

NATIVE AMERICAN SACRED SITES AND THE FEDERAL GOVERNMENT

A Training for Federal Employees
and Contract Staff Developed under
the Sacred Sites Memorandum of
Understanding



Authority of Training

- On December 5, 2012, the Departments of Defense, the Interior, Agriculture, Energy, and the Advisory Council on Historic Preservation (ACHP) entered into a memorandum of understanding (MOU) to improve the protection of and Indian access to sacred sites through interagency coordination and collaboration.
- The following training was developed under the MOU, in coordination with subject matter experts from across the Federal Government, Indian Country, Academia and Tribal Advocacy Groups.

TRAINING OVERVIEW

- I. Native American Sacred Sites
Introduction and Background.***
- II. What is a Sacred Site?***
- III. Sacred Sites and the Law.***
- IV. Guidance Toward Effective Sacred Site
Consultations.***
- V. Moving Forward.***

PART I.

***NATIVE AMERICAN
SACRED SITES***

***INTRODUCTION
& BACKGROUND***

INTRODUCTION

- This training is for Federal employees and contract staff to obtain a base understanding of Sacred Sites.
- While this training will not make you an expert, it will give you the tools necessary to assist with your legal obligations in the field.
- The concepts in this training pertain to American Indians and Alaska Natives. The terms Native, Indigenous, American Indian, Indian and AI/AN (“American Indian/Alaska Native”), may be used interchangeably throughout the training unless otherwise noted.

BACKGROUND

Long before there was a United States of America, or any government established by European colonists throughout the Americas, countless Native nations existed.

Each Native nation was self-governed and possessed unique cultures and ways of life.

Establishment of non-Indian governments from Canada through South America brought devastation to the Native nations of the Americas.

Historically, the United States government, as a means of acquiring Native American land and resources, systematically used Federal policy to eliminate, forcefully assimilate and destroy Native life.

Today, despite the historical atrocities and great adversity, Native Americans continue to advocate for their indigenous sovereign rights and to be treated with the same dignity awarded to all Americans.

As the Federal Government's policies towards Native Americans matures, federal actions are being taken to redress detrimental historic policies still adversely impacting Indian Country.

One major area where the Federal Government has taken action is the protection of Native American Sacred Sites, Places and Landscapes on federally managed property and assuring Native American access.

Such measures are positive steps in helping to heal over 200 years of detrimental Federal Indian policy.

It can be difficult to understand the integral connection between specific land and the survival of an entire culture.

Many people are familiar with the major world religions. If a church, mosque, temple or place of worship is tragically destroyed, one may continue to pray or congregate. The building, the structure, the place, does not define the practitioner's ability to exercise their beliefs.

That is not always true for Native Americans.

For Native American nations, many religious, spiritual, medicinal and cultural practices are linked to a very specific geographical location.

If that specific “Sacred Site, Place and/or Landscape” no longer existed or was inaccessible to Native people, those specific religious, spiritual, medicinal and cultural practices would no longer survive.

The cultural practice may be defined by the place; There is no ability to practice their culture elsewhere.

Simply another part of our Native population’s culture is lost.

Protection of these lands is necessary for the survival of America's unique indigenous histories, cultures and religions.

Native American history is the first history of the United States and is an integral part of the collective American heritage.

PART II.

WHAT IS A SACRED SITE?

This section offers an overview of what is a sacred site, differing definitions and touches upon the complexity of the subject matter.

Definition Difficulties

- Sacred Site is a term that is often used in the legal/regulatory world meaning a very specific and defined geographic location that is of cultural significance to a Indian Tribe. This is an **incomplete** definition of Sacred Sites in real life.
- Throughout this training you will see the terms “Sacred Site,” “Sacred Place,” and “Sacred Landscape.” (*Often interchangeably*)

- To many Tribal Nations the terms “Sacred Place” or “Sacred Landscape” are preferred, because they do not limit the geographic boundary of the sacred land being discussed.
 - *Example: A burial ground is a “Sacred Site,” the hill where the burial ground is located is a “Sacred Place,” and the Mountain Range that the hill is a part of is a “Sacred Landscape.” All of which are independently sacred and integrally interconnected to each other as a whole. (Example to illustrate concepts **NOT** an actual rule).*

- **Sacred Sites** are often associated with a specific location or with larger “traditional cultural landscapes” or large geographic landscapes.
- **Sacred Places** are particular sites, areas, and/or landscapes possessing one or more attributes that distinguish them as extraordinary or “significant,” usually in a religious or spiritual sense.

- **Sacred Cultural Landscapes** are geographic areas that have special meaning for people that have a long-standing or historical association/relationship within a particular region.
- How a particular Tribe defines a Sacred Site, Place and Landscapes can vary:
 - a site of awe, mystery, power, fascination, attraction, oneness, danger, healing, ritual, identity, revelation, transformation, history, and/or tragedy.

Examples

- **Land**

- Soils, plants, rocks, dunes, hills, mountains, caves, volcanoes, forests, prairies, deserts, animal impacts.

- **Water (Ocean & Fresh Water)**

- Coral reefs, islands, estuaries, mangroves, shores, beaches, marshes, spits, sea grass beds, sea arches, tides, waves, lakes, swamps, rivers and other bodies of water.

- **Sky**

- Celestial events, star constellations, sunrise, sunset, moon phases.

- **Human**

- Ceremonial places involving man-made features, such as petroglyphs, pictographs, burial sites, structures, rock cairns, rock alignments, rock shelters, trails, wells, and sites used for ceremonial purposes such as religious practices, collecting areas for plant or wildlife, celestial observatories or markers, traditional cultural places/properties, and other items specific to an area.

- **Viewsheds:** areas that require unobstructed views of particular areas or events.
 - Sunrise, star constellation, moon phases
- **Tectonic Activity:** places may be alive and dynamic, not static. They actively come into existence through naturally occurring phenomenon.
 - Volcanoes, earthquakes, etc.

Further Understanding

- For many Native Americans Sacred Sites, Places and Landscapes often are not only geological, biological, cultural, geographical, pre and post contact, but may also be religious/spiritual.
- Some of these places may attract pilgrims and tourists because they are universally seen as unique (*i.e Niagara Falls*).
- It is not uncommon that individuals from many different Tribal, ecological, cultural, religious, and national backgrounds may independently view the same place as sacred (*i.e The Grand Canyon*).

- A particular sacred landscape may encompass many independent sacred sites and natural phenomena, all of which are integrally interconnected parts of the entire sacred landscape.

Example: Mt. Shasta in northern California is considered a sacred landscape by the Wintu and several other American Indian cultures of the region. However, each individual waterfall, spring, cave or meadow that comprise Mt. Shasta have independent sacredness but are still an interconnected part of the whole sacred landscape.

- Sacred places can be connected by rivers or lakes, legends or stories, the histories of individuals or groups, and/or pilgrimage routes.

Example: *The Zuni Salt Lake (NM)*

- Other sacred places may have cultural limitations on human access; either being forbidden access or strictly limited to a ritual specialists, healers, or elders.

Example: *Traditionally for the Lakota areas of the Black Hills of South Dakota were reserved for Holy People. (Federal/private land ownership inhibits such practices today)*

Many Natives rely on naturally grown or occurring substances for religious and ceremonial purposes. (e.g., wildlife, plants, & minerals may be worn, carried, or presented during specific cultural practices).

These items may be found in areas identified as sacred.

Sometimes, items must be collected from very specific Sacred Sites, Places and Landscapes for cultural practices, and any desecration to the area renders these necessary resources unusable, ending certain cultural practices. (*i.e. see “Snow Bowl” and the Navajo Nation. The Tribe views the permittee*

actions as desecration, the Federal government and the Courts disagree)

Native American Concepts

- Multiple Tribes may hold the same land as sacred, for similar or different reasons.
- Physical evidence of use may or may not be present at such places.
- Certain ceremonial practices may be required when entering or leaving sacred land.
- Traditional Native names of Sacred Sites, Places and Landscapes are extremely important.
- Due to historic detrimental Federal policies some knowledge of Sacred Sites, Places and Landscapes has been lost.
- Sacred Sites, Places and Landscapes and need to be considered from Native perspectives, including locations, resources, etc. All of which may be less obvious or discoverable by non-Native methods of identification.

- Sacred Sites, Places and Landscapes encompass more than archaeological or historic sites; they can be natural sites, where no physical evidence of their importance is obvious, and may be ceremonial.
- Through archival, ethnographic or ethno historical research-including oral and traditional histories-some sacred places and ceremonial practices are being revived by tribes.
- Great care must be taken to identify and describe Sacred Sites, Places and Landscapes , often through special methods of documentation by traditional practitioners or elders.

Summary

- Sacred Sites, Places and Landscapes go by many different names, may include any aspect of the natural world and are integral parts of Native cultures.
- Evidence of human activity at a Sacred area may or may not be present.
- Native involvement when collecting information on a Sacred Site, Place and Landscape is crucial and necessary.
- Showing respect for Sacred Sites, Places and Landscapes is showing respect to those who deem such places sacred.

QUESTION, PART II

- Sacred Sites, Places and Landscapes may include which of the following?
 - A. Water features
 - B. Viewsheds
 - C. No evidence of human use
 - D. All of the above

- (Answer) D, All of the above

PART III. SACRED SITES AND THE LAW

This section provides a brief overview of legal concepts for non-lawyers.

Please share and discuss the entire training with your legal counsel.

Origins of the Trust Responsibility

- American Indian Law revolves around the special relationship that exists between the federal government and the tribes.
- Typically referred to as the Trust Relationship, the conceptual basis for the relationship was first recognized by the Supreme Court in two early decisions interpreting Indian treaties.

Origins of the Trust Responsibility

- **Cherokee Nation v. Georgia**, 30 U.S. 1 (1831)—The Court, in the context of a challenge to Georgia’s incursions on the Tribe, sought to fit tribes within our federalist system.
 - Tribes:
 - neither states nor foreign nations
 - “domestic dependent nations”
 - “in a state of pupilage”
 - stand as “ward to his guardian”
 - Regrettably, this paternalistic language evolved into a source of power *over* Indians
 - See, e.g., **U.S. v. Kagama**, 118 U.S. 375 (1886), upholding the Major Crimes Act making certain offenses committed by Indians federal crimes

Origins of the Trust Responsibility

- **Worcester v. Georgia**, 31 U.S. 515 (1832)
 - Tribes separate & distinct political communities
 - Tribes sovereign over lands retained
 - Treaties intended to ensure availability of sustainable, land-based, traditional existence
 - Treaties retain for tribes everything not expressly given up
 - ***Duty of protection*** the bargained-for consideration for land cessions

The Duty of Protection

- Against what?
 - Then: unrelenting pressure and conflict from immigrant intrusion onto Indian lands
 - Now: environmental impacts, incompatible development, and other threats to tribal lands, resources, graves, and traditional cultural properties

Satisfying the Trust Responsibility

- Trust responsibility extends to all federal agencies and actions
- But absent a specific legal requirement, duty is a moral obligation only and may be discharged by compliance with general laws and regulations not aimed specifically at Indians
- Courts have, however, consistently upheld the trust responsibility as an independent basis for federal action benefiting tribes

Fiduciary Duty

- If federal officials have a pervasive role in the management of Indian resources, a legally enforceable *fiduciary duty* arises
- In such cases, federal officials must:
 - Consult with tribes to determine best use of resources
 - Make decisions based on the tribe's best interests
 - Maintain and provide to the tribe an accurate accounting of all transactions

The Upshot

- Agencies obligated to consult when tribal lands, resources, or cultural properties may be affected
- Duty of protection not limited to specific statutory obligations
- Agencies have broad discretion to take duty into consideration
- Discretion exercised to protect tribal lands, resources, and cultural properties generally will be upheld

Treaty Rights

- Treaties are the supreme law of the land
- Treaty rights are not diminished by the passage of time or non-use
- Some treaty rights are stated expressly—e.g., land reservations and hunting, fishing, gathering, and grazing rights
- Some are implied—e.g., the right to the water necessary to make expressly reserved rights meaningful

Treaty Rights

- Treaties are construed as the Indians would have understood them at the time of signing (so-called *rule of sympathetic construction*)
- Congress may unilaterally abrogate treaty promises, but must consider the impact on those rights and must clearly express its intent to abrogate those rights
- Abrogation of a treaty right is generally compensable IAW the Fifth Amendment

Indians & the Free Exercise of Religion

- Many sites important to the free exercise of American Indian ceremonial, cultural, and spiritual practices are on federal lands outside of any reservation
- Federal management, development, or regulation of these lands can sometimes interfere with tribal access to and use of these sites

Reliance on the Free Exercise Clause

- Challenges to federal development projects affecting sacred sites on religious grounds must establish a violation of the Free Exercise Clause (RFRA)
- But courts have held government is free to manage and develop its property so long as it:
 - Does not coerce individuals into violating their religious beliefs; or
 - Penalize religious activities by denying rights or benefits available to others
- Free Exercise claims consequently very difficult to prove!

American Indian Religious Freedom Act

- Enacted in 1978 to protect exercise of traditional religious practices
- Agencies must:
 - Consult with traditional religious leaders
 - “Consider” American Indian religious practices
- But Lyng case (485 U.S. 455 (1988)) limited the importance of the Act
 - Act expresses only the “sense of Congress”
 - Creates no enforceable private right of action

Religious Freedom Restoration Act of 1993

- Applies to government actions that impose a substantial burden on the exercise of religion
- Agencies must:
 - Establish a compelling government interest; and
 - Choose least restrictive means to accomplish
- *But see Navajo Nation decision (9th Cir. 2008), which held a burden exists only if:*
 - Religious activity is penalized; or
 - Coerced to act contrary to religious beliefs
- Consequently, RFRA adds few additional protections for American Indian religious practices

Indian Sacred Sites

- Executive Order 13007, May 24, 1996
- Agency obligations:
 - Notice of proposed actions that may limit access to or adversely affect sacred sites
 - Accommodate access to & ceremonial use of sacred sites by Indian religious practitioners
 - Avoid adversely affecting physical integrity of sacred sites
- Limitations: Defines sacred sites narrowly; E.O.s are not legally enforceable

Bottom Line

- Federal officials have very broad discretion when weighing alternatives that may affect a Sacred Site, Place, or Landscape
- Courts have rejected most American Indian challenges to development on public lands; e.g.,
 - Federal dam inundating sacred grounds upstream
 - Expansion of a ski area on a sacred mountain
 - Logging road through a sacred area of a national forest
 - Use of sewage wastewater to make snow on a sacred mountain
 - ALL REJECTED!

Establishment Clause

- American Indians have fared better under the Establishment Clause
- The court “has long recognized that the Government may (and sometimes must) accommodate religious practices, and that it may do so without violating the Establishment Clause.”
 - *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987) (quoting *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 144-45 (1987)).
- Discretion exists to permit agency decision makers to develop reasonable accommodations for Tribes and traditional practitioners to access and protect Sacred Sites, Places, and Landscapes

Statutes Supporting Sacred Sites Protection

National Historic Preservation Act

- Applies to:
 - Federal undertakings
 - Anywhere in the United States
 - That may affect a property currently listed in the National Register or eligible for listing
- Agency obligations
 - Consult with any tribe that attached religious or cultural significance to the property
 - Take into account the effect of the undertaking on the property

NHPA, cont.

- '92 Amendments to Act enhanced tribal role
- Agencies must consult with tribes about effects on traditional cultural properties (TCPs) wherever located—on or off tribal lands
- Must use “reasonable and good faith efforts” to identify TCPs
 - NPS Bulletin 38
 - Pueblo of Sandia decision, 50 F.3d 856 (10th Cir. 1995)

Archaeological Resources Protection Act

- Applies to:
 - Excavation of an “archaeological resource”
 - Material remains of human life at least 100 years old
 - On public or Indian lands
- Agency obligations:
 - Notify tribes; consult on permit terms
 - Obtain tribal consent of on Indian lands
- Criminal enforcement possible for trafficking in archaeological resources removed without a permit—potential felony conviction

Native American Graves Protection & Repatriation Act

- Applies to:
 - Intentional excavation or inadvertent discovery
 - On federal or tribal lands
 - Of Native American cultural items: human remains; funerary objects; sacred or cultural patrimony
- Agency obligations:
 - Stop work; protect site; consult with tribe(s)
 - Develop plan of action or comprehensive agreement
 - See Yankton Sioux Tribe case (83 F. Supp.2d 1047)

Consultation with Tribal Governments

- Executive Order 13175, November 6, 2000
- Agency obligations:
 - Consult re regulations, proposed legislation, or other policy statements that may have substantial effects on tribes
 - Use consensual mechanisms to develop regulations and policies affecting...
 - Treaty rights
 - Tribal self-government
 - Tribal trust resources

Presidential Memos on G-to-G Relations

- Pres. Obama, November 5, 2009
 - Commitment to “regular and meaningful consultation”
- Pres. Bush, September 23, 2004
 - Respect tribal rights of self-government & self-determination
- Pres. Clinton, April 29, 1994
 - Consult prior to taking actions that affect tribes
- All recognize unique legal and political relationship

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

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

Farm Bill 2008

- Congress enacted legislation in the 2008 Farm Bill that strengthened support for the protection and preservation of traditional, cultural and ceremonial rites and practices of Tribes.
- Statute included language permitting the following:
 - Reburial of human remains and cultural items on National Forest System (NFS) land. (sec. 8103, 8106)
 - Temporary closure of portions of national forests for Tribal traditional and cultural practices. (sec. 8102, 8104)
 - Tribes' use, free of charge, of trees, parts of trees, or forest products on NFS land for Tribal traditional and cultural practices. (sec 8105)
 - The protection of the confidentiality of certain culturally sensitive information from disclosure under the Freedom of Information Act (FOIA).

Site Specific Laws

- Congress may also enact site-specific laws pertaining to specific locations.

Examples:

- El Malpais National Monument, NM
- Cibola Historical Park, AZ
- California Desert Protection Act of 1994

UNDRIP

- In 2010, the United States announced support for the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).
- Its articles address indigenous peoples' rights to maintain culture and traditions (Article 11); and religious traditions, customs, and ceremonies (Article 12); to participate in decision making in matters which would affect their rights (Article 18); and to maintain spiritual connections to traditionally owned lands (Article 25).
- The applicability and impact of the UNDRIP on US policy is a question of debate and will only be measured by future Federal actions.

Importance of the Declaration

- New dimension to federal-tribal relations
- Adoption signals official recognition of rights
- Political and moral force
- Creates expectation of implementation
- May spur recognition as customary international law

Summary

This section provided an overview of the laws, policies and regulations impacting the field.

In short:

- The Federal Government has a Trust Responsibility that requires acting in the best interest of Tribes and for their benefit.
- Federal Government action that will directly impact Tribes requires government-to-government consultation.
- Many laws support the protection of and Tribal access to Sacred Sites, Places and Landscapes.

QUESTION, PART III

- Which of the following is TRUE regarding the Federal Trust Responsibility?
 - A. It was established by the Supreme Court under the Marshall Trilogy.
 - B. It requires acting in the best interest of Tribes.
 - C. It is an independent basis for Federal Action benefitting Tribes.
 - D. All of the above.
- (Answer) D, All of the above

PART IV.

GUIDANCE FOR EFFECTIVE

SACRED PLACE

CONSULTATIONS

This section offers guidance for working with Tribes and is presented from Tribal viewpoints.

Please explore links to case studies provided throughout this section.

General Considerations for Effective Consultations

- Tribes may have rules or protocols for sharing information about locations, meanings, and oral histories of Sacred Sites, Places and Landscapes. Rules or protocols may also dictate when, where and with whom a Sacred Site, Place or Landscape may be discussed.
- Many tribes cannot discuss a Sacred Site, Place or Landscape during certain times of the day/night or year (e.g., a place used only for fall ceremonies that cannot be discussed during other seasons).

- Protection of Sacred Sites, Places and Landscapes can only occur through ongoing meaningful and respectful consultation with Tribal governments and their appropriate and knowledgeable Native practitioners and elders.
 - For example, for some Tribes only specific people are allowed to interpret a Sacred Site, Place and Landscape and speak on behalf of the place.
- During government-to-government consultation, ask who the appropriate and knowledgeable individuals are for consultation regarding a specific Sacred Site, Place or Landscape.

- Native place names of Sacred Sites, Places and Landscapes should be used and respected at all times.
- Many Natives consider burial areas sacred and feel the ancestors' spirits are still present at these places. Such topics deserve special consideration, sensitivity and respect.
- Below are consultation guidelines for the Section 106 process but they are beneficial examples for other consultation purposes.
 - <http://www.achp.gov/docs/Assistance%20Agency%20Tribal%20Consultation%20Q&A.pdf>
 - <http://www.achp.gov/docs/consultation-indian-tribe-handbook.pdf>

Best Practices: Communication

- Initiate and maintain ongoing communication with Tribes with historic and/or contemporary ties to the Federal land base. Communication should continue outside of formal consultations in addition to during the consultation process.
- Regular, ongoing communication will build trust, confidence and will foster positive relationships and partnerships with Tribes.
- Engage intertribal or regional Tribal associations if possible and appropriate.
- Remember, the Federal Government forcibly removed many Tribes from their ancestral homelands and some of those Tribes have settled half way across the country. It is necessary to know what Tribes have an ancestral tie to any specific area of land, so they may be formally engaged in any consultation.

- Some Tribes have historic ties to lands far removed from their current land base and need to be consulted with regarding Sacred Sites, Places and Landscapes in their original territory.



Example:

Ocmulgee Mounds, Georgia, are sacred to the Muscogee (Creek) Nation, now in Oklahoma following forced removal in the 1830s. The mounds are protected in part as the Ocmulgee National Monument under National Park Service jurisdiction

(for further info) (<http://www.nps.gov/ocmu/index.htm>).

(Photo: National Park Service)

- Involve Tribes in every stage of sacred places protection, from planning through implementation, and share information, data and relevant files during the earliest consultation phase.
- Develop agreements regarding general locations and concerns of Sacred Sites, Places and Landscapes.
- Incorporate shared information (agreed to by all parties) into meaningful National Register *Determinations of Eligibility*.
- Reach and implement terms of agreements (Memoranda of Agreement (MOA), Memoranda of Understanding (MOU), etc.) as quickly as possible.

- Discuss planned administrative conveyances of land . . .

Example:

Secretary of the Interior conveyed into trust 120 acres of Bear Butte, South Dakota, to the Cheyenne and Arapaho Tribes in 1979 for use by all tribes with cultural relationships to the site.

(Photo: South Dakota Game, Fish & Parks)



- . . . and recommendations for congressional conveyance of land.

- **Communicate within your agency regarding:**
 - The need to protect sacred places
 - The nature of any ongoing agreements and how well they are working
 - Topics for future consultations
 - How Federal Agencies have protected or are currently protecting sacred sites
- Consider consulting about sacred land a privilege, and treat all shared information with the greatest respect.

Best Practices: Access and Mitigating Impact

More than one Tribe can ascribe meaning to Sacred Sites, Places and Landscapes, on land or in water.

Example:

The Oneida of Wisconsin live on lands held in trust for them near Lake Michigan. Ho-Chunk (to their west today) ancestors are buried on that Reservation and the Oneida contact Ho-Chunk elders when Ho-Chunk burials are discovered so they can care for their ancestors in their traditional way.



(Photo: U.S. Census Bureau)

- It may be inappropriate for non-Tribal people to visit places sacred to Tribes or visiting may cause irreparable damage to the site.
- Consider the impact of encroaching tourism, such as rock climbing and other recreational activities that may cause damage.

Example:



Cave Rock on the shore of Lake Tahoe, Nevada, was closed to climbers by the U.S. Forest Service through a management plan it developed. The area is still accessible to hikers but considered a sacred place by the Washoe people.

(for further info)

http://www.fs.usda.gov/detail/lbmu/maps-pubs/?cid=fsm9_046789

(Photo: William Dancing Feather, ACHP)

- Consider treaty and/or court-affirmed management and use of Sacred Sites, Places and Landscapes. And develop plans to allow access routes to remain as unencumbered as possible, with agreements regarding route maintenance.



Examples:

Pacific Northwest: Treaty rights exist to fish, gather, hunt for ceremonial, commercial and subsistence purposes at tribes' usual and accustomed places in the Pacific Northwest and Columbia River.

Great Lakes: Similar treaty rights exist on tribes' ceded lands in the Great Lakes states.

(for further info)

<http://nwifc.org/about-us/shellfish/treaty-rights-faq/>

<http://www.glifwc.org/publications/pdf/jointtreatyrightspub.pdf>

(Photo: NOAA)

- Develop use agreements with Tribes for Sacred Sites, Places and Landscapes used to gather traditional products, plants and animals and agreements for co-management and joint stewardship of Sacred Land.

Example:



Kasha-Katuwe Tent Rocks National Monument in New Mexico is co-managed by the Bureau of Land Management and Cochiti Pueblo.

The agreement includes closures without notice by the Pueblo, non-disclosure of private information regarding specific religious or cultural places, and other items that can be used as model terms of agreement.

(for further info)

http://www.blm.gov/pgdata/content/nm/en/prog/NLCS/KTR_NM.html

(Photo: Bureau of Land Management)

Best Practices: Maintaining Confidentiality

- Create inventories of Sacred Sites, Places and Landscapes on Federal land.
- Inventories should not be considered final and may be expanded by either Federal Agencies or Tribes.
- Develop buffer zones around Sacred Sites, Places and Landscapes that will be avoided in planning (and all) stages of projects, and protect locations from inadvertent impacts.

Example:

BLM and traditional religious leaders devised the inkblot system for the California Desert Plan. An inked shape designates a sensitive area, without disclosing the exact location of the sacred place.

Ink-blotted areas are no-development or no-encroachment areas.

(for further info) http://www.blm.gov/style/medialib/blm/ca/pdf/cdd/cdcaplan.Par.15259.File.dat/CA_Desert_.pdf



(Photo: Bureau of Land Management)

- Consult with Tribes regarding closures and to develop alternative marker systems that indicate “off limits” areas.

Example:

Federal Agencies can use a range of signage when Tribes require closure for stewardship, ceremonial or observational purposes.

Military installations often protect sites by making them off limits. One form of alternative marker system is to incorporate protected sites into military exercises while keeping them off limits.



(Photo by Laurie Rush, US Army)

- Fully consider direct, indirect and cumulative impacts to Sacred Sites, Places and Landscapes during Environmental Remediation activities.

- Adopt the principle that “sacred is sacred” and that sacredness is determined by Tribes.



Petroglyphs and pictographs, such as these at Bandelier National Park, often have special meaning to tribal people connected to their past through these places. (Photo: ACHP files)

Important Practices to Avoid:

- Requesting exact information about Sacred Sites, Places and Landscapes when locations are not already public.
- Creating public maps or any other locational indicators outlining Sacred Sites, Places and Landscapes.
- Requiring Tribes to “document” or detail how places, ceremonies, events or activities are sacred.
- Repeated requests for similar information.

- Granting Use Permits to or entering into agreements with non-Native persons or entities without consultation with Tribes, or over their objections.
- Delegating consultation responsibility to archaeological consultants; consultation is a Federal, Government-to-Government, responsibility.
- Relying on non-Tribal subject matter experts over Tribal experts; non-Tribal experts may dismiss *Sacred Landscape* features as “non-Indian”.

- **Discussions and processes that attempt to characterize entire classes or types of sites and Sacred Sites, Places and Landscapes.**



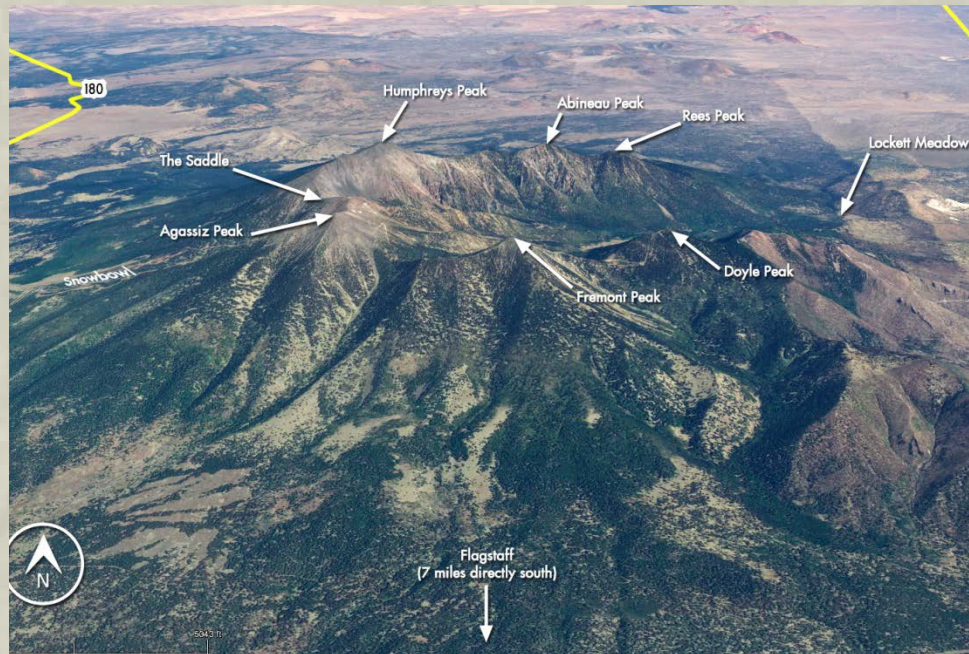
Example:

“All cairns in New England are stone piles made by Colonial farmers”
is not a true statement.

Left: A stone cairn of unknown origin
In Southern New York

(Photo: Laurie Rush, US Army)

- Take all possible steps to avoid litigation with Tribes over protecting Sacred Sites, Places and Landscapes.
- Tribes across the country claim the primary factors leading to litigation over sacred places is Federal Agency lack of respect, recognition and/or consultation.



Example:

San Francisco Peaks, or Arizona Snow Bowl, was a controversial case; Tribes lost their battle to prevent spraying of treated sewage for snowmaking on a sacred mountain.

(For more Info)

<http://www.fs.usda.gov/detail/coconino/about-forest/about-area/?cid=stelprdb5340115>

(Photo: Forest Service)

This is an example of how difficult such cases can be. The Federal Government and the Courts believe this case was properly decided. Tribes disagree and the Navajo Nation voices that opinion regularly, even citing so to the United Nations in Geneva.



Structures from the Colonial or post-Colonial period, such as a Christian mission or church, can be just as sacred to Native Americans as a 10,000-year-old archaeological site. The San Francisco de Assisi Mission Church, Rancho de Taos, NM, is a blend of Native and Spanish styles and a National Historic Landmark. (Photo: ACHP files)

(For more info) http://www.nps.gov/nr/travel/american_latino_heritage/San_Francisco_de_Assisi_Mission_Church.html



This symbol of a more recent place important to Indians across the country recalls the occupation of Alcatraz Island, CA, and the beginning of the American Indian Movement (AIM) in the early 1970s. Native Americans continue to make pilgrimages to Alcatraz for Indigenous Day Sunrise Gatherings (Columbus Day) to commemorate the 1969-71 occupation.

Summary

- This section provided guidance and best practices for Tribal consultation:
 - Consult frequently and often with Tribes (Local and Removed).
 - Keep an open dialogue.
 - Listen to Tribal experts and accept their expertise.
 - Mitigate impacts whenever possible, and always protect, and make concessions for access.
 - Take action to protect confidentiality of Sacred Sites, Places and Landscapes.
 - Be creative in approaches to protecting sites and learn from best practices, while being aware of practices to avoid.

QUESTION, PART IV

- True or False: Federal agencies should take steps to protect the confidentiality of Sacred Sites, Places and Landscapes?

- (ANSWER) True

PART V.

MOVING FORWARD

This section explains Tribal concerns regarding the protection of Sacred Sites, Places and Landscapes, explores ideas for positively addressing those concerns, and is followed by an overview the inter-agency *Memorandum of Understanding for the Protection of Indian Sacred Sites* and the *White House Council on Native American Affairs*.

Tribal Concerns

CONFIDENTIALITY

- Many Tribes avoid sharing confidential information about Sacred Sites, Places and Landscapes with outsiders. Disclosing specific details like location and significance may be taboo.
- Tribes want assurance that any disclosed information is protected and managed sensitively.

(Continued)

- Many Federal-Tribal partnerships include confidentiality or data sharing agreements, outlining how information is stored, accessed and appropriately used.
 - Often a Federal Agency does not retain any sensitive data; it is housed with the Tribe, and an agreement details how it will be accessed by an Agency and, to what they will have access.

FORMALIZED CONSULTATION PROTOCOLS

- Federal Agencies are encouraged to establish formal Government-to-Government consultation protocols with Tribes, including:
 - MOUs/MOAs outlining the consultation process,
 - Opportunities for collaboration/coordination on specific issues,
 - Points of contact,
 - Authorities,
 - Responsibilities, etc.

MANAGEMENT & PROTECTION

- Tribes are more likely to trust a Federal Agency with sensitive/confidential information when well maintained working relationships have been established.
 - Establish such relationships around non-contentious projects, so there is a level of trust when more difficult projects arise.
- Federal Agencies can foster true Government-to-Government relationships with Tribes by working together through land management decisions, such as:
 - How will the site be managed, protected and used by the land manager or the public? How will Tribal access be accommodated?

(Continued)

- Most Tribal-Federal Agency interactions can be detailed in a formalized agreement that outlines specific procedures for Tribal access/use, uses by Federal Agencies that do not conflict with Tribal use, dispute resolution processes, and any pertinent Federal laws, rules, regulations, and jurisdictions.

(Continued)

- **Develop a consultation protocol in accordance with E.O. 13175**
 - Although Federal Agency specific consultation guidance may exist, a Federal Agency should conduct outreach to Tribal Governments to see how they want to be consulted.
 - Some Tribes have their own consultation protocols and a Federal Agency should be accommodating to their process.
 - A Tribe may identify key policy makers and staff to consult with and the Federal Agency should do the same.

(Continued)

- **Federal Agency tracking system for consultation should be in place and reported annually.**
 - A Federal Agency must ensure a reasonable and good faith effort to consult with Tribes. Agencies and Tribes should document the consultation processes.
 - If more than one Federal Agency is involved, it is imperative for interagency communication and coordination.
 - Tribes should create a written record of interactions in the event consultation fails and issues are elevated to a higher level, including litigation.
 - All consultations should be reported annually as part of the OMB annual report on E.O. 13175.

CONSULTATION PROCESSES & TRIBAL POLICIES

- Ask a Tribe if it has a Tribal policy on Sacred Sites, Places and Landscapes or any other applicable laws or policies.
- Ask for a copy for your records and reference. Know this policy when consulting with a Tribe, and try to apply the policy into land management decisions if possible.
- Model the successful strategies of other Federal Agencies that have good working relationships or consultation processes with a Tribe(s) on Sacred Sites, Places and Landscapes.
- A Federal Agency should ask a Tribe if it has good working relationships with other Federal or State Agencies, and then strive to create a similar relationship or consultation process.
- Don't reinvent the wheel!

AGENCY TRIBAL LIASIONS

- Federal Agency Tribal Liaisons should be involved in collaborations with Tribes.
- Agency Tribal Liaisons should make themselves known to Tribes, so Tribes know who to work with and so their expertise can be utilized to address Tribal concerns and issues.
- It is imperative that Agency Tribal Liaisons create meaningful relationships with the Tribes and conduct frequent outreach.
- Typically, the Tribal Liaison can elevate issues and concerns or assist in resolution of an issue or concern.

THE ROLE OF TRIBES IN CONSULTATIONS

- Tribes should be consulted throughout the entire project process from start (planning phase) to finish.
- This will ensure Tribes can offer insight early in the process, sometimes offering solutions or identifying problems not thought of by the agency.
- Working through issues together early on can help move the project along more smoothly and quickly.

Consultation includes asking Tribes their ideas or thoughts on future implementation of sacred sites issues.

Steps to Effectively Consult with Tribal Governments

- 1) Identify the appropriate Tribe(s) for your project.
 - This may include removed tribes. Learn the historical tribal territory for the area.
- 2) Establish a relationship with Tribe(s) at various levels of the organization.
 - Ideally do this when there isn't a contentious project to build a level of trust and goodwill that will serve everyone well when a difficult project happens.
- 3) Develop a consultation agreement.
- 4) Develop a data sharing agreement.

- 5) Identify funding for Tribes to inventory Sacred Sites, Places and Landscapes if a land managing agency is involved.
 - Do not assume that Tribes have this data available or in a form that the agency can use.
 - If an inventory is proactive, the agency can make better management decisions to protect sites, rather than finding out about the site after a project is proposed.

- 6) Change the conversation: Tribes want Federal Agencies to understand and support why Tribes find these places important.

MOU for the Protection of Indian Sacred Sites

There is an ongoing dialogue and awareness within the federal government regarding Sacred Sites, Places and Landscapes.

The 2012 Sacred Sites MOU was created to formalize interagency collaboration and communication between the U.S. Departments of Defense, Interior, Agriculture, Energy and the Advisory Council on Historic Preservation. The goal is to establish Federal standards for guidance, public education and outreach, confidentiality, management practices, Federal protections, interagency collaborations, and Tribal consultation for the protection, management and stewardship of sacred land.

Working together and learning from each other is the best way to successfully implement the goals of the MOU.

White House Council on Native American Affairs

- Established by President Obama in 2013 to ensure the Federal Government engages in true and lasting Government-to-Government relationships with Federally Recognized Tribes in a more coordinated and effective manner. This includes fulfillment of Trust Responsibilities, protecting Tribal lands, environments and natural resources and, promoting respect for Tribal cultures.
- The Council membership includes the Secretary of the Interior, who is the chair, along with the heads of executive departments, agencies, and offices. They meet three times per year, with additional meetings and invitees as determined by the Chair.
- All products developed under the Sacred Sites MOU are formally adopted by the White House Council on Native American Affairs.

- The Council's mission and function is to:
 - Make policy recommendations to the President,
 - Coordinate the United States Government's engagement with Tribal governments and their communities,
 - Coordinate a more effective and efficient process for Tribal consultation as set forth in E.O. 13175, and
 - Organize White House Tribal Nations Conference each year.
- Tribes should be able to advocate for their Sacred Sites, Places and Landscapes to the Council including suggesting policy recommendations and improvements to Tribal consultation.
 - Tribes may also address issues they are having with Federal Agencies at the regional offices and/or headquarters.

Summary

- This section explored some major concerns of Tribes regarding the protection of Sacred Sites, Places and Landscapes and Tribal interests in those places.
- It then examined ideas for moving forward positively in addressing these concerns and interests.
- This was followed by an overview of the Interagency Sacred Sites MOU and the White House Council on Native American Affairs.

QUESTION, PART V

- Federal Agencies should do which of the following when working with Tribal governments?
 - A. Formalize consultation protocol agreements with Tribes.
 - B. Ensure Tribes have access to Sacred Sites.
 - C. Accept Tribal histories and narratives regarding sacred sites
 - D. All of the above
- (Answer) D, All of the above

Acknowledgements

- Kashia Band of Pomo
- Red Lake Band of Chippewa
- Pueblo of Santa Ana
- Confederated Tribes of Umatilla
- Navajo Nation
- Coeur D'Alene
- The National Congress of American Indians
- Native American Rights Fund
- Smithsonian National Museum of the American Indian
- Morning Star Institute
- Association on American Indian Affairs
- Sandra Day O'Connor College of Law at ASU, Indian Legal Program
- University of Arkansas School of Law
- National Park Service
- Department of Justice
- The US Forest Service

REMEMBER

Sacred places deserve respect, and additionally, respect is merited for the people, cultures, and belief systems that consider such sites sacred.

The purposeful desecration of a sacred site, place or landscape is demoralizing and dehumanizing and to those who hold it sacred.