United States Department of Agriculture

Forest Service
Office of Tribal Relations

REPORT TO THE SECRETARY OF AGRICULTURE

USDA Policy and Procedures Review and Recommendations: Indian Sacred Sites

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EXECUTIVE SUMMARY

Report to the Secretary of Agriculture
USDA Office of Tribal Relations and Forest Service Policy and Procedures Review
Indian Sacred Sites

In 2010, Secretary of Agriculture Thomas J. Vilsack directed the U.S. Department of Agriculture's (USDA) Office of Tribal Relations and the USDA's Forest Service (Forest Service) to engage in dialogue with American Indian and Alaska Native (AI/AN) Tribal leaders to find out how USDA can do a better job of accommodating and protecting AI/AN sacred sites while simultaneously pursuing the Forest Service's multiple-use mission. Secretary Vilsack requested information about unintended consequences of land management decisions affecting sacred sites and AI/AN communities whose cultural survival is often deeply rooted in these sites.

> ***"I have asked the USDA Office of Tribal Relations to work closely with the USDA Forest Service to immediately begin convening consultative sessions with Native American leaders. This dialogue should be about how we can do a better job addressing sacred sites issues, while simultaneously balancing pursuit of the Forest Service's mission to deliver forest goods and services for current and future generations. We need to examine the effectiveness of existing laws and regulations in ensuring a consistent level of sacred site protection that is more acceptable to tribes."*** **– Secretary Vilsack, July 2, 2010**

In response to Secretary Vilsack's request, the USDA Office of Tribal Relations and the Forest Service formed a team, led by senior executives, to talk to Tribes and other AI/AN communities about how the Forest Service can do a better job incorporating the accommodation and protection of sacred sites into the agency's multiple-use mission. This *Report to the Secretary of Agriculture* was developed in response to Secretary Vilsack's request.

What is in this *Final Report*?
This report and its appendices constitute a review of law, policy, and procedures, with recommendations for changes based on Tribal consultation and public comments.

This report reflects an interpretation of some of the voices of AI/AN people as requested by Secretary Vilsack. It provides the Secretary with information about how USDA and the Forest Service are protecting AI/AN sacred sites on National Forest System (NFS) lands and how USDA and the Forest Service might improve the manner in which sacred sites are protected.

This report does not, by itself, change policy or have any effects, significant or otherwise, on the human or natural environment and does not constitute final agency action. In developing this report, the Government neither required nor requested that Tribes provide specific information about the nature and location of their sacred sites, nor were AI/AN people asked to reveal the beliefs and practices associated with these sites.

How was this *Final Report* compiled?
Initially, in 2010 through July 2011, more than 50 meetings (listening sessions) were held across the Nation in Indian Country and Alaska Native villages. These listening sessions reached out to Native communities by engaging not only Tribal leadership but also culture-keepers, traditional practitioners, and unaffiliated Native descendants. The team conducting this review surveyed Forest Service employees to learn about what they think and what they have observed regarding the effectiveness of the

agency's efforts to manage land that includes sacred sites. A comprehensive review of current laws, rules, regulations, and policies pertaining to AI/AN sacred sites was also conducted. The team developed a *Draft Report to the Secretar*y ("*Draft Report"*) that included a suite of recommendations for consideration by the Secretary.

In the second phase of inquiry, July through November 2011, the *Draft Report* was distributed to all Federally Recognized Indian Tribes and Alaska Native Corporations (ANCs). AI/AN Tribal governments and ANCs were invited to comment, consult, and otherwise engage in continuing dialogue on the *Draft Report*. Specifically, the team requested a review of the effectiveness of recommendations made in the *Draft Report*. Local Forest Service officials and team members held **49** meetings reaching **125** Tribes and ANCs and received additional correspondence from **22** Tribes and inter-Tribal organizations. Additionally, notice of the *Draft Report's* availability was published in the Federal Register for public notice and comment. Twenty-two (**22**) comments on the content of the *Draft Report* were received from groups and individuals in response to the Federal Register notice. Another **21** public comments were received specifically regarding the Forest Service decision to allow the use of treated wastewater (sewage effluent) for snowmaking at the Snowbowl Ski Area on the San Francisco Peaks near Flagstaff, Arizona, but did not include comment on the *Draft Report.*

What did we hear?[1]

Three broad but distinctive themes emerged from listening sessions and the review of the *Draft Report* by AI/AN participants and the public:

I. *Relationships/Communication*. We observed that AI/AN people and Forest Service managers share many of the same concerns about sacred sites protection. We heard that partnering with Tribes to understand and manage sacred sites is critical to their protection. Although participants shared stories about successful partnering and communication between Tribes and the agency, the team conducting this review also heard about inconsistencies in Forest Service consultative/collaborative processes. We heard that Forest Service attempts at consultation are ineffective when done in ways that Tribes do not consider meaningful.

II. *Direction/Policy*. We heard that land managers sometimes do not use the discretion currently available to them in laws and policies for the benefit of the Tribes. Listening session participants and Forest Service employees said that sacred site issues are not weighed equally with competing uses of the NFS.[2] Participants expressed concern with narrow interpretation of Executive Order (E.O.) 13007, Indian Sacred Sites, and that NFS managers would benefit from more explicit policy language to protect sacred sites. We heard of barriers to protection created by the mining laws.

III. *On-the-Ground Actions*. The team conducting this review heard that, in some cases, the Forest Service has recognized and protected sacred sites using currently available legal tools. We heard that some NFS land management decisions and actions and the activities of third parties, however, have led

[1] "We" and "our" in this report is used to refer to the USDA Office of Tribal Relations and the Forest Service, which jointly conducted this review.

[2] Specifically, some commenters noted the Multiple-Use Sustained-Yield Act of 1960 (MUSYA), does not include consideration of sacred sites, and states "It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." 16 U.S.C.§§528 (1960).

to damage, destruction, and desecration of AI/AN sacred sites. We heard that the consistent on-the-ground application of currently available tools could begin to reverse past harms to sacred sites. Alternatively, some Tribes are grateful that their sacred sites are within NFS boundaries rather than owned by private individuals, companies, or other ownerships that might not value their cultural traditions.

Some comments on the *Draft Report* submitted by the public in response to the Federal Register notice were from groups with interests in the management of the NFS that were critical of the report and of the process used to develop the report. Specifically, these groups were critical of the legal analysis in the *Draft Report,* and the agency authorities cited within as tools for protection of sacred sites, which they considered to be overreaching and in conflict with the agency's multiple-use mandate. The second group of public comments included comments that were supportive of the report but requested further detail on how the recommendations will be implemented. The recommendations in this report follow the themes of what was heard: relationships, policy, and on-the-ground action.

What is the context of this *Final Report*?

Tribal Sovereignty and Trust Responsibility: The U.S. Department of Agriculture and the Forest Service affirm the principles of Tribal sovereignty, self-determination, and self-governance, and the unique Government-to-Government relationship that exists between the United States and Federally Recognized Tribes.

Tribal and Public Processes: This report and its recommendations were developed in consultation with Tribes, per direction in E.O. 13175 ("Consultation and Coordination with Indian Tribal Governments"),[3] and in keeping with the Federal trust relationship with the Tribes. Although this report does not constitute a rulemaking or final agency action, notice of the *Draft Report's* availability was published in the Federal Register[4] and the public was invited to comment in the interest of transparency and open Government. Concerns heard from AI/AN and public commenters were considered when editing the *Draft Report* and will be considered if and when USDA moves forward with implementation of any of the recommendations. Any changes to regulation or policy suggested by this review will be adopted in accordance with the Administrative Procedure Act (APA), Title 5, United States Code (U.S.C.) Section 553, and other relevant authorities, including those requiring Tribal consultation.

Multiple Use: Protection of AI/AN sacred sites and accommodation of a Tribe's particular use of a sacred site does not entail complete exclusion of other uses. Sacred sites must be considered in the context of other uses. The recommendations do not conflict with the agency's statutory mandate to manage for multiple uses of the NFS under the Multiple Use-Sustained Yield Act.

Decisionmaking Authority: The Forest Service retains and cannot divest itself of decisionmaking authority for land management actions on the NFS.

Funding and Capacity Limitations: The recommendations in this report were developed based on input regarding what was needed for effecting positive change and were not driven by budget

[3] E.O. No. 13175, 65 Fed. Reg. 67,249 (Nov. 9, 2000).
[4] Sacred Sites, E.O. 13007, Public Notice; Request for Comment. 76 Fed. Reg. 47,538 (Aug. 5, 2011).

considerations. While the Forest Service acknowledges that there is no new agency funding associated with the recommendations, many of the recommendations can be accomplished without new funding. Some recommendations could be accomplished by shifting existing funds.

What are the next steps?

This *Final Report* is addressed to Secretary of Agriculture Thomas J. Vilsack for his review and consideration. The development of this report and recommendations is already changing how AI/AN Tribes and people and the Forest Service interact regarding land management decisions for the good of all Americans. It is our hope that the recommendations contained in this *Final Report* will lead to meaningful changes in the way AI/AN sacred sites are protected and accessed. Perhaps just as important, the recommendations will lead to a better understanding of AI/AN values as American values.

If the Secretary moves forward with specific policy changes to address the recommendations in this *Final Report*, including revisions to Forest Service directives, we may conduct additional Tribal consultation and public dialogue before those changes are implemented, in accordance with the Administrative Procedure Act and other relevant authorities.

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Report to the Secretary of Agriculture
USDA Policy and Procedures Review: Indian Sacred Sites
Office of Tribal Relations and Forest Service

INTRODUCTION

The Forest Service, an agency of the U.S. Department of Agriculture (USDA), is charged with sustaining the health, diversity, and productivity of the Nation's forests and grasslands to meet the needs of present and future generations. Whether in private, State, Federal, or Tribal ownership, many people from all walks of life consider the forests and grasslands, and the resources they provide, to be sacred. It is abundantly clear that the Nation's American Indian and Alaska Native (AI/AN) people retain histories, values, and spiritual underpinnings that are inextricably intertwined with America's forests; especially with the national forests. Many of these cultural and physical connections predate establishment of the United States and the National Forest System (NFS). As Federal executives of the Forest Service and USDA's Office of Tribal Relations (OTR), we take this charge as a solemn responsibility. If we do not act responsibly to protect the sacred values associated with these lands, we may fall short of the Forest Service fiduciary obligations to Tribes, and we are all diminished. We know so little about AI/AN sacred sites as an agency. It is through the voices of the AI/AN people that we are learning about and affirming the real importance of sacred sites; these voices instruct us.

AMERICAN INDIAN AND ALASKA NATIVE SACRED SITES

Like almost all public and private lands in the United States, all or part of every national forest is carved out of the ancestral lands of AI/AN people. Their historical and spiritual connection to the land has not been extinguished despite changes in title. AI/AN sacred sites are integral to the lands managed by the Forest Service. These sacred sites are those locations considered to be sacred by indigenous Americans, the citizens of Federally Recognized Tribes (FRTs) and other AI/AN peoples who may or may not be associated with a specific FRT. The complexity and breadth of Forest Service statutory responsibilities in managing the NFS are immense. The Forest Service manages 193 million acres of national forests and grasslands, visited and shared by millions of members of the American public and the world, each of whom has a different relationship with the land and a different perspective on what activities are appropriate. The agency is required by law to administer the NFS for outdoor recreation, range, timber, watershed, and wildlife and fish purposes;[5] to analyze the environmental impacts of decisions it authorizes;[6] to protect threatened and endangered species;[7] to conduct research;[8] and to carry out a host of other responsibilities on NFS lands. Untold numbers of AI/AN sacred sites are located on these same

[5] Multiple-Use Sustained-Yield Act of 1960 (MUSYA), 16U.S.C.§§528-531 (1960). MUSYA states "'Multiple use' means: The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services…that some land will be used for less than all of the resources…and harmonious and coordinated management of the various resources…with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output." 16 U.S.C. §531(a).
[6] National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §4321 *et seq.*.
[7] Endangered Species Act of 1973 (ESA), 16. U.S.C. §1531 *et seq.*
[8] Forest and Rangeland Renewable Resources Planning Act of 1974 (FRRRPA), 16 U.S.C. 1600 *et seq.*

lands. Other agencies in the USDA and other Federal Departments[9] also have roles in management of NFS lands that may affect AI/AN sacred sites.

On May 24, 1996, President Clinton signed Executive Order (E.O.) 13007 on Indian Sacred Sites, to "protect and preserve Indian religious practices."[10] It requires Federal agencies responsible for the management of Federal lands, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, 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. Agencies are required to, where appropriate, maintain the confidentiality of sacred sites. E.O. 13007 defines a "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; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site."

E.O. 13007, §1(b)(iii) (Emphasis added to highlight that **it is Indian Tribes and appropriate representatives of AI/AN religions who identify which locations are sacred sites** under the E.O.). E.O. 13007 builds on the body of law that directs or allows Federal agencies to protect or accommodate AI/AN sacred sites and their use.

CONSULTATION

Consultation with AI/AN Tribal governments is legally mandated and integral to the agency's trust responsibility to Tribes. Many Federal laws and national policies such as executive memoranda and executive orders, including E.O. 13007,[11] provide agencies with a duty to consult and are a direct outgrowth of the Government's affirmation of the principles of Tribal sovereignty, self-determination, and self-governance, and the unique Government-to-Government relationship that exists between the United States and the Tribes.[12] Among the laws that specifically require consultation are the Archeological Resources Protection Act (ARPA), Native American Graves Protection and Repatriation

[9] U.S. Department of the Interior agencies such as the Bureau of Land Management (BLM), the National Park Service, and the U.S. Fish and Wildlife Service, in particular, hold management responsibility for hundreds of millions of acres of Federal land; however, the U.S. Department of Defense and others also have land management responsibilities. While this report will be shared with, and, we hope, will be useful for other agencies, the focus of this report is on policies and procedures applicable to and employed by USDA, specifically, the Forest Service.

[10] E.O. 13007, 61 Fed. Reg. 26771 (May 24, 1996). E.O. 13007 refers to "Indian Sacred Sites." In this report we generally use the term "American Indian/Alaska Native" as a broadly inclusive term to refer to American Indians, Alaska Natives, First Nations, First Peoples, Native Americans, and other indigenous people. See Glossary, Appendix A of this report, for explanation of how terms are used in this report. A copy of E.O. 13007 appears in Appendix B of this Report.

[11] E.O. 13007 references Executive Memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments," which requires federal executive agencies to consult with Tribes on a Government-to-Government basis to the greatest extent practicable and to the extent permitted by law on actions that affect Federally Recognized Tribal Governments.

[12] Consultation with ANCs is based on Public Law 108-199, Div. H, Sec. 161, Jan. 23, 2004, 118 Stat. 452, as amended by Public Law 108-447, Div. H, Title V, Sec. 518, Dec. 8, 2004, 118 Stat. 3267, which provides that: "The Director of the Office of Management and Budget and all Federal agencies shall hereafter consult with Alaska Native corporations on the same basis as Indian tribes under Executive Order No. 13175."

Act (NAGPRA), and the National Historic Preservation Act (NHPA). More about each of these can be found in the "Synthesis of the Legal Landscape" section below.[13]

Consultation is not merely about process. It is about working together in good faith toward informed, workable decisions. Because of the unique Government-to-Government relationship that exists, the Tribes are not treated like other public agencies, the public, or special interest groups; the Tribes' input is tracked separately and may be treated as confidential and exempt from disclosure under the Freedom of Information Act (FOIA) under certain circumstances.

Figure 1: Historical Trauma

The history of AI/AN peoples in America after European contact and colonization is a history of trauma: degradation of AI/AN populations and cultures from disease, appropriation of and removal from traditional lands, forced disuse of native languages and native subsistence lifeways, separation of families through boarding schools and adoption, suppression of AI/AN religions, and genocide. These actions and others by the Spanish, French, English, and, later, the Government and citizens of the United States, left a legacy of trauma that continues to plague AI/AN communities. We recognize that the policies of self-determination and self-governance are intended to help remedy some of that harm. We also recognize that the continued existence of and access to AI/AN sacred sites is an important component to necessary healing. To disregard the value of AI/AN sacred sites would perpetuate the cycle of trauma.

INDIGENOUS VALUES—CHANGING LANDSCAPES

Between November 2010 and April 2011, Forest Service and USDA managers participated in more than 50 in-person and telephonic listening sessions with more than 500 individual AI/AN people across the United States and many Tribes and Alaska Native Corporations (ANCs).[14] In July 2011, the agency released a *Draft Report* detailing what was heard in these listening sessions, with recommendations for policy changes, and offered FRTs and ANCs the opportunity for Government-to-Government consultation on the *Draft Report*.[15] In listening sessions leading up to the *Draft Report*, and sessions to review its contents, participants shared stories of challenges and opportunities, as well as how some sacred sites had been destroyed or degraded while others had been respected and protected. Tribal leaders and others shared their concerns and observations about relationships, access, sustainability, sovereignty, spirit, and communication through consultation. These communities' cultural and spiritual practices are tied to their cultural responsibilities and mandates to take care of the natural world by performing ceremonies and rites that are linked to specific places. Throughout the conversations with AI/AN peoples, participants told us that sacred sites must be protected, not just for their Tribe or to perpetuate their beliefs, but for the health of the entire world. Tribes and others reiterated that sacred sites continue to be reduced in number and quality through actions required, or approved, by the Forest Service. Conversely, it was also clear there is a growing awareness and appreciation of AI/AN sacred sites by the current Administration and the agency. Some expressed hope that the old patterns of destruction and degradation would give way to

[13] ARPA, 16 U.S.C. 470cc(c) (1979), (requiring Federal agencies to notify Tribal authorities before permitting archeological excavations on Tribal lands); NHPA, 16 U.S.C. § 470 et seq. (1966), Section 101(d)(6)(B). ("In carrying out its responsibilities under section 106 of this Act, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties described [below]."); NAGPRA, 25 U.S.C. §§3002 (Ownership, including Inadvertent Discovery and Intentional Removal); 3002 (Inventory); 3005 (Repatriation); 3006 (Review Committee).

[14] See Appendix D for the dates and locations of these listening sessions.

[15] The Forest Service also requested and received public comment on the *Draft Report* and surveyed Forest Service employees. More information on the process of building the *Draft Report* and modifying it after AI/AN people and the public had the opportunity to consult or otherwise comment on it can be found in the Methodology Section, below.

new patterns of protection, accommodation, and respect, but many expressed skepticism that this review would result in true change. See figure 1, "Historical Trauma."[16]

We heard from participants and Tribal leaders that they believe the mainstream American society strongly values religious freedom, and yet they also believe the legal framework that protects religious freedom in the United States does not apply to AI/AN philosophies in meaningful or adequate ways. The February 2011 publication *America's Great Outdoors: A Promise to Future Generations*, which was jointly developed by USDA, the U.S. Department of the Interior (DOI), the U.S. Environmental Protection Agency, and the Council on Environmental Quality, notes:

"Our appreciation for these special places is rooted in the natural environment as well as in the rich diversity of people, stories, and traditions that have become associated with them over the course of our history. Since our earliest beginnings, the lands, coasts, rivers, forests, and mountains and the resources they hold have helped to define who we are as a people and as a nation. They have also been a source of America's wealth, providing places to reflect, relax, recreate, and create lasting memories with friends and family." [17]

That statement is core to the American people and to the Forest Service. While most Americans live in urban areas, we are also dependent upon rural lands, particularly forest lands, for clean water and a healthy climate. To AI/AN people, "special places" are often sources of cultural, spiritual, sacrosanct connections to the land. For these reasons, conserving forests and grasslands is not a luxury; it is a necessity. Yet America's forests today are threatened like never before. Climate change, catastrophic fires, diseases and pests, and the transformation of working forest lands to increasingly fragmented private parcels have all led to declining ecosystem health. All of these changes have enormous impacts on ecosystems and local economies.[18] As the health, integrity, and connectedness of forests are threatened, so too are AI/AN sacred sites.

The Forest Service is committed to restoring our forests and the vital resources important to our survival, while wisely respecting the need for a natural resource economy that creates jobs and vibrant rural communities.[19] Respecting, honoring, accommodating, and protecting AI/AN sacred sites must be part of that commitment and be considered in the context of other uses. Economic and recreational drivers are important in land management decisionmaking, but not more or less important than sacred sites concerns. In the past, however, the Forest Service has not always thoroughly considered sacred sites concerns, balanced sacred sites concerns with other values or used its discretion in land management decisions to find creative ways of incorporating protections for sacred sites in its decisions. The Forest Service also must acknowledge that, in certain instances, its decision space is very limited, making it hard—perhaps impossible—to protect AI/AN sacred sites in the way the Tribes prefer in

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[16] *See*, e.g., Brave Heart M.Y., DeBruyn L.M., "The American Indian Holocaust: Healing Historical Unresolved Grief." *American Indian and Alaska Native Mental Health Research: Journal of the National Center* [1998, 8(2):56-78].

[17] *America's Great Outdoors: A Promise to Future Generations*, February 2011, p. 1. *Available at http://americasgreatoutdoors.gov/report/*, last viewed April 4, 2011.

[18] See generally, Smail, Robert A.; Lewis, David J. 2009. Forest-land conversion, ecosystem services, and economic issues for policy: a review. PNW-GTR-797. Portland, OR: U.S. Department of Agriculture, Forest Service, Pacific Northwest Research Station. 40 p. *See also*, remarks by Secretary Vilsack, August 14, 2009, Seattle, Washington. *Available at* http://www.fs.fed.us/video/tidwell/vilsack.pdf, last viewed April 4, 2011.

[19] *Id.*

specific cases.[20] Tribes and national forests are increasingly entering into agreements that establish a shared understanding of the agency-Tribal relationship. These agreements can improve communications, formalize a productive working relationship, and help the agency to honor its commitments to Tribes.[21]

AN INTERNATIONAL PERSPECTIVE

What we heard in the listening sessions and in Government-to-Government consultation reflects the shared aspirations of indigenous peoples worldwide, as expressed in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), for which the United States announced support in 2010.[22] 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." In listening sessions and other meetings we heard about how the UNDRIP's concepts may relate to sacred sites, even though the UNDRIP does not use the phrase "sacred sites." Notably, UNDRIP's Article 12 declares the right 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 the use and control of their ceremonial objects; and to the repatriation of their human remains.[23] The U.S. support for the UNDRIP serves as an affirmation of our national and global aspirations, which provides important context for review of our policies.

ACCOMMODATING COMMON GROUND

The Forest Service shares nearly 3,000 miles of contiguous border with AI/AN-owned lands and acknowledges that many lands now within the NFS are the ancestral homelands and ceded territories of many Tribes. This makes the agency and Tribes more than just neighbors; they are partners with common goals for social, cultural, ecological, and economic sustainability. Many Tribes have historically managed their own forests well and in ways the Forest Service hopes to emulate. Tribal land management is a testament to the Tribal land ethic, an ethic rooted in traditions, stories, and cultures. Sacred sites, both on AI/AN land and within the national forests, are important facets of that land ethic and a common bond between us.

The Forest Service acknowledges there are conflicts over AI/AN sacred sites both inside and outside the agency. Many examples of these conflicts are described in appendices D, E, and J. However, the agency also recognizes that many sacred sites on NFS land are being appropriately protected and that many relationships between Tribes and national forests are constructive and productive. It is only through positive relationships that the Forest Service can work together with Tribes to meet the goals they have in common. Many Forest Service employees realize that protection of sacred sites and ensuring

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[20] For instance, "An Act to Promote the Development of Mining Resources of the United States, May 10, 1872," better known as the"1872 Mining Law," provides little discretion for land managers to deny a permit for mineral exploration.
[21] See http://www.fs.fed.us/spf/tribalrelations/agreements/index.shtml for example agreements of this nature.
[22] For further explanation of the United States' position on the declaration and many initiatives in Indian country, see Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples -- Initiatives to Promote the Government to Government Relationship & Improve the Lives of Indigenous Peoples, which was released to accompany the President's statement in support of the declaration, at http://www.state.gov/documents/organization/153223.pdf.
[23] United Nations Declaration on the Rights of Indigenous Peoples, Article 12 (2007). *Available at* http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf. See also the Synthesis of the Legal Landscape section below, and appendix G, "Existing Authorities."

improved access to those sites is congruent with the Forest Service mission. We heard from Forest Service employees, including many line officers—regional foresters, forest supervisors, and district rangers who are the on-the-ground decisionmakers for the agency—that they take seriously the charge to enhance protection of sacred sites. They are looking for ways to accommodate the needs of AI/AN people who use these sites, and, in many cases, are finding ways to do so. Their efforts are enhanced by legislation in the Food, Conservation, and Energy Act of 2008 (see appendix C, 2008 Farm Bill)[24] providing for reburial of repatriated human remains on NFS lands, for keeping culturally sensitive information confidential, and for temporarily closing portions of NFS lands for Tribal traditional and cultural practices. Their efforts are further strengthened by the high level of visibility the current review has engendered. They recognize top-level support from the agency, the Department, and the President. The challenge is striking a balance among existing laws and policies, including the Forest Service's multiple use mandate; the public's needs and desires; and the need to protect sacred sites, manage for sacred places, and provide for Tribal traditional and cultural practices. The protection of sacred sites must be a value we will strive to protect; it cannot be an afterthought or be less than our other values. When sacred sites protection is in conflict with other uses, Forest Service employees must be mindful and creative in reaching for balance. Balancing must necessarily involve creative approaches and must be done within the context of our existing authorities. There are boundaries to our existing authorities, but where those authorities can co-exist with sacred sites, Forest Service employees should give due consideration to accommodating and mitigating for the protection of sacred sites.

[24] Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title VIII, Forestry, Subtitle B, Cultural and Heritage Cooperation Authority, §§8101-8107..

METHODOLOGY

GATHERING INFORMATION

The Forest Service and Tribal communities have interacted for many years on sacred sites issues. The current review builds upon this foundation by incorporating information from many different sources:

Listening sessions. The listening sessions were conducted from November 2010 to April 2011 and provided the core information used to develop the *Draft Report* released in July 2011. The sessions included national telephonic listening sessions, regional and local level in-person meetings, and portions of national and regional meetings of inter-Tribal organizations and other types of AI/AN groups. Participants included FRT leaders, ANCs, State recognized Tribes, elders, traditional practitioners, culture keepers, AI/AN individuals not affiliated with any specific Tribe, and others. Several Tribes requested Government-to-Government consultation on sacred sites issues at this early stage, and these requests were honored. The sessions focused on five key questions addressing:

- Past and current experience interacting with the Forest Service regarding protection, care, and preservation of sacred sites;
- Whether existing laws, regulations, policies, and procedures have been effective in protecting sacred sites;
- Changes needed to enhance protection of sacred sites;
- How consultation should proceed on the *Draft Report* to the Secretary of Agriculture; and
- Any other issues regarding sacred sites.

For more information regarding how the information was collected, tracked, and summarized, see appendix D for a table of listening session locations and a description of the themes heard at the listening sessions, with examples.

Forest Service employee survey and interviews. To assess Forest Service personnel's experience and knowledge around sacred sites, the Executive Team conducted a survey of employees, asking them to describe their challenges, successes, tools, needs, and recommendations for working with Tribes to protect sacred sites. After the *Draft Report* was distributed, the team conducting the review interviewed a cross-section of employees who were familiar with it in order to obtain their feedback on the recommendations and other content of the *Draft Report*. See appendix E.

Analysis of current law, regulations, and policies. To ascertain the current legal and policy landscape surrounding Forest Service's ability to protect sacred sites, the team conducted a review of current laws, regulations, policies, procedures, and relevant case law. See the Synthesis of the Legal Landscape section below, and appendix F, Selected Court Decisions, and appendix G, Existing Authorities.

Previous review. The review used information from a preliminary factfinding effort regarding agency sacred sites policies that took place from 2003 to 2007. Information from the earlier effort is integrated into the current review; it is consistent with what was heard during the recent listening sessions. See appendix H.

Mailed and emailed comments. Interested people sent a number of emails, either in connection with a particular listening session or other in-person event, or independent of any particular session, to a

designated email address. Some comments were mailed to Washington Office or regional staff in connection with this effort, and these were also incorporated into the review.

Review of Draft Report: AI/AN People. From July to November 2011, USDA and the Forest Service offered FRTs and ANCs the opportunity to consult with the Government on the *Draft Report* and its recommendations. The Forest Service participated in over 50 face-to-face meetings to review the *Draft Report*. Some of these were in person consultation sessions that were conducted between Forest Service and FRT representatives and/or ANCs who mutually agreed to participate in this manner. Other in-person meetings were collaborative discussions between Forest Service representatives and those FRT representatives who chose not to conduct Government-to-Government consultation but did choose to comment in person as an individual or representative of a Tribe. Some meetings included Nonfederally Recognized Tribal (NFRT) representatives who participated in in-person collaborative discussions and, in some cases, as guests at consultations due to local circumstances (for example, in California due to affiliations with FRTs or State recognition). Finally, email, mail, and telephone call comments were received from FRTs, AI/AN groups, and NFRTs. These commenters and consulting Tribes have been identified in appendix J, which summarizes all comments on the *Draft Report*.

Review of Draft Report: Public Comments. On August 5, 2011, the Forest Service published a notice in the Federal Register of the availability of the *Draft Report*, which opened a 60-day public comment period. Fewer than 50 public comments were received by mail and email in response to the notice. Some of these comments that focused on the *Draft Report* were from groups representing a number of businesses or a particular industry. Other commenters did not comment on the *Draft Report* but raised issues specific to a particular site or Tribe(s). See summary of comment themes in appendix J.

PERSONNEL CONTRIBUTING TO THIS EFFORT

A team of senior executives from USDA and the Forest Service led the development of this report. The executives are Janie Hipp, Senior Advisor to the Secretary of Agriculture for Tribal Affairs (member of the Chickasaw Tribe[25]); Joel Holtrop,[26] Deputy Chief for the NFS (now retired); Faye Krueger, Associate Deputy Chief for the NFS (now Regional Forester for the Northern Region); James Hubbard, Deputy Chief for State and Private Forestry (S&PF); and Corbin Newman, Regional Forester for the Southwest Region. The Executive Team was supported by a small Core Team including staff from the USDA OTR and from the Forest Service at the national, regional, and forest levels. The core team compiled public and consultation comments, developed and modified recommendations, and drafted the report. Team members are listed below:

- Tracy Calizon, Program Specialist, Ecosystem Management Coordination, Washington DC
- Fred Clark, Director, USDA Forest Service Office of Tribal Relations, Washington, DC (member of the Citizen Potawatomi Nation Tribe)
- Kendall Clark, Forest Supervisor, Carson National Forest, Taos, NM (now retired)

[25] Members of the Executive or Core Teams participating in the development of this *Final Report* are participating in their capacities as USDA and Forest Service employees, and are not representing the interests of the particular Tribes in which they are enrolled members.

[26] Joel Holtrop retired from the Forest Service on October 3, 2011. After his retirement, Faye Krueger joined the team as lead executive for NFS.

- Larry Heady, Special Assistant to the Regional Forester on Indian Affairs, Milwaukee, WI *(*member of the Lenape-Delaware Tribe*)*
- Michael Kaczor, National Federal Preservation Officer and Heritage Program Leader, Washington, DC
- Steve Kessler, Regional Subsistence Program Leader, Anchorage, AK
- Will Reed, Regional Heritage Program Leader, Ogden, UT
- Toni Stanger, Program Specialist, USDA Office of Tribal Relations, Albuquerque, NM (member of the Colville Tribe)

Many other Forest Service line officers and staff in the field conducted outreach and coordinated with Tribes to set up and attend listening sessions and consultation events, and documented what was heard. The Udall Institute for Environmental Conflict Resolution (USIECR) (under the Udall Foundation, an independent Federal agency), as well as Triangle Associates, Inc., (Triangle) assisted with process design, served as neutral third-party facilitators, and compiled, analyzed, and summarized what was heard.

ACKNOWLEDGEMENTS AND RECOMMENDATIONS

At the request of the Secretary, we listened intently to the voices of Native America across the United States. We heard about the values, experiences, feelings, beliefs, and expectations people have about the places they hold sacred. We also heard many excellent suggestions about how the agency can do a better job of protecting those places. The thousands of individual comments were profound and meaningful. Some public groups commented that the Forest Service must maintain public access to Federal lands as the agency strives to protect sacred sites, and we recognize that many concerns remain from both Tribes and the public. In appendix J, we offer a side-by-side presentation of the overarching themes we heard from FRTs and ANCs, other AI/AN groups, and the public. Those comments and themes reflect a variety of issues regarding processes, content, and relationships in the context of rights, partnership opportunities, and administrative flexibility and consistency. They also lead us to recommendations for actions that we believe will have the greatest impact in protecting sacred sites. Before describing our recommended actions, we first recognize some of the concerns we heard. These acknowledgements are intended as a step toward fostering better relationships that improve protection of sacred sites in the future.

ACKNOWLEDGEMENTS

We recognize that activities authorized by the Forest Service and other agencies affect sacred sites in ways many AI/AN people consider damaging. While we acknowledge the complexity of balancing the pursuit of goods and services from the national forests for all Americans with Tribal concerns, we encourage dialogue about addressing past actions to build trust between Tribal leadership and the Forest Service, with an eye to the future. We acknowledge the frustration of multiple and overlapping requirements from different land management agencies and agree that consistency among Federal agencies whose decisions impact sacred sites is important. We intend to share what we have learned with other agencies, as well as work with Tribes and other agencies to develop a more consistent Federal approach to sacred sites.

We heard many concerns about the impacts to AI/AN peoples' use of and access to sacred sites stemming from the agency's authorization of recreational activities, including rock climbing, interpretation, outfitting and guiding, and off-highway vehicle use. Specifically, we heard numerous concerns with the Forest Service's decision to allow the use of reclaimed wastewater for creating artificial snow at the Arizona Snowbowl Ski Area in the San Francisco Peaks from many who strongly urged the agency to reverse this decision. Many public commenters commented only on Snowbowl; many of these commenters requested that the agency reverse the decision. Others suggested the *Draft Report* mischaracterized the Snowbowl decision and failed to acknowledge the economic benefits that will flow from the decision. We recognize that this decision has had profound impacts on the agency's relationships with many AI/AN people and communities, but we hope this review and the changes that will result from it will begin to address some of the concerns we heard. We understand that the dialogue this review has generated is merely a beginning, and that better, more consistent, and more meaningful consultation, communication, and understanding between the agency and AI/AN people will be necessary if we are to avoid similar circumstances in the future. The Forest Service will strive to achieve these ideals while meeting its statutory mandates.

We heard from AI/AN commenters that economic values often hold greater weight in agency decisionmaking than traditional and cultural values. These commenters stated that competing extractive

and recreational interests were usually given greater consideration than sacred sites. Some Forest Service employees stated they had no way of "valuing" sacred sites in the current agency analysis and decisionmaking framework. We believe the agency can do a better job of integrating sacred sites into its multiple-use mission, and that the Forest Service mission is broad enough to include sacred sites protection.

The need for better relationships and communication between the agency and AI/AN people was unquestionably the most common issue raised by AI/AN commenters, and this concern was echoed by Forest Service employees who were surveyed. We acknowledge that continuity of leadership is often lacking due to frequent turnover of Forest Service line officers, as well as Tribal leaders. This turnover can present challenges to establishing and maintaining relationships between the Forest Service and Tribes. The development and maintenance of written agreements between Tribes and agencies can help to bridge these transitions while new leaders build personal relationships. However, the Forest Service needs to ensure that our line officers have sufficient time to participate in transition briefings and review existing agreements to gain an understanding of their content, spirit and intent. Written agreements and memorandums of understanding (MOUs) are among the best ways to establish stable, consistent understanding and provide a foundation for relationships between Tribes and the agency. Agreements can establish estimated timeframes, schedules for regular communication, methods of communication, and processes for protection of sacred sites. An example proposed as a model for regular communication between agency employees and Tribes was the annual "To Bridge a Gap" conference.[27] This report recommends seeking increased AI/AN representation on advisory committees, including resource advisory committees, and establishing a schedule for regular consultation meetings at the forest level to improve relationships and enhance communication.

"Co-management" is not well defined and means different things to different people. We heard many AI/AN commenters express interest in development of co-management strategies with Tribes or entering into formal "co-management agreements" for the protection of sacred sites. We heard that some consider "co-management" as equal decisionmaking authority; others think of it as any direct involvement in a project. In their comments on the *Draft Report*, some AI/AN groups advocated for legislation to authorize a greater degree of co-management between the Forest Service and Tribes than is allowed under current authorities. Other Tribes indicated they supported increased and better use of mutually beneficial agreements to support shared management goals. Some public groups expressed great concern regarding the idea of co-management, characterizing it as a "de-facto veto power" the Tribes would hold over public lands. While the Forest Service cannot divest itself of inherently Federal decisionmaking authority, the agency does have broad authority to engage in partnerships and other mutually beneficial agreements, as funding allows, that enable the agency and Tribes to achieve shared management goals. We believe that a case-by-case approach to crafting partnership agreements to meet shared objectives is appropriate for the protection of sacred sites. The type of instrument used to memorialize such an agreement depends on the specific resources, sites, Tribes, and the forests involved, but the agency has statutory authority to enter into many different types of agreements with Tribes and other entities, including challenge cost-share agreements, Wyden agreements, participating agreements, MOUs, and stewardship agreements pursuant to the Tribal Forest Protection Act. [28] (See figure 2 for more information on these types of agreements.) Tribes entering into agreements such as these with the

[27] For information on "To Bridge a Gap" *see* http://www.choctawnationculture.com/TBAG2012.
[28] See, for example, http://www.partnershipresourcecenter.org, produced in partnership with the National Forest Foundation, the Forest Service, and the USDA, last visited January 17, 2012.

Forest Service can help implement management actions that are desirable to Tribal partners, without compromising agency statutory obligations or unlawfully delegating Federal authority. What "co-management" means in a particular agreement should be determined by the parties to the agreement.

FIGURE 2: Some types of agreements available under existing authorities

Memorandum of Understanding: To document a framework for cooperation between the Forest Service and other parties for carrying out their separate activities in a coordinated and mutually beneficial manner.

Participating Agreement (Cooperative Funds & Deposits Act of December 12, 1975, Public Law 94-148): Authorizes the Forest Service to enter into agreements to cooperatively perform mutually beneficial projects with public and private agencies, organizations, institutions, or persons, for the following purposes: pollution abatement; cooperative manpower, job training, and development programs; development of publication of cooperative environmental education and forest history materials; or forestry protection.

Participating Agreement (Wyden Amendment, Section 323 of the Department of the Interior and Related Agencies Appropriations Act, 1999, Public Law 105-277, Div. A, Section 101 (e), as amended by Public Law 107-63, Sec. 330; and by Public Law 111-11, Sec. 3001): Authorizes the Forest Service to enter into mutual benefit agreements with willing Federal, tribal, State, and local governments; private and nonprofit entities; and landowners for the protection, restoration, and enhancement of fish and wildlife habitat, and other resources on public or private land that benefit those resources within the watershed.

Challenge Cost-Share Agreement (Interior and Related Appropriations Act of 1992, (Public Law 102-154): Authorizes the Forest Service to cooperate with other parties to develop, plan, and implement projects that are mutually beneficial to the parties and that enhance Forest Service activities. Cooperators may be public and private agencies, organizations, institutions, and/or individuals.

Joint Venture Agreements (National Agricultural Research, Extension and Teaching Act of 1977 as amended by the Food Security Act of 1985 (7 U.S.C. 3152, 3318, and 3319, Public Law 99-198): Authorizes the Forest Service to enter into joint venture agreements with any entity for agricultural, research, extension, and teaching activities.

Cost Reimbursable Agreements (National Agricultural Research, Extension and Teaching Act of 1977 as amended by the Food Security Act of 1985 (7 U.S.C. 3152, 3318, and 3319, Public Law 99-198): Authorizes agreements with any State cooperative institutions or educational institution for acquisition of goods or services, without competition, for agricultural research, extension, or teaching activities.

Stewardship Authority, Public Law 108-7 Sec. 323 (2003): Until 2013, authorizes the Forest Service, via contract or agreement, to enter into stewardship projects with private or public entities to perform services to achieve land management goals for the national forests or public lands that meet local and rural community needs. See also the **Tribal Forest Protection Act.**

VISIT http://www.partnershipresourcecenter.org; SEE "Training Modules" under "Developing Strong Partnerships."

We heard a range of views from both AI/AN and the public generally about the authority the agency has to protect sacred sites. There is no statute mandating protection of sacred sites in all instances, but the Forest Service has considerable authority that supports protection and discretion to protect sacred sites within the current legal framework. See "Synthesis of the Legal Landscape," following the recommendations below. The agency's legal decision space includes opportunities for protection of sacred sites, although the Forest Service does not always use this discretion to act in ways that protect sacred sites. This decision space can and should be used by the Forest Service in a manner more protective of sacred sites. We believe our exercise of discretion to act in a positive way toward sacred sites will further the intent of existing legal and policy responsibilities.

Increased use of the agency's discretion to protect sacred sites must begin with an understanding of how management of NFS lands would affect those sacred sites. We heard from AI/AN commenters, as well as from Forest Service employees, that E.O. 13007's definition of sacred sites is too limiting, too focused on religion, and does not accurately represent all that AI/AN people consider sacred. To enrich the agency's understanding and provide an opportunity for broader dialogue with Tribes about what is sacred to them, we encourage discussion around the concept of "sacred places" as described in figure 3.

Figure 3: Sacred Places

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 historically important spiritual and cultural significance to that entity, greater than the surrounding area itself. Sacred places may include but are not limited to geological features, bodies of water, burial places, traditional cultural places, biological communities, stone and earth structures, and cultural landscapes uniquely connecting historically important cultural sites, or features in any manner meaningful to the identifying tribe.

This language was developed based on what we heard in the listening sessions, consultations, and from public comment; we hope it captures more accurately the scope and variety of sacred areas, places, sites, landscapes, and biological communities on NFS lands. The Forest Service 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. The intent of including this language here is to inspire Forest Service line officers to walk the land together with AI/AN people to learn more about their sacred places and to focus on that knowledge when making land management decisions. This report recommends that the Forest Service use this more expansive concept of "sacred places" in discussions with Tribes and with other key Federal agencies to reach a better, more consistent understanding of what is sacred to Tribes and of the tools available to protect these places. Additionally, the report recommends emphasizing sacred places in training and exploring ways to incorporate the concept of sacred places into the Forest Service's decisionmaking processes. See recommendations II.A.1-3 and II.E.2. Generally, a sacred place may not necessarily include an area of exclusive use or dedication of an exact location.. Forest Service officials would consider the significance and use of sacred places in land management planning and in project decisionmaking, and uses of sacred places would be subject to valid existing rights and potential multiple uses.

The *Draft Report* included the following recommendation: "Work to revise the E.O. definition of 'sacred sites' with other Departments and the White House in consultation with Tribes." We have determined there needs to be further discussion between the Forest Service, the White House and other

federal departments and agencies concerning the scope of EO 13007. However, the agency does recognize that what is sacred to Tribes does not always neatly fit within E.O. 13007's definition of sacred sites. The Forest Service and USDA will work diligently with Tribes and other agencies and Departments who also must follow E.O. 13007, NHPA, and other authorities, to first better understand what is sacred to Tribes, whether or not it is explicitly stated in E.O. 13007. Two major objectives of this dialogue, which are recommended in this *Final Report*, should be the development of a common language to reflect this broader understanding of what is sacred, and training to help agency employees effect protections and accommodate Tribal use on the ground and to help agency employees and Tribes understand the authorities and limitations under current law.

Tribes and AI/AN individuals have experienced a lack of access to sacred sites for practitioners, elders, and other AI/AN people who need it. In other cases, open access for the general public and even Native people has resulted in vandalism, theft, and exploitation of sacred sites. We heard, and recognize that the permitting process for certain types of gatherings and access can be lengthy and cumbersome and can be seen as a barrier. We believe that the agency's newer authorities will help protect sacred sites from misuse and provide appropriate access, especially those authorities relating to closures to protect the privacy of tribal activities for traditional and cultural purposes, Tribal use of forest products for traditional and cultural purposes, and confidentiality of information regarding sacred sites. See appendix C, 2008 Farm Bill provisions.

We heard both concerns and support for the agency's working with NFRTs on access to and protection of sacred sites. Non-federally recognized tribes (NFRTs) are not included in Federal policies for Government-to-Government consultation. Therefore, many NFRTs with ancestral ties to federally managed lands are not engaged prior to project development, permit consideration, and policy decisions. As a result, their ability to exercise traditional and cultural practices may be compromised. In contrast, some NFRTs have no valid association with federally managed lands, except as members of the general public. There is no specific policy in this area or consistent approach. Some Forest Service units are inclusive, recognizing, for example, that many Tribes were stripped of their Federal recognition during the "termination era" of the 1950s. Other units deal exclusively with FRTs in the Tribal relations context. Local line officers should exercise their well-informed, professional judgment in including NFRTs in decisionmaking; nothing in this document is intended to dissuade or discourage forests from engaging in dialogue with NFRTs. However, the agency's trust responsibility to Tribes, its obligation to engage in consultation with Tribes, and its delivery of programmatic benefits to Tribes are restricted to FRTs.

Many AI/AN commenters expressed concerns about Tribal ownership and related issues, including rights to hunt, gather, fish, and otherwise use NFS lands. We recognize concepts of "ownership" may include treaty and other reserved rights and acknowledge the need for resolution of Native land claims in some areas. A thorough exploration of AI/AN land ownership and interest as it applies to the NFS is beyond the scope of this effort, but we recognize that some disputes by and among AI/AN Tribes, individuals, clans, corporations, and others remain.

Protection of sacred sites is not possible without the ability to protect confidential information regarding these sites. We acknowledge that information has been released inadvertently in the past. We recognize

the 2008 Farm Bill[29] presents the Forest Service with increased authority to exempt certain types of culturally sensitive information from disclosure under the Freedom of Information Act. We also heard that the language in the 2008 Farm Bill on confidentiality can be difficult to understand, and that the Forest Service has not issued any regulations or directives to implement or explain the provisions on confidentiality of information pertaining to sacred sites in the 2008 Farm Bill. Additional guidance issued by the agency would clarify for Tribes and agency employees the types of information that must, may, and cannot be protected from disclosure under FOIA, and how the information must be provided. We also acknowledge Tribal members' concerns about the Forest Service providing information to State Historic Preservation Officers (SHPOs), which is required under the NHPA. In the course of NHPA-required consultation with SHPOs, and other consulting parties, the Forest Service can limit the types of information provided to SHPOs. The NHPA requirement that the agency provide information regarding the nature and location of cultural resources potentially affected by a proposed agency action is essential to the consultation process, but we can make determinations of significance without revealing the full scope of Tribal concerns about a resource. What is discussed with SHPOs should be a subject for consultation with Tribes before engaging SHPOs. We endeavor to honor Tribes' expectations for confidentiality by pledging to work with FRT to develop procedures for maintaining the confidentiality of information the Tribes provide to the Forest Service about sacred sites.

We heard and recognize that *Traditional Ecological Knowledge (TEK),* and the traditional cultural practices associated with TEK represents a body of knowledge that transcends Western science for many AI/AN people. For traditional leaders and practitioners, TEK and associated cultural practices are at the core of their world view. The lessons learned by generations of people living on the land are lessons that may enhance peer-reviewed and academic sciences.[30] Through the lens of TEK, we can see that sacred sites may include landscapes and biological communities. We intend that agency planning processes, such as land management and travel management planning, will consider TEK along with the many sources of scientific and technical information that feed the planning process.

We heard many requests from AI/AN commenters for the agency to coordinate its activities within the Department and with other Federal land management agencies. This review focuses on lands and policies impacting the NFS, but the Forest Service also conducts scientific research through its Research and Development (R&D) deputy area, and administers numerous assistance and conservation programs supporting other forest landowners through its S&PF deputy area. In addition to partnerships between NFS land managers and Tribes, there may be opportunities to leverage other Forest Service programs to protect or accommodate access to sacred sites. In addition, other USDA agencies conduct research and development activities and administer assistance programs that could influence the protection of sacred sites on lands managed by other Federal agencies. For these reasons, this report should be widely shared within the Department, as well as broadly throughout the Federal Government.

In comments on the *Draft Report*, Tribes and others reiterated that traditional places of sacred, religious, or cultural importance to communities may also be afforded some protection under the provisions of the NHPA. The NHPA requires Federal agencies to consult with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by a federal undertaking and take

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[29] Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title VIII, Forestry, Subtitle B, Cultural and Heritage Cooperation Authority, Sections 8101-8107. (June 18, 2008).

[30] *See*, e.g., "Traditional Ecological Knowledge: Application by Service Scientists" U.S. Fish and Wildlife Service Fact Sheet, *available at* http://www.fws.gov/nativeamerican/graphics/TEK_Fact_Sheet.pdf, *last visited* September 24, 2012.

those potential effects into account in their decision making, This consultation should occur at the earliest steps in general land management or project planning and may include consultation with Tribes concerning inventory methods, management prescriptions, proposed land uses, and impacts from both human and natural effects. It is at these early stages that Tribes may wish to raise sacred sites concerns. We heard examples of how NHPA can be an effective means to address potential effects and put in place lasting protections when the sacred sites are historic. The NHPA regulatory framework establishes several points for required consultations in the process of considering effects. The NHPA process for considering effects in any given project, however, does not guarantee that sites will be protected in the manner Tribes might prefer, nor that particular adverse effects will be prevented in perpetuity. For more information, see the Synthesis of the Legal Landscape section below, Figures 7 and 8, and Table 1.

Conversely, we also heard that sacred sites issues are seldom about archaeology and historic preservation. We acknowledge that while many archeologists are more comfortable working with material evidence in the form of historical documentation or archeological data, there are some Tribal members who would prefer to define sacred sites without reference to history. It is clear, however, that many sacred sites have a historic component, and preservation of sacred sites can sometimes be accomplished through historic preservation guidelines. In this preservation effort, heritage professionals and Tribes are often working toward the same goals. Heritage professionals need to recognize that Tribal traditional and cultural practices associated with sacred sites contribute to their historic significance, and heritage professionals need to enable continued use of sacred sites by those who consider them sacred. Archeologists and AI/AN peoples may emphasize different aspects of "significance" for particular sites, but these aspects are not necessarily in opposition. The sacredness ascribed to a site by Tribal representatives should be understood as adding additional significance to a historic site.

Many AI/AN commenters noted, and we acknowledge, that land management decisions relating to mining and energy development often degrade and desecrate sacred sites. Some public groups expressed that restrictions on mining and energy projects to increase protections for sacred sites will adversely affect the local and national economies, and will threaten the energy security of the country, among other concerns. Decisions regarding mining and energy development are often not under the exclusive control of the Forest Service. The agency often must work with other agencies and departments regarding decisionmaking on mining and energy projects. The Forest Service does not have the authority to alter the 1872 Mining Law. We removed the reference seeking legislative changes from the recommendations that had been included in the *Draft Report*. We recognize that the Forest Service can do a better job of regulating surface uses and imposing mandatory conditions for hydropower relicensing pursuant to section 4(e) of the Federal Power Act (FPA 4(e))[31] to protect sacred sites.

We heard that the Forest Service does not have enough law enforcement officers (LEOs) to adequately enforce laws that protect sacred sites from disturbance and desecration. We recognize that the priorities of the Law Enforcement and Investigations staff of the Forest Service do not always conform to Tribal priorities. We heard from some commenters that some Forest Service LEOs have acted in ways that may seem intimidating to elders, traditional practitioners, and other indigenous users of sacred sites and traditional gathering areas. Many LEOs do work with Tribes to protect AI/AN sacred sites. However,

[31] Federal Power Act, 16 U.S.C. 797(e) (1994).

some commenters stated Forest Service LEOs could sometimes do a better job of coordinating with State, local, and Tribal law enforcement agencies. Self-regulation agreements[32] and the use of DOI-USDA cross-deputation authorities expand capacity and can promote greater protection of trust resources and sacred sites. Law enforcement personnel from the Forest Service working closely with their Tribal counterparts can mitigate some of the unintended effects of law enforcement activity on Tribal communities.

E.O. 13007 instructs agencies such as the Forest Service to "accommodate access to and ceremonial use of Indian Sacred Sites," yet we heard many concerns related to accessing sacred sites, particularly within congressionally designated wilderness. The Wilderness Act of 1964 is clear: The Forest Service cannot allow motor vehicle use in wilderness unless the designating legislation contains an exception allowing that use or another statute authorizes that use.[33] We heard this restriction has sometimes created an access challenge for elders, hunting and gathering needs, and other purposes within congressionally designated wilderness. We can work to facilitate access for traditional users and elders where appropriate, to the extent permitted by law.[34]

Activities associated with wildfire—before, during, and after—may affect sacred sites and were another area noted for action. We heard, and we recognize, there have been communication breakdowns related to sacred sites between heritage staff, fire incident commanders, and line officers. We believe better communication and improved planning before a fire will lead to actions taken during a fire that are more consistent with Tribes' desired level of protection for their sacred sites. This approach proved successful in protecting sacred sites and cultural values during the Los Conchas, Wallow, and other fires in 2011. See figure 4: Emergency Cultural Resource and Sacred Site Protection. Increased collaboration with Tribal fire crews will also help in this regard.

Figure 4: Emergency Cultural Resource and Sacred Site Protection

During the 2011 fires in Arizona and New Mexico, Forest Service heritage specialists were effective in protecting historic properties of cultural and religious importance to Tribes. Their efforts were recognized by the Society for American Archaeology (SAA) in a letter to the National Interagency Fire Center Governing Board on July 21, 2011:

"It is clear that archaeologists assigned to fire teams and consultations with Native American communities have helped preserve archaeological sites and sacred sites threatened by fire and fire suppression. Deploying archaeologists on handlines and firelines to identify sites before damage occurs, to mitigate damage to impacted sites, and to advise on watershed rehabilitation is excellent management. Using team archaeologists to prepare initial site assessments on the damage caused by the fire and to submit recommendations for emergency treatments helps protect and perpetuate sacred sites, archaeological sites, and their attendant values to communities of Native Americans, land managers, and scientists."

[32] Self-Regulation Agreements: MOUs that help clarify the extent to which a tribe may exercise its civil enforcement jurisdiction over its own members while engaged in certain activities on the NFS.
[33] There are certain extremely limited exceptions; for example, for rescue operations in wilderness.
[34] Under the Alaska National Interest Lands Conservation Act of 1980 (ANILCA) (43 U.S.C. 1636 et seq.), Alaska Wilderness is exempted from many of the prohibitions of the Wilderness Act, including, in some circumstances, the prohibition on motorized access. For example, ANILCA allows "…appropriate use for subsistence purposes of snowmobiles, motorboats, and other means of surface transportation traditionally employed for such purposes by local residents, subject to reasonable regulation." 16 U.S.C. §3121.

We heard and acknowledge there are actions the Forest Service can take related to its workforce to position agency employees to support and implement the recommendations in this *Final Report*. In reviewing the *Draft Report*, AI/AN people resoundingly commented that the Forest Service should develop, or make better use of, existing training on a variety of subjects, including cultural competency, Tribal law, law enforcement, and consultation. This sentiment was echoed by Forest Service personnel, whether they regularly worked with Tribes or not. AI/AN people also requested that the agency establish clear and transparent mechanisms for holding appropriate employees accountable for protection of sacred sites. AI/AN comments on the *Draft Report* were also very supportive of agency efforts to recruit and hire indigenous people, although these commenters cautioned that having Native people on agency staff is not a substitute for Government-to-Government consultation.

We heard from AI/AN commenters that increased and dedicated funding will be needed to protect sacred sites adequately. We intend for this review of sacred sites policies to reflect the agency's increased focus on its trust responsibilities, treaty obligations, and consultation with Tribes. However, the Forest Service recognizes current funding and the number of full-time personnel assigned only to Tribal responsibilities may fall short of the expectations of Tribes. While most Forest Service regions have some staff to work with Tribes, not all forests have full-time staff dedicated to this work. Usually, the work the Forest Service does with Tribes is project-specific and is funded as such, rather than Tribal relations program activities having a dedicated budget. The work, though important, is one of many competing interests for funding. In addition, the Forest Service currently has limited leadership expertise in core competencies regarding Tribal relations. The recommendations in this report, if implemented, will help to address this issue. The agency recognizes that it can do a better job of honoring its commitments to Tribes and protecting sacred sites, even at current levels of funding and staff.

RECOMMENDATIONS

We heard many concerns, a number of compliments, and some excellent suggestions for improvement from AI/AN people, the public, and from Forest Service employees. The review of the current legal environment, the compilation of listening sessions with AI/AN people and consultation with FRTs, public comment, the Forest Service employee survey, and other sources also guided the development of the recommendations below. This section recommends actions that we believe will result in the most significant improvements in the protection of sacred sites. These actions were chosen because they will educate and empower line officers, managers, and staff to do a better job of protecting sacred sites in a way that is more acceptable to Tribes. The recommendations also provide increased accountability for Forest Service employees in carrying out their duties with respect to sacred sites.

These recommendations seek to strike a balance between providing sufficient guidance for purposes of achieving consistency and predictability in protection of sacred sites and encouraging the tailoring of local approaches to protection and consultation. We recognize that a "one-size-fits-all" approach to protecting sacred sites and accommodating AI/AN use of those sites will not work. The recommendations are written broadly to allow space for local adaptation and creativity. In carrying out the recommendations, the Forest Service will strive to understand and value the preferences of Tribal governments and respect each Tribe's relationship with the national forests.

Recommendations are loosely grouped into three main categories: Relationships/Communication, Direction/Policy, and On-the-Ground Actions, to address overarching themes we heard. Recommendations involving changes to agency directives or regulations may require additional public input to comply with the Administrative Procedure Act, Title 5, United States Code (U.S.C.) Section 553, and may require additional consultation under E.O. 13175 and other authorities. When implementing the recommendations below, the Forest Service must also comply with its obligations under NEPA, the National Forest Management Act (NFMA), and other laws. We do not anticipate additional funding to accomplish these recommendations, nor should these recommendations be construed as commitments to request additional funding. However, significant improvements can be accomplished without additional funds or by reprioritizing existing agency funds.

I. RELATIONSHIPS/COMMUNICATIONS

Without good relationships and communications between Forest Service individuals and AI/AN caretakers of sacred sites and a full understanding of authorities and limitations under current law, there will never be respectful recognition and protection of sacred sites.

Recommendations:

A. Communication.

1. Work with the USDA Office of Budget and Program Analysis and the Forest Service Office of Regulatory and Management Services to provide Forest Service and USDA leadership with regular notice of upcoming national policy initiatives such as rulemakings that will require consultation. This knowledge will enable coordinated timing of consultation events, allowing regions and forests to provide more timely notice to Tribes, improved scheduling of consultation, and potentially reduce the administrative and financial burdens associated with consultation for Forest Service employees, Tribes, and ANCs.
2. Require forests to offer regularly scheduled communication and consultation opportunities with FRTs. Document commitments regarding these opportunities in a MOU; include sacred sites protection among the topics to be discussed.
3. Develop a recognition system for employees and Tribal partners engaging in effective communication. Encourage those recognized to mentor and train others.
4. Revise Forest Service consultation directives in Forest Service Manual (FSM) 1563 and Forest Service Handbook (FSH) 1509.13 to reflect agency consultation policy and to incorporate USDA Tribal consultation goals and objectives.
5. Encourage Forest Service employees to meet regularly with FRT tribal elected officials and other stakeholders to discuss improvements in the protection of sacred sites. Build on the successes of the "To Bridge a Gap" conference and other similar meetings in reaching sacred sites protection goals.

B. Training. Develop and implement core competencies for line officers and staff including a comprehensive training program for line officers, staff, and law enforcement personnel to provide the knowledge to build respectful relationships; to use available tools for sacred site protection; and to gain a broader understanding of and competency with AI/AN laws, customs, traditions, and values. Invite AI/AN people to assist in developing and delivering core curricula.

1. *Training—Existing*: Develop a catalog of existing training offered by Tribes and other entities, work to increase Forest Service attendance at tribally sponsored sessions, and work with Forest Service Grants and Agreements to develop agreements to simplify the acquisition of these training services. (Forest Service and USDA OTR).
2. *Training—Departmental*: Develop a training track to serve USDA at the Department level and be available for other USDA agencies to tailor to their particular mission area. (USDA OTR).
3. *Training—Agency Leadership/Regions*: Develop training for its line officers and program area staffs at the Washington and regional levels using USDA and other available resources. Target audiences will also include the Acquisition Management staff; FOIA officers; NEPA specialists; LEOs; and Lands and Recreation Special Uses, S&PF, and R&D staffs with program-specific training developed to address the particular needs and concerns in those areas. (Forest Service).

4. *Training—Local*: Develop training for the field based on national core curricula. The target audience is national forest and grasslands line officers and staff, including forest supervisors' offices, district rangers, staff officers at forest and district levels, and field employees. Training will include workshops and other relationship building efforts with partners and draw on existing training resources as described above. Forest Service units will reach out to local Tribes to both develop and deliver training to Forest Service employees. Forest Service units will coordinate with local Tribes when sponsoring Forest Service workshops or training to include Tribal perspectives. (Forest Service).

C. Staffing. Take steps to increase support to the agency in carrying out its trust responsibilities and other obligations to Tribes.

1. Hold appropriate line officers accountable for fulfilling obligations to Tribes, including those related to sacred sites, through performance measures or other means such as requiring training and coordination.
2. Have Forest Service OTR and regional foresters jointly develop strategy to ensure Tribal liaison functions at the regional and forest levels are optimally aligned to support consultation and collaboration with Tribes.
3. Include strategies in Forest Service succession planning to enhance diversity in the Forest Service workforce and improve program administration by providing for full-time Tribal relations managers and liaisons where needed, if funds are available.
4. Require core competencies in Tribal relations where Tribal partnerships and delivery of trust and treaty obligations are significant (see also recommendations on Training).
5. Encourage increased presence of AI/AN people in Forest Service advisory roles through targeted recruitment and outreach to AI/AN people for established Federal advisory committees, and in emerging collaborative efforts. As existing Federal advisory committee charters are reviewed and revised, encourage advisory committees to include AI/AN representatives.
6. Publish a list of existing Federal advisory committees and vacancies and make it available to the public and Tribes.

II. DIRECTION/POLICY

Across the United States, listening session participants, employee survey respondents, and Tribal reviewers of the *Draft Report* said that the definition for sacred sites in Executive Order 13007 is flawed. Some public commenters stated they believed the Executive Order definition is appropriate and should not be changed. Various laws hinder the agency's ability to protect sacred sites, but, in many instances, commenters felt agency decisionmakers do not use existing discretion and tools. Many believed direction and policy could be revised to enhance protection of sacred sites.

Recommendations:

A. Executive Order on Sacred Sites (E.O. 13007). The definition limiting sacred sites to "specific, discrete, narrowly delineated locations" of "religious significance" may be too narrow and inconsistent with the AI/AN view of sacredness.[35] Any or all of the following steps should be reviewed and further discussion with other departments and agencies should occur:
   1. Consider the broader concept of "sacred places," including cultural landscapes, traditional cultural properties, sacred sites, and others.
   2. Consider incorporating the concept of "sacred places" and/or other tools discussed in II.A.1 into training developed pursuant to Recommendation I.B.
   3. Consider revising Forest Service directives a requirement and mechanism by which potential effects of proposed Forest Service actions on areas identified by Tribes as essential to their religious, ceremonial, or traditional cultural practices will be considered and addressed prior to Forest Service action that may affect those areas.

B. Confidentiality. Without knowing the location of sacred sites, it is difficult to protect them. However, we heard that many AI/AN people do not trust that information provided to the Forest Service will be kept confidential. The Forest Service has authority to maintain the confidentiality of some information provided by AI/AN people through existing legislation—most notably FOIA and its exceptions under the 2008 Farm Bill, NHPA, and ARPA[36], but see acknowledgements, above, on confidentiality.[37]
   1. Revise the directives at FSM 6270 (Availability of Records [FOIA]) to implement the 2008 Farm Bill's confidentiality provisions and procedures, and provide training at the forest and district levels regarding confidentiality of information on sacred sites.
   2. Develop standard clauses to include in MOUs between the agency and individual Tribes regarding confidentiality of information on sacred sites.
   3. Work with Congress to improve the language of the confidentiality provisions of existing law.

[35] The *Draft Report* included a recommendation to work towards changing the definition of "sacred sites" in E.O. 13007. For discussion of why this recommendation is not included here, please refer to the Acknowledgements section, page 13-14. .
[36] As noted above, E.O. 13007 also requires that, "[w]here appropriate, agencies shall maintain the confidentiality of sacred sites."

C. Policy, Authority, and Discretion. Although laws, regulations, policies, and court decisions currently exist that enable land managers to protect sacred sites, we heard that the Forest Service does not always use its discretion under these authorities to do so. From some employees, we heard about the need for high-level support for land managers who might make a decision to protect and accommodate AI/AN use of sacred sites, but were concerned about repercussions from other local constituencies, Congress, or the Administration.

1. Support line officers' use of existing authorities to protect sacred sites through clear direction and appropriate training on the opportunities and limitations available under current law. See "Synthesis of the Legal Landscape" below.
2. Review and revise USDA and Forest Service directives, incorporating sacred sites protection using existing authorities. Prioritize directives for revision that will have the greatest impact such as FSM 1563 (American Indian and Alaska Native Relations); 1580 (Grants, Cooperative Agreements, and Other Agreements); 2360 (Heritage Program Management); 1920 (Land Management Planning [NFMA]); 1950 (Environmental Policy and Procedures [NEPA]); 5100 (Wildfire Management); 5300 (Law Enforcement, including 5370, Suitability Requirements, Training, and Standards); 6270 (Availability of Records [FOIA]); and FSH 6209.13 (FOIA).

D. Competing Statutory Obligations. Numerous laws and policies with effects on sacred sites are outside agency control, such as the 1872 Mining Law, Federal Energy Regulatory Commission issuance of hydropower licenses and placement of transmission corridors, and decisions involving the leasing of certain minerals on NFS lands reserved from the public domain.

1. Further evaluate policies interpreting the agency's discretion and lack of discretion in implementing the 1872 Mining Law, as sacred sites may be impacted by exploration or development operations for locatable minerals. Consider appropriate mitigation measures through NEPA and in Records of Decision that can minimize and/or avoid impacts to sacred sites where possible.
2. Develop more specific guidance for requesting the Department of the Interior to withdraw NFS lands from one or more of the laws authorizing the disposal of federal minerals to proactively protect areas that include sacred sites where appropriate.
3. Develop more specific guidance regarding the appropriate use of mandatory conditions in Federal Power Act hydropower relicensing procedures to protect sacred sites or other resources that are sacred to Tribes.
4. Consider sacred sites when prioritizing lands for acquisition or exchange.
5. Share the results of this review with other Federal agencies to encourage them to protect and accommodate sacred sites.

E. Land Management Plans. The 2012 planning rule requires that new plans or plan revisions provide for protection of cultural and historic resources and management of areas of Tribal importance. The 2012 planning rule also includes requirements for "ecosystem services," which include cultural heritage values.

1. Use the provisions in the new planning rule to ensure consideration of sacred sites on an individual forest or grassland is addressed in the plan revisions.
2. Incorporate concepts as identified in Recommendation II.A.1 into land management planning directives at FSM 1920.

III. ON-THE-GROUND ACTIONS

Those who commented on the *Draft Report* suggested many ways to improve on-the-ground sacred sites protection and interpretation of cultural and sacred areas. These ideas can be implemented now.

Recommendations:

A. Partnerships: Partner with and recruit AI/AN people using existing authorities (contracting, grants and agreements, hiring, and volunteer services) to enhance Forest Service interpretation, law enforcement, cultural resource protection, youth involvement, firefighting, and other agency work and to serve as agency liaisons, trainers, and consultants.
   1. In outreach activities, target AI/AN people in striving to meet the objective of increased overall workforce diversity in the Forest Service.
   2. Increase Tribal access to partnership resources and training by providing example agreements that could achieve shared management goals and by working with Tribes to develop partnership guidance materials for a Tribal audience.

B. Access. Ensure that land managers and Tribes are aware of the 2008 Farm Bill and other legal authorities regarding accommodation of AI/AN access for religious, ceremonial, or other purposes, and limited closures of NFS lands for Tribal traditional and cultural practices.

C. Protection. Increase the physical protection of sacred sites, historic properties, and their surroundings during land management activities.
   1. Ensure line officers and law enforcement personnel work together to protect sacred sites and allow appropriate access by Tribal traditional, cultural, or religious practitioners. Coordinate with Tribal, State, and other local enforcement agencies to inform them of allowed, expected, and permitted Tribal activities.
   2. Utilize DOI-USDA cross-designations authorities to assist in the enforcement of violations of ARPA and NAGPRA, and other cultural crimes. Work with the Bureau of Indian Affairs (BIA) to utilize tribal LEOs, where appropriate, who have been commissioned consistent with DOI authorities. Consult on emergency activities, such as fire and other natural disasters, as early as possible to protect sacred sites.
   3. Where feasible, include AI/AN people as stewards in monitoring sacred sites.
   4. Improve the ability to identify, document, and maintain confidentiality of sacred sites information, consistent with applicable law.

SACRED SITES AND THE FOREST SERVICE: SYNTHESIS OF THE LEGAL LANDSCAPE[38]

OVERVIEW

Federal land management agencies, including the Forest Service, operate under myriad laws, regulations, policies, and procedures that influence and direct the agencies' discretion to protect and accommodate AI/AN use of sacred sites located on Federal lands. These laws and policies range from the United States Constitution to agency directives guiding employees' actions relative to a particular statute or regulation.

Overall, land management agencies are afforded a great deal of discretion when they decide to protect sacred sites and have employed a number of laws and policies to protect or mitigate impacts to sacred sites. However, land management agencies' decisions impacting sacred sites in ways that many AI/AN people consider damaging and sacrilegious have been treated deferentially and upheld by the courts as not violating AI/AN peoples' constitutional, statutory, or other rights. Courts have been constrained by the often limited cause of action provided in statutes written to protect AI/AN sacred sites. Courts have ruled that these statutes do not create judicially enforceable individual rights.[39] Many AI/AN commenters noted that due to court decisions regarding these statutes, the statues have "no teeth." Thus, agency-approved projects that Tribes and other AI/AN people consider to be a desecration of their sacred sites have been upheld by courts as not imposing a substantial burden on the Tribes' free exercise of religion, even under the Religious Freedom Restoration Act (RFRA).[40]

While the Federal Government may prevail in court after months or years of litigation regarding planned actions that adversely impact sacred sites, the victory may come at great cost to the agency's and the Federal Government's relationship with Tribes: not only with the particular Tribe(s) whose site has been affected, but with many AI/AN people and groups nationwide. In comments made before and after release of the Draft Report, throughout the United States, we heard AI/AN people say they do not believe the laws designed to protect their interests are capable of doing so. In many cases, they do not believe the Forest Service or any other Federal agency is concerned with or capable of providing protection for these sacred sites.

There are, however, many existing laws, regulations, policies, and court decisions upon which the Forest Service and other Federal land management agencies can and do rely to support their decisions to protect sacred sites. We highlight these authorities below, especially those available to the Forest Service.

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[38] This synthesis is intended to improve understanding of available authorities and the discretion they provide the agency; it is not intended to be comprehensive or all-encompassing. For more information on relevant case law and other authorities, see appendices F, Selected Court Decisions, and G, Existing Authorities.

[39] *Lyng* v. *Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988).

[40] *Navajo Nation* v. *United States Dep't of Agric.,.* 535 F.3d 1058 (9th Cir. 2008) (*en banc*); *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

GOVERNMENT'S TRUST RESPONSIBILITY TO TRIBES

The Tribal trust responsibility requires the Federal Government to maintain a fiduciary relationship towards all FRTs. The trustee beneficiary relationship between the Federal Government and Indian Tribes has been described as resembling a "guardian-ward" relationship. The trust relationship was first recognized by the Supreme Court in its early decisions interpreting Indian treaties,[41] and the Court's interpretation of the trust responsibility has evolved over the years. Today, certain principles of this trust relationship are clear.

1. Support for Tribal sovereignty and Tribal self-government is important to the execution of the Federal trust responsibility.

2. The 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. The trust responsibility also applies to the right of Tribes to govern their own reservations.

3. The trust responsibility applies to Congress, as well as all Executive Branch agencies.

4. Congress under certain laws has imposed more specific trust duties upon particular Federal agencies, mainly the DOI and in particular the BIA.

5. Congress may unilaterally alter or terminate the terms of the trust at any time, without the Tribes' consent, provided Congress does so by an express and clear act.

Federal agencies, including land management agencies, should approach their trust responsibilities to FRTs in a way that gives effect to Federal Indian policy, is protective of Tribal property interests, and ensures Tribes' political and cultural well-being and survival. Government-to-Government communication is essential to understanding Tribal

Figure 5: The Lyng Decision
The G-O Road

In ***Lyng* v. *Northwest Indian Cemetery Protective Association*,** 485 U.S. 439 (1988), the Forest Service sought to develop a road on the Six Rivers National Forest (the Gasquet-Orleans Road or "G-O Road") through an area historically used by Indians for religious and spiritual activities. An Indian organization and several individual Indians sought to prohibit the road construction, arguing that the road would violate their rights under the **Free Exercise Clause** of the First Amendment.

The Supreme Court held that the Free Exercise Clause did not prohibit the Government from constructing the proposed road because the Government's action would not coerce the Indians into violating their religious beliefs, nor would the governmental action penalize the exercise of religious rights by denying adherents an equal share of the rights, benefits, and privileges enjoyed by other citizens.

The Court held that the Forest Service's efforts to adjust the road to minimize adverse impacts to the Indians' spiritual and religious interests in the area was consistent with the policy of the United States as set forth in the American Indian Religious Freedom Act (AIRFA) and, at the same time, the Court determined that AIRFA provides no judicially enforceable individual right or cause of action against the Government.

[41] For example, the Supreme Court observed in *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) (1831), that Native American Tribes are appropriately considered as "domestic dependent nations" that are "in a state of pupilage" to the United States, resembling "that of a ward to his guardian." In *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832), the Court held that Federal treaties with the Cherokee recognized the tribe as a distinct political community which "claimed and receiv[ed] the protection of one more powerful."

rights and interests and fulfilling trust responsibilities to Tribes. While implementing Federal law pertaining to Federal lands, land managers should also consider how their actions will support Tribes' ability to protect their own members, manage their resources, and generally maintain their distinct cultural and political identities.

FIRST AMENDMENT OF THE CONSTITUTION: THE ESTABLISHMENT CLAUSE AND THE FREE EXERCISE CLAUSE

Federal actions that may impact Tribal spiritual, traditional, and religious practices are guided by the First Amendment of the United States Constitution which provides, in pertinent part, that:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…" (U.S. Const. amend. I).

An extensive body of case law has developed regarding the two aspects of this provision, known as the Establishment Clause and the Free Exercise Clause of the First Amendment. Courts deciding matters involving the Free Exercise Clause have found that 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. See figure 5.

The Supreme Court has held that the Establishment Clause generally prohibits the Government from singling out religious organizations for special treatment, whether in the form of a direct benefit or an exemption from a Government requirement. The Government must "pursue a course of neutrality toward religion, favoring neither one religion over others nor religious believers over nonbelievers."[42] See figure 6. At the same time, 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."[43] Case law developed under the Establishment Clause generally has created discretion for agency decisionmakers to work with AI/AN people to develop reasonable accommodations for Tribes and traditional practitioners to access and protect sacred sites.[44] *See* figure 6.

In many cases where the Government has been accused of violating the Establishment Clause, courts have applied some variant of what has become known as the "*Lemon* test," to weigh the issues. This test, which originated in *Lemon* v. *Kurtzman*, (403 U.S. 602), a 1971 Supreme Court case, is used to determine whether Government action has violated the Establishment Clause of the United States Constitution. The test has three prongs, which may be summarized as follows:

1. The Government's action must have a secular purpose;
2. The Government's action must not have the primary effect of either advancing or inhibiting religion; and

[42] *Board of Education of Kiryas Joel* v. *Grumet*, 512 U.S. 687, 696 (1994) (internal quotation omitted).
[43] *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).
[44] For more information on court decisions involving sacred site issues, see appendix F, Selected Court Decisions.

3. The Government's action must not result in an "excessive Government entanglement" with religion.

If any of these three prongs is violated, the Government's action may be deemed unconstitutional under the First Amendment. However, the *Lemon* test has been scrutinized, criticized, and distinguished and has evolved since 1971, with the Ninth Circuit noting, "the *Lemon* test has hardly been sanctified by the Supreme Court"[45]. While courts regularly cite the *Lemon* test when evaluating Establishment Clause cases, the fact that religious considerations factored into the Government's decision will not automatically render the Government action unconstitutional. See figure 6 below.

In very broad terms, the Free Exercise Clause might be thought of as a "floor" and is written in terms of what the Government *cannot* do to the individual: to wit, 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. The Establishment Clause might be considered a "ceiling" in that it limits Government action in support of religious exercise: actions taken to protect sacred sites must not single out one particular religion for special treatment. Accommodation of particular religious practices, however, is permissible, particularly if Government action also serves a secular purpose.

Thus, the responsible official has discretion when weighing alternatives that may impact a sacred site. Broadly speaking, this discretion is bounded by the Free Exercise Clause and the Establishment Clause.

Figure 6: The *Access Fund* Decision Climbers and Cave Rock

In *Access Fund* v. *USDA* (2007), the Ninth Circuit upheld a decision by the Forest Service for a complete ban on recreational rock climbing on Cave Rock, the most sacred feature in the Washoe religion, finding that the restriction did not violate the **Establishment Clause**. The court found that the Forest Service in approving the ban had acted pursuant to a **secular purpose**—the preservation of a historic and cultural area—and concluded that "even if the ban on climbing were enacted in part to mitigate interference with the Washoe's religious practices, this objective alone would not give rise to a finding of an impermissible religious motivation." The panel also noted "the Supreme Court has counseled that "the Constitution… affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." That is, "the Government may (and sometimes must) accommodate religious practices and…it may do so without violating the Establishment Clause."

[45] *Access Fund* v. *USDA*, 499 F.3d 1036 (9th Cir. 2007).

STATUTES SUPPORTING SACRED SITE PROTECTION

Congress has enacted a number of laws designed to protect Tribes' traditional, cultural, and religious uses and values. 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.[46] In 1979, Congress adopted the **ARPA**, creating protections for archeological resources on federal and Tribal lands.[47] In 1990, Congress passed the **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.[48]

The **Religious Freedom Restoration Act,** 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."[49] Though written in part to address concerns of the AI/AN community with adverse outcomes in court in *Lyng* and other cases, the impact of RFRA, and its value in the minds and hearts of Tribes, traditional practitioners, and indigenous people, was substantially lessened by a court decision in the Ninth Circuit known as *Navajo Nation* v. *United States Forest Service*. In this decision, the entire Ninth Circuit, ruling on a petition for rehearing, found that a Forest Service decision to allow the use of treated wastewater (sewage effluent) for snowmaking at the Snowbowl Ski Area did *not* pose a "substantial burden" to the Tribes' religious practice, because it does not "coerce the Plaintiffs [Tribes] to act contrary to their religious beliefs under the threat of sanctions, nor does it condition a governmental benefit upon conduct that would violate their religious beliefs." The 13 affected Tribes consider the snowmaking, and in particular the use of treated wastewater to make snow, to be a sacrilegious desecration of their sacred mountains, the San Francisco Peaks. The Ninth Circuit's decision included a dissent that would have held the activity was indeed a substantial burden on religious practices of the Tribes. The Tribes petitioned for certiorari before the U.S. Supreme Court, which declined to hear the case in 2009.[50]

In passing the **NHPA** in 1966, Congress declared that the spirit and direction of the Nation are founded upon and reflected in its historic heritage and that heritage should be preserved to give a sense of orientation to the American people. With the passage of the NHPA, Congress went beyond the

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[46] 42 U.S.C. §1996.

[47] 16 U.S.C. §470aa - 470mm.

[48] 25 U.S.C. §3001.

[49] (42 U.S.C. 2000bb, et. seq.) Pub. L. 103-141, Sec. 7, Nov. 16, 1993, 107 Stat. 1489

[50] *Navajo Nation* v. *United States Forest Service*, 535 F.3d 1058 (9th Cir., 2008), *cert denied*, 129 S.Ct. 2763 (2009). In a follow-up case to *Navajo Nation*, Plaintiffs Save the Peaks Coalition and other AI/AN individuals alleged the Forest Service's decision at Snowbowl did not adequately analyze the impacts resulting from the potential ingestion of snow made from reclaimed wastewater. Plaintiffs contended this constituted a violation of NEPA resulting from the Forest Service's failure to take a "hard look" at these potential impacts. In upholding the District Court, the Ninth Circuit stated that Plaintiffs' litigation tactics in this case were "unfair" and "a gross abuse of the judicial process." The court found in favor of the Forest Service (and Arizona Snowbowl Resort) on the merits of the case, concluding: "Having discussed the issue at length in the [Final Environmental Impact Statement] and the response to comments, the USFS clearly took a 'hard look' at the environmental impacts of permitting the snowmaking project to proceed. The FEIS contains a thorough discussion of the significant aspects of the probable environmental consequences, including the risks posed by human ingestion of snow. Indeed, it is hard to imagine how the USFS's analysis could have been more exhaustive." *Save the Peaks Coalition* v. *United States Forest Service*, No. 10-17896, slip op. (9th Cir. Feb. 9, 2012).

emphasis on objects and ruins in the Antiquities Act, setting into law a broad range of historical values. Under the NHPA, prior to approving federal action, agencies must take into account and enter consultation concerning the effects of the action on properties eligible for inclusion in the National Register for Historic Preservation. Under the NHPA amendments of 1992, historic properties of religious and cultural importance to a Native American Tribe may be determined eligible for inclusion on the National Register of Historic Places (National Register or NRHP) and therefore subject to NHPA consultation requirements. The 1992 amendments significantly expanded the provisions of the NHPA to ensure that Tribal interests are considered in determinations of significance and effect.[51] For more information on the NHPA and the interplay between sacred sites and traditional cultural properties, see figure 7, and table 1.

[51] 16 U.S.C. §470a(d); see also Forest Service Manual 2363.17.

FIGURE 7: Historic Properties and Sacred Sites—Places That Matter

When the Antiquities Act became law in 1906, the American sense of historic preservation was very much devoted to the objects and ruins so prized by archaeologists and museum curators. The Historic Sites Act of 1935 provided protection for buildings and structures, and the Reservoir Salvage Act of 1960 continued the trend in preservation of things that would otherwise be destroyed. In 1966, with the passage of the NHPA, Congress went beyond the emphasis on objects and ruins in the Antiquities Act, setting into law a broad range of historical values.

The preamble to the act is highlighted here for its declaration that the cultural foundations of the Nation should be preserved as a living part of our community.

In enacting the NHPA, Congress declared that:

1) The spirit and direction of the Nation are founded upon and reflected in its historic heritage;
2) The historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;
3) Historic properties significant to the Nation's heritage are being lost or substantially altered, often inadvertently, with increasing frequency;
4) The preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans.

16 U.S.C. 470. Additionally, the NHPA declared it to be our national policy that the Federal Government will "administer federally owned, administered, or controlled prehistoric and historic resources in a spirit of stewardship for the inspiration and benefit of present and future generations."

Section 106 of NHPA requires Federal agencies to consider the effects of any Federal undertaking that might affect historic properties. Regulations were prepared and codified (36 CFR 800 *et seq.*, 16 U.S.C. 469–470), and significant amendments to the statute were passed in 1980 and 1992. The 1980 amendments, in Section 110, established the expectation that agencies would manage a program of inventory to proactively identify all historic properties on public lands, and required heritage planning.

In 1990, the National Park Service released **Guidelines for Evaluating and Documenting Traditional Cultural Properties**, or "Bulletin 38," to provide guidance on evaluating traditional cultural properties as historic properties that may be eligible for listing on the National Register of Historic Places.

The 1992 NHPA amendments responded to general concerns about historic properties of religious and cultural important to AI/AN people. These amendments recognized and addressed AI/AN interests by broadening the notion of "historic properties" to include historic properties of religious and cultural importance to tribes: "*Properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register*" (NHPA Section 101(d)(6)(A)).

With the addition of this language in the regulations at 36 CFR 800, tools for considering effects on some sacred sites as historic properties were made available in the same way as all other historic properties. Identification of such sacred sites as a type of historic property, determination of actions causing adverse effects to sacred sites, and the appropriate resolution of any adverse effects must be informed by the special knowledge of AI/AN people.

Interaction of National Historic Preservation Act and Executive Order 13007

Throughout this review, we heard that it is important to clarify the distinction between sacred sites under E.O. 13007 and traditional cultural properties under NHPA. The following figures attempt to illustrate those distinctions. However, it is also important to understand that in many cases both authorities can be used for the protection of Indian sacred sites.

TABLE 2
COMPARING SACRED SITES AND TRADITIONAL CULTURAL PROPERTIES

	E.O. 13007 Sacred Site	NHPA Traditional Cultural Property (TCP)
Who identifies the sacred sites or TCP	Only a Tribe or appropriate representative of an Indian religion may identify a site as sacred.	The agency designates a TCP, through consultation with Tribes and others.
How is it defined?	A site that is "sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion."	A historic property that is eligible for NRHP "because of its association with cultural practices or beliefs of a living community."
What is the authority that requires consultation?	• E.O. 13007, Section 2 • Executive Memo, April 29, 1994 • E.O. 13175	• 36CFR 800.2 through 800.7 require consultation regarding the significance of the historic property that is a TCP during NHPA Section 106 review. • NHPA Section 110(a) requires consultation for the identification of traditional cultural properties during NHPA Section 110 inventory. • Note: Consultation requirements such as NHPA Section 101 may include non-Tribal entities (State Historic Preservation Officers, ACHP, and others).
What are the confidentiality requirements?	"Where appropriate, agencies shall maintain the confidentiality of sacred sites."	• NHPA Section 304 requires the agency to secure information regarding the nature and location of historic properties. Traditional cultural properties are historic properties and therefore protected under this section of the NHPA. • National Register Bulletin 38 provides official guidance on the documentation and designation of traditional cultural properties, including the restriction on release of certain information.
What are the provisions for disclosure?	Subject to FOIA, but Farm Bill Prohibition on Disclosure provides for security of information regarding the "identity, use, or specific location" of site, resource, or cultural items.	• Information may be shared with the National Park Service Keeper of the NRHP as part of the process for listing on the National Register of Historic Places. • NHPA Section 106 and 36CFR 800.2-7 require that information be shared with State Historic Preservation Officer/Tribal Historic Preservation Officers Tribal Historic Preservation Officers. • May be published in Federal Register
Who documents sacred sites or TCPs?	Agency	Multiagency: TCPs are historic properties and their listing on the National Register of Historic Places requires NPS approval.
How are records treated?	Sealed: Agency restricted subject to parameters established in consultation with the	TCP Determination-NRHP criteria: • Limited public release depending on the

	designating Tribe(s).	nature and location of the property • FOIA Exceptions: Use of Sec. NHPA Section 304 to withhold site information
How are sacred sites and TCPs managed?	• Accommodate tribal use and access where appropriate • Memorandum of understanding or other agreements to establish management practices and protections.	• The agency must address its multiple use mission when managing TCPs. • Programmatic agreements or site specific agreements prepared under the provisions of 36CFR 800 *et seq*.
How are sacred sites and TCPs protected?	Where appropriate, avoid adversely affecting the physical integrity of such sacred sites	• Seek to avoid adverse impacts to integrity of characteristics of the property that qualify it for inclusion in the NRHP • Adverse impacts require consultation to establish mitigation requirements in site specific memorandums of agreement for the protection of TCPs under 36CFR800

In the **2008 Farm Bill,**[52] Congress enacted legislation "to strengthen support for the policy of the United States of protecting and preserving the traditional, cultural, and ceremonial rites and practices of Native American Tribes, in accordance with [AIRFA]."[53] The 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.[54]
- 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. See figure 9, and appendix C, 2008 Farm Bill.

Figure 9: Confidentiality

For many reasons, practical, cultural, religious, or political, Tribal people may be reluctant to share information related to sacred sites with Federal agency personnel. Worries about members of the public vandalizing or looting sacred sites and concerns about increased visitation, noise, or traffic play a role in tribal peoples' hesitation to share information about the location and uses of sacred sites. Moreover, in many tribal cultures, it is *strictly forbidden* to discuss the location and uses of specific sites and what makes them sacred to the Tribe with outsiders who do not practice the same life-ways, or even members who are not elders or traditional practitioners. The exemptions in FOIA at 5 U.S.C. §552(b) determine the extent to which a federal agency can withhold documents from disclosure.

Congress has also enacted site-specific laws pertaining to particular administrative units of the federal land management agencies that authorize temporary closure for exclusive use by Tribes. These statutes include authority to temporarily close portions of El Malpais National Monument in New Mexico for exclusive use by Tribes for traditional cultural and religious purposes; authority to temporarily close portions of Cibola Historical Park for Indian religious services; and similar closure authority for lands included under the California Desert Protection Act of 1994.[55]

OTHER AUTHORITIES SUPPORTING SACRED SITES PROTECTION

This review has already discussed President Clinton's E.O. 13007 (1996) on Indian sacred sites at length. E.O. 13007 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."

E.O. 13007 defines "sacred sites" as follows:

[52] Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, §§ 8101-8106, 25 U.S.C. §§ 3051-3056.
[53] Id. at § 8101(7).
[54] In January 2011, this provision was entered into the Code of Federal Regulations as a type of closure the Forest Service may issue under special order. *See* "Prohibitions in Areas Designated by Order; Closure of National Forest System Lands To Protect Privacy of Tribal Activities," 76 Fed. Reg. 3015 (Jan. 19, 2011), codified at36 CFR §261.53(g). See also appendix C.
[55] 16 U.S.C. § 460uu-47; 16 U.S.C.§228i; and 16 U.S.C. §410aaa-75.

> 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.

For the full text of E.O. 13007, please see appendix B. **A key feature of this definition is that it is Tribes and appropriate representatives of AI/AN religions who identify which sites are sacred to them,** *not* the Federal Government.[56] Though E.O. 13007 does not create a private right of action and the definition of sacred sites is unsatisfactory to many AI/AN people and agency employees, E.O. 13007 is currently the clearest federal policy on sacred sites.

In December 2010, the United States announced support for the **United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)**.[57] In announcing this support, President Obama stated: "The aspirations it affirms—including the respect for the institutions and rich cultures of Native peoples—are one we must always seek to fulfill…[W]hat matters far more than any resolution or declaration – are actions to match those words."[58] The UNDRIP is a nonbinding, aspirational document. It creates no new rights under U.S. or international law, nor is it a statement of current international law. Its articles address indigenous peoples' rights to maintain culture and traditions (Article 11); and religious traditions, customs, and ceremonies (Article 12); to participate in decisionmaking in matters which would affect their rights (Article 18); and to maintain spiritual connections to traditionally owned lands (Article 25). The UNDRIP is reprinted in full in appendix G, Existing Authorities.

LAND MANAGEMENT PLANNING PROCESSES

The Forest Service conducts land management planning activities under several overarching statutes and their implementing regulations. These authorities control how the agency plans for and executes projects with on-the-ground impacts, including those that may have an impact on sacred sites. Two primary statutes that significantly influence all Forest Service land management decisions are the National Forest Management Act[59] and the National Environmental Policy Act. Further, section 202(b) of the Federal Land Policy and Management Act (FLPMA) directs the Secretary of Agriculture to "coordinate land use plans for lands in the [NFS] with the land use planning and management programs of and for Indian tribes by, among other things, considering the policies of approved tribal land resource management programs."[60]

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[56] This is a key distinction between "sacred sites" as defined by E.O. 13007, and "traditional cultural properties" managed under the NHPA. *See* table 1 and figure 7.

[57] For further explanation of the United States' position on UNDRIP and many initiatives in Indian country, see Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples—Initiatives to Promote the Government to Government Relationship and Improve the Lives of Indigenous Peoples, which was released to accompany the President's statement in support of the Declaration on January 12, 2011, at http://www.state.gov/s/srgia/154553.htm, last visited January 16, 2012.

[58] President Obama, White House Tribal Leaders' Summit, Washington, DC, December 16, 2010. Available at: http://www.whitehouse.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference, last referenced January 16, 2012.

[59] National Forest System Land Management Planning; Final rule and record of decision, 77 Fed. Reg. 21162 (April 9, 2012). This rule was developed using a collaborative process that went beyond minimum statutory requirements. The process included extensive consultation and collaboration with tribes.

[60] 43 U.S.C. § 1712(b).

On April 9, 2012, the Department published in the *Federal Register*, the final rule, codified at 36 CFR Part 219, for NFS land management planning under NFMA. Section 219.4 of the final rule requires opportunities for public and Tribal participation and coordination throughout the planning process. Section 219.4(a)(2) requires consultation with FRTs or ANCs, and 219.4(a)(3) requires that the responsible official request "information about native knowledge, land ethics, cultural issues, and sacred and culturally significant sites" during consultation and opportunities for Tribal participation. Section 219.6(b) requires the assessment to include identification and evaluation of information about cultural conditions and cultural and historic resources and uses. Section 219.8 recognizes cultural aspects of sustainability by requiring "cultural and historic resources and uses" be taken into account when designing plan components to guide contributions to social and economic sustainability. Section 219.10(b)(1)(ii) requires "plan components . . .for a new plan or plan revision must provide for protection of cultural and historic resources," and "management of areas of Tribal importance." The final rule also includes recognition of and requirements for "ecosystem services," which include "cultural heritage values."

A thorough treatment of these laws and regulations' applicability to the protection of sacred sites is beyond the scope of this report. However, it is worth noting that while land management plans must balance all issues related to management of NFS lands and resources, development of a land management plan may provide a proactive process for evaluating methods of protecting sacred sites**,.** This report includes recommendations to consider sacred sites in land management plans and incorporate the concepts described herein in Forest Service directives. See Recommendations II.E.1 and 2.

Forest Service directives at FSM 1563.01b[61] describe in brief the agency's responsibility in cooperative land management and planning with Tribes:

> 1. Coordination with Tribal Land Use Management and Planning. [Section 202(b) of FLPMA] …provides that:
>
> **In the development and revision of land use plans, the Secretary of Agriculture shall coordinate land use plans for lands in the National Forest System with the land use planning and management programs of and for Indian Tribes by, among other things, considering the policies of approved Tribal land resource management programs. [43 U.S.C. 1712(b).]**…
>
> 2. Consultation and Coordination with Tribes on Forest Planning. Regulations implementing the National Forest Management Act (NFMA) of 1976 (16 U.S.C. 1600 et seq.) direct the Forest Service to consult with and coordinate forest planning with Tribes. The land management planning regulations, which implement NFMA, are set out at 36 CFR part 219. […]
>
> 3. Consultation and Coordination with Tribes on NFS Project Planning and Decisionmaking. The National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 et seq.) and the Council on Environmental Quality (CEQ) implementing regulations at 40 CFR parts 1500-1509 require

[61] Forest Service directives at 1563.01b were last revised in 200X. This report recommends updating and revising these directives.

Federal agencies to invite Tribes to participate in the scoping process for projects and activities that affect Tribes and requires NEPA documentation. Section 1501.2 requires that:

The Federal agency consults early with appropriate State and local agencies and Indian Tribes and with interested persons and organizations when its own involvement is reasonably foreseeable.

Tribes with treaty rights and other federally protected rights on National Forest System lands may also meet with line officers in advance of the formal planning processes. E.O. 13175 calls for early consultation with Tribes in the development of regulatory policies that have Tribal implications (FSM 1563.01g, para. 1).

SUMMARY OF EXISTING LEGAL AUTHORITIES

The agency has many authorities that can support a decision to protect sacred sites. In addition to those discussed here, *see* appendix F, Selected Court Decisions, and appendix G Existing Authorities. From this review of case law, statutes, regulations, and policies, some general conclusions may be drawn.

- Actions protective of cultural resources, watersheds, animal communities, and other natural resources that also protect an AI/AN sacred site may serve a secular purpose, as well as accommodate Tribal religion.
- The 2008 Farm Bill provides some authority for protecting confidential information regarding sacred sites from disclosure under the FOIA. It also authorizes temporary closures of NFS lands for Tribal traditional and cultural practices. This authority has been implemented in Forest Service regulations at 36 CFR 261.53(g). See appendix C.
- Subject to applicable law and as appropriate, the Forest Service can amend directives guiding agency action under NEPA (FSM 1950); NFMA (FSM 1920); and historic preservation laws such as NHPA, ARPA, and NAGPRA (FSM 2360); as well as agency directives on law enforcement (FSM 5370), wildfire management (FSM 5100), other land management activities, and Tribal Relations (FSM 1563), to provide more protection for sacred sites.
- If the agency is aware of its existing authority to protect sacred sites and chooses to use it, many actions can be taken to protect sacred sites without amending directives.

Recommendations for actions that can be taken under existing authorities, as well as those that will require policy changes, are summarized in the “Acknowledgements and Recommendations” section, above.

RECOGNITION/NEXT STEPS

USDA's OTR and the Forest Service want to recognize and honor the many individuals from Tribes, AI/AN organizations, traditional practitioners, the public, and Forest Service employees who contributed to this review and the development of this report. It was an intensive, emotional effort. Their participation has been critical.

This *Final Report* is intended to advise the Secretary of Agriculture on recommended policy changes that will improve the Forest Service's overall relationships with Tribes and, in particular, improve the way the agency treats Tribal sacred sites, while still upholding its mission to sustain the health, diversity, and productivity of America's national forests and grasslands to meet the needs of present and future generations. Implementation of the recommendations contained in this *Final Report* will likely foster changes in how the agency makes land management decisions for the good of all Americans. If adopted by the Secretary of Agriculture, some of the recommendations can be implemented immediately. Other recommendations will take longer to implement and may require public notice and comment or coordination among the Federal land management agencies.

In the short term, the Forest Service anticipates improving its training and directives in keeping with the recommendations in this report. Many recommendations will be impacted by current and future budget constraints and depend on availability of funding. The Forest Service's OTR will, however, report annually on implementation of the adopted recommendations.

We anticipate that implementation of adopted recommendations will continue to enhance agency, operations and procedures. Since the review was started in 2010, it has catalyzed the sharing of information and other positive changes in the Forest Service's relationship with Tribes, such as:

- Including sacred sites as a significant consideration in a major national environmental review.
- Hiring an AI/AN person as a line officer for a national forest that has historically had a tumultuous relationship with local Tribes.
- Conducting Tribal consultations before, during, and after a major fire to ensure suppression activities were conducted in a manner that Tribes considered appropriate for their sacred sites.
- Using the new authority 36 CFR 261.53 for temporary closure of an area in the NFS to accommodate a Tribal sun dance.

We anticipate that improved relationships between the Forest Service and Tribes will be one of the most important benefits of this review and of the implementation of its recommendations. We strongly believe that a better understanding of the values connected to sacred sites will continue to lead to positive changes in perspective, protection, access, and continued use of these special places across the NFS landscape.

We believe this emerging effort will provide much-needed attention to this important concern and will truly be in furtherance of the President's commitment to Tribal leaders that he reiterated again this past December when many of you may have been in Washington for his second historic meeting with Tribal leaders.

> **Janie Hipp**, USDA Senior Advisor to the Secretary for Tribal Affairs
> National Telephonic Listening Session
> February 14, 2011

We have [heard] a lot of specifics, and we asked for them. We wanted your experiences, and you gave them to us. We asked for some solutions, and you came up with some. We appreciate that. That is part of why we are doing this. And I hope this kind of approach represents…a collaborative process, that we try to collect information before we write a plan, before we write a policy, and hopefully we can learn to do more of that.

> **Jim Hubbard**, Forest Service Deputy Chief for State and Private Forestry
> Listening Session, Eureka, California
> March 4, 2011

I as Regional Forester will be talking to my counterparts that cover all 193 million acres of National Forest System lands about the importance of us and our Line Officers engaging with you in ways that advance the cause of making sure we're protecting and treating sacred sites in an appropriate way.

> **Corbin Newman**, Forest Service Regional Forester for the Southwestern Region
> National Telephonic Listening Session
> November 29, 2010

If we are not successful in accomplishing the purposes of this sacred sites review, we are all diminished.

> **Joel Holtrop**, Forest Service Deputy Chief (retired) for National Forest System
> Listening Session, Alaska Forum on the Environment, Anchorage, Alaska
> February 6, 2011

I cannot overemphasize the value of Government-to-Government consultations with the Tribes. These discussions continue to produce information critical to developing land management strategies that respect and protect America's sacred lands.

> **Thomas J. Vilsack**, Secretary of the U.S. Department of Agriculture
> Announcement of Availability of *Draft Report* on Indian Sacred Sites
> August 6, 2011

APPENDICIES

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APPENDIX A: GLOSSARY

Glossary

Alaska Native Corporation (ANC): A regional, urban, or village corporation established under the laws of the State of Alaska in accordance with the provisions of the Alaska Native Claims Settlement Act.

American Indian/Alaska Native (AI/AN): In this report, this term is used as an inclusive term to refer to indigenous individuals in the contiguous United States, Hawaii, and Alaska, whether or not they belong to a Federally Recognized Tribe. Individuals may also be referred to as Native Americans or Indians in law, regulations, and policies. This definition includes Native Hawaiians.

Farm Bill: The Food, Conservation, and Energy Act of 2008, Title VIII, Subtitle B—Cultural and Heritage Cooperation Authority, Sections 8101–8106, provides for the Forest Service to accommodate Tribal requests for confidentiality of information, reburial of human remains, access to NFS lands and forest products from NFS lands for Tribal traditional and cultural practices. These provisions may not be applicable for use by other federal agencies.

Federally Recognized Tribe (FRT): Any Indian or Alaska Native Tribe, band, nation, pueblo, village, or other community, the name of which is included on a list published periodically by the Secretary of the Interior titled "*Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs."*

Forest Service staff: Forest Service employees who are not line officers.

Heritage Program: The Forest Service staff area responsible for identifying, understanding, interpreting, and preserving archaeological and historical resources on National Forest System lands.

Indian sacred site: As used in Executive Order 13007, *". . . 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."*

Line officer: A Forest Service employee with delegated land management decision-making authority over the NFS, a region, an administrative unit, or a ranger district.

Multiple use management: The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people, as described in the Multiple Use-Sustained Yield Act at 16 U.S.C. § 531(a).

Nonfederally Recognized Tribe (NFRT): Indian groups in the United States that are not recognized on the list published periodically by the Secretary of the Interior titled "*Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs."*

Special use authorization: A permit, term permit, lease, or easement which allows occupancy, use, or other privileges on NFS lands (36 CFR 251.51

State Recognized Tribe: Indian Tribes or groups that are acknowledged by a State.

Traditional cultural property (TCP): A property or site that is eligible for inclusion on the National Register of Historic Places because of its association with cultural practices or beliefs of a living community that are rooted in that community's history and because of its importance to maintaining the cultural identity of that community.

Traditional ecological knowledge (TEK): A way of understanding the world, including knowledge of how to live in and adapt to the environment, that is derived from multiple generations of indigenous peoples' interactions, observations, and experiences with their ecosystems. TEK is place-based and culture-based knowledge in which people learn to live in and adapt to their own environment through interactions, observations, and experiences with their ecological system. This knowledge is generally not gained, developed by, or retained by specific individuals, but is rather accumulated over successive generations and is expressed through oral traditions, ceremonies, stories, dances, songs, art, and other means within a cultural context.

Traditional Practitioner: An American Indian/Alaska Native who practices the cultural, spiritual, or religious traditions passed on to him or her in a way accepted by his or her Tribe or cultural peers. Similar terms used in this document include culture keepers, spiritual leader, clan leader, and medicine men/women/societies.

Tribal Consultation: A process that enables Federally Recognized Tribes and Alaska Native Corporations to provide meaningful, timely input and, as appropriate, exchange views, information, and recommendations prior to a Forest Service policy or project decision that may affect their rights or interests.

Tribal Relations Program: The USDA and Forest Service program that advises and assists agency leadership in meeting their responsibilities to Tribes under law and policy, and that leverages opportunities associated with working with Tribal governments and other Native American groups and individuals.

APPENDIX B: EXECUTIVE ORDER 13007 ON INDIAN SACRED SITES

Executive Order 13007 of May 24, 1996: Indian Sacred Sites

By the authority vested in me as President by the Constitution and the laws of the United States, in furtherance of Federal treaties, and in order to protect and preserve Indian religious practices, it is hereby ordered:

Section 1. *Accommodation of Sacred Sites.* (a) In managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites. Where appropriate, agencies shall maintain the confidentiality of sacred sites.

(b) For purposes of this order:

(i) ''Federal lands'' means any land or interests in land owned by the United States, including leasehold interests held by the United States, except Indian trust lands;

(ii) ''Indian Tribe'' means an Indian or Alaska Native Tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian Tribe pursuant to Public Law No. 103–454, 108 Stat. 4791, and ''Indian'' refers to a member of such an Indian Tribe; and

(iii) ''Sacred site'' means 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.

Sec. 2. *Procedures.* (a) Each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, as appropriate, promptly implement procedures for the purposes of carrying out the provisions of section 1 of this order, including, where practicable and appropriate, procedures to ensure reasonable notice is provided of proposed actions or land management policies that may restrict future access to or ceremonial use of, or adversely affect the physical integrity of, sacred sites. In all actions pursuant to this section, agencies shall comply with the Executive memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments.''

(b) Within 1 year of the effective date of this order, the head of each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall report to the President, through the Assistant to the President for Domestic Policy, on the implementation of this order. Such reports shall address, among other things, (i) any changes necessary to accommodate access to and ceremonial use of Indian sacred sites; (ii) any changes necessary to avoid adversely affecting the physical integrity of Indian sacred sites; and (iii) procedures implemented or proposed to facilitate consultation with appropriate Indian Tribes and religious leaders and the expeditious resolution of disputes relating to agency action on Federal lands that may adversely affect access to, ceremonial use of, or the physical integrity of sacred sites.

Sec. 3. Nothing in this order shall be construed to require a taking of vested property interests. Nor shall this order be construed to impair enforceable rights to use of Federal lands that have been granted to third parties through final agency action. For purposes of this order, ''agency action'' has the same meaning as in the Administrative Procedure Act (5 U.S.C. 551(13)).

Sec. 4. This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies, officers, or any person.

WILLIAM J. CLINTON

APPENDIX C: 2008 FARM BILL
CULTURAL AND HERITAGE COOPERATION AUTHORITY PROVISIONS

2008 FARM BILL CULTURAL AND HERITAGE COOPERATION AUTHORITY PROVISIONS

Excerpted from the "Food, Conservation, and Energy Act of 2008," Pub. L. 110-246, Title VIII, Forestry, Subtitle B, Cultural and Heritage Cooperation Authority, §§8101-8107. (June 18, 2008).

SEC. 8101. PURPOSES.

The purposes of this subtitle are--
(1) to authorize the reburial of human remains and cultural items on National Forest System land, including human remains and cultural items repatriated under the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 et seq.);
(2) to prevent the unauthorized disclosure of information regarding reburial sites, including the quantity and identity of human remains and cultural items on sites and the location of sites;
(3) to authorize the Secretary of Agriculture to ensure access to National Forest System land, to the maximum extent practicable, by Indians and Indian Tribes for traditional and cultural purposes;
(4) to authorize the Secretary to provide forest products, without consideration, to Indian Tribes for traditional and cultural purposes;
(5) to authorize the Secretary to protect the confidentiality of certain information, including information that is culturally sensitive to Indian Tribes;
(6) to increase the availability of Forest Service programs and resources to Indian Tribes in support of the policy of the United States to promote Tribal sovereignty and self-determination; and
(7) to strengthen support for the policy of the United States of protecting and preserving the traditional, cultural, and ceremonial rites and practices of Indian Tribes, in accordance with Public Law 95-341 (commonly known as the American Indian Religious Freedom Act; 42 U.S.C. 1996).

SEC. 8102. DEFINITIONS.

In this subtitle:
(1) Adjacent site.--The term ``adjacent site" means a site that borders a boundary line of National Forest System land.
(2) Cultural items.--The term ``cultural items" has the meaning given the term in section 2 of the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001), except that the term does not include human remains.
(3) Human remains.--The term ``human remains" means the physical remains of the body of a person of Indian ancestry.
(4) Indian.--The term ``Indian" means an individual who is a member of an Indian Tribe.
(5) Indian Tribe.--The term ``Indian Tribe" means any Indian or Alaska Native Tribe, band, nation, pueblo, village, or other community the name of which is included on a list published by the Secretary of the Interior pursuant to section 104 of the Federally Recognized Indian Tribe List Act of 1994
(6) Lineal descendant.--The term ``lineal descendant" means an individual that can trace, directly and without interruption, the ancestry of the individual through the traditional kinship system of an Indian Tribe, or through the common law system of descent, to a known Indian, the human remains, funerary objects, or other sacred objects of whom are claimed by the individual.
(7) National forest system.--The term ``National Forest System" has the meaning given the term in section 11(a) of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1609(a)).
(8) Reburial site.--The term ``reburial site" means a specific physical location at which cultural items or human remains are reburied.
(9) Traditional and cultural purpose.--The term ``traditional and cultural purpose", with respect to a definable use, area, or practice, means that the use, area, or practice is identified by an Indian Tribe as

traditional or cultural because of the long-established significance or ceremonial nature of the use, area, or practice to the Indian Tribe.

SEC. 8103. REBURIAL OF HUMAN REMAINS AND CULTURAL ITEMS.
(a) Reburial Sites- In consultation with an affected Indian Tribe or lineal descendant, the Secretary may authorize the use of National Forest System land by the Indian Tribe or lineal descendant for the reburial of human remains or cultural items in the possession of the Indian Tribe or lineal descendant that have been disinterred from National Forest System land or an adjacent site.

(b) Reburial- With the consent of the affected Indian Tribe or lineal descendent, the Secretary may recover and rebury, at Federal expense or using other available funds, human remains and cultural items described in subsection (a) at the National Forest System land identified under that subsection.

(c) Authorization of Use-

(1) IN GENERAL- Subject to paragraph (2), the Secretary may authorize such uses of reburial sites on National Forest System land, or on the National Forest System land immediately surrounding a reburial site, as the Secretary determines to be necessary for management of the National Forest System.

(2) AVOIDANCE OF ADVERSE IMPACTS- In carrying out paragraph (1), the Secretary shall avoid adverse impacts to cultural items and human remains, to the maximum extent practicable.

SEC. 8104. TEMPORARY CLOSURE FOR TRADITIONAL AND CULTURAL PURPOSES.
(a) Recognition of Historic Use- To the maximum extent practicable, the Secretary shall ensure access to National Forest System land by Indians for traditional and cultural purposes, in accordance with subsection (b), in recognition of the historic use by Indians of National Forest System land.

(b) Closing Land From Public Access-

(1) AUTHORITY TO CLOSE- Upon the approval by the Secretary of a request from an Indian Tribe, the Secretary may temporarily close from public access specifically identified National Forest System land to protect the privacy of Tribal activities for traditional and cultural purposes.

(2) LIMITATION- A closure of National Forest System land under paragraph (1) shall affect the smallest practicable area for the minimum period necessary for activities of the applicable Indian Tribe.

(3) CONSISTENCY- Access by Indian Tribes to National Forest System land under this subsection shall be consistent with the purposes of Public Law 95-341 (commonly known as the American Indian Religious Freedom Act; 42 U.S.C. 1996).

SEC. 8105. FOREST PRODUCTS FOR TRADITIONAL AND CULTURAL PURPOSES.
(a) In General- Notwithstanding section 14 of the National Forest Management Act of 1976 (16 U.S.C. 472a), the Secretary may provide free of charge to Indian Tribes any trees, portions of trees, or forest products from National Forest System land for traditional and cultural purposes.

(b) Prohibition- Trees, portions of trees, or forest products provided under subsection (a) may not be used for commercial purposes.

SEC. 8106. PROHIBITION ON DISCLOSURE.
(a) Nondisclosure of Information-

(1) IN GENERAL- The Secretary shall not disclose under section 552 of title 5, United States Code (commonly known as the `Freedom of Information Act'), information relating to--

(A) subject to subsection (b)(l), human remains or cultural items reburied on National Forest System land under section 8103; or

(B) subject to subsection (b)(2), resources, cultural items, uses, or activities that--

(i) have a traditional and cultural purpose; and

(ii) are provided to the Secretary by an Indian or Indian Tribe under an express expectation of confidentiality in the context of forest and rangeland research activities carried out under the authority of the Forest Service.

(2) LIMITATIONS ON DISCLOSURE- Subject to subsection (b)(2), the Secretary shall not be required to disclose information under section 552 of title 5, United States Code (commonly known as the `[FOIA]), concerning the identity, use, or specific location in the National Forest System of--

(A) a site or resource used for traditional and cultural purposes by an Indian Tribe;

(B) any cultural items not covered under section 8103.

(b) Limited Release of Information-

(1) REBURIAL- The Secretary may disclose information described in subsection (a)(l)(A) if, before the disclosure, the Secretary--

(A) consults with an affected Indian Tribe or lineal descendent;

(B) determines that disclosure of the information--

(i) would advance the purposes of this subtitle; and

(ii) is necessary to protect the human remains or cultural items from harm, theft, or destruction; and

(C) attempts to mitigate any adverse impacts identified by an Indian Tribe or lineal descendant that reasonably could be expected to result from disclosure of the information.

(2) OTHER INFORMATION- The Secretary, in consultation with appropriate Indian Tribes, may disclose information described under paragraph (1)(B) or (2) of subsection (a) if the Secretary determines that disclosure of the information to the public--

(A) would advance the purposes of this subtitle;

(B) would not create an unreasonable risk of harm, theft, or destruction of the resource, site, or object, including individual organic or inorganic specimens; and

(C) would be consistent with other applicable laws.

Forest Service Regulations: 36 CFR § 261.53 – Closures for traditional and cultural purposes (76 Fed. Reg. 3015, January 19, 2011).

§ 261.53 Special closures. When provided in an order, it is prohibited to go into or be upon any area which is closed for the protection of:

* * * * *

(g) The privacy of Tribal activities for traditional and cultural purposes.

Closure to protect the privacy of Tribal activities for traditional and cultural purposes must be requested by an Indian Tribe; is subject to approval by the Forest Service; shall be temporary; and shall affect the smallest practicable area for the minimum period necessary for activities of the requesting Indian Tribe.

APPENDIX D: SUMMARY OF SACRED SITES LISTENING SESSIONS

Summary of Sacred Sites Listening Sessions

From November 2010 through April 2011, 55 listening sessions were held with American Indian and Alaska Native (AI/AN) people and communities across the United States. Most of these sessions were in person; however, two nationwide telephonic listening session calls were also conducted. Combined, these sessions included more than 500 and possibly as many as 1,000 AI/AN participants. See Table 1 for dates and locations of each of the listening sessions.

Participants included representatives of Federally Recognized Tribes, Alaska Native Corporations, other State- or nonfederally recognized groups, as well as AI/AN traditional practitioners, culture keepers, and spiritual leaders. In addition, 30 AI/AN individuals submitted comments via email/mail/phone communications. U.S. Department of Agriculture (USDA) Office of Tribal Relations staff and USDA Forest Service employees attended each individual listening session, including the nationwide telephonic listening session calls, scheduled meetings of inter-Tribal organizations, large and small group meetings, and meetings with individual AI/AN Tribes.

For each listening session, a facilitator, line officer, or staff member who attended summarized what was heard and then entered it into a database. Comments from individual emails and letters were also entered into this database. Using the transcripts and notes from the telephonic national listening sessions, as well as the summaries from in-person listening sessions held early in the process, the Triangle Associates, Inc., (Triangle) Team (as a neutral party) devised a coding system to analyze the content of each session. The Triangle Team reviewed the summary of each session and noted content as being consistent with themes heard to date, including new themes to be added, and/or including nuances to be added to existing themes.

Those comments received from the listening sessions and email/mail correspondence that were specific to one sacred site or forest, or were specific to one event, were not included in this summary. However, these specific comments were noted in relation to the theme they referred to (such as confidentiality, access, etc.) and then were forwarded to the Tribal Relations Program manager or other relevant staff.

The USDA/Forest Service Team reviewed these themes for consistency with the listening sessions they had attended. These themes were also reviewed by the agency leads from the appropriate Forest Service region for consistency with the listening sessions they had organized and attended.

Recommendations to address the comments from the listening sessions and those heard from other sources were developed by the teams conducting this review in collaboration with national and regional Forest Service staff. These recommendations are included in the “Acknowledgements and Recommendations” section in the main body of the report.

TABLE 1: SACRED SITES LISTENING SESSIONS DATES AND LOCATIONS

	Region(s)	Date	Location
1.	1, 2, 3, 4, 5, 6, 8, 9, 10	11/29/2010	National Listening Session Conference Call
2.	1, 2, 3, 4, 5, 6, 8, 9, 10	02/14/2011	National Listening Session Conference Call
3.	1	05/27/2010	Confederated Salish & Kootenai Tribal Preservation Department Office, Pablo, MT
4.	2	02/22/2011	Ute Mountain Ute Tribal Hotel and Resort, Towaoc, CO
5.	2	03/10/2011	Wakpa Sica Reconciliation Center, Fort Pierre, SD
6.	2	03/11/2011	Mystic Ranger District, Black Hills National Forest (Medicine Wheel Coalition), Rapid City, SD
7.	3	02/09/2011	Yavapai Apache Cultural Center, Camp Verde, AZ
8.	3	02/18/2011	The Ft McDowell Recreation Center, Ft. McDowell, AZ
9.	3	02/23/2011	Zuni Tribal Cultural Preservation Office, Pueblo of Zuni, NM
10.	3	03/02/2011	Mescalero Tribal Office, Mescalero, NM
11.	3	03/04/2011	Santa Fe NF Supervisor's Office, Santa Fe, NM
12.	3	03/07/2011	Coconino National Forest Supervisor's Office, Flagstaff, AZ
13.	3	03/09/2011	Pueblo of Isleta offices, Isleta, NM
14.	3	03/11/2011	The Huhugam Heritage Center, Gila River Indian Community, Chandler, AZ
15.	3	03/11/2011	Santa Fe National Forest Headquarters, Santa Fe, NM
16.	3	03/11/2011	South Mountain Park and Preserve, Phoenix, AZ
17.	3	03/14/2011	Navajo Nation Museum, Window Rock, AZ
18.	3	03/15/2011	Coalmine Chapter, Tuba City, AZ
19.	3	03/16/2011	Shiprock Chapter House, Navajo Nation, Shiprock, NM
20.	3	03/16/2011	San Carlos Apache Tribal Court House, San Carlos, AZ
21.	3	03/16/2011	Kaibab Band of Paiute Indians Community Center, Pipe Springs, AZ
22.	3	3/17/2011	Hualapai Tribal Historic Preservation Office, Peach Springs, Arizona
23.	3	03/21/2011	Pueblo of Acoma Tribal Office, Acoma Pueblo, NM
24.	3	04/04/2011	Pueblo of Laguna Tribal Office, Laguna, NM
25.	4, 2	03/02/2011	Joint Tribal Council Board Meeting, Ft. Washakie, WY
26.	5	03/01/2011	The Garden Pavilion, 5640 Dudley Boulevard, Sacramento, CA
27.	5	03/04/2011	Natural Resource Conservation Services Building, Eureka, CA
28.	5	03/08/2011	San Bernardino National Forest, San Bernardino, CA
29.	5	03/17/2011	Pit River Tribal Community Center, Burney, CA
30.	6	02/25/2011	Sheraton Hotel Airport, Portland, OR
31.	8, 9	04/05/2011	To Bridge A Gap Conference, Norman, OK
32.	8, 9	02/07/2011	Impact Week Meeting, Joint session of Culture & Heritage, and Natural Resources Committees, Arlington, VA
33.	9	02/03/2011	Voigt Inter-Tribal Task Force meeting, Lac du Flambeau, WI

TABLE 1: SACRED SITES LISTENING SESSIONS DATES AND LOCATIONS (CONTINUED)			
	Region(s)	**Date**	**Location**
34.	9	03/02/2011	Fond du Lac Tribal Center, Fond du Lac Reservation, MN
35.	9	03/09/2011	Great Lakes Visitor Center, Ashland, WI
36.	9	03/31/2011	Chippewa National Forest Headquarters, Cass Lake, MN
37.	10	11/22/2010	Organized Village of Kasaan Offices, Kasaan, AK
38.	10	12/14/2010	Cape Fox Corporation Cultural Resources Office, Ketchikan, AK
39.	10	01/07/2011	Central Council Tlingit Haida Indian Tribes of Alaska (CCTHITA) Office of the President, Juneau, AK
40.	10	01/07/2011	Sealaska Heritage Institute Offices, Juneau, AK
41.	10	01/12/2011	Angoon Community Building, Angoon, AK
42.	10	01/14/2011	Douglas Indian Association Office, Juneau, AK
43.	10	01/26/2011	Sitka Tribe of Alaska Office, Sitka, AK
44.	10	02/01/2011	Organized Village of Kake Tribal Office, Kake, AK
45.	10	02/03/2011	Yakutat Tlingit Tribe, Yakutat, AK
46.	10	02/09/2011	Dena'ina Convention Center, Anchorage, AK
47.	10	02/14/2011	Skagway Traditional Tribe Office, Skagway, AK
48.	10	02/15/2011	Chilkat Indian Village Office, Klukwan, AK
49.	10	02/15/2011	Chilkoot Tribal Office, Haines, AK
50.	10	02/18/2011	Metlakatla Indian Community Hall, Metlakatla, AK
51.	10	02/23/2011	Kasaan Café, Kasaan, AK
52.	10	02/25/2011	Ketchikan Indian Community Board Room, Ketchikan, AK (Session 1)
53.	10	02/25/2011	Ketchikan Indian Community Board Room, Ketchikan, AK (Session 2)
54.	10	03/01/2011	Petersburg Indian Association Office, Petersburg, AK
55.	10	03/07/2011	Hoonah Indian Association Board Room, Hoonah, AK
56.	10	03/10/2011	Wrangell Cooperative Association, Wrangell, AK

APPENDIX D (Continued)

SUMMARY OF WHAT WE HEARD: SACRED SITES LISTENING SESSIONS

LISTENING SESSION THEMES

In reviewing the range of themes heard during the listening sessions, the team conducting the review found three main categories of themes were heard:

1. **The need for effective communications and relationships**–Listening session participants described communication and relationships as foundational to the protection of sacred sites.
2. **Authorities and tools available to the Forest Service**–Listening session participants commented on existing law and policy and the impacts of these on the protection of and access to sacred sites.
3. **Application of authorities and tools through management activities**–Listening session participants made suggestions on how agency management activities need to change to better protect sacred sites.

See below for descriptions of the range of themes heard from listening session participants in each of these categories.

1. The Need for Effective Communications and Relationships:

Several themes emerged from the listening sessions that centered on the relationship between agency personnel and the appropriate AI/AN representatives with connections to each sacred site. This included requests for effective ongoing communications, agreements, and partnerships. Many listening session participants noted where it was not working, and others provided examples of working relationships, agreements, and partnerships.

a. **Ongoing, effective communication and a commitment to relationships with AI/AN people and communities are required for the agency to gain a true understanding of what sacred sites mean to Tribes and other AI/AN people, and, therefore, to improve protection of sacred sites.** This was the most common suggestion or comment heard throughout the listening sessions. Participants commented that ongoing, effective communications, information sharing, and a commitment to a working relationship was foundational to honoring the Federal trust responsibility. For example, "Develop a relationship with Tribal members; go to feasts that are open to the public to show that you are interested and not just looking for an official relationship." Examples of comments included:

- Forest Service leadership, officer, and staff turnover at the forest level significantly affects the quality of the Forest Service's relationships with Tribes. Better policies need to be developed to involve Tribes during Forest Service leadership transitions to ensure that Memorandums of Understanding (MOUs) or other programmatic agreements continue.
- Many Tribal members and traditional practitioners lack modern communication tools such as email. Outreach efforts by the agency need to go beyond the use of information sent by email, posted online, and provided by telephonic listening sessions to include faxing, postal mail, and, most importantly, in-person meetings.
- The agency cannot rely on Federal Register notices as an effective means of communication as these notices are confusing and are difficult to access.
- Effective information sharing is a key component to consider for maintaining communications and relationships.

- The annual "To Bridge a Gap" Conference offers a good model to maintain regular communications between Tribes and the Forest Service.
- Quarterly or annual meetings with the State Historical Preservation Office, the Forest Service, and the interested Tribe were recommended to maintain good communications.
- A range of agreements that support ongoing communications and regular meetings were noted as example models (see more on agreements under number 3 below).

b. **Consultation with Tribes needs to be meaningful and in-person/face to face**. We heard participants throughout the listening sessions consistently request that the agency conduct consultation much earlier in any process and in person with the appropriate decisionmakers from the agency. Tribes across the country noted their capacity to participate in consultation is overwhelmed due to the number of consultations currently underway with the Forest Service and other Federal agencies. The emphasis on consultation with decisionmakers was important to many Tribal participants as we heard that "Too often what was agreed to during consultation is not what is ultimately decided upon." Examples of suggestions heard throughout the sessions included that:
    - Consultation should occur as early as possible in the development of a project, plan, or activity that may affect sacred sites.
    - Consultation should include face-to-face communication with medicine people, spiritual leaders, elders, and with Tribes that do not reside on their aboriginal homelands.
    - Each Tribe should have the opportunity to define how consultation is conducted with the agency.
    - Consultation always needs to occur at the regional and local forest level as this will enable Tribes to develop relationships and the trust needed to discuss specific sacred sites issues.
    - More advanced notice (i.e., 2 months) is needed to account for Tribal councils that meet infrequently.
    - Tribes need to be included very early in planning and decisionmaking processes, including involving Tribes before "scoping" under National Environmental Policy Act (NEPA) takes place.
    - Funding to support travel to and in some cases participation in consultation was requested by many participants.

c. **The right Tribal or AI/AN people must be involved when discussing sacred sites.** We heard from many listening session participants about the importance of the agency involving the "right" AI/AN people in discussions about activities that may affect sacred sites. They provided examples such as:
    - Communications and consultation that may include discussion of sacred sites should include more than Tribal governmental representatives. Involving Tribal spiritual leaders and elders in the sacred sites process is critical as many are not affiliated with a specific Tribal government.
    - Forest Service officials had consulted with the incorrect individuals about removal of remains from burial sites and other similar incidents.
    - Forest Service staff must know and be prepared to work and consult with not only those Tribes physically located nearby the forest, but also those Tribes for which the forest was their aboriginal homeland.

- Members of Nonfederally Recognized Tribes requested that the agency create a formal process for how to provide access to sites for Nonfederally Recognized Tribes.
- All Tribes that use a sacred site should be represented in discussions.
- "If the Federally Recognized Tribes in the area do not have an interest in a sacred site, there is no mechanism to ensure that the site is protected."

d. **Collaborative working relationships/partnerships and cultural sensitivity are essential to the protection of sacred sites.** We heard from many listening session participants about the importance of working relationships and partnerships with Tribes to provide for better protection of sacred sites. It was noted that this protection would more likely occur if agency staff had a better understanding of the meaning of sacred sites to AI/AN people (through cultural orientation or training provided by AI/AN people) and if AI/AN people were directly involved with the agency in sacred sites protection, interpretation, policy development, etc. Suggestions from participants included:
    - Co-development and co-presentation of cultural orientation and sensitivity training for agency line officers, staff, enforcement officers, volunteers, and concessionaires.
    - Advisory groups at the national, regional, and/or forest level to be comprised of Tribal representatives and AI/AN traditional practitioners where appropriate to work in partnership with the agency on the development of sacred sites policy and procedures.
    - Participation of the appropriate AI/AN people in the development of interpretation materials.
    - Training for AI/AN people on working with the Forest Service.
    - Increased opportunities for internships within the Forest Service for Tribal members.
    - AI/AN liaisons to help with public education and outreach including tours.
    - Development of workshops about sacred sites and related laws such as Native American Graves Protection and Repatriation Act (NAGPRA).
    - Camps and other opportunities for AI/AN youth involvement.
    - Joint monitoring of sites to ensure protection.

e. **Agreements between Tribes and the Forest Service are an important mechanism for the protection of sacred sites, but can also be a cause for concern.** We heard from many listening session participants that MOUs or agreements between Tribes and the agency can serve to create and maintain stronger relationships and better communications. Several participants noted that the only way to determine what is sacred is in consultation with Tribes, which may require dialogue, programmatic, or other agreements, or MOUs. Agreements that outline co-management of sacred sites by Tribes and the Forest Service were requested by several participants. We also heard notes of caution from some participants that establishing MOUs can risk leaving out Tribes or other AI/AN people that should participate in discussions with the Forest Service. Examples regarding agreements included:
    - Requests for "co-management" agreements to protect specific sacred sites;
    - Information sharing agreements to protect confidentiality;
    - Models such as the California Historical Records and Information System; MOU regarding Tribal USDA Forest Service Relations on National Forest [System] Lands within the Ceded Territory in Treaties of 1836, 1837, and 1842; and
    - Requests for agreements or permit processes to clarify and allow for access to sites for gathering or ceremonial purposes.

f. **Examples of successes and good relationships do exist between Tribes and the Forest Service at the local and regional level.** Although we heard numerous requests for improved communications and relationships, we also heard from listening session participants about many examples of good relationships with line officers and other Forest Service staff at the local and regional level. Participants shared several models of how AI/AN Tribes and agency staff are maintaining good relations, including:
    - A quarterly Tribal forum for each forest to keep Tribes up-to-date with Forest Service activities.
    - A ceremony that acknowledged loss of cultural sites in Alaska in the 1900s helped to improve relations.
    - Specific examples of individual regional foresters, forest supervisors, and Tribal relations program managers and liaisons who are working to communicate effectively, maintain good relationship with Tribes, and are actively working to protect specific sacred sites.

2. **<u>Authorities and Tools Available to the Forest Service:</u>**
We heard from numerous listening session participants about challenges with current Forest Service authorities or policies; for example, the agency's "multiple-use" mission, the definition of sacred sites, and processes to maintain confidentiality. Participants also noted current laws and policies that are not being used effectively to help protect sacred sites, or they are written in such a way to prevent protection of sacred sites.

a. **The Forest Service "multiple-use" mission does not align with the protection of sacred sites.** We heard throughout the listening sessions that participants questioned the ability of the Forest Service to protect sacred sites while maintaining the current multiple-use mission. Economic valuation of resources was viewed as central to the Forest Service mission and inconsistent with considering spiritual or cultural values.

b. **The definition of what a sacred site is needs to be revisited/clarified/changed to reflect AI/AN perspectives.** Throughout the listening sessions, we heard from AI/AN people that the definition of a sacred site needs be revisited and revised. In particular, we heard that the definition needs to reflect that sacred sites are often not specific locations with boundaries. Instead, they should be viewed as "cultural landscapes" that are more than just their physical location—they also include plants, animals, sound, light, and other sometimes intangible features. Example comments included:
    - The United States should continue to support the United Nations Declaration on the Rights of Indigenous Peoples as a way to demonstrate support for this broader concept of protection of sacred sites.
    - Sacred sites are not related to "religion" as understood under the First Amendment to the U.S. Constitution, but instead as integral to AI/AN culture.
    - Sacred sites include "living resources" that the National Historic Preservation Act (NHPA) does not recognize.
    - Executive Order (E.O.) 13007 on sacred sites needs to be revised to incorporate a much broader AI/AN perspective of sacred sites.

c. **Specific laws or policies were noted as either not being utilized effectively by the agency to protect sacred sites or are preventing effective protection of sacred sites.**

We heard throughout the listening sessions about several examples of current laws and policies that are available to the agency that could be used more effectively to help protect sacred sites. Additionally, some type of "accountability" was suggested so that there is some consequence if agency personnel do not use available tools to protect sacred sites.

Examples of law and policy perceived as underutilized included:

- 2008 Farm Bill provisions for confidentiality, reburial, and land closures (see more under number 2d below).
- The NEPA.
- Incorporation of sacred sites protection in forest planning.
- The American Indian Religious Freedom Act.
- Even if a land management action is excluded from environmental analysis under NEPA, other laws may require the agency to consult before taking action. For example, Section106 of the NHPA requires consultation if a proposed action might affect cultural resources.
- Archaeological Resources Protection Act (ARPA).
- NAGPRA.
- Permits to allow for gathering traditional plants.

Additionally, numerous laws or policies were noted as written in a way that prevents or limits the protection of sacred sites. Examples included:

- 1872 Mining Act was the law most often mentioned as preventing protection of sacred sites.
- The Arizona-Idaho Conservation Act.
- E.O. 13007 is not written in a way that adequately defines what is sacred to AI/AN people.
- AIRFA/RFRA should strengthen "Substantial Burden" as it relates to line officers.
- The Tribal Forest Protection Act, which does not place enough responsibility for protection of sacred sites on the Forest Service.
- Antiquities Act.
- Changing definitions in NAGPRA.
- The National Forest Management Act.
- Forest Service Facility Realignment and Enhancement Act.
- The current proposed revisions to the regulations implementing the National Forest Management Act or "Planning Rule."[62]
- Traditional Cultural Properties do not qualify for protection.
- Special use permit processes that allow for "non-Natives [that] easily take artifacts from identified sacred sites…"

d. **Confidentiality, reburial, and other specific provisions of the 2008 Farm Bill related to sacred sites need to be clarified**. We heard from a wide range of Tribes and traditional practitioners alike about confidentiality, reburial, and other concerns that could be better addressed using provisions of the 2008 Farm Bill (including Sections 8103 on Reburial on

[62] National Forest System Land Management Planning; Proposed Rule, 70 Fed. Reg. 8480 (proposed Feb. 14, 2011) (to be codified at 36 CFR pt. 219).

Forest Service land, 8104 on Temporary Closure of Forest Service Land for Traditional or Cultural Purposes, and 8106 on the specific Freedom of Information Act exemption preventing release of Tribal confidential information). In particular, we heard from many participants that were concerned or unwilling to share information with the Forest Service because information had not be kept confidential in the past, or they did not trust that the information would be kept confidential. Examples of comments regarding confidentiality included:

- Issues with confidentiality that have occurred due to a misinterpretation or failure to implement nondisclosure provisions about sensitive sacred sites information.
- Identification and inventories of sacred sites was challenging for many Tribes due to cultural practices. For example, for some Tribes, an individual who provides information about a site or sacred resource may no longer be allowed to access it.
- Maintaining confidentiality is an essential part of the Federal trust responsibility.
- Specific examples of confidentiality with geographic information system data and intellectual property.
- The Forest Service volunteer stewardship program was a cause for concern as it is unclear what kind of information or training volunteers receive about sacred sites.
- Formal or informal information sharing during consultation needs to be considered confidential.
- Cooperative agreements like MOUs may be beneficial to help increase trust and understanding for sacred site confidentiality.
- The confidentiality provisions under NHPA were noted as a model for protecting confidential information in some cases.

e. **Sacred sites policy should be consistent across Federal land management agencies.** We heard that many participants are frustrated with the wide range of inconsistent policy for the protection of sacred sites across Federal agencies. Participants requested that Federal agencies and land management agencies, in particular, have a consistent policy for protection of and access to sacred sites. Additionally, listening session participants noted that on large developments that require multiagency permitting, Federal agencies need to collaborate together in order to have a blanket policy with respect to consultation with Tribes.

f. **Use of Traditional Ecological Knowledge can be a tool to benefit the protection of sacred sites.** We heard from several listening session participants that inclusion of traditional ecological knowledge along with western science would be a helpful mechanism for creating a balanced approach to protecting sacred sites.

g. **Ownership issues regarding sacred sites were noted by participants as a barrier to the protection of sacred sites.** We heard several examples of ownership issues in relation to AI/AN perspectives of land ownership. Comments included:

- "Nobody owns the land; it is everyone's obligation to care for it. It is not just the responsibility of Tribes to care for the land and specifically sacred sites; it is everyone's responsibility."
- Although Tribes may not own the land, they do not want their access to the resources on the land to be restricted.
- It is difficult to effectively protect sites that span multiple land ownership boundaries.

- Sacred sites and artifacts should be Native owned.

3. **<u>Application of Authorities and Tools Through Agency Management Activities:</u>**
We heard from many listening session participants about the impacts of land management activities, enforcement, and decisionmaking on sacred sites protection and access. In particular, activities related to archeology, mining, energy development, and wildfire management were noted as needed changes.

   a. **Participants noted many examples of Forest Service activities and decisions that they felt have destroyed, desecrated, or negatively impacted sacred sites directly**. These examples were noted as limiting the ability of AI/AN people to trust the Forest Service to protect sacred sites. Examples included:
      - Impacts to sacred mountains.
      - Impacts to burial sites.
      - Removal of buildings or other structures.
      - Altering sacred aspects of the land and landscape including loss of plants and animals.
      - Impacts of development activities such as oil and gas, mining, and ski areas.
      - Loss of views and other "intangible" elements of sacred sites.

   b. **Consider appropriate roles for archaeology activities and staff.** We heard from a wide range of listening session participants that Forest Service or consultant archaeologists cannot determine whether sites are sacred or not. Only the appropriate AI/AN people can do this. Several examples were provided by listening session participants, including:
      - Forest Service archaeologists and heritage specialists need to work closely with Tribal archaeologists, traditional practitioners, elders, or ethnographers when accessing or researching sacred sites—agreements need to be established to ensure this happens.
      - Traditional consultants, such as Tribal archeologists, should be included in Forest Service project analyses and compensated for their particular and specific knowledge and skills as it relates to sacred sites.
      - All of the appropriate Tribes should be consulted before conducting any archaeological studies.
      - Tribes have encountered difficulty engaging with forests on ARPA permits and acquiring data related to the permits.
      - The NHPA defines a historic property to be 50 years old. This needs to be revisited because of the contemporary use of many sacred sites by Tribes.

   c. **Wildfire management/wildfire suppression activities affecting sacred sites.** We heard that wildfire suppression activities have been conducted by the Forest Service in a manner that has severely impacted sacred sites. Participants requested better coordination between Tribes and firefighters to protect sacred sites before, during, and after wildfires. Additionally, participants told us that the use of fire retardants and pesticides on forests have caused health issues to AI/AN people using sacred sites.

   d. **Better coordination on energy development and transmission projects between Tribes, agencies, States, and companies needs to occur in order to protect sacred sites.** We heard from participants that Forest Service districts need to have more authority in collaborating and consulting with Tribes on energy development projects that affect sacred sites. For example,

the Forest Service needs to work with geothermal and power line companies to protect sacred sites.

e. **The *Navajo Nation* v. *Forest Service*, involving the San Francisco Peaks in Northern Arizona (also known as "Snowbowl"), has impacted the protection of sacred sites generally and the protection of sacred mountains specifically, such as Mt. Tenabo, Mt. Graham, Mt. Taylor, and others.** Listening session participants were deeply concerned about the impacts of the San Francisco Peaks case on the protection of other sacred mountains (including Mt. Tenabo, Mt. Graham, and Mt. Taylor) and other sacred sites. In particular, participants felt that this case demonstrated that the Forest Service valued development interests over cultural and spiritual values. Listening session participants:

- Requested an analysis of the implications and precedent set by the San Francisco Peaks decision and the type of consultation that was conducted leading up to the lawsuit.
- Provided examples of contamination of ceremonial and household water resources, including uranium mining and artificial snowmaking using reclaimed water at Snowbowl.
- Recommended that hydrologic and geologic studies be performed on a regional basis.

f. **Land management activities and policies often restrict access for Tribes and traditional practitioners.** We heard many examples where access was noted as critical to continue gathering, conducting ceremonies, or maintaining cultural traditions. For example, participants said "We are concerned about access to the forest to obtain materials like fir trees for tee pee poles and oak brush to construct arbors for ceremonies. Thinning and landscape treatment projects do not take into account the need for these materials." Additionally, wilderness area rules and the Wilderness Act often do not take into account Tribal gathering needs. For example, road closures and wilderness area designations can restrict access to sacred sites for elders.

g. **Enforcement and monitoring to prevent tampering and other inappropriate activities around sacred sites are needed.** We heard many listening session participants describe examples where monitoring and enforcement were not happening, or not happening enough. Listening session participants requested increased monitoring and enforcement, in partnership with Tribes, to better protect sacred sites. For example, it was recommended that the Forest Service cross-deputize Tribal enforcement officers to assist with sacred sites protection.

h. **Land transfers were noted as having the potential to support or limit protection of sacred sites.** We heard that land transfers from private to public land can help to facilitate Tribal access to sacred sites located on Forest Service lands. Land transfers from public to private ownership need to include consultation with Tribes because of the possibility that burial locations or sacred sites located on Forest Service-managed lands might transfer into private ownership.

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APPENDIX E: SUMMARY OF FOREST SERVICE EMPLOYEE COMMENTS

SUMMARY OF FOREST SERVICE EMPLOYEE COMMENTS: INITIAL SURVEY AND COMMENTS ON DRAFT

As part of the listening effort, the team conducting the sacred sites review developed a survey for Forest Service employees, focusing on line officers and Tribal relations specialists. The survey posed 13 questions, covering topics such as the definition of sacred sites, programs and planning, and requested sharing what respondents hear from Tribes about the Forest Service's ability to protect sacred sites. The questions are listed in the box below. More than 140 people responded to the initial survey, representing 52 national forests and grasslands. The results are summarized below.

Following the publication of the *Draft Report* to the Secretary, Tribal consultation and public comment, the team conducting this review once again reached out to line officers for their feedback on the process and contents of the *Draft Report*. During the month of December 2011, the team conducted interviews with a cross-section of about 50 line officers at all levels of the organization and from all areas of the United States. Those participating in phone interviews were asked if their concerns had been adequately addressed. The summary of their comments on the *Draft Report* follow the initial responses from the survey and include their thoughts, suggestions, concerns, and overall level of satisfaction with the *Draft Report*.

QUESTIONS FROM INITIAL FOREST SERVICE EMPLOYEE SURVEY ON SACRED SITES

1. **Please describe your understanding of what a sacred site is and what this understanding is based on.**
2. **What tools have you used to accommodate or protect American Indian or Alaska Native sacred sites on your unit? (Which laws, treaties, policy, programs, etc.)**
3. **Do you have any existing sacred site management plans or designations on your unit, or does your forest plan include sacred sites standards and guidelines?**
4. **Do you have any existing sacred site management plans or designations on your unit, or does your forest plan include sacred sites standards and guidelines?**
5. **Has this plan or designation served to successfully protect sacred sites? If so, what led to that success?**
6. **Do you have specific agreements or other instruments that guide your work with tribes on issues around sacred sites (as a reminder, sacred sites may include traditional cultural properties, national historic districts, ceremonial landscape, etc.)?**
7. **Please describe your approach to consultation with tribes including timing of consultation.**
8. **If you developed relationships with tribes that have led to successful sacred sites protections, please describe your approach to the relationship and the example of success.**
9. **Please share the perspectives you have heard over the last several years from tribes about the Forest Service's capability to protect sacred sites.**
10. **From your perspective, does your unit have the knowledge and capability to protect sacred sites? Please explain.**
11. **Do you have the information you need to understand sacred sites issues? To appropriately accommodate or protect sacred sites? If not, what kind of information would be helpful to you?**
12. **What barriers have you experienced with respect to protection of sacred sites?**
13. **What are your recommendations for changing or improving any policies, procedures, laws or regulations that would lead to a consistent level of protection of sacred sites, including identification, access, and protection, to meet the intent of E.O. 13007?**

Definition: The definition of a sacred site given by respondents was wide ranging. Those who indicated experience working directly with Tribes and Tribal governments tended to define sacred sites in broad terms such as landscape, mountains, areas, resources, regions, lineal features, viewsheds, etc., and did not refer to the narrow, specific delineation definition of E.O. 13007. Many recommended that the Executive order definition be changed to give flexibility to define a sacred site in concert with the Tribes with which they work. Those with little or no experience working with Tribes tended to only use the strict definition of the Executive order, and frequently relied on heritage program designations in their definition, and subsequent discussions.

Relationships: Those who have endeavored to protect a sacred site or special area stressed universally that having and maintaining relationships is the most critical tool. Relationships were described as extending beyond formal Government-to-Government relations, to daily relationships that enrich the individuals involved. When the Forest Service has been unable to provide the protection Tribes expect, the damage to relationships can last a very long time. People know there are many tools for strengthening relationships and have used many creative approaches in consultation with AI/AN Tribes, some with mixed success.

Forest Planning: With 52 forests represented by survey respondents, it appears that the Forest Service nationwide has rarely considered sacred sites in its past planning documents required under the National Forest Management Act and does not have many specific provisions for sacred sites protection in current forest plans. Several forests are pursuing language that would recognize sacred sites, and set standards and guidelines in ongoing forest plan revision efforts, as well as through associated processes such as amendments, special designations, and other planning avenues. Of those forests that have plan provisions protective of sacred sites, the sites are fairly discrete, although some noted were quite large. Examples included linear trails running hundreds of miles, such as the Trail of Tears and Nez Perce Trail, or a lake basin. Most forest plan provisions noted by respondents that are protective of sacred sites were for sites that are relatively small, for example, a dance house or a camas meadow. Those who use traditional cultural properties as a protection mechanism struggle with defining the scale and boundary.

Consultation: Many national forests follow a structured consultation process with concerned Tribes, varying from annual to quarterly meetings, with forest supervisors, with rangers, and staff to staff. Some respondents participate in multiforest, multi-Tribe meetings where it is expedient for both parties. Employees stated that face-to-face consultation is most valuable for them and Tribes. Most people understand that good relationships are what lead to effective consultation. Respondents also clearly understand the time commitment involved with true relationships and meaningful consultation. Only a small number of respondentsdid not know about consultation processes or did not have any specific protocol for consultation on their unit. Rarely were scoping letters, required as part of a National Environmental Policy Act (NEPA) analysis, the only approach. Most respondents combined annually scheduled rounds of meetings and consultation with information sharing and discussion of the Schedule of Proposed Actions (also required as part of the agency's responsibilities under NEPA).

Tribal Views: In response to the question about Tribal views of Forest Service efforts to protect sacred sites, many respondents shared that Tribes do not trust the Forest Service. Several commented that AI/AN Tribes think the Forest Service does not have the willingness to protect sacred sites, and the 1872 Mining Law has left many AI/AN Tribes wary of the agency's legal ability to follow

through on any stated commitment to protect sacred sites. Some reported frustration from AI/AN Tribes that we do not seem to understand what they are telling us. "They struggle to respond to requests for site-specific effects to a sacred site since sacred sites generally are believed to exist at a broader landscape scale."

San Francisco Peaks/Arizona Snowbowl: Southwest Region (Arizona and New Mexico) respondents, and those nearby, acknowledged that relationships across the geographical region have been compromised. "They do not believe we do a good job, especially given the decision to move forward on the Arizona Snowbowl proposal. As a result, they don't believe our 'consultation' efforts are sincere, and that we are really listening to their concerns about an area."

Capability: When asked if they feel prepared to address sacred sites, approximately 40 percent of respondents believed the agency has the knowledge and capability. Notably, several referenced specific training or experience that gives them this confidence. Some respondents stated they rely on staff, a Tribal liaison, or an archeologist to ensure consistent relationships. There are those, however, who are cautious and recognize their own lack of knowledge and understanding. Several people advocated more training in cross-cultural communication, cultural sensitivity, and Tribal law.

Barriers: Internally, capacity remains a strong concern when it comes to program management, protection, monitoring, and enforcement. Other perceived barriers included the 1872 Mining Law. Several respondents noted conflict with the agency mission. Most respondents recommended clarification of definitions, policy, and support for decisionmakers. Many requested more training, beginning earlier in their career. Some recommended more "teeth" in existing law. Other challenges noted included funding, definition of sacred sites, accountability, the agency's multiple-use mandate, meeting Tribal and Secretarial intent, Tribal site identification issues, and cultural differences.

Recommendations: Respondents requested more personnel, funding, training, permanent full-time duties for Tribal liaisons, and greater enforcement capacity. Other personnel responding challenged themselves to form better relationships, work more collaboratively with Tribes, and ensure good communication internally, as well as externally, all at the local level.

Considered alongside Tribal and other AI/AN input from the listening sessions (appendix D, above), it is noteworthy that many observations, concerns, and recommendations are very closely aligned. Most notable is the agreement between Tribes and Forest Service employees to better define sacred sites in E.O. 13007. Strong synergy also exists between AI/AN and Forest Service employees' concerns and recommendations related to training, relationships, and consultation.

SUMMARY OF COMMENTS FROM LINE OFFICER INTERVIEWS ON *DRAFT REPORT*, DECEMBER 2011

All line officers who participated in the survey felt the *Draft Report* did a good job of covering their concerns. Several noted that it was an honest assessment of what was heard from Tribes and employees. There was encouragement to be bold and truly represent the issue and its importance.

Accountability: Some expressed several concerns related to accountability. Others requested direction and training, crosswalk materials, and other forms of guidance. They are supportive and wish to be accountable, but are concerned due to the lack of specificity, direction, and implementation guidance contained in the *Draft Report*. They are anxious to see the details.

Sacred Places: Some were concerned about the term "sacred places." They report that Tribes have been pleased with this expanded definition, but some employees working "on the ground" are concerned about the definition, as well as the current lack of direction or guidance for implementing this recommendation.

Capacity and Resources: There remains a great concern over capacity and resources. Some expressed concerns that their capacity, and that of Tribes, has already become overly taxed. Enforcement capacity within the agency is a concern. Still, all line officers continue to emphasize that their relationships with Tribes are the key to success.

Training: There was broad support for the training recommendations. Some asked that training be developed for all levels of the organization. Others expressed strong support to provide training early in a Federal employee's career.

Hiring: There were several comments encouraging a more proactive recruitment program to attract and retain AI/AN individuals in the workforce.

Flexibility: Some indicated that they were pleased with the flexibility provided to line officers to implement the recommendations within the *Draft Report* in a way that worked for the individual Tribes and forests, and they encouraged the authors to retain that flexibility in the *Final Report*.

Implementation: The line officers' primary concern is how feasible it will be to consistently implement the recommendations of the *Final Report*. They strongly encourage the development of guidance materials and direction and development of appropriate training and delivery in order to ensure successful implementation. They suggest that the agency engage with Tribes to develop and participate in training about any new policies, to ensure all are working from the same set of expectations.

APPENDIX F: SELECTED COURT DECISIONS

Selected Court Decisions: Annotated Listing of Significant Court Decisions Relating to Federal Land Management and American Indian/Alaska Native Sacred Sites

***Fortune v. Thompson*, No. 09-98, 2011 U.S. Dist. LEXIS 5343 (D. Mont. Jan. 20, 2011).**

The Forest Service adopted a travel management plan (TMP) for a portion of the Badger-Two Medicine area, encompassing 130,000 acres of the Lewis and Clark National Forest. The TMP substantially prohibited motorized use within the area, closing all but roughly 8 miles to motorized use and prohibiting snowmobile access in Badger-Two Medicine entirely. One of the reasons given for the motorized use restrictions was to mitigate interference with religious practices of the Blackfeet, and a Traditional Cultural District within the area. Motorized user groups and individual recreationists sued, claiming the decision unduly favored the AI/AN religion in violation of the Establishment Clause of the United States Constitution. Using the test set forth in *Lemon* v. *Kurtzmann*, the Court held that the plan did not run afoul of the Establishment Clause because the prohibition was entered for a secular purpose; its principal effect neither advances nor inhibits religion; and there is no "excessive entanglement" with religion resulting from enactment of the TMP. The Court emphasized that the TMP set forth "a host of secular purposes, including benefits to air quality, water quality, soil quality, wildlife habitat, and fish habitat. Consideration was also given to the Traditional Cultural District located within Badger-Two Medicine and to resources governed by the [NHPA], 16 U.S.C. § 470f." Even if the Forest Service's consideration and decision were enacted in part to mitigate interference with the Blackfeet's religious practices, the Court found that this objective alone did not signify a constitutional violation.

***Quechan Tribe* v. *United States Department of the Interior*, No. 10-2241, (S.D. Cal. filed Dec. 15, 2010).**

In this case involving the Bureau of Land Management's (BLM's) decision to approve a programmatic agreement authorizing an array of solar collection panels and associated transmission lines on lands managed by the BLM located within the Imperial Valley in California, the Court issued a preliminary injunction halting the project, finding that the plaintiff, Quechan Tribe, was likely to prevail on its claim that the BLM failed to adequately consult with the plaintiff under section 106 of the National Historic Preservation Act (NHPA). The Quechan Tribe claimed, and environmental analyses indicated, that the project would wholly or partially destroy archeological sites, cultural resources, prehistoric areas of settlement and use, ancient trails, and burial areas within the 6,500-acre project area. After a thorough analysis of the documentation provided by BLM supporting its claims that it adequately consulted with the Quechan and other AI/AN Tribes, the Court noted the following:

- "While public informational meetings, consultations with individual Tribal members, meetings with government staff or contracted investigators, and written updates are obviously a helpful and necessary part of the process, they don't amount to the type of "Government-to-Government" consultation contemplated by the regulations. This is particularly true because the Tribe's government's requests for information and meetings were frequently rebuffed or responses were extremely delayed as BLM-imposed deadlines loomed or passed."

- "The Tribe was entitled to be provided with adequate information and time, consistent with its status as a government that is entitled to be consulted. The Tribe's consulting rights should have been respected. It is clear that did not happen here."
- "The Ninth Circuit has emphasized that consultation with Tribes must begin early, and that if consultation begins after other parties may have invested a great deal of time and money, the other parties may become entrenched and inflexible, and the government agency may be inclined to tolerate degradation it would otherwise have insisted be avoided…. [T]he fact that [Defendants] are now pressed for time and somewhat desperate after having invested a great deal of effort and money is a problem of their own making and does not weigh in their favor."

Te-Moak Tribe v. *United States Department of the Interior*, 608 F.3d. 592 (9th Cir. June 18, 2010).

This case involved the Bureau of Land Management's (BLM's) approval of expanded mineral exploration activities in the plan of operations for an existing project, the Horse Canyon/Cortez Unified Exploration Project area in northeastern Nevada. According to the Ninth Circuit's published opinion, "According to their oral history, Te-Moak and other Western Shoshone Tribes have inhabited this area since time immemorial, and their religion and culture is inextricably linked to the landscape of the area. The project area is located on their ancestral lands. Mount Tenabo, located within the project area, is considered a traditional locus of power and source of life for the Western Shoshone, and figures in creation stories and world renewal...The project area also contains many pinyon pine trees, a source of pine nuts that …remain a focal point of Western Shoshone culture and ceremony…the ancestors of the Western Shoshone are likely buried throughout the project area."[63] The Tribe and others sued the BLM claiming various violations of National Environmental Policy Act (NEPA), the National Historic Preservation Act (NHPA), and the Federal Land Policy and Management Act (FLPMA). The Ninth Circuit held that the BLM violated NEPA's mandate by failing to conduct a proper analysis of the cumulative impacts of the project and other nearby reasonably foreseeable mining and energy projects on Western Shoshone cultural resources in the area. The Court found in Defendants' favor regarding Plaintiffs' claims that BLM violated NHPA (BLM's consultation with Te-Moak was adequate and its finding of "no effect" to certain cultural resources was not in error) and FLPMA (information BLM required from mining companies was sufficient for exploratory plan of operations and lack of specific drill site information was permissible at this stage).

Navajo Nation v. *United States Department of Agriculture*. 535 F.3d 1058 (9th Cir. 2008) (*en banc*).

Located on the Coconino National Forest in Northern Arizona, the San Francisco Peaks are sacred to at least 13 Tribes and many other AI/AN people and communities in this area and elsewhere. The Forest Service authorized the use of reclaimed wastewater for snowmaking and other purposes on

[63] One commenter on the *Draft Report* sent extensive transcripts of hearing and deposition testimony before the Nevada District Court in an apparent attempt to dispute the quoted statement here. The team developing this report received and considered these comments and acknowledges the apparent disagreement with the Ninth Circuit's finding. This appendix summarizes court opinions, and the quoted statement is taken directly from a published opinion of the Ninth Circuit.

the Snowbowl ski area. The Ninth Circuit, sitting en banc, upheld the Forest Service's approval of the use of reclaimed wastewater for snowmaking purposes at Snowbowl Ski Area, reversing the decision of the three judge Ninth Circuit panel in this case. The majority held that the Forest Service's decision did not violate the Religious Freedom Restoration Act (RFRA) or impose a "substantial burden" on the exercise of religion by AI/AN peoples. The Court found that the use of recycled waste water neither coerced plaintiffs to act contrary to their religious beliefs under a threat of sanctions, nor conditioned a valuable government benefit upon conduct which would violate their religious beliefs. Specifically, the en banc panel's majority determined that "no plants, springs, natural resources, shrines with religious significance, nor … religious ceremonies…would be physically affected" by the use of the reclaimed wastewater. Three judges dissented, stating that the majority "misstates the evidence …, misstates the law under the RFRA, and misunderstands the very nature of religion." The U.S. Supreme Court declined to review the Ninth Circuit's en banc decision.

***Access Fund* v. *United States Department of Agriculture*, 499 F.3d 1036 (9th Cir. 2007)**.

The Forest Service determined that Cave Rock, a particularly important feature to the culture and religion of the Washoe Tribe, was eligible for protection as a traditional cultural property and archaeological site. Cave Rock was also an important historic travel corridor. The agency noted these and other factors in developing a management plan for the feature, and adopted an alternative that included a permanent closure from rock climbing in its decision. The Forest Service emphasized, in connection with a discussion of social practices and civil rights in the Final Environmental Impact Statement (FEIS) for the management plan, "[t]he fact that traditional history and culture at Cave Rock are sometimes discussed in religious terms does not diminish the site's historical or cultural significance to the Washoe people." The agency's plan decision prohibited rock climbing on Cave Rock, and the Access Fund, a rock climbing advocacy group, sued, claiming the Forest Service had violated the Establishment Clause of the Constitution. While recognizing climbers as an important social group that values the rock, the court noted the agency's decision served the goal of protecting environmental, historical, and cultural resources. The three-judge panel also emphasized the strong record and documentation assembled by the Forest Service. The Ninth Circuit rejected Access Fund's contention that the ban on climbing would lead to excessive governmental entanglement with religion, due to the enforcement activities in which the Forest Service would have to engage. Instead, the court held that "[r]outine administrative or compliance activities do not constitute impermissible interference of . . . secular authorities in religious affairs." The court distinguished two cases cited by plaintiffs involving voluntary bans and temporary closures and upheld the Forest Service's decision. In doing so the court relied on Cholla Ready Mix (see below) and concluded "the fact that Cave Rock also derives its historical and cultural force in part from its role in Washoe religious belief and practice does not counsel the conclusion that the Forest Service acted with the purpose of advancing religion."

http://www.fs.fed.us/r5/tribalrelations/dat/caverock/appeals/accessfund.pdf

***Cholla Ready Mix v. Civish*, 382 F. 3d 969 (9th Cir. 2004).**

The Ninth Circuit Court of Appeals issued a decision upholding the State of Arizona's policy against use of material mined from Woodruff Butte, a site sacred to Tribes, against a challenge alleging that the policy violated First Amendment's Establishment Clause. In its analysis, the Court focused on the basis for protection of Indian Tribes' sacred sites:

Because of the unique status of Native American societies in North American history, protecting Native American shrines and other culturally-important sites has historical value for the nation as a whole, much like Greece's preservation of the Parthenon....Similarly, because of the central role of religion in human societies, many historical treasures are or were sites of religious worship. The Establishment Clause does not require governments to ignore the historical value of religious sites. Native American sacred sites of historical value are entitled to the same protection as the many Judeo-Christian religious sites that are protected on the National Register of Historic Places, including the National Cathedral in Washington, DC; the Tuoro Synagogue, America's oldest standing synagogue; and numerous churches that played a pivotal role in the Civil Rights Movement.

The Ninth Circuit decision recognized the legal basis for governments to take affirmative steps to protect sites considered sacred to Tribes without violating the United States Constitution's Establishment Clause. The decision acknowledges the cultural and historical significance of sacred sites as a legitimate basis for extending protection to such sites, and affirms that Tribal sacred sites can and do have importance to the Nation as a whole, in addition to the Indian Tribes that consider them sacred.

***Bear Lodge Multiple Use Association v. Babbitt*, 2 F. Supp. 2d 1448, 1456 (D. Wyo. 1998), *aff'd on other grounds*, 175 F.3d 814 (10th Cir. 1999).**

This case initially involved a challenge to a National Park Service (NPS) decision not to issue commercial rock climbing permits at Devil's Tower during the month of June out of respect for the reverence many American Indians hold for Devil's Tower as a sacred site. The U.S. District Court for the District of Wyoming (D. Wyo.) issued a preliminary injunction against the NPS's action, finding that the plaintiffs were likely to prevail on their claim that withholding of commercial rock climbing permits impermissibly promoted religion in violation of the Establishment Clause. The NPS then revoked the commercial climbing ban.

The plaintiffs pressed forward with their claim that NPS' request that climbers voluntarily refrain from climbing Devil's Tower during June was an Establishment Clause violation. The district court upheld the voluntary ban, finding that it was a permissible accommodation, not an impermissible promotion, of religion under the Establishment Clause.

Rupert v. Director, United States Fish and Wildlife Service, 957 F.2d 32 (1st Cir. 1992)

Plaintiff, pastor of a church comprised of non-Indians, brought suit against the U.S. Fish and Wildlife Service challenging regulations providing an exemption for Federally Recognized Indian Tribes from the criminal prohibition on possession of eagle feathers under the Bald Eagle Protection Act. The plaintiff alleged that the act's exemption for Indian Tribes to possess eagle parts for religious purposes violated the Establishment Clause of the Constitution by creating a preference for American Indian and Alaska Native (AI/AN) religions over all others. The Court determined that the exemption was rationally related to a legitimate governmental interest. The Court held that the exemption for Indians was a permissible preference, basing its decision on "Congress' historical obligation to respect AI/AN sovereignty and to protect AI/AN culture." The Court also noted that the preference or exemption was supported by the legislative history and congressional findings underlying

the American Indian Religious Freedom Act, which establishes Federal policy to protect and preserve the right of AI/AN peoples to believe, express, and exercise their traditional religions.

***Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988).**

The Forest Service sought to develop a road on the Six Rivers National Forest through an area historically used by Indians for religious and spiritual activities. The Forest Service attempted to place the road to avoid archeological sites and as far as possible from sites used by Indians for spiritual activities. Nevertheless, an Indian organization, individual Indians, and others sought a permanent injunction prohibiting the road construction, arguing that the road would violate their rights under the Free Exercise Clause of the First Amendment, as well as other statutory violations. The district court and court of appeals held in the Indians' favor on the First Amendment issue.

The Supreme Court, in a 5-3 decision, reversed and remanded the lower court decisions. The majority held that the Free Exercise Clause does not prohibit the Government from constructing the proposed road because the Government's action would not coerce the Indians into violating their religious beliefs, nor would the governmental action penalize the exercise of religious rights by denying adherents an equal share of the rights, benefits, and privileges enjoyed by other citizens. The majority noted that "[t]he 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."

The majority noted that the Government's right to the use of its lands need not and should not dissuade it from accommodating religious practices such as those engaged in by Indian respondents. The Court noted that the Forest Service commissioned a 423 page study of the impacts of the road on cultural and religious values in the area, chose a route that best protected sites where specific rituals occur, and developed steps to reduce visual impacts of the road on the surrounding country. The Court noted the Forest Service's efforts to adjust the road to minimize adverse impacts to the Indians' spiritual and religious interests in the area more than satisfied the Government's obligations under the American Indian Religious Freedom Act (AIRFA). The Court noted that AIRFA provides no judicially enforceable individual right or cause of action against the Government.

The dissent would have upheld the lower court rulings on the 1st Amendment Free Exercise issue. In the view of the dissenting justices, the Free Exercise Clause is directed against any form of governmental action that frustrates or inhibits religious practice, not simply those governmental actions that coerce religious adherents into actions inconsistent with their beliefs. The dissent argued that where, as the lower courts found in this case, the governmental action would virtually destroy one's religious practices, that action should be found to violate the Free Exercise Clause absent some compelling governmental justification. The dissent viewed the impacts on the Indians' religious practices to be comparable to other cases in which the Court held that governmental action violated individuals' rights under the Free Exercise Clause.

***United States. v. Means*, 858 F.2d 404 (8th Cir. 1988).**

Defendants, principals of a group of Sioux Indians, sought to establish a permanent camp for use by members of the Sioux Tribe on 800 acres of the Black Hills National Forest as a religious, cultural, and educational community. The Forest Service denied them a special-use permit for this use, citing

statutory and regulatory limitations on permits to 80 acres and 30 years duration. The Forest Service determined that to grant the permit would be inconsistent with the public interest in maintaining the integrity of the Black Hills National Forest as public land. The district court held that denial of the permit violated defendants' First Amendment right to free exercise of religion, and directed the Forest Service to issue defendants a special use permit. On appeal, the 8th Circuit reversed the District Court order, holding that the agency had not violated defendant's First Amendment right and that the denial of defendants' special-use application for exclusive use of the area was not arbitrary and capricious. The court held that the defendants failed to demonstrate that the special-use permit denial burdened the exercise of their religion.

***Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983).**

The Navajo and Hopi Tribes challenged a Forest Service decision authorizing developers to expand the Snowbowl Ski Area on the San Francisco Peaks in the Coconino National Forest in Arizona. The Tribes argued that the expansion would harm the Peaks and impermissibly interfere with their religious beliefs and practices. The Court upheld the Forest Service's action and concluded that the expansion would not violate the Tribes' First Amendment rights. The Court also rejected the Tribes' argument that the ski area expansion would violate American Indian Religious Freedom Act (AIRFA):

It is clear from the reports, and from the statutory preamble, that AIRFA requires Federal agencies to learn about, and to avoid unnecessary interference with, traditional Indian religious practices. Agencies must evaluate their policies and procedures in light of the Act's purpose, and ordinarily should consult Indian leaders before approving a project likely to affect religious practices.

The Court found that the Forest Service had complied with AIRFA because it had held many meetings with Indian religious practitioners and conducted public hearings on the Navajo and Hopi reservations at which practitioners testified. The views expressed there were discussed at length in the final environmental impact statement and were given due consideration in the evaluation of the alternative development schemes proposed for the Snowbowl Ski Area.

***Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980).**

Plaintiffs, Navajo Tribe members, filed suit against the National Park Service alleging that the operation and management of Rainbow Bridge National Monument violated their rights under the Free Exercise Clause of the First Amendment because the Government, in order to form a reservoir (Lake Powell), had flooded an area of the monument that was a sacred location for prayer. The Tenth Circuit held that the Government's interest in maintaining the reservoir's capacity at a level that intrudes into the monument outweighs plaintiffs' religious interest. Regarding plaintiffs' challenge to the intrusive and disruptive presence of tourists in and around the monument, the Court held that there was no basis in law for ordering the Government to exclude the public from public areas to ensure privacy during the exercise of First Amendment rights, and that the plaintiffs did not have a constitutional right to have tourists visiting the bridge act "in a respectful and appreciative manner."

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APPENDIX G: EXISTING AUTHORITIES

Annotated Listing of Select Statutes, Regulations, and Executive Orders Influencing Sacred Site Protection

National Historic Preservation Act (NHPA), 16 U.S.C. §470 et. seq (1966):

Properties of traditional religious and cultural importance to Indian Tribes or Native Hawaiian organizations ("traditional cultural properties") may be determined to be eligible for inclusion on the National Register of Historic Places. NHPA's implementing regulations, 36 CFR Part 800, require Federal agencies to consult with Tribes regarding properties of religious or cultural importance. The purpose of this consultation requirement is to ensure that the Federal agencies adequately consider the effects of proposed actions on properties significant to the affected Tribes. Where historic properties of concern to Tribes may be adversely affected, then Indian Tribes are to be invited by the agency to be included as consulting party (-ies) under certain circumstances. The regulations also provide that the agency may and sometimes must give Indian Tribes the opportunity to be signatories to Memoranda of Agreement or Programmatic Agreements arising out of the consultation process, particularly for agency undertakings on Tribal lands. Tribes must be given the opportunity to participate when an undertaking may affect properties of religious, cultural, or historic value to a Tribe on public lands. When assessing information needs related to an undertaking, an agency must seek information from Tribes likely to have knowledge of or concerns about traditional cultural properties as well as historic properties in the area. It is important to consider that determining eligibility for listing on the National Register may require documentation of certain characteristics that Tribes would not ordinarily reveal. Equally important is the fact that, under NHPA, agencies have the "last word" (on Federal public land) in determinations of significance, and, therefore, eligibility for listing on the National Register. The agencies, having determined that a property is significant and eligible for listing, may treat the property in all official actions as if it were listed. (However, Tribes identify what sites are sacred to them under Executive order 13007. See appendix B, appendix J, figure 7, and table 1.)

Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701-1784 (1976)

Under § 1712(b), the Secretary of Agriculture is directed to coordinate development and revision of land use plans for National Forest System lands with the land use planning and management programs of and for Indian Tribes by considering the policies of approved Tribal land resource management programs. Under § 1712[c], the Secretary of the Interior is directed to undertake similar coordination with Indian Tribes regarding lands administered by the Bureau of Land Management during land use planning and administration.

American Indian Religious Freedom Act (AIRFA), 16 U.S.C. 1996 (1978)

AIRFA establishes the policy of the Federal Government "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 traditional rites." It directs the President to instruct Departments and agencies to "evaluate their policies and procedures in consultation with Native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices."

Statute: http://www.nps.gov/history/local-law/fhpl_indianrelfreact.pdf

Archaeological Resources Protection Act (ARPA), 16 U.S.C. §470 (1979)

ARPA was enacted to protect archeological resources on public and Indian lands and to foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals having collections of archaeological resources and data. Any person may apply to a Federal land manager for a permit to excavate or remove an archeological resource on public lands. ARPA contains a provision for limited confidentiality of information. Federal land managers are directed under ARPA to develop regulations to carry out the act.

Under Forest Service regulations at 36 CFR 296.7, the agency must notify Tribes that may consider a site of religious or cultural importance where the excavation is to occur at least 30 days prior to issuing an ARPA permit and to otherwise consult with Indian Tribes to determine under what circumstances a Tribe or group should be notified after a permit has been issued. These regulations at § 296.7(b) also instructs the Federal land manager to seek to identify **all** Indian Tribes having aboriginal or historic ties to the lands and seek to determine the location and nature of specific sites of religious or cultural importance so that such information may be on file for land management purposes.

Statute: http://www.nps.gov/history/local-law/fhpl_archrsrcsprot.pdf
Forest Service Regulations: http://law.justia.com/cfr/title36/36cfr296_main_02.html

Alaska National Interest Lands Conservation Act of 1980 (ANILCA) (43 U.S.C. § 1636 *et seq*.)

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. Title VIII of the act provides that: "Except as otherwise provided in this act and other Federal laws, the taking on public lands of fish and wildlife for non-wasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes." Section 810 of this act stipulates how subsistence rights affect land use decisions:

In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence use and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes.

Sections 811(a) and 812 direct the Secretary of the Interior to ensure both Native and non-Native rural residents have access to subsistence resources on public lands.

Alaska Native Claims Settlement Act (ANCSA) 43 U.S.C. § 1613 (1971)

ANCSA provided for the immediate settlement of Alaska Native Claims. The settlement extinguished Alaska Native claims to the land by transferring titles to 12 land-based corporations and 1 nonland-based regional corporation, as well as over 200 local Village Corporations. In ANCSA, Congress sought to resolve claims of aboriginal title. ANCSA authorized the conveyance of fee title to 40 million acres of public lands in Alaska and the payment of $962.5 million to these corporations in settlement of the claims of aboriginal title to Alaska by its Natives. Section 14(h)(1) of ANCSA

describes how the Secretary of the Interior may convey fee title of existing cemeteries and historical places to the appropriate regional corporation.

Native American Grave Protection and Repatriation Act (NAGPRA) 25 U.S.C. §3001 (1990)

NAGPRA sets forth the process by which Native American cultural items, including human remains, shall be handled when excavated or discovered on Federal or Tribal lands, with repatriation of such remains prioritized in favor of lineal descendants and, then, the Indian Tribe or Native Hawaiian organization that is recognized as aboriginally occupying the area of Federal land in which the items were discovered. NAGPRA directs that activities shall cease on lands where inadvertent discoveries of Native American remains are made until the items discovered have been protected and notice consistent with the statute has been provided. NAGPRA also sets forth a process by which Federal agencies and museums are to inventory Native American cultural items in their possession, as well as a process for repatriation of such cultural items. Under NAGPRA, consultation is required under certain circumstances, including those identified in Sections 3002(c), 3002(d), 3003, 3004, and 3005.

The NAGRPA implementing regulations refer to consultation or consultation-related concerns in several sections, including (but not limited to) 43 CFR 10.5 (consultation requirements for intentional excavation or inadvertent discovery), 43 CFR 10.8 (consultation requirements for summaries), and 43 CFR 10.9 (consultation requirements for inventories). The regulations also specify other requirements for communicating with Tribes, though without requiring consultation.

Detailed information about NAGPRA and its implementing regulations is available at the National Park Service National NAGPRA Web site: http://www.nps.gov/history/nagpra/.

Tribal Forest Protection Act (TFPA), 25 U.S.C. § 3115a (2004)

The TFPA authorizes 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. Indian Tribes submit project proposals to the Forest Service and the Bureau of Land Management (BLM) for projects bordering or adjacent to Tribal land that are intended to address fire, disease, other threats to Indian forest or range land, or where the Forest Service or BLM land is in need of restoration. The Secretaries are to respond to Tribal project proposals within 120 days from the date a project proposal is submitted. The decision whether to authorize Tribes' project proposals is wholly discretionary.

The Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1 (1993)

RFRA 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. Later amendments codified at 42 U.S.C. 1996a specifically clarified that the use of peyote by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion is lawful.

Executive Order 13175—Consultation and Coordination with Indian Tribes, November 6, 2000

Executive Order 13175 directs Federal agencies to develop an "accountable process" for ensuring meaningful and timely input by Tribal officials in development of regulatory policies that have Tribal

implications. The Executive order applies to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Tribes, on the relationship between the Federal Government and Tribes, or on the distribution of power and responsibilities between the Federal Government and Tribes. For more information, visit http://www.fs.fed.us/spf/tribalrelations/documents/policy/executiveorders/E.O.13175_11_6_00.pdf.

Executive Order 13007—Indian Sacred Sites, May 24, 1996

See appendix B for full text.

United Nations Declaration on the Rights of Indigenous Peoples (Excerpts)
(Support announced by President Obama in December 2010)

The General Assembly: Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfillment of the obligations assumed by States in accordance with the charter,

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing 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,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

Article 1 - Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights (4) and international human rights law.

Article 2 - Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3 - Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4 - Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5 - Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 6 - Every indigenous individual has the right to a nationality.

Article 7 - 1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person. 2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8 - 1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture. 2. States shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources; (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights; (d) Any form of forced assimilation or integration; (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9 - Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10 - Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11 - 1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature. 2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12- 1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains. 2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13 - 1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.
2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14 - 1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning. 2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination. 3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15 - 1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information. 2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16 - 1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of nonindigenous media without discrimination.
2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17- 1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law. 2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their

empowerment. 3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labor and, inter alia, employment or salary.

Article 18 - Indigenous peoples have the right to participate in decisionmaking in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decisionmaking institutions.

Article 19 -States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20 - 1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. 2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21 - 1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.
2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22 - 1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.
2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23 - Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24 -1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.
2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25 - Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26 - 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise

acquired. 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27 - States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28 - 1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29 - 1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination. 2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent. 3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30 - 1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned. 2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31 - 1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions. 2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32 - 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. 3. States shall provide

effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33 - 1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live. 2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34 - Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35 - Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36 - 1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.
2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37 - 1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.
2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 38 - States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39 - Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40 - Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41 - The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42 - The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Article 43 - The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 44 - All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45 - Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Article 46 - 1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States. 2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society. 3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, nondiscrimination, good governance, and good faith.

(2) See resolution 2200 A (XXI), annex.
(3) A/CONF.157/24 (Part I), chap. III.
(4) Resolution 217 A (III).
http://www.un.org/esa/socdev/unpfii/en/drip.html

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APPENDIX H: SUMMARY OF 2003–2007 SACRED SITES POLICY REVIEW

SUMMARY OF 2003–2007 SACRED SITES POLICY REVIEW

Introduction

In 2003, the Forest Service chartered a team to conduct a review of the agency's implementation of Executive Order (E.O.) 13007 on Indian Sacred Sites. That team first met in 2003 and examined the requirements of E.O. 13007, the American Indian Religious Freedom Act, the National Historic Preservation Act, and other relevant laws. The team proceeded to conduct numerous listening sessions with Tribal leaders and citizens, traditional practitioners, and elders throughout the Western United States and in Alaska. The team also analyzed policies from the Forest Service and other agencies and interviewed Forest Service personnel at all levels of the agency. The listening sessions and interviews yielded several themes around how people felt about the agency's land management decisions and especially about how those decisions have affected Indian sacred sites. In 2007, the team reported to Forest Service leadership on the results of their investigations. The observations, conclusions, and themes from their work are summarized below.

Observations Expressed

In general, Tribal people, including leaders, elders, and other individuals expressed concern that their views had not been fully considered in important forest management decisions that relate to protection of and continued access to sacred sites. It was suggested that this situation will need to be corrected if proper and ongoing consultation and relationship-building is to be meaningful. More specifically,

- Tribal people expressed that they feel betrayed, not heard, and not valued when they speak about the importance of protecting sacred sites and maintaining a connection to them. Tribal representatives consistently say that traditional perspectives were not critical considerations in current land management decisions.
- Regular meetings between the Forest Service local unit and appropriate Tribes need to be encouraged and maintained. It is important to the Government-to-Government relationship. In addition, Tribes indicated that every forest needs to conduct open discussions on developing an agreement to deal with sacred sites; Native American Graves Protection and Repatriation Act (NAGPRA); the protection and use of traditional medicine, food, and cultural needs in their traditional homelands; and viewshed impacts.
- Tribes believe everything is sacred. Yet some areas need certain management to maintain viewsheds and access. Some areas can accommodate an appropriate level of natural resource management. Some areas are more special and can be attributed to be more critical for ceremonies, beliefs, and values. The Forest Service must work with Tribes through the consultative process to investigate what this means for protection of and access to sacred places and resources.
- When describing the importance of access to and protection of sacred sites, Tribal people related that these sites are vital to the survival of all humanity and traditional people pray for all living entities.
- When Tribal representatives and traditional practitioners described what sacred sites were, they represented these locations at multiple geographic scales, from landscapes of mountain ranges to specific areas associated with plant gathering. They also represented sacredness in terms of temporal scale: past, present, and future.
- Tribes expressed that consideration of traditional ecological knowledge (TEK) must be integrated into national forest management on an equal footing with what we term as "science." Tribes have cultivated TEK over thousands of years and see themselves as stewards of the land. Tribes reflected that in collaboration with the Forest Service, TEK could help improve land management decisions. Because of the Federal Government's trust responsibility, Tribes asserted that the Forest

Service also has an obligation to protect indigenous cultures and promote and preserve their connection to their cultures.

- An important function of a living culture is to pass on traditional values and perspectives to members through a variety of traditional practices. Within Tribal communities, this includes hunting, gathering, processing food, and conducting religious ceremonies at historic and cultural significant sites. The activities of hunting, gathering, and conducting religious ceremonies are considered sacred by some traditional people. Associated songs, stories, protocols, and locations are also sacred.
- Tribes have established governments. These governments have and maintain internal protocols and processes that govern Tribal interactions with members and external entities. Spiritual leadership may differ in roles and responsibilities from elected governmental Tribal leadership. Recognition and respect of these Tribal infrastructures and relationships with Tribal councils and traditional leaders will improve Forest Service relationships with Tribes.
- Tribes are concerned that the Forest Service and the Federal Government seem to be in a continual state of reorganization. The continual replacement of Forest Service personnel inevitably results in interruptions that hinder long-term relationship development between the Tribe, traditional practitioner, and/or Alaska Native Corporation, and the Forest Service. The Forest Service needs to institutionalize and integrate consultation and protocols so that regardless of personnel changes, their actions honor and incorporate the concerns of Tribal governments into land management decisions and practices. It is important and appropriate to ask Tribal Governments and traditional practitioners, in particular, how to work with them.
- In emergencies, Tribes expressed a desire to have a sacred sites policy that could "trigger" responses at the most appropriate level to the situation and be a collaborative process. Ideally, this means a policy has been negotiated prior to an immediate need for direction and that all parties know and understand the guidance set forth in the policy. Tribal people referred to inadvertent discoveries in a NAGPRA context as an example, but then extended the idea to inadvertent discoveries of sacred sites in land management activities and natural disasters.

Conclusions of the Team

- More effort should go into fully considering traditional values and perspectives in management decisions.
- Regular meetings between land managers and Tribes should be held, and, where useful, should lead to agreements.
- While everything is sacred to Tribes, there are different degrees of how central and essential sacred areas and resources are to Tribes and how Tribes feel they should be protected and managed that can only be determined through consultative processes.
- Tribes believe traditional practitioners conduct their rituals for all living entities and that some sacred sites are vital to the survival of all humanity.
- Sacred sites may occur at multiple geographic scales and may concern past, present, and future temporal scales.
- Traditional ecological knowledge is often connected to sacred sites; this must be taken into account in land management actions. Protecting indigenous cultures and promoting their connection to their cultures will improve land management decisions.
- Tribes consider sacred sites to be essential elements in Tribal communities' ability to pass on traditional values and perspectives through the practice of traditional activities such as hunting, gathering, processing food, and conducting religious ceremonies. Associated songs, stories, protocols, and locations are also considered sacred.

- Recognition and respect of Tribal governmental and traditional leadership structures, including internal protocols and processes, will improve Forest Service relationships with Tribes.
- Because of continual turnover of Forest Service personnel, protocols related to sacred sites should be developed in consultation with Tribes and institutionalized to transcend agency personnel.
- Such protocols could extend to emergency situations and inadvertent discoveries of sacred sites in land management activities and natural disasters.

Themes

- **TRUST:** The importance of trust in both the Federal trust responsibility to Tribes and in the sense of interpersonal relationships between agency employees and Tribes.
- **CONFIDENTIALITY:** Whether the Forest Service can keep information confidential, that talking about sacred sites may be culturally prohibited, and that providing information about sacred sites may "quantify" it in a way that would result in restrictions.
- **CONSULTATION:** The Forest Service should consult with Federally Recognized Tribes and honor its trust responsibility. Additionally, the agency should confer with traditional practitioners and communities that have knowledge and interests in sacred sites and resource protection, and ensure consulting and conferring on sacred sites is conducted pursuant to E.O. 13007 and the American Indian Religious Freedom Act.
- **MANAGEMENT, MONITORING, AND ACCOUNTABILITY:** Concerns were expressed as to whether Forest Service officials would follow through and implement actions to honor commitments. The Forest Service should also:
    - Provide appropriate information in easily accessible ways (radio, television, Web, regular meetings).
    - Work with traditional, spiritual, and clan leaders, as well as the Tribal governments, to identify culturally/traditionally appropriate communications protocols.
    - Develop and include in agency processes and policies to protect sacred sites and access.
    - Work with Tribes on place names and heritage sites.
    - Coordinate special forest products management across jurisdictional boundaries.
    - Work together with Tribes to resolve conflicts about sacred sites.
    - Co-manage sites, special use areas, and other lands.
- **TRAINING:** Forest Service personnel should undergo training about Tribal history, Tribal law, cross-cultural communication, and cultural sensitivities.
- **INTERPRETATION:** Interpretation of Tribal culture and sites should be developed in cooperation with Tribal people and should involve Tribal youth.
- **SPECIAL USES** (including recreation, special forest products, energy, wildlife and fish, etc.): Special uses of lands and resources of sacred importance should be done in collaboration with Tribes and reduce the impacts to sacred sites and traditional uses.
- **INTELLECTUAL PROPERTY RIGHTS:** Intellectual property rights, such as rock art, clan crests, etc., of Tribal people, should be protected.
- **NONFEDERALLY RECOGNIZED INDIAN GROUPS AND COMMUNITIES.** Groups and communities may have traditional knowledge and historical ties to national forests; traditional practitioners and traditional communities need to be conferred with appropriately.

In addition, many Tribal people would like to see legislation making elements of E.O. 13007 legally enforceable in court. The Tribes and agency employees who were interviewed also recognized a need to work through disagreements with respect, using mutually agreed-upon procedures for conflict and dispute resolution.

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APPENDIX I: SECRETARY OF AGRICULTURE THOMAS J. VILSACK'S LETTER REQUESTING SACRED SITES REVIEW

(INSERT PDF OF Secretary Vilsack's letter).

APPENDIX J: SUMMARIES OF COMMENTS AND CHANGES TO *DRAFT REPORT*

Appendix J: Sacred Sites Summary of Comment Themes

This appendix summarizes the overall themes of the American Indian/Alaska Native (AI/AN) and public comments received by the Forest Service, an agency of the U.S. Department of Agriculture (USDA), regarding the *Draft Report to the USDA Secretary: USDA's Office of Tribal Relations and Forest Service Policy and Procedures Review: Indian Sacred Sites*. (*Draft Report*). Comments on this *Draft Report* were received through multiple methods and sources. These include:

- In-person consultations that were conducted between Forest Service and Federally Recognized Tribal (FRT) representatives and Alaska Native Corporations (ANC) who mutually agreed to participate in this manner.
- In-person collaborative discussions between Forest Service representatives and those FRT representatives who chose not to conduct Government-to-Government consultation but did choose to comment in person as an individual or representative of a Tribe.
- In-person collaborative discussions (and, in some cases as guests at consultations, for example, in California due to affiliations with FRTs or State recognition) between Nonfederally Recognized Tribal (NFRT) representatives and Forest Service representatives.
- Email, U.S. postal mail, and phone call comments that were received from FRTs, AI/AN groups, and NRFTs;
- Email and U.S. postal mail comments that were received from public groups and individuals as a result of a Notice of Availability was published in the Federal Register, which included a request for public comment.[64]

These comments were grouped into three types, reviewed for content, and analyzed for themes:

1. **Federally Recognized Tribes and Alaska Native Corporations Comments**: These themes are based on comments from representatives of FRTs and ANCs who participated as individuals or on behalf of their Tribe or corporation. The majority of the comments were received via a Forest Service representative who summarized an in-person meeting with representatives of and one or more Tribes. In some cases, FRT members chose to include NFRT participants in these meetings due to local circumstances pertaining to sacred sites. This category also includes comments from FRTs submitted by email or U.S. postal mail. Some of these meetings constituted consultation; others did not.
2. **Other Native American/Alaska Native Groups**: These themes are based on comments from six AI/AN affiliated groups, such as the National Congress of American Indians and two NFRTs that submitted comments.
3. **Public:** These themes are based on comments received from groups or individuals that responded by mail or email to a Federal Register Notice[65] and indicated no Tribal, Native American, or Alaska Native affiliation.

[64] "Sacred Sites; Executive Order 13007," 76 Fed.Reg. 47538 (Aug. 5, 2011).
[65] *Ibid.*

The USDA and Forest Service team assigned to craft the draft and *Final Report* considered all of the comments provided. To aid in the consideration of the comments received, Triangle Associates, Inc., as a neutral party, analyzed each of the comments and developed this summary outlining the themes. See table J1 for an overview of the sources of comments received. See table J2 for a summary of themes by category of commenter type. See appendix K for a listing of all comment records. Note the following:

- The contents of this summary are not intended to agree, disagree, or respond to any of the comments received. They are intended as a summary report of the overall themes that were heard from the three categories of comments noted above.
- As the purpose of this appendix was to identify themes, the specifics of any one individual comment are not included. However, all comments were reviewed and considered by the Forest Service.
- The venue and format for receiving comments, as well as the context of the comments, varied significantly. Therefore, other than the overview provided in table J1, a statistical analysis to determine the percentage of respondents commenting on any one topic was not conducted.
- The Forest Service will not be producing a "response to comments" such as one that is required when the agency prepares a final environmental impact statement under Title 40, Code of Federal Regulations (CFR), Section1503.4(a). This effort to review and consult on sacred sites policy does not constitute agency action that would "trigger" analysis under the National Environmental Policy Act and associated Council on Environmental Quality regulations. However, a summary of changes made to the report to address themes heard in consultation and from other comments is provided as appropriate to each theme in table J2.

Themes described in Table J2 below include:

- **Overall Process/Overall Report**
- **Access to Sites or Information**
- **Accountability/Enforcement**
- **Agency Authority/Discretion**
- **Communication**
- **Co-management/Partnership**
- **Confidentiality and sharing of information**
- **Consultation**
- **Economic Impacts/Funding**
- **Executive Order (E.O.) 13007**
- **International Context/United Nations Declaration on the Rights of Indigenous Peoples**
- **Legacy of impacts from past Forest Service Actions**
- **Legal Authority/Legal Landscape**
- **Mining Law/Mining Rights**
- **Multiple Use Mandate**
- **National Historic Preservation Act Tools**
- **Nonfederally Recognized Tribes**
- **Sacred Places**
- **Snowbowl/San Francisco Peaks**
- **Staffing/Hiring**
- **Terminology**
- **Traditional Knowledge**
- **Training**

TABLE J1: Comment Sources and Types

Comments	Number	Sources	Overall Theme
Type 1: Comments received from Tribes and ANCs (either as individuals or on behalf of the Tribe or ANC).	Total Forest Service/Tribal meetings held = 49 Individual FRT correspondence received = 21 Total FRTs included in the above combined = 125 ANCs = 3 NRFTs or groups that participated at the invitation of FRTs by local agreements = 7	In-person meetings summarized by Forest Service personnel or Udall Institute for Environmental Conflict Resolution contracted facilitators, and letters submitted to the Forest Service on FRT letterhead	In general, supportive of the contents of the report with requests for further detail on how the recommendations will be implemented. Some exceptions to this were comments indicating the report could not be taken seriously while activities at Snowbowl continued.
Type 2: Correspondence received from AI/AN groups and individual NFRTs	Groups = 8 NRFTs = 3	Email, letters, and one conference call	In general, supportive of the report and requests for further detail on how the recommendations will be implemented. Exceptions to this were comments indicating the report could not be taken seriously while activities at "Snowbowl" continue.
Type 3: Other Public Comments **a. Public Comments Received from Groups**	13 (mining, recreation, oil and gas, and grazing interests)	email and letters	Critical of report and specifically the report's legal analysis. Several questions, concerns, and specific disagreements were raised regarding the report's references to agency authority.
b. Public Comments Received from Individuals	9	email and letters	Generally supportive of the report and requests for further detail on how the recommendations will be implemented
Additional: Snowbowl-specific comments (no comments on the report included; therefore, not included in the analysis below)	21 Individuals	email	No mention of the report, with comments strongly against the decision to allow reclaimed water to be used to make snow for the Snowbowl ski area.

TABLE J2: Summary of Comment Themes

Themes (overall themes followed by themes listed alphabetically)	FRT and ANC Comments[66]	Other AI/AN[67]	Other Public Comments[68]
Overall Draft Report Review Process	Some Tribal and ANC commenters noted their appreciation for the report and the effort to consider protection of and access to sacred sites. Other Tribal commenters were critical of the report, indicating that in their view it provides no new mechanisms to protect sacred sites. Additionally, some Tribal commenters noted that they were not in agreement with the decision to allow the public to comment on the *Draft Report*. Some Tribal and ANC commenters noted their appreciation for the effort to communicate with Tribes before writing recommendations. Others noted some confusion about listening sessions held early in 2011 and how they related to consultation.	Some of the other AI/AN commenters indicated they were encouraged by and supportive of the *Draft Report*, such as "the USDA has made a significant start." Others of the other AI/AN commenters were concerned that, from their perspective, the report contained no new mechanisms to protect sacred sites.	Some public groups indicated that they were disappointed that the listening sessions held in early 2011 (to gather information for the *Draft Report*) did not include an opportunity for the general public and stakeholder interests to participate and comment. Additionally, these commenters called for significant stakeholder and public involvement in any further development of Forest Service land management policy regarding sacred sites. Some of the other commenters indicated they were supportive of the process and the report, but called for more specificity in how the recommendations would be implemented.

[66] **FRT and ANC Comments**: These themes are based on comments from representatives of FRTs and ANCs who participated as individuals or on behalf of their tribe or corporation. The majority of the comments were received via a Forest Service representative that summarized an in-person meeting with representatives of one or more tribes. In some cases, FRT members chose to include NFRT participants in these meetings due to local circumstances pertaining to sacred sites. This category also includes comments from FRTs submitted by email or U.S. Postal Service mail.

[67] **Other Native American/Alaska Native**: These themes are based on comments from AI/AN affiliated groups, such as the National Congress of American Indians and two NFRTs that submitted comments by email.

[68] **Public:** These themes are based on comments from groups or individuals that responded to a Federal Register Notice and indicated no Tribal, Native American, or Alaska Native affiliation.

Themes (overall themes followed by themes listed alphabetically)	FRT and ANC Comments[66]	Other AI/AN[67]	Other Public Comments[68]
	Other Tribal commenters noted that the report appears to take a one-size-fits-all approach to sacred sites policy. These commenters noted the report should recognize the differences between different Tribes and between Tribes and ANCs.		
Changes to the report regarding the report overall include: • Rewrote Executive Summary. • Added Informational Memorandum. • Revised overall language to reflect that comments were provided both during listening sessions and in response to the *Draft Report.* • Added this appendix summarizing AI/AN and other public comments. • Added to appendix summarizing Forest Service Employee comments. • Revised language throughout for consistency. • Added section on personnel contributing to this report. • Added language in Executive Summary and Recommendations to clarify that this is not a "one-size-fits-all" approach but seeking national consistency with local flexibility.			
Access to Sites/Information	Some Tribal commenters provided specific examples of barriers they had encountered for Tribal member access to sacred sites. These examples included lack of roads, inability to obtain a special use permit, misunderstandings with Forest staff, and Forest Service staff not understanding what is sacred to AI/AN peoples. Some Tribal commenters noted they wanted more access to information the Forest Service has about their Tribe's	Not Addressed in Comments (NA)	Some commenters asked for access to information about sacred sites so that these other users of the National Forest System (NFS) could help protect the sites while conducting their activities. Other commenters noted that both access to public lands and increased protection of sacred sites are important. Some public groups expressed concern that increased protections for sacred sites would result in diminished access

Themes (overall themes followed by themes listed alphabetically)	FRT and ANC Comments[66]	Other AI/AN[67]	Other Public Comments[68]
	sacred sites. Others noted they wanted more control over the information that the agency has access to. Additionally, some Tribal commenters expressed concern that access to sacred sites or information about them would be granted to non-Indians that were posing as Natives or were inappropriately practicing Native ways. This included concerns about providing access to NFRT representatives.		for the public to the NFS. Other public commenters indicated that any closures to areas of the NFS for protection or accommodation of sacred sites should occur only after undergoing public notice and comment.
Changes to the report regarding access include: • Updated the acknowledgements in the report to reflect comments received on the *Draft Report* regarding access. • Revised the recommendation on access to reflect "limited closures." • Added a new recommendation to develop model provisions for Tribal/Forest Service information sharing agreements.			
Accountability/Enforcement	Some Tribal commenters recommended that accountability for Forest Service staff needs to be addressed through the establishment of specific consequences if there is desecration of a site, an memorandum of understanding (MOU) or agreement is not followed, consultation is not conducted or not conducted properly, or if trust responsibilities to Tribes are not upheld. Other Tribal commenters recommended that accountability measures should be put in place to	Some of the other AI/AN commenters requested that specific recommendations, criteria, or guidance for accountability to be included in the report, including consequences for Forest Service staff.	Some public groups noted that they could help to protect sacred sites if they had information on where they were.

Themes (overall themes followed by themes listed alphabetically)	FRT and ANC Comments[66]	Other AI/AN[67]	Other Public Comments[68]
	determine effectiveness of line officers in working with Tribes. In addition, some Tribal commenters noted that the term "permission" used in the recommendations section of the report is not strong enough.[69] These commenters indicated that protection of sacred sites needs to be required.		
Changes to the report regarding accountability/enforcement include: • Updated the acknowledgements in the report to reflect comments received (law enforcement, and new acknowledgement regarding workforce). • Law Enforcement was highlighted as part of the new recommendations for I. B.3. Training and II.C.2. under revising directives. • Added recommendation III. C.2: Protection regarding law enforcement agreements with other agencies and, where appropriate, Tribal police.			
Agency Authority/Discretion	Some Tribal commenters indicated they were in support of the report's recommendations for implementing existing agency authority. These comments included suggestions to enhance, emphasize, or add criteria for tools and authority under the National Historic Preservation Act (NHPA), forest planning, and numerous other statutes (see also comments under NHPA). Other Tribal commenters asked for new legislation that would add more	Some of the other AI/AN commenters indicated they were in support of the report's recommendations for implementing existing agency authority. These commenters recommended adding more specifics on tools and authority specifically available under the NHPA as well as other statutes (see also comments under NHPA). Additionally, some of the other AI/AN commenters asked for new legislation that would add specific actions Forest	Some public groups indicated that the agency does not have the legal authority to implement many of the recommendations in the *Draft Report*. Additionally, these public group commenters indicated that in their view the *Draft Report* recommendations would grant an "inappropriate" level of authority to the Forest Service in working with Tribes and would result in prioritizing Tribal interests at the expense of other land uses and users (see also comments under Legal

[69] Draft report page12: "These actions were chosen because they will engender an environment where line officers, managers, and staff feel they have the knowledge, support, and "permission" they need to improve communication and relationships with Native Americans and successfully carry out the direction of E.O. 13007 in a way that is acceptable to Tribes."

Themes (overall themes followed by themes listed alphabetically)	FRT and ANC Comments[66]	Other AI/AN[67]	Other Public Comments[68]
	specific actions Forest Service staff could take under existing authorities to protect sacred sites. Additionally, some Tribal commenters noted they were concerned that the report did not identify any specific policy changes as part of the review.	Service staff could take under existing authorities to protect sacred sites. These commenters provided additional specific examples of how to use existing agency authorities to protect sacred sites. Some of the other AI/AN commenters noted they were concerned that the report did not identify any specific policy changes as part of the review.	Analysis/Landscape). Some of the other respondents encouraged Forest Service personnel to achieve a better understanding of existing authorities and tools available to protect sacred sites.
Changes to the report regarding agency authority include: • The acknowledgements in the report were updated to reflect comments received • Included information on agency authority in the new Executive Summary. • Added detail to recommendation II.C.2 in response to comments asking which policies the report was reviewing. • Additional information clarifying agency authority is included in the "Legal Landscape" section.			
Co-management/ Partnership	Some Tribal commenters noted their support for the recommendation on "Partnership." These commenters provided a wide range of examples and suggestions for establishing MOUs between forests and Tribes. Other Tribal and ANC commenters asked for the Forest Service to support legislation that would establish clear Forest Service authority for co-management of sacred sites. Some Tribal and ANC commenters indicated that Native management or	Some of the other AI/AN commenters recommended that the report go further to support "co-management" of sacred sites, not just "partnerships" as it is stated now in the recommendations. These commenters included examples of co-management agreements or authorities under NHPA. Some of these commenters asked the Forest Service to support legislation that would establish clear authority for co-management of sacred sites with AI/ANs. Some of these commenters	Some public groups, while noting their support for partnerships with Tribes where appropriate, indicated that the discussion of co-management in the report goes beyond existing agency authority. In their view, any co-management agreement with Tribes, or other partnerships with Tribes to achieve shared management goals would give Tribes a "de-facto veto" over use of the NFS. These commenters indicate that, in their view, the report prioritizes Tribal interests over other interests and the recommendations run counter to the

Themes (overall themes followed by themes listed alphabetically)	FRT and ANC Comments[66]	Other AI/AN[67]	Other Public Comments[68]
	ownership of sites should be a goal supported by the Forest Service. Some Tribal commenters called for the Forest Service to report on what current advisory committees the agency has, as well as a report on AI/AN people who were appointed to these advisory committees today and over time.	noted the co-management authority of the National Park Service as a model. Additionally, some of the other AI/AN commenters suggested that broad agreements could be established with Tribes that clearly define Tribal roles for joint management while leaving Forest Service inherent authorities intact.	agency's multiple-use mandate. Some of the other respondents noted their support for co-management of sacred sites and requested the Forest Service support legislation to establish a clear legal foundation for this.
Changes to the report regarding co-management/partnership include: • The acknowledgements in the report were updated to reflect comments received from Tribes and the public, and provide additional clarification. • Added figure 2 outlining types of partnership agreements available under existing authorities. • Revised acknowledgement on co-management to reflect comments requesting legislation in support of co-management of sacred sites. • Added recommendation III.A.3 under "Partnerships" to respond to consultation & other AI/AN comments requesting examples of existing authorities.			
Communication	Some Tribal commenters expressed support for the report's recommendation for early and ongoing communications between forests and Tribes. Additionally, some of these commenters called for criteria to be developed so that there are clear communications guidelines for forest personnel to follow. Some Tribal and ANC commenters noted that many Forest Service personnel do not have a good understanding of Native culture and life ways, and that communication can therefore be challenging.	Some of the other AI/AN commenters expressed support for the report's recommendation for early and ongoing communications between forests and Tribes. Additionally, some of these commenters called for criteria to be developed so that there were clear communications guidelines for forest personnel to follow.	Some public groups noted their understanding of and agreement with report's recommendations on the importance of good communications between the Forest Service and Tribes. Some of these public groups expressed concern that non-Tribal users of the NFS were not being included in these communications. Other public groups noted that in order to protect sacred sites during land use activities on public lands, Tribes need to be engaged, participate in consultation in a timely way, and share information on the location of sacred

Themes (overall themes followed by themes listed alphabetically)	FRT and ANC Comments[66]	Other AI/AN[67]	Other Public Comments[68]
	Other Tribal commenters gave specific examples of where communications is either working well or needs improvement at a specific forest or sacred site.		sites. Some public individuals noted their understanding of, and agreement with, the report's recommendations on the importance of good communications between the Forest Service and Tribes.
Changes to the report regarding communication include: • Added two additional recommendations: I.A.1, regarding regular notice of upcoming national policy topics requiring consultation and I.A.4, revising Forest Service consultation directives.			
Confidentiality/Sharing Information About Sacred Sites	Some Tribal commenters noted that it is very difficult to share information about sacred sites due to several factors. In general, Tribal representatives do not trust the Forest Service to keep information about sacred sites confidential. Some of these commenters noted that it should be the Tribes that manage the information if it has been shared. Other Tribal commenters noted that it is not okay to share information about sacred sites to anyone outside of the Tribe and in some cases only certain individuals within the Tribe could know about them. Some Tribal commenters noted that existing provisions under the 2008 Farm Bill allow the Forest Service to keep certain traditional and cultural	Some of the other AI/AN commenters noted that existing provisions under the Farm Bill allow the Forest Service to keep certain traditional and cultural information confidential (not release under the Freedom of Information Act) and that guidelines and training need to be developed by the Forest Service to implement these provisions.	Some public groups indicated that "confidentiality" as discussed in the report leaves other interests out of the discussions. These commenters called for greater transparency and more inclusive participation of land use interests. Other public groups indicated that if the Tribes or the Forest Service could provide information on the location of sacred sites, they could help protect these sites when land use or recreational activities were conducted.

Themes (overall themes followed by themes listed alphabetically)	FRT and ANC Comments[66]	Other AI/AN[67]	Other Public Comments[68]
	information confidential (not release under the Freedom of Information Act) and that guidelines for implementing this must be developed. Additionally, these commenters noted that in addition to Farm Bill provisions, the report should emphasize the tools for confidentiality available under NHPA. Other Tribal commenters noted that information held by the Forest Service should not be withheld from legitimate AI/ANs who request it.		
Changes to the report regarding confidentiality include: • Updated the acknowledgements section in the report to reflect comments received. • Updated the recommendation on confidentiality under II.B.1 regarding development of directives to implement 2008 Farm Bill and MOUs on confidentiality. • Added recommendation II.B.2 regarding development of optional protocols for information to sharing between Tribes and Forest Service. • Included a table in the "Legal Landscape" on the differences and similarities between sacred sites under E.O. 13007 and NHPA, including confidentiality provisions.			
Consultation	Some Tribal commenters noted that they have been overwhelmed with requests for consultation from the Forest Service and other Federal agencies in recent years and in particular during the period of the sacred sites review. Additionally, some of the commenters suggested that Federal agencies should coordinate their consultation requests both within and between agencies.	Some of the other AI/AN commenters noted that the report needs to outline specific guidelines for consultation with FRTs. Additionally, commenters recommended that specific guidelines for consultation under NHPA and Native American Graves Protection and Repatriation Act, should be included. Representatives of NFRTs indicated	Some public groups indicated that consultation sessions between Tribes and the Forest Service should include other NFS users whose interests may be affected by the decisionmaking process. Some of these commenters expressed frustration because in their view the Forest Service does not let other interests speak with Tribes. Other public groups noted that

Themes (overall themes followed by themes listed alphabetically)	FRT and ANC Comments[66]	Other AI/AN[67]	Other Public Comments[68]
	Other Tribal commenters noted that the Forest Service does not have adequate capacity to conduct consultation. These commenters also noted that many agency staff do not understand the obligation to consult with FRTs. Additionally, some Tribal and ANC commenters noted that consultation needs to involve Forest Service decisionmakers to be effective.	that in their view, existing statutes indicate that consultation is required with indigenous people and "Native traditional spiritual leaders."	consultation must be with Tribal decisionmakers, not traditional or spiritual leaders. Additionally, these commenters noted that Tribal leaders must be willing to share the location of sacred sites to adequately protect them. Some public individuals called for more involvement of Tribes in the development of policy prior to consultation and for more effective consultation. Some of these public individuals called for consultation with both Tribal leaders and traditional practitioners.
Changes to the report regarding consultation include: • Updated the acknowledgements in the report to reflect comments received. • Added a section to the Introduction describing the agency's legal responsibility to consult with Tribes. • Included a table in the "Legal Landscape" on the differences and similarities between sacred sites under E.O. 13007 and NHPA, including consultation requirements. • Updated several recommendations, including I.A.1, I.A.4, to clarify the agency's obligation to consult with Tribes and to revise directives regarding consultation.			
Economic Impacts/Funding	Some Tribal commenters noted that, from their perspective, the report's frequent mention that no new funding is available to implement the recommendations indicates a lack of agency commitment to fulfill its obligations to Tribes.	Some of the other AI/ANs indicated that the report should advocate for new funding to help protect sacred sites.	Some public groups indicated that in their view implementation of the *Draft Report*'s recommendations could present economic hardships on business interests. Specifically, these groups were concerned that reduced access to NFS land, stemming from increased protections for sacred sites,

Themes (overall themes followed by themes listed alphabetically)	FRT and ANC Comments[66]	Other AI/AN[67]	Other Public Comments[68]
	Other Tribal and ANC commenters noted that the *Final Report* should advocate for new funding to help protect sacred sites. Some Tribal commenters noted that current Forest Service funding for working with Tribes is inadequate, in particular for Tribal liaisons and other Forest Service staff working on implementation of NHPA. Other Tribal commenters expressed frustration with the references to limited funding and expressed their view that many of the recommendations only suggested the Forest Service follow its laws and appropriately train and enable its employees to do their job correctly.		would result in increased costs, impacts to valid existing rights, reduced Federal taxes, and limits on job creation due to fewer opportunities for economic (energy, recreation, or other) development. Additionally, some of these public groups were concerned about threats to national security from reduced access to domestic energy supplies on NFS land resulting from implementation of the report's recommendations. Some public individuals called for an increase in Federal budget appropriations specifically to help protect sacred sites.
Changes to the report regarding economic impacts/funding include: • Updated the acknowledgements in the report to reflect comments received • Included funding context in new Executive Summary.			
E.O. 13007 regarding sacred sites[70]	Some Tribal commenters expressed support for the recommendation to revise E.O. 13007 to include the broader concept of "sacred places" as this term more accurately captures the nature of what is sacred to Tribes.	Some of the other AI/AN commenters called for the E.O. 13007 to be revised to include a "cause of action" that would provide for the legal protection of sacred sites.	Some public groups indicated support for E.O. 13007 as currently written and do not support the report's recommendation to revise it. These commenters noted the agency does not have the authority to change E.O.

[70] See appendix B.

Themes (overall themes followed by themes listed alphabetically)	FRT and ANC Comments[66]	Other AI/AN[67]	Other Public Comments[68]
	Additionally, these commenters often requested that the Forest Service specifically develop guidelines for the implementation of E.O. 13007 including sacred places (see also topic on sacred places below).	(See also comments on Sacred Places.)	13007. Additionally, these public groups called for the Forest Service to take no action toward implementation of additional terms, such as "sacred places." In their view, E.O. 13007 contains all the direction required for protection of sacred sites through land use management directives and guidance (see also topic on sacred places below). Some public individuals indicated that in their view protection of sacred sites would not be achieved by changing the language in E.O. 13007. These commenters indicate that the real problem lies with the agency's interpretation and implementation of what is a sacred site.
Changes to the report regarding E.O. 13007 include: • Clarified *Draft Report* Recommendation II.A.1, involving making changes to E.O. 13007. • Updated Acknowledgements to explain removal and describe proposed approach to addressing Tribes' concerns about E.O. 13007's definition. • Updated Acknowledgements to clarify role of sacred places in keeping with multiple use considerations and valid existing rights. • Added cross-reference "sacred places" into recommendations around training in Recommendation II.A.2. • Updated Recommendation II.A.3 to recommend directives revision.			

Themes (overall themes followed by themes listed alphabetically)	FRT and ANC Comments[66]	Other AI/AN[67]	Other Public Comments[68]
International Context/United Nations Declaration on the Rights of Indigenous People (UNDRIP)	Some Tribal commenters indicated that the report should include specific support for the UNDRIP[71].	Some of the other AI/AN commenters indicated that the report should include specific support for UNDRIP as well as endorse and follow the recommendations contained in the Report by the Special Rapporteur on the Rights of Indigenous Peoples.[72]	Some public groups noted they were concerned that the Forest Service is not only using UNDRIP as a guide, but appears to be in the process of adopting its policies.
Changes to the report regarding International Context include: • Added new language referencing the United Nations' *Report by the Special Rapporteur on the Rights of Indigenous Peoples*.			
Legacy of impacts from past Forest Service actions	Some Tribal commenters indicated that report does not address how the Forest Service will address the agency's legacy of past actions that resulted in damages to sacred sites and resulting trauma to the people and cultures that hold them sacred.	Some of the other AI/AN commenters indicated that report does not address how the Forest Service will address the agency's legacy of past actions that resulted in damages to sacred sites.	Some public groups noted that if sacred sites have been impacted in the past, in their view this is likely the result of a Tribe either not being actively engaged or not sharing information.
Changes to the report regarding legacy of past actions include: • No new language added.			
Legal Analysis/"Legal Landscape"	Some Tribal commenters noted that the report left out many of the tools available under the NHPA and that the report should clearly establish NHPA as a legal basis to work from. These commenters provided several examples of tools available under this statute (see additional comments under	Some of the other AI/AN commenters indicate that the report incorrectly references the term "interested persons" in reference to Section 106 of the NHPA and has not included many of the tools under NHPA available to protect sacred sites.	Some public groups indicated they were very concerned with the report's overview of the agency's legal authority to work with Tribes and protect sacred sites. These commenters provided numerous examples of where they believed the agency's legal analysis in the report was flawed,

[71] See appendix G.

[72] U.N. Human Rights Council [HRC], *Report by the Special Rapporteur on the rights of indigenous peoples*, Annex X, "United States of America: Situation of the Native Americans in relation to artificial snowmaking from recycled wastewater in the San Francisco Peaks." A/HRC/13/35/Add.1. 2011 (August 22, 2011). (*Prepared by* James Anaya).

Themes (overall themes followed by themes listed alphabetically)	FRT and ANC Comments[66]	Other AI/AN[67]	Other Public Comments[68]
	NHPA). Other Tribal commenters expressed frustration with the discretion left to the Forest Service, as described in the "Legal Landscape" section, explaining that the agency seldom if ever used its discretion in a way that protected sacred sites. Instead, these commenters believe that the Forest Service regularly makes decisions favoring economic development rather than protections for Tribes and their sacred sites.	Additionally, some of the other AI/AN commenters suggest that there are some existing authorities for working with Tribes to protect sacred sites that are missing from the report, such as the Self Governance Act and American Indian Religious Freedom Act.	inaccurate, overreaching, and/or re-interpreting/re-writing laws to suit its needs. Additionally, these groups noted that in some cases the agency does not have the discretion it claims to have (for example, valid existing rights under the General Mining Law of 1872). Additionally, some public commenters indicate that the report incorrectly references the term "interested persons" in reference to Section 106 of NHPA.
Changes to the report regarding legal analysis include: • Updated the acknowledgements in the report to reflect comments received. • Added numerous cites to clarify case law and statues. • Moved "Government's Trust Responsibility to Tribes" to the beginning of Legal Landscape section. • Revised text regarding the Free Exercise clause and legal interplay between Free Exercise and Establishment Clauses. • Included discussion of test from *Lemon* v. *Kurtzmann* regarding Constitution's Establishment Clause in Legal Landscape section. • Added new text regarding the NHPA in the Legal Landscape section. • Added new figures in the "Legal Landscape" on (1) development and purpose of the NHPA and (2) outlining differences and similarities between sacred sites under E.O. 13007 and NHPA.			
Minerals Exploration and Development Under the General Mining Law of 1872	Some Tribal and ANC commenters expressed long standing frustration with the 1872 Mining Law and in their view the inability of the Forest Service or any Federal agency to prevent mining impacts on sacred sites located on public lands.	Some of the other AI/AN commenters expressed frustration with the inability of the Forest Service to prevent mining impacts on sacred sites.	Some public groups indicated that they were very concerned with the report's recommendation to explore changes to the 1872 Mining Law, its implementing regulations, or internal agency directives. These commenters indicated that in their view the agency

Themes (overall themes followed by themes listed alphabetically)	FRT and ANC Comments[66]	Other AI/AN[67]	Other Public Comments[68]
			did not have the authority to issue any revised interpretations of its regulations or directives with respect to the 1872 Mining Law. Additionally, these groups were not in agreement with the report's characterization of the impacts of the 1872 Mining Act on sacred sites.
Changes to the report regarding GML 1872 include: • Amended *Draft Report* Recommendation II.D.1 reference to seeking new *legislation.* • Modified Recommendation II.D.2 referencing mineral withdrawal authority.			
Multiple-Use Mandate—Competing Obligations	Some Tribal commenters indicated that Forest Service policy should support a Forest Service decisionmaker's ability to prioritize the protection of sacred sites. These commenters noted that treaty rights and other statutes provide the authority to do so.	NA	Some public groups indicated that adoption of the *Draft Report*'s recommendations would result in the exclusion of other uses and would violate the agency's multiple-use mandate.
Changes to the report regarding multiple-use include: • Added new text in the Executive Summary clarifying protection and accommodation of Indian sacred sites is compatible with and not contrary to the agency's multiple-use mission.			
NHPA—National Historic Preservation Act	Some Tribal commenters noted that the report left out many of the tools available under NHPA. These commenters noted that the report should clearly establish NHPA as a legal basis to work from and provided several examples of tools available	Some of the other AI/AN noted that the report left out many of the tools available under NHPA. These commenters noted that the report should clearly establish NHPA as a legal basis to work from and provided several examples of tools available	Some public individuals noted that there needs to be better use of NHPA (and specifically Bulletin 38) to protect traditional cultural properties including sacred sites.

Themes (overall themes followed by themes listed alphabetically)	FRT and ANC Comments[66]	Other AI/AN[67]	Other Public Comments[68]
	under this statute, in particular Section 106.	under this statute, in particular Section 106.	
Changes to the report regarding NHPA include: • Added new acknowledgement on the tools available for protection under the NHPA, and acknowledging that it is a procedural statute not guaranteeing an outcome. • Revised acknowledgement on archeology and historic preservation. • Added new text on NHPA in the "Legal Landscape" section • Added new figures in the "Legal Landscape" describing the (1) development and purpose of the NHPA and (2) outlining differences and similarities between sacred sites under E.O. 13007 and NHPA. • Clarified NHPA provisions throughout the document.			
NFRTs	Some Tribal commenters noted that the USDA and Forest Service should only be taking comment from FRTs. Other Tribal commenters noted that comments from NFRTs should be included with public comments.	Representatives of NFRT commenters in this category indicated that, in their view, there are existing statutes that require consultation with indigenous people and "Native traditional spiritual leaders."	Some public individuals noted that under the American Indian Religious Freedom Act, the Forest Service has an obligation to meet and confer with legitimate traditional practitioners regarding sacred sites. Additionally, these individuals requested that the next Farm Bill include language to allow for closures requested by traditional practitioners, whether or not they are affiliated with a FRT.
Changes to the report regarding NFRTs include: • Added new text in acknowledgements regarding comments received.			
Sacred Places	Some Tribal and ANC commenters were supportive of the concept and recommendations regarding sacred	Some of the other AI/AN commenters indicated that a sacred place is the "most appropriate term" to use as it	Some public groups rejected the new concept of sacred places as overly broad and subjective. These

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	places in the report, noting that it more accurately describes the Tribal and AI/AN perspective of sacred areas and landscapes. These commenters often requested that the agency go further and provide specific guidelines for how this concept would be implemented. Other Tribal commenters were concerned that the introduction of a new term such as sacred places would not necessarily result in additional protections to those areas that are now called sacred sites. Additionally, some Tribal commenters were concerned that that the report demonstrates that the Forest Service does not understand what is sacred to Tribes.	best represents the "scope and variety" of what is sacred to Tribes. These commenters recommend that the agency go further to endorse this term and use it when E.O. 13007 is being implemented, as well as provide specifics on how it will be implemented. Others of the other AI/AN commenters were concerned about the use of the term "sacred places" and, in their view, the "proliferation" of definitions that does not protect sacred sites. Additionally, these commenters recommend using terms that already exist rather than introduce new terms.	commenters noted that in their view this new concept would directly conflict with or contradict existing law and policy for example: • Current Case Law • E.O. 13007 • Multiple Use Sustained Yield Act • Administrative Procedures Act • U.S. Constitution Establishment Clause • Federal Land Planning Management Act • 1872 General Mining Law • and several other examples These public groups indicated that the new definition of "places" is vague and would create conflicts between Tribes and other national forest users, such as recreational interests, mining, oil and gas development, and grazing. Additionally, some of these public groups argue that the report demonstrates a willingness of the agency to give preference to AI/AN religious beliefs and that this will not withstand constitutional scrutiny. Some public individuals indicated that in their view protection of sacred sites would not be achieved by use of the term "sacred place." These commenters indicated that the real

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			problem lies with the agency's interpretation and implementation of what is a sacred site.
Changes to the report regarding sacred places include: • Updated Acknowledgements to explain removal and describe proposed approach to addressing Tribes' concerns about E.O. 13007's definition. • Updated Acknowledgements to clarify role of sacred places in keeping with other multiple-use considerations and valid existing rights. • Updated Recommendation II.A.1 to emphasize working with other Federal agencies. • Added Recommendation II.A.2 to cross-reference "sacred places" into recommendations around training. • Updated Recommendation II.A.3 to recommend directives revision.			
San Francisco Peaks/Snow bowl	Some Tribal commenters noted that it was hard for them to take the report's intentions seriously the pipeline for providing reclaimed water to make snow at the Snowbowl ski area was moving forward at the same time the *Draft Report* was developed and under review. Additionally, some of these commenters called for a moratorium on development activities at Snowbowl.	Some of the other AI/AN commenters called for the report to address current "threats" to sacred sites, including the pipeline for providing reclaimed water to make snow at the Snowbowl concession. Additionally, some of these commenters called for the Forest Service to "suspend" development activities at Snowbowl. Other AI/AN commenters requested that the *Final Report* include the United Nations' Report by the Special Rapporteur on the rights of indigenous peoples, Annex X, which evaluated the situation at the San Francisco Peaks/Snowbowl and recommends "the U.S. Government engage in a comprehensive review of its relevant policies and actions to ensure that they are in compliance with international standards in relation to the San Francisco Peaks and other Native	Some public individuals noted that the Forest Service needed to stop all development of the pipeline at the Snowbowl concession and end the use of reclaimed water for making snow. Some Tribal commenters noted that it was hard for them to take the report's intentions seriously since the pipeline for providing reclaimed water to make snow at the Snowbowl ski area was moving forward at the same time the *Draft Report* was developed and under review. Other public groups noted their support for the Snowbowl pipeline project and, in their view, the report mischaracterized the Snowbowl project.

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		American sacred sites, and that it take appropriate remedial action."	
Changes to the report regarding Snowbowl include: • Updated the text regarding Snowbowl in the acknowledgement to include a summary of comments received.			
Staffing/Hiring	Some Tribal and ANC commenters noted their support for the report's recommendation on "Staffing" as it is described in the report as well as the recruitment of Native Americans under the "Partnership" recommendations. Some of these commenters noted that only local AI/ANs should hold positions that are interpreting Tribal culture. Other Tribal commenters noted that recruitment and hiring AI/AN people does not substitute for Government-to-Government consultation, which would still be required regardless of presence of AI/AN people in the agency. Some Tribal commenters called for the Forest Service to track and report the number of AI/AN hires annually as well as those appointed to standing advisory committees.	Some Tribal and ANC commenters noted their support for the report's recommendation on "Staffing" as it is described in the report as well as the recruitment of Native Americans under the "Partnership" recommendations.	Some public groups noted that their companies employed AI/AN people who supported economic development on the NFS, because of the jobs this development creates for AI/AN people. These public commenters also noted that they supported Forest Service efforts to hire more AI/AN people because it was beneficial for relationships and communications with Tribes.
Changes to the report regarding staffing/hiring include: • Added new text in the acknowledgements regarding hiring AI/AN people. • Revised staffing recommendations to clarify the intent of the recommendation and added additional recommendations.			

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Terminology	Some Tribal commenters disagreed with the use and definition of the term "Native American." This was noted by some commenters as not being inclusive of Alaska Natives; others noted that this term was too broad and did not recognize the unique circumstance of each individual Tribe. Other Tribal commenters noted other terminology that should be addressed in the report including: • Use of the term "walk in the woods" as inappropriate due to its use by some Alaska Natives. • Use of Tribe vs. tribe as inconsistent in the report. • Use the term "peoples" in place of "people."	NA	NA
Changes to the report regarding terminology include: • Eliminated the use of the term "walk in the woods" in favor of "walk the land together." • Eliminated all uses of the term "Native American" and replaced with "AI/AN" (except when directly quoting from law, regulation, or other source). • Reviewed and updated report's use of Tribe vs. tribe. • Eliminated the use of the term "people" and replaced with "peoples" where appropriate.			
Traditional Ecological Knowledge	Some Tribal commenters noted that AI/AN representatives should be providing culturally relevant information and traditional knowledge	Some of the other AI/AN commenters noted that Tribal representatives should be providing culturally relevant information in decisionmaking, not	Some public groups were concerned that the definition of TEK as provided in the report is not a rigorous enough standard with which to make land use

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	in decisionmaking, not Forest Service personnel. Other Tribal commenters noted that the Forest Service needs to work with Tribes to involve traditional practitioners in discussions regarding sacred sites. Some Tribal commenters noted that the Traditional Ecological Knowledge (TEK) definition misses the key point of "spirituality" and its connection with the environment that is important to AI/AN peoples.	Forest Service personnel, especially in regards to trainings on traditional knowledge.	decisions, and that use of TEK could run counter to the Data Quality Act, and USDA's own policies on "Scientific Integrity." Some public individuals suggest that TEK is not given enough credit in the report or by the Forest Service and that agency personnel need more training and understanding of TEK.
Changes to the report regarding traditional knowledge include: • Updated traditional practitioner definition. • Revised Acknowledgement to reflect comments received and to recognize use of TEK in *supplementing* peer-reviewed and academic sciences.			
Training	Some Tribal commenters noted that training provided by the Forest Service should only be based on how to work with Tribes. It should not be specific to sacred sites or what is sacred to Tribes—only Tribes can speak to this if they choose to. Additionally, Tribal and ANC commenters offered a wide range of example topics that the Forest Service should incorporate into training.	Some of the other AI/AN commenters noted that Tribal representatives should be providing culturally relevant information in decisionmaking, not Forest Service personnel, especially in regards to trainings on traditional knowledge Some of these commenters noted that the Forest Service should coordinate with existing training programs and courses, such as those offered by inter-Tribal organizations.	Some public groups noted their support for the report's recommendation for more training of Forest Service personnel on working with Tribes. However, some of these groups were concerned with how the concept of sacred places would be described in training sessions. Some public individuals commented that rather than creating new definitions such as sacred places, the Forest Service needs to spend time on

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	Other Tribal commenters noted that trainings which include information specific to a Tribe should be provided only by that Tribe. Additionally, Tribal commenters noted that Native peoples should be giving the training, not non-Indians. Face-to-face training with Tribal members and Forest Service personnel was recommended.		training and prioritization of sacred sites.
Changes to the report regarding training include: • Added additional detail to training recommendations.			