

SACRED SITES MOU TRAINING SUB-GROUP OF THE MOU CORE WORKING GROUP

Draft Outline For Training on Sacred Sites for Federal Employees

Four (4) working groups of volunteer subject matter experts from across Indian Country, Academia, Non-Governmental Organizations, and the Federal Government worked independently on specific modules that will be incorporated into a single training for Federal Employees. Each Subject Matter Expert has been instrumental in working within their group to create outlines for their modules

This document contains the DRAFT outlines of each module and associated comments.

EVERYTHING IN THIS DOCUMENT IS A DRAFT

GROUP #1

*****NOTE. The entire training should be understandable to an average high school student.**

1. What is a Sacred Site (*****NOTE. We will be working to refrain from any metaphysical discussions in this section**)
 - a. Legal Definitions
 - b. Various Tribal definitions
 - c. Confusions in terminology (sacred site, place, landscape, etc)
 - d. Very general—why Important?

DRAFT

Group
1

Subject Matter Experts Working Groups
“What is a Sacred Site (Place/Landscape)”
Presentation Outline
April 14, 2015

1. Clarification of Terminology & General Importance

- a. Defining a “Sacred Site”: The concept of a sacred “site” may be problematic as the term “site” may imply physical evidence of use that may or may not be present
- b. Sacredness is based on emic/native concepts and as such, these locations/resources may be less obvious to, or discoverable by, traditional archaeological or historic techniques – must rely on tribal/native beliefs and knowledge.
- c. Use of the term “sacred place” would be preferable as it does not exclude archaeological or historic “sites”. This term would also be inclusive of those locations where no physical evidence of their importance is obvious.
- d. Some examples of a “sacred place” include: mountains/mountain ranges, rivers, springs, rocks, petroglyphs, pictographs, burial sites, and ceremonial sites used for ceremonial purposes included religious acts, collection of plant or wild life, and other items specific to that area.
- e. A sacred place may be, but is not only, an area that ceremony is required when entering it and leaving it.
 - i. Native religious practitioners rely on naturally grown/occurring substances for religious and ceremonial acts—certain wildlife, plants, and minerals may be worn, carried, or present during these acts, and these items may be found in areas identified as a sacred place.
- f. Sacred places can also include “viewsheds”—or areas that require an unobstructed view of a particular area or event. Example: area with a viewshed of a naturally occurring event such as a sunrise or sunset, or astrological viewings/events.
- g. Sacred places may also correlate with areas of tectonic activity—places can be alive and dynamic, not static, and they can actively come into existence through naturally occurring phenomenon.
- h. Due to assimilationist policies, some knowledge of sacred places has been lost due over time. But through archival research and oral histories some sacred places and ceremonial practices are coming back into existence by tribes.
- i. Sacred places can also hold religious and ceremonial significance to multiple tribes in a region.
- j. Because such locations are sacrosanct, utmost care must be taken in the identification and description of these locations – they cannot be described in the same detail or with the same openness that we expect of other types of “significant sites.”
- k. Important to remember that every tribe may have its own set of rules or protocols for the disclosure of information about locations, meanings, and histories of sacred places.
- l. A best practice for the protection of sacred places: there are many sacred places that will only be disclosed through the process of ongoing and meaningful consultation.

Comment [PS1]: Having just finished reviewing Secretary Washburn’s letter of May 8, 2015 “Policy statement on Confidentiality of Indian Sacred Sites”, I would suggest that we use the term “Sacred Landscape” for consistency’s sake.

Comment [PS2]:

Comment [RG3]: Use “site, place, landscape” and explain why all three terms is more appropriate (maybe combine points a, c and d, and have point b be the opening comment to set the stage about the concept of sacredness

Comment [RG4]: If “place” will be used throughout, provide a brief note early on that this is replacing “site, place, landscape”; and we need to think about consistency throughout the training (all modules) beyond this section. Language is a key issue, and the appropriation of inaccurate (or inappropriate terms), so this should be addressed, and early on in the first or second module!

Here are some topics to consider when ongoing or meaningful consultation comes up, these are pieces of the definition of a sacred place that can only be attained through on-going and meaningful consultation:

- i. Many tribes have very strict rules or protocols that dictate when and where, or with whom a sacred place may be discussed with.
- ii. Many tribes cannot discuss a sacred place during certain times of the year, an example is a place that is used in the fall for ceremonies that cannot be discussed in any way, during the spring.
- iii. There can be more than one tribe that has a sacred place on a piece of land. An example is Oneida of Wisconsin; they live on lands that are held in trust for them in and around Green Bay, Wisconsin. There are Ho-Chunk people buried on that reservation and when issues come up around those burials, Oneida calls Ho-Chunk to come take care of them (I am disclosing this with the permission of Ho-Chunk whose burials are being referenced). The same could happen for sacred places and many Native people consider burials and burial areas to be a sacred place.
- iv. Many tribes have specific people who are allowed to interpret what a sacred place is and only these individuals are allowed to speak on behalf of the place. It is a best practice to ask a tribe to recommend an individual they would like you to consult with (this applies to many but not all tribes).

2. Legal Definitions

- a. The Interagency MOU Group should look at recommendations provided by the 1979 "American Indian Religious Freedom Act Report, P.L. 95-341: Federal Agencies Task Force".
- b. This report lists a number of statutory authorities for Administrative action related to land use planning that be utilized or updated to reflect the protection of sacred places in protecting and preserving traditional areas.
- c. Recommendations for each federal agency to revise existing regulations, policies, and practices to provide for separate consideration of any Native religious concerns prior to making any decision regarding use of federal lands and resources.
- d. Also point to examples used in the National Historic Preservation Act:
 - i. Section 106 of NHPA requires that there be identification of historic properties; an assessment of adverse effects; an effort to resolve the adverse effects; coordination with the National Environmental Policy Act; review of Section 106 compliance; as well as creation of standards for review and documentation; and providing for emergency situations and post-review discoveries

Comment [RB5]: The recommendations made in this section are good and could be helpful to the MOU working group, but may not fit easily in to the training module. Federal employees will need to follow the definitions provided in EO and statutes. Consider a discussion of the definitions provided in the EO and NHPA, NEPA, ARPA, etc. Perhaps this discussion could be tied into the larger regulatory/statutory discussion covered in Module 2 (Sacred Sites and Indian Law 101).

Comment [E6]: When I think of legal definitions for this entire presentation I think of Legal Definitions being used more as examples to show ambiguities in terminology. I.E. legal definition of Sacred Site under LAW X = _____. That definition is different than LAW Y which = _____. And both laws are in opposition to traditional definitions or philosophies because _____

- ii. Special attention should be paid to the proper consultation and identification of historic properties under 36 CFR 800
 - iii. Meaningful government-to-government consultation only occurs if the Section 106 process has been completed with a Tribal Historic Preservation Officer(s) for the affected tribe(s)
- e. Review how other Administrative actions could be improved for agency implementation (e.g. Executive Order 13007)
- f. Recommendations for Congress should include how legal instruments such as the American Indian Religious Freedom Act, the Religious Freedom Restoration Act, the National Historic Preservation Act, and the National Environmental Policy Act could be improved to provide increased legal redress for tribes.
 - i. Example: In recent years Courts have ruled that the Religious Freedom Restoration Act does not protect Native American religious interests at the San Francisco Peaks or Snoqualmie Falls. How can this law be improved by Congress to protect Native religious and ceremonial practices and sacred places?
- g. Reinforcement of the importance of meaningful consultation with tribes and the appropriate tribes/tribal leaders/tribal historic preservation officers/religious practitioners—these individuals should be recognized prior to the initialization of formal consultation.

Comment [E7]: This training is going to serve as a guide/handbook for people in the field—people of varying levels of education and intellect. I feel this section is far more specific to simply explain WHAT a sacred site, place and landscape is.....Any "recommendations" you have I would suggest we complete to provide to the "Moving Forward" group. I think this section more of a place for explanation of the subject matter.....rather than diving into it

SAME Outline DIFFERENT Set OF Comments

Group 1

DIFFERENT

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Presentation Outline
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- c. Use of the term "sacred place" would be preferable as it does not exclude archaeological or historic "sites". This term would also be inclusive of those locations where no physical evidence of their importance is obvious.
- d. Some examples of a "sacred place" include: mountains/mountain ranges, rivers, springs, rocks, petroglyphs, pictographs, burial sites, and ceremonial sites used for ceremonial purposes included religious acts, collection of plant or wild life, and other items specific to that area.
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- k. Important to remember that every tribe may have its own set of rules or protocols for the disclosure of information about locations, meanings, and histories of sacred places.
- l. A best practice for the protection of sacred places: there are many sacred places that will only be disclosed through the process of ongoing and meaningful consultation.

Comment [O1]: Mark Calamia: Such tribal/native beliefs may be best elicited through ethnographic and/or ethnohistoric documentation

Comment [RG2]: Use "site, place, landscape" and explain why all three terms is more appropriate (maybe combine points a, c and d, and have point b be the opening comment to set the stage about the concept of sacredness

Comment [MAC3]: Mark Calamia: It would be helpful to include comments under this item about the importance of "place names" for specific areas and places. I would recommend using some of the material from Keith Basso's wonderful book "Wisdom Sits in Places: Landscape and Language Among the Western Apache" (1996).

Comment [RG4]: If "place" will be used throughout, provide a brief note early on that this is replacing "site, place, landscape"; and we need to think about consistency throughout the training (all modules) beyond this section. Language is a key issue, and the appropriation of inaccurate (or inappropriate terms), so this should be addressed, and early on in the first or second module!

Comment [O5]: Mark Calamia: I agree with Rae that "place" would probably be a more accurate term and if used, then some introductory material discussing the importance of "place" as more than just "site", "landscape", would be appropriate. In the Cultural Resources Management world, the term "site" has been and is associated with "archaeological sites", yet we know they are far more encompassing from the American Indian perspective—having both tangible and intangible values associated with them.

Comment [MAC5]: Mark Calamia: Particular area views or viewsheds also may be integral to a traditional group's identity as expressed through ceremony and ritual.

Comment [MAC7]: Mark Calamia: I would also add "ethnographic and ethnohistoric documentation" to this list.

Comment [MAC8]: Mark Calamia: I would add "...significance to multiple tribes in a region and/or the North American continent." Consider Pipestone National Monument, for example.

Comment [MAC9]: Mark Calamia: I would add here the concept of "power" which is associated with many such places/sites and that in addition to being sacrosanct, tribes are often concerned that inappropriate people could access the power of a particular place/site, which could then endanger them or the owners of such power.

Comment [MAC10]: Mark Calamia: It is usually a best practice, if possible, to engage traditional spiritual practitioners and/or elders in such consultation and not just expect that the tribal council/treaty council members know the historical & spiritual importance of such sites/places.

Here are some topics to consider when ongoing or meaningful consultation comes up, these are pieces of the definition of a sacred place that can only be attained through on-going and meaningful consultation:

- i. Many tribes have very strict rules or protocols that dictate when and where, or with whom a sacred place may be discussed with.
- ii. Many tribes cannot discuss a sacred place during certain times of the year, an example is a place that is used in the fall for ceremonies that cannot be discussed in any way, during the spring.
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- iv. Many tribes have specific people who are allowed to interpret what a sacred place is and only these individuals are allowed to speak on behalf of the place. It is a best practice to ask a tribe to recommend an individual they would like you to consult with (this applies to many but not all tribes).

Comment [MAC11]: Mark Calamia: This may also apply to whether a certain narrative of traditional knowledge associated with a particular sacred site/place is conveyed during the daylight or night time.

Comment [MAC12]: Mark Calamia: Recommendations should be elicited from individuals that have traditional knowledge for the specific place/site in question. I would suggest more than one traditional practitioner should be consulted, because they will often confer with other traditional practitioners who know about the protocols and stories associated with a site/place.

2. Legal Definitions

- a. The Interagency MOU Group should look at recommendations provided by the 1979 "American Indian Religious Freedom Act Report, P.L. 95-341: Federal Agencies Task Force".
- b. This report lists a number of statutory authorities for Administrative action related to land use planning that be utilized or updated to reflect the protection of sacred places in protecting and preserving traditional areas.
- c. Recommendations for each federal agency to revise existing regulations, policies, and practices to provide for separate consideration of any Native religious concerns prior to making any decision regarding use of federal lands and resources.
- d. Also point to examples used in the National Historic Preservation Act:
 - i. Section 106 of NHPA requires that there be identification of historic properties; an assessment of adverse effects; an effort to resolve the adverse effects; coordination with the National Environmental Policy Act; review of Section 106 compliance; as well as creation of standards for review and documentation; and providing for emergency situations and post-review discoveries

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Comment [E14]: When I think of legal definitions for this entire presentation I think of Legal Definitions being used more as examples to show ambiguities in terminology. I.E. legal definition of Sacred Site under LAW X = _____. That definition is different than LAW Y which = _____. And both laws are in opposition to traditional definitions or philosophies because _____

Comment [MAC15]: Mark Calamia: Note that in our MOU Policy SME Working Group, a legal review of pertinent laws, regs, E.O.s, etc. was performed, and determined limitations in the use of Sec. 106 NHPA and associated CFR 800s in protecting sacred sites on federal and Indian Trust lands.

- ii. Special attention should be paid to the proper consultation and identification of historic properties under 36 CFR 800
- iii. Meaningful government-to-government consultation only occurs if the Section 106 process has been completed with a Tribal Historic Preservation Officer(s) for the affected tribe(s)
- e. Review how other Administrative actions could be improved for agency implementation (e.g. Executive Order 13007)
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- g. Reinforcement of the importance of meaningful consultation with tribes and the appropriate tribes/tribal leaders/tribal historic preservation officers/religious practitioners—these individuals should be recognized prior to the initialization of formal consultation.

Comment [MAC16]: Mark Calamia: In light of the lack of current federal legislation for protecting sacred sites and access to sacred sites, the importance of reviewing and improving "other Administrative actions" becomes critical under E.O. 13007. For consistency between both agencies and departments it seems appropriate to strive for consistency/standardization. However, this may not be altogether possible given the different missions of the departments and associated agencies.

Comment [MAC17]: Mark Calamia: Recommendations could be made to find interpretive language regarding the Religious Freedom Restoration Act that shows that the "establishment clause" of the U.S. Constitution is not violated in exercising the Act.

Comment [MAC18]: Mark Calamia: Further recommendations could be made develop new interpretive language that shows how American Indians, as dependent sovereign nations co-existing through a fiduciary (trust) responsibility of the federal government, cannot have the state "substantially burden them from exercising their religion" unless it is further "a compelling government interest" and acting in the least restrictive way possible. The key question here is what constitutes "a compelling government interest." The Snowbowl Case in AZ shows that that American Indian plaintiffs' arguments, for the time being, were not viable under this Act, according to the 9th Circuit Ct. of Appeals that reversed itself and the U.S. Supreme Court that chose not to consider the case. Perhaps this important case should be summarized in the training or the Sacred Sites and Indian 101 section.

Comment [E19]: This training is going to serve as a guide/handbook for people in the field—people of varying levels of education and intellect. I feel this section is far more specific to simply explain WHAT a sacred site, place and landscape is.....Any "recommendations" you have I would suggest we compile to provide to the "Moving Forward" group. I think this section more of a place for explanation of the subject matter.....rather than diving into it

GROUP #2

2. Sacred Sites & Indian Law 101 (*****NOTE. This section needs to clearly describe legal concepts to ensure they will be understood by NON-lawyers**)
 - a. Trust Responsibility and Canons of Construction
 - b. Statutory and regulatory obligations
 - i. Clear, precise, to point
 - ii. Black letter law from cases as to what courts have determined if any ambiguity
 - iii. Applicable Executive Orders
 - c. Consultation Triggers

INDIAN LAW 101 & SACRED SITES

- ▣ There is a unique historical and political relationship between the Federal government and American Indians
- ▣ Understanding this relationship is critical to understanding federal policies
- ▣ **Basic Concepts-Cornerstones**
 - Government-to-Government relationship is based upon Tribal Sovereignty
 - Consultation*
 - Trust responsibility
- ▣ **Cornerstones-Sovereignty**
 - Tribes always had the power inherent in sovereign nations
 - The Constitution gave Congress plenary power
- ▣ **Cornerstones-Government-to-Government**
 - Unique relationship has historical continuity
 - Affirmed by current laws and policies
- ▣ **Cornerstones-Consultation**
 - Implicit & explicit in laws, executive orders, regulations, policies and instructions
- ▣ **Cornerstones-Trust Responsibility**
 - Trade and Intercourse Act of 1790 (no conveyance of an interest in Indian land without the approval of the United States)
 - The Marshall Trilogy-Supreme Court, Chief Justice John Marshall
 - 1823 Johnson v. McIntosh
 - 1831 Cherokee Nation v. Georgia-Sovereign governments with inherent powers over their members and territory
 - 1832 Worcester v. Georgia
- ▣ **Basic Concepts-Trust Responsibility**
 - Origins (Marshall Trilogy)

- ***Johnson v. McIntosh (1823)***
- transfer of land from Indian tribe to private individual invalid unless approved by United States
- ***Cherokee Nation v. Georgia (1831)***
- neither states nor foreign nations
- “domestic dependent nations”
- “in a state of pupilage”
- stand as a “ward to his guardian”
- ***Worcester v. Georgia (1832)***
- Tribes separate & distinct political communities
- Tribes sovereign over lands retained
- ***Seminole Nation v. United States (1942)***
- “Moral obligations of the highest responsibility and trust”
- Conduct “judged by the most exacting fiduciary standards”
-

□ **Basic Concepts-Major Themes of Federal Indian Law**

□ Trust responsibility

- The federal government owes a fiduciary duty to Tribal Nations and individual Indians.
- This duty is like that of a trustee to a beneficiary.
- Applies to money, land, and other resources and rights held in trust.
- Duties are found in statutes and regulations (can be interpreted using general law of trusts).
- When faced with two reasonable choices, choose the alternative that is in the best interest of the Indian tribe or individual indian

□ **Basic Concepts-Major Themes of Federal Indian Law**

□ Congressional plenary power

(Information summarized from the Final Report to the Secretary of Ag.-Indian Sacred Sites- August 2012)

Synthesis of the Legal Landscape-Overview

-Federal Land Management Agency operational laws, regulations, policies and procedures influence an agency's discretion to protect & accommodate AI use of sacred sites on Federal lands

-FLMA decisions are often considered damaging & sacrilegious and have been viewed by courts as not violating AI constitutional, statutory or other rights (i.e., not judicially enforceable individual rights) and therefore, do not impose a substantial burden on the Tribes' free exercise of religion

-Realization of limits of protection for sacred sites

Government's Trust Responsibility to Tribes-requires a fiduciary relationship towards all FRTs

-Support for the 5 government trust responsibilities to tribes (5 Principles)

1st Amendment of the Constitution (recognition)-Establishment Clause & Free Exercise Clause

-Generally prohibits Government from special treatment, direct benefit or exemption

-Neutrality is pursued toward religion

-May accommodate practices w/o violating Establishment Clause—discretion is necessary

-Lemon Test (3 actions)—note: Access Fund Decision (Climbers and Cave Rock)

-Responsible official has discretion when weighing alternatives—(bounded by Free Exercise and Establishment Clause tests)

Statutes supporting Sacred Site Protection (designed to protect Tribes' cultural, religious uses & values)

American Indian Religious Freedom Act (AIRFA, 1978)

- ▣ Protect right to exercise traditional religions
- ▣ Act creates no veto power, new substantive rights, nor enforceable procedural duties
- ▣ Duty to:

- Consult with traditional religious leaders
- Consider American Indian religious values

Lyng case (485 US 455 (1988)) reduced import (i.e., bring into consequence) of the Act

Archaeological Resources Protection Act (ARPA, 1979)

- ☐ Purpose: Protect resources
- ☐ Trigger:
 - Excavation, removal, damage of “archeological resource”
 - Material remains of human life at least 100 year-old
 - On public or Indian lands
- ☐ Obligations:
 - Notify tribe before issuing permit affecting any Indian religious or cultural site
 - If items found, other laws may also apply
- ☐ Tribal consultation required for religious or cultural site on Federal lands
- ☐ Tribal consent required on Indian lands
- ☐ Criminal and civil enforcement provisions
 - Prohibits trafficking in archaeological resources
 - Potential felony conviction
- ☐ Curation
- ☐ FOIA exemption for site information

Native American Graves Protection & Repatriation Act (NAGPRA, 1990)

- ☐ Purposes:
 - Establish process for repatriation of human remains and cultural items
 - Protect remains and cultural items recovered from federal and Indian lands
- ☐ Trigger:

- intentional excavation (Section 3) or inadvertent discovery
 - on federal or tribal lands
 - of Native American cultural items: human remains; funerary objects; sacred objects, objects of cultural patrimony
- ☐ Obligations:
- stop work; protect site; consult
 - develop a plan of action or comprehensive agreement
- ☐ Items must be repatriated
- To tribe from whose tribal land they were excavated (Section 3)
 - Where culturally affiliated (Section 3 and 7)
 - In custody of fed. agencies or federally funded entities (Section 7)

Religious Freedom Restoration Act (RFRA, 1993)

- ☐ Trigger:
- substantial burden on exercise of religion
- ☐ Obligations:
- compelling government interest,
 - least restrictive means

Government may substantially burden the exercise of religion only if there's a compelling government interest and uses the least restrictive means

- ☐ *But, see Navajo Nation & Havasupai Tribe v. USFS & Arizona Snowbowl*, 9th Cir., March 12, 2007; burden only if:
- Religious activity penalized; or
 - Coerced to act contrary to religious beliefs

Compare *Comanche Nation v. U.S. Army* (W.D. Ok. 2008)

National Historic Preservation Act (NHPA, 1966)

- ☐ Purpose of NHPA: Promote preservation

- Trigger:
 - federal undertaking, anywhere in U.S.,
 - may affect a Register-eligible property
- Obligations:
 - consult w/any tribe that attaches religious/cultural significance to the property,
 - and take into account effect of undertaking
- Application:
 - §110: locate, evaluate, nominate, protect
 - §106: consult 36 C.F.R. pt. 800
- Process:
 - 36 C.F.R. part 800
- '92 Amendments enhanced tribal role
- Consult with tribes regarding religious or cultural sites, wherever located - on or off tribal lands
- Traditional Cultural Properties (NPS Bulletin No. 38)
 - *Pueblo of Sandia case* (50 F.3d 856)
 - *Muckleshoot Indian Tribe case* (177 F.3d 800)
- Concurrence role on tribal lands
 - THPO may assume SHPO role

**Legal Landscape –
Sacred Sites and the Forest Service**

Trust Relationship

- The trust relationship was first
- recognized by the Supreme Court in its early decisions interpreting Indian treaties.
 - Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) (1831)
 - Tribes are considered as “domestic dependent nations” in a relationship resembling “that of a ward to his guardian.”
 - Worcester v. Georgia, 31 U.S. (6 Pet. 515 (1832)
 - Federal treaties with the Cherokee recognized the tribe as a distinct political community which “claimed and receiv[ed] the protection of one more powerful.”

Principles of Trust Relationship

- Support for Tribal sovereignty and Tribal self-government is important to the execution of the Federal trust responsibility
- Federal trust responsibility applies to the lands and resources, such as fish, wildlife, and timber, which Congress has agreed or elected through treaties and statutes to protect and manage for the benefit of the Tribes

Principles of the Trust Relationship

- Trust responsibility also applies to the right of Tribes to govern their own reservations.
- Trust responsibility applies to Congress and all Executive Branch agencies.
- Congress has imposed more specific trust duties on specific Federal agencies
- Congress may unilaterally alter or terminate the terms of the trust at any time, without the Tribes' consent, provided it does so in an express and clear act.

First Amendment of the Constitution

- The Establishment Clause and the Free Exercise Clause
 - “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...” (U.S. Const. amend. I).
- Government action does not interfere with a group's or individual's free exercise of religion except in *very limited* circumstances:
 - when the Government's action coerces the individual to violate his or her religious beliefs or penalizes
 - religious activity by denying a person an equal share of the rights, benefits, and privileges enjoyed by other citizens.

First Amendment of the Constitution

- The court “has long recognized that the Government may (and sometimes must) accommodate religious practices, and that it may do so without violating the Establishment Clause.”
 - *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987) (quoting *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-45 (1987)).
- Discretion exists for agency decision makers to work with AI/AN people to develop reasonable accommodations for Tribes and traditional practitioners to access and protect sacred sites

First Amendment to the Constitution

- **Free Exercise:**
 - The Government cannot coerce people into violating their religious beliefs, or penalize the exercise of religious rights by denying adherents an equal share of the rights, benefits, and privileges enjoyed by other citizens.
- **Establishment:**
 - Limits Government action in support of religious exercise: actions taken to protect sacred sites must not single out one particular religion for special treatment.
- ***Thus, the responsible official has discretion when weighing alternatives that may impact a sacred site.***

Statutes Supporting Sacred Site Protection

- In 1966, Congress passed the **National Historic Preservation Act (NHPA)** which went beyond the emphasis on objects and ruins in the Antiquities Act; required agencies take into account and enter consultation concerning the effect of government action on properties eligible for inclusion in the National Register for Historic Preservation.
- 1992 amendments to NHPA, historic properties of religious and cultural importance to Tribes may be determined eligible for inclusion on the National Register and therefore subject to NHPA consultation requirements

Statutes Supporting Sacred Sites Protection

- In 1976, Congress directed the Secretary of Agriculture to coordinate development and revision of land use plans for the National Forest Systems Lands under the **Federal Land Policy and Management Act (FLPMA)**
 - 43 U.S.C. Section 1701-1784
- National plans must be coordinated with policies of approved Tribal land resource management programs
- Secretary of Interior is also directed to take similar steps to coordinate with Tribes regarding lands administered by BLM

Statutes supporting Sacred Site Protection

- In 1978, Congress enacted the **American Indian Religious Freedom Act (AIRFA)**, creating a Government wide policy to protect AI/AN sacred sites and traditional forms of worship.
– 42 U.S. C. Section 1996
- In 1979, Congress adopted the **Archaeological Resources Protection Act (ARPA)**, creating protections for archeological resources on federal and Tribal lands.
– 16 U.S.C. Section 470aa-470mm

Statutes Supporting Sacred Site Protection

- In 1990, Congress passed the **Native American Grave Protection & Repatriation Act (NAGPRA)**, requiring Federal land managers to protect Native American graves, consult with Native American Tribes concerning religious and cultural sites and objects, and to repatriate cultural and religious items found on Federal lands.
– 25 U.S.C. Section 3001

Statutes Supporting Sacred Sites Protection

- The **Religious Freedom Restoration Act (RFRA)**, passed in 1993, reiterated that governments should not substantially burden religious exercise without compelling justification and attempted to “provide a claim or defense to persons whose religious exercise is substantially burdened by government.”
– 42 U.S.C. 2000bb-1

Statutes Supporting Sacred Sites Protection

- In 2004, **Tribal Forest Protection Act (TFPA)** directs the Secretaries of Agriculture and the Interior to enter into agreements and contracts with Tribal governments to carry out projects on Federal lands to protect Indian forest or range land or communities
– 25 U.S.C. Section 3115a

Statutes Supporting Sacred Sites Protection

- In 1980, the **Alaska National Interest Lands Conservation Act of 1980 (ANILCA)** recognizes subsistence hunting and fishing rights for Native and non-Native rural residents of the State of Alaska and gives them priority to subsistence resources in the event of shortages on public lands
– 43 U.S.C. Section 1636

Statutes Supporting Sacred Sites Protection

- In 1971 the **Alaska Native Claims Settlement Act (ANCSA)** was passed in order to provide for the immediate settlement of Alaska Native Claims. Land claims were extinguished and title was transferred to 12 land-based corporations and 1 non land-based regional corporation as well as over 200 local Village corporations.
- Section 14(h)(1) of ANCSA describes how the Secretary of Interior may convey fee title of existing cemeteries and historical places to appropriate regional corporations.
– 43 U.S.C. Section 1613

Farm Bill 2008

- Congress enacted legislation in the 2008 Farm Bill that strengthened support for the protection and preservation of traditional, cultural, and ceremonial rites and practices of Tribes
- Statute included language permitting the following:
 - Reburial of human remains and cultural items on NFS land.
 - Temporary closure of portions of national forests for Tribal traditional and cultural practices.
 - Tribes' use, free of charge, of trees, parts of trees, or forest products on NFS land for Tribal traditional and cultural practices.
 - The protection of the confidentiality of certain culturally sensitive information from disclosure under the FOIA.

Site Specific Laws

- Congress may also enact site-specific laws pertaining to specific locations
 - El Malpais National Monument, NM
 - Cibola Historical Part
 - California Desert Protection Act of 1994

Other Actions

- Executive Order 13007, signed by President Clinton in 1996
 - directs Federal agencies "to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) [to] accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites."

Definition

- EO 13007 defines "sacred sites"
- Any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian Tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the Tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site.

EO 13007

- TRIBES and appropriate representatives of AI/AN religions identify which sites are sacred to them, not the Federal Government
- Does not create a private right of action and the definition of sacred sites is unsatisfactory to many AI/AN people and agency employees

UNDRIP

- In 2010, United States announced support for the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)
- Its articles address indigenous peoples' rights to maintain culture and traditions (Article 11); and religious traditions, customs, and ceremonies (Article 12); to participate in decision making in matters which would affect their rights (Article 18); and to maintain spiritual connections to traditionally owned lands (Article 25).

GROUP #3

3. Best and worst practices examples. (*****NOTE. This section is very specific to best and worst practices regarding Sacred Sites on Federally Managed Land**)
- a. Good example
 - b. Bad example
 - c. Good example
 - d. Bad example

Examples of Ways Sacred Places Have Been/Are Being Protected

1. Initiate and maintain ongoing communication and consultation with Native nations and tribal groups, which have historic and/or contemporary relationships with the federal land base. Keep in mind that some Native nations and tribal groups have historic ties to lands that are far removed from their current land base and that geographical distance does not preclude them from being a part of the consultation responsibility.

Examples: See Grand Canyon National Park and Sand Creek Massacre National Historic Site for ongoing communication, consultation and work with Native nations and tribal groups.

2. Consult with Native nations and tribal groups regarding general locations and concerns, and focus on specific locations and features and related concerns. Incorporate all aspects of shared information into meaningful determination of eligibility and significance.

Example: Consultation on a regular, ongoing basis will protect against damage and will build up trust and confidence in the process and generally.

Example: Park Service approach and Keeper's determination; Turner's Falls, Massachusetts.

3. Consult with Native nations and tribal groups regarding administrative conveyance of sacred places to Native nations and/or tribal groups.

Example: Secretary of Interior conveyed in trust 120 acres of Bear Butte to the Cheyenne & Arapaho Tribes in 1979 for use by all tribes with cultural relationships to this sacred place.

4. Consult with Native nations and tribal groups regarding recommendations for congressional conveyance of sacred places to Native nations and/or tribal groups.

Example: Sacred places and other lands returned to various Pueblos by Congress in the 1990s and 2000s, with a reversion clause should gaming be operated on any of these lands.

5. Consult with Native nations and tribal groups regarding treaty and/or court affirmed management/use of sacred places.

Example: Treaty fishing, gathering, hunting for ceremonial (as well as commercial and subsistence) purposes at tribes' usual and accustomed places in the Pacific Northwest and Columbia River (U.S. Supreme Court decisions, 1904-1979, and various other court decisions, and ongoing tribal management and co-management agreements with federal and state governments, negotiations, consultation regarding classifications of harvestable catch, habitat restoration, law enforcement and other matters.

Example: Treaty fishing, gathering and hunting for ceremonial (as well as commercial and subsistence) purposes on tribes' ceded lands in the Great Lakes states (various court decisions and ongoing tribal management and co-management agreements with federal and state governments, negotiations, consultation regarding classifications of harvestable catch, habitat restoration, law enforcement and other matters.

6. Consult with Native nations and tribal groups regarding use of sacred places and use agreements for them.

Example: See various use agreements for Native gathering of traditional products, such as medicine plants, cedar bark, berries, roots, birch bark, wild rice, and/or other natural products.

7. Consult with Native nations and tribal groups regarding co-management of sacred places.

Example: Kasha-Katuwe Tent Rocks National Monument in New Mexico is co-managed by the Bureau of Land Management and Cochiti Pueblo, under an agreement that includes closures without notice by the Pueblo, non-disclosure of private information regarding specific religious or cultural places, etc.

8. Consult with Native nations and tribal groups regarding joint stewardship of sacred places.

Example: Protection of burial grounds and various tribes' other sacred places along the Missouri River under joint stewardship agreement(s) with the Army Corps of Engineers.

9. Consult with Native nations and tribal groups regarding an inventory of sacred places for the federal land bases.

Example: Inventories should carry the caveat that they are not conclusive, because not all those in the consultative class may have the optimum information, either from the federal agencies or in the sense of traditional knowledge.

10. Consult with Native nations and tribal groups to develop buffer zones surrounding sacred places (which are located somewhere within the buffer zones and whose specific location may or may not be delineated) that will be avoided in planning stages and will protect locations from inadvertent impacts.

Example: BLM and traditional religious leaders devised the inkblot system used in the California Desert Plan, wherein an inked shape was used to show an area of sensitivity, without disclosing the exact location of the sacred place. This method shows a no-development area or no-encroachment vicinity, while not disclosing the specific location of the sacred place or making it vulnerable to exposure.

11. Consult with Native nations and tribal groups regarding closures and to develop alternative marker systems that indicate "off limits" areas.

Example: See various federal agencies' signage used when the cognizant tribe(s)/nation(s) require(s) closure for ceremonial or observational purposes.

12. Develop plan to allow access routes to remain as unencumbered as possible.

Example: See various agreements with provisions regarding maintenance of access routes.

13. Communicate with your organization regarding the need to protect sacred places.

Example: Even if there is no action to report, update your organization regarding the ongoing nature of the agreement, how well it is working, any requests for subjects for future consultation, etc.

14. Communicate with your organization regarding ways listed above that federal agencies have previously protected and already are protecting sacred places, as well as other ways this could be done.

Example: Actively look for better ways to protect sacred places.

15. Consider the opportunity to consult on sacred places to be an honor and a privilege and treat all shared information with the greatest respect.

16. Recognize that sacred features may reflect extremely sophisticated knowledge of the cosmos and celestial events.

15.17. Be creative in terms of offering opportunities and settings for meaningful sharing of information.

Example: Colgate University planetarium symposium and analysis of celestial attributes of ceremonial stone landscapes.

Things to Avoid

1. Avoid not consulting with Native nations or tribal groups.

Example: Not consulting can have serious consequences for federal agencies. After the Army failed to consult on expansion development of Fort Sill at Medicine Bluff, a sacred place to the Arapaho, Cheyenne, Comanche and Kiowa Nations, the Comanche Nation and Comanche Citizen Jimmy Arterberry sued the Army in federal court in Oklahoma. Following a trial, including a site visit to Medicine Bluff, the district court judge found that the Army failed to consult, ruling on the side of a high consultative standard and disallowing its proposed expansion.

2. Avoid requesting exact information about a sacred place whose location is not already known.

3. Avoid creating public maps or any other locational indicators outlining sacred place locations.

4. Avoid requiring groups to “document” or detail reasons that sacred places or ceremonies, events or activities at or uses of sacred places are sacred. Avoid repetitive requests for similar information.

5. Avoid repetitive requests for similar information.

6. Avoid granting use permits to or entering into agreements with non-Native persons or entities without consultation with Native nations and tribal groups, or over their objections.

7. Avoid participation from subject matter experts who without substantive evidence dismiss sacred features in the landscape as “non-Indian” and as the result of European land clearing practices or wall building

Example Turner’s Falls, Massachusetts.

8. Avoid discussions and processes that attempt to characterize entire classes or types of sites and sacred places in specific ways.

Example: “All cairns in New England are stone piles made by European farmers” is not a true statement. Current FERC controversy over ceremonial stone landscape considerations and energy pipeline projects in the American northeast.

9. Avoid turning over consultation responsibility to the archaeological consultants. Federal agencies need to continually remember that consultation is a federal responsibility.

Example: See FERC controversy, above.

GROUP #4

4. Moving Forward

- a. Major Tribal concerns and complaints
- b. MOU
- c. White House Council
- d. Interagency Collaborations
- e. Intergovernmental dialogue and coordination

DRAFT

Moving Forward

Prepared by Marc Paiva, Brett Shelton, Teara Farrow Ferman and Carolyn McClellan

Major Tribal Concerns and Complaints

- Maintaining confidentiality about site (location, religious and/or cultural significance, etc.)
- How will site be managed and protected?
- How will site be used by land manager or public?
- Procedures for Tribal access and use
- What happens if a Federal land management decision ~~use or lease~~ is proposed or issued that conflicts with Tribal concerns or access?
- How will disputes be resolved?

Pertinent Points from MOU

- **Highlight important points from the Memorandum of Understanding (MOU) Among the**
 - U.S. Department of Defense,
 - U.S. Department of the Interior,
 - U.S. Department of Agriculture,
 - U.S. Department of Energy,
 - and the Advisory Council on Historic Preservation
- **Regarding Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites: how do we get different agencies with different rules and regulations to coordinate, collaborate, and/or reach agreement? Is there a third-party arbiter for dispute, particularly one that can speak to Tribal concerns?**

White House Council on Native American Affairs

- **To honor treaties and recognize tribes' inherent sovereignty and right to self-government under U.S. law, it is the policy of the United States to promote the development of prosperous and resilient tribal communities, including by:**
 - (e) protecting tribal lands, environments, and natural resources, and promoting respect for tribal cultures.
 - **What is this Council's role going forward? What should it be? What happens if this Council is eliminated in a future administration? How can Tribes advocate for their sacred sites to the Council?**

Interagency Collaborations

- Identify some examples of these interagency collaborations
- What are/were the lessons learned?
- **How should tribal consultation be conducted?**
- What can be applied across all federal agencies on a national basis?
- What are the Tribes role in these collaborations?
- **What** would Tribes **like** to see implemented in the future?

Intergovernmental Dialogue and Coordination

- This goes back to the previous slide. What is an example of this dialogue that we can use for learning purposes?
- What is the role of the DoD Sr. Tribal Liaison once this training has been completed? Can he or she be involved in cases regarding the MOU as a mediator or arbitrator?
- Perhaps an annual report on how each agency has complied with the MOU as we do for archaeological sites and historic properties?