, *Report to the Secretary* (2012), p. Appendix J-14.

[200] White House Council on Native American Affairs, Best Practices Guide, p. 35.

[201] Ibid.

[202] Ibid. p. 34.

[203] For example, see DOI, Department of Justice, and Department of the Army, "Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions," January 2017, p. 50, https://www.achp.gov/digital-library-section-106-landing/improving-tribal-consultation-and-tribal-involvement-federal; U.S. Government Accountability Office (GAO), *Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects*, GAO-19-22, March 2019, p. 24, https://www.gao.gov/products/gao-19-22; Letter from Fawn Sharp, President, NCAI, to Shalanda Young, President, OMB, April 9, 2021, p. 5. Available to congressional clients from the authors on request.

available agency funding for these purposes as a barrier to providing such compensation and assistance.[204]

Native Hawaiians may face particular capacity challenges in protecting sacred sites for several reasons. Native Hawaiians are not federally recognized, which means they do not have THPOs or access to certain federal funding opportunities available to federally recognized Tribes. In addition, Native Hawaiians are highly diverse: there are over 100 NHOs that may participate in NHPA Section 106 review and other federal processes.[205] Coordinating federal consultation with NHOs may be complex because NHOs may attach religious and cultural significance to a historic property on ancestral lands on different islands from those on which the NHO currently operates or resides.[206] In addition, unlike many federally recognized Tribes, NHOs typically do not employ full-time staff, making it challenging for representatives to regularly participate in consultation meetings.[207] Recognizing these issues, ACHP noted that federal agencies "should reasonably expect to pay for work carried out" by NHOs as part of the Section 106 process.[208]

Unique capacity and resource challenges also may arise with regard to Indigenous sacred site considerations in Alaska. There are more than 220 federally recognized Tribes in Alaska, resulting in a diverse cultural landscape with differences in dialect, cultural activities, and traditional ways of life.[209] In addition, Alaska's large size can complicate coordination and participation in federal consultation efforts, exacerbating capacity issues facing Alaska Tribes and agencies operating within the state. Federal agencies are also generally required to coordinate and consult with Alaska Native Villages and Village and Regional Corporations, in addition to relevant Tribes in the state. The Alaska Native Claims Settlement Act (ANCSA; 43 U.S.C. §§1601 et seq.) divided the state of Alaska into 12 geographic regions and authorized the creation of Village and Regional Alaska Native Corporations (ANCs), which are for-profit corporations that may own and manage resources for the benefit of their Alaska Native shareholders.[210] ANCs sometimes have focused on protecting sacred and historical sites and artifacts through the NHPA Section 106 process. For example, one ANC helps protect more than 80 sacred historical sites located throughout the region on behalf of Tribes that are the traditional owners of the sites, which include historical burial grounds, forts, petroglyphs, and villages.[211]

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[204] ACHP, "ACHP's Policy Statement on Indigenous Knowledge and Historic Preservation: Summary of Comments and Coordination," March 2024, https://www.achp.gov/sites/default/files/2024-03/SummaryofComments25March2024_0.pdf.

[205] DOI, "NHOL Complete List," September 27, 2023, https://www.doi.gov/media/document/nhol-complete-list-pdf.

[206] ACHP, "Consultation with Native Hawaiian Organizations In the Section 106 Process: A Handbook," p. 7, January 2020, https://www.achp.gov/sites/default/files/guidance/2020-01/ConsultationwithNHOshandbookupdate29Jan2020final.pdf. For example, Mauna Kea, on the island of Hawaii, is widely regarded as a place of religious and cultural significance to many individual Native Hawaiians and NHOs throughout the state of Hawaii.

[207] Ibid., p. 21.

[208] Ibid., p. 9. The ACHP has also issued guidance to agencies for when payment may be appropriate to entities other than NHOs. For example, if a federal agency requests that a THPO carry out activities that are the federal agency's responsibility under the NHPA, ACHP guidance indicates that the THPO "can and should be reimbursed for doing so," as the THPO is fulfilling the role of a cultural consultant or contractor. See ACHP, "Guidance on Assistance to Consulting Parties in the Section 106 Review Process," November 28, 2018.

[209] ANCSA Regional Association, "Overview of Entities Operating in the Twelve Regions," https://ancsaregional.com/overview-of-entities/. See also DOI, BIA, "Alaska Region," https://www.bia.gov/regionaloffice/alaska-region.

[210] Village corporations may be for-profit businesses or, unlike regional corporations, nonprofit businesses, organized under laws of the State of Alaska (43 U.S.C. §1607).

[211] GAO, *Regional Alaska Native Corporations: Status 40 Years after Establishment, and Future Considerations*, GAO-13-121, December 6, 2012, p. 46, https://www.gao.gov/assets/gao-13-121.pdf.

To address these capacity issues, Congress has, at times, provided funding to agencies to help Tribes and other Indigenous entities participate in consultations about federal actions that could impact tribal resources, including sacred sites. For example, Congress typically appropriates annual funding to NPS for THPOs to help pay expenses relating to federal-tribal consultation on projects on or affecting tribal lands and resources.[212] However, Tribes have largely viewed the appropriations as insufficient, in part, because annual funding has not kept up with the increase in the number of approved THPOs. For example, in 1996, 12 Tribes were approved by the Secretary of the Interior and NPS to assume the responsibilities of a THPO on tribal lands, compared with over 200 in 2022.[213]

Some laws promote economic development based on, and in support of, Indigenous cultural heritage. For example, the Native American Tourism and Improving Visitor Experience Act (NATIVE Act; 25 U.S.C. §§4351 et seq.) directed federal agencies to provide grants, loans, and technical assistance to Tribes, ANCs, tribal organizations, and NHOs to (1) spur important infrastructure development, (2) increase tourism capacity, and (3) elevate living standards in Native American communities. The NATIVE Act may build financial and technical capacity for Indigenous communities interested in sharing their cultural heritage, including information about their sacred sites. For example, FS has used NATIVE Act funding to support projects promoting the preservation of sacred sites.[214] In 2021, FS signed a five-year agreement with the United Keetoowah Band of Cherokee (UKB) enabling the UKB to plan and organize a tour of important cultural and sacred sites on National Forest lands in Tennessee and North Carolina.[215]

Some stakeholders also have called for federal assistance to promote tribal capacity to directly manage sacred sites through acquisition of culturally significant lands. For example, some groups have advocated for legislation to allow Tribes direct access to funding awarded through the Land and Water Conservation Fund (LWCF).[216] LWCF funding can be used to support federal land acquisition, outdoor recreation grants to states, and other programs.[217] However, Tribes must partner with, or apply through, states to receive such funding.[218] The Biden Administration requested additional funding in FY2024 and FY2025 for the creation of a new program that would primarily provide funding to Tribes to acquire lands or easements "for the purposes of protecting and conserving natural resource areas that may also be of cultural importance" or have

[212] For more information on THPOs, see footnote 70.

[213] See, for example, Statement of Valerie J. Grussing, PhD, Executive Director, the National Association of Tribal Historic Preservation Officers, in U.S. Congress, House Committee on Appropriations, Subcommittee on Interior, Environment, and Related Agencies, *PART 7 Testimony of Interested Individuals and Organizations*, 116th Cong., 2nd sess., February 6, 2020 (Washington: GPO, 2021). See also NPS, "Tribal Historic Preservation Office [THPO] Grants," https://www.nps.gov/subjects/historicpreservationfund/thpo-grants.htm.

[214] DOI and USDA, *Native American Tourism and& Improving Visitor Experience (NATIVE) Act: Report to the Senate Committee on Indian Affairs and the Committee on Natural Resources of the House of Representatives FY2020 – FY2022*, pp. 24-25, at https://www.bia.gov/sites/default/files/dup/inline-files/native_act_report_fy22_final.pdf (hereinafter "NATIVE Act Report"). FS received $1.00 million in FY2021 and $1.01 million in FY2022 to implement the NATIVE Act. See also American Indian Alaska Native Tourism Association, "The U.S. Forest Service and AIANTA Select Recipients for FY 23 NATIVE Act Grants," January 31, 2024, https://www.aianta.org/the-u-s-forest-service-and-aianta-select-recipients-for-fy-23-native-act-grants/.

[215] NATIVE Act Report, p. 24.

[216] See Michael C. Spears et al., "Tribal Access to the Land and Water Conservation Fund," p. vii, September 2023, https://www.wilderness.org/news/reports/report-tribes-lack-access-land-and-water-conservation-fund (hereinafter Spears et al., "Tribal Access to the Land and Water Conservation Fund").

[217] See generally CRS In Focus IF12256, *Land and Water Conservation Fund (LWCF): Frequently Asked Questions*, by Carol Hardy Vincent; and CRS Report RL33531, *Land and Water Conservation Fund: Overview, Funding History, and Issues*, by Carol Hardy Vincent.

[218] 54 U.S.C. §200305. See also Spears et al. "Tribal Access to the Land and Water Conservation Fund."

recreational benefits.[219] The FY2024 budget justification requested $12 million in discretionary unobligated LWCF funds, whereas the FY2025 budget justification requested $8 million for such purposes. Thus far, Congress has declined to act on these requests. Legislation was introduced in the 118th Congress that would have added "Indian Tribe, urban Indian organization, or Alaska Native or Native Hawaiian community or organization" as eligible entities to apply for and directly receive funding from certain discretionary LWCF grant programs; however, Congress took no additional action.[220] Land acquisition funding provided through programs such as the LWCF may be unappealing to some Indigenous groups looking to protect culturally significant places or sacred sites. In general, lands developed or acquired with LWCF grants must be open for public access and use—a requirement that may be at odds with the reclamation or preservation of a sacred or ceremonial site.

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[219] See BIA, *Budget Justifications and Performance Information Fiscal Year FY2024, Bureau of Indian Affairs*, p. IA-ES-6; and BIA, *Budget Justifications and Performance Information Fiscal Year FY2025, Bureau of Indian Affairs*, p. IA-ES-7.

[220] S. 448, Outdoors for All Act (118th Congress).