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AMERICAN INDIAN RELIGIOUS FREEDOM AND CULTURAL RESOURCES MANAGEMENT: PROTECTING MOTHER EARTH'S CARETAKERS

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Introduction

> Every part of this soil is sacred in the estimation of my people. Every hillside, every valley, every plain and grove, has been hallowed by some sad or happy event in days long vanished.
>
> —Chief Seattle
> Statement upon signing the Treaty of Medicine Creek, 1854, quoted in V. Deloria, *God is Red*, 176 (1973).

Infringements of religious freedom of traditional American Indians have been all too common occurrences throughout the history of the United States. Suppression of traditional tribal religions was official federal policy for many years.[1] Recognition by Congress that infringements continued to occur after the policy of suppression had been abandoned culminated in the enactment of the American Indian Religious Freedom Act (hereafter AIRFA),[2] which establishes that it is now "the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise [their] traditional religions. . . ."[3]

Infringements of Indian religious freedom have resulted from a variety of causes, and in AIRFA Congress acknowledged that among the causes are "lack of knowledge or the insensitive and inflexible enforcement of Federal policies and regulations."[4] In order to identify administrative and legislative measures that might be taken to overcome ignorance and insensitivity and to

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1. *See generally* AMERICAN INDIAN POLICY REVIEW COMM'N, 95th Cong., 1st Sess., 1 FINAL REPORT 67-68, 70 (Comm. Print 1977); M. PRICE, LAW AND THE AMERICAN INDIAN 693-703 (1973). See also notes 25-33 *infra* and accompanying text.

2. S.J. Res. 102, Aug. 11, 1978, Pub. L. 95-341, 92 Stat. 469 (codified in part at 42 U.S.C. § 1996 n.). *See* H.R. REP. No. 1308, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 1262.

3. 42 U.S.C. § 1996 (Supp. IV 1980).

4. S.J. Res. 102, *supra* note 2. The quoted language is from one of the "Whereas" clauses, which is not codified.

otherwise help implement the policy of protecting Native American religious rights and practices, section 2 of AIRFA mandated the President to direct an evaluation by federal agencies of their policies and procedures "in consultation with native traditional religious leaders" and to report the results of this evaluation to Congress.[5] The resultant *American Indian Religious Freedom Act Report*[6] describes many actions which were taken by federal agencies to implement the policy of AIRFA as well as other actions that were recommended.

Despite the statement of policy and the actions and recommendations to implement the policy, several conflicts involving Indian religious freedom have resulted in litigation.[7] In all of the cases in which Indians have sought access to and protection of

5. 42 U.S.C. § 1996 (Supp. IV 1980).

6. FEDERAL AGENCIES TASK FORCE, AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT, Pub. L. 95-341 (1979) [hereinafter cited as AIRFA REPORT]. Pursuant to section 2 of AIRFA, the AIRFA Report was to have included recommendations for legislation. None were included, although there were several references to such "recommendations are currently being reviewed within the Administration." *Id.* at 63, 67, 75, 81. However, no such recommendations have been submitted to Congress. In addition, the AIRFA Report contained several recommendations for "uniform administrative procedure." *Id.* at 62, 71, 75, 81. These recommendations were formulated into a proposed executive order, which, however, did not reach the President's desk. In response to objections raised within the Office of the Secretary, Department of the Interior, the Deputy Assistant Secretary-Indian Affairs returned the proposed executive order to the Commissioner of Indian Affairs with a directive to prepare a report to the Secretary. Memorandum from Philip S. Deloria, Deputy Assistant Secretary-Indian Affairs, to the Commissioner of Indian Affairs (Jan. 15, 1981). Although preparation of the report was begun, including correspondence with relevant federal agencies, the report was never completed. In light of the ambivalence demonstrated by the Department's response to the mandate of AIRFA and the inherent conflicts between Indian religious interests and the Department's various missions, should the Congress determine that further administrative review is needed to carry out the policy of AIRFA fully, lead responsibility should be assigned to an agency with less likelihood that its primary missions will interfere with presenting recommendations to the Congress. The United States Civil Rights Commission may be an appropriate agency.

7. Wilson v. Block, No. 81-1905, Hopi Indian Tribe v. Block, No. 81-1912, Navajo Medicinemen's Ass'n v. Block, No. 81-1956, slip. op. (D.C. Cir., May 20, 1983) (joined as Hopi Indian Tribe v. Block) (Plaintiff Hopi and Navajo Indians seek to prevent expansion of ski development on San Francisco Peaks, a sacred mountain.); Sequoyah v. TVA, 620 F.2d 1159 (6th Cir. 1980), *aff'g* 480 F. Supp. 608 (E.D. Tenn. 1979), *cert. denied*, 449 U.S. 953 (1980) (Plaintiff Cherokee Indians sought (1) to prevent impoundment of water behind Tellico Dam, thereby flooding a religious property, including the site of the ancient Cherokee town of Chota, and (2) to require reinterment of human remains that had been excavated from the project area.); Inupiat Community of Arctic Slope v. United States, 548 F. Supp. 182 (D. Alaska 1982) (Inupiat Eskimos sought to block issuance of oil leases in Beaufort and Chukchi seas.); Northwest Indian Cemetery Protective Ass'n v. Peterson, 552 F. Supp. 951 (N.D. Cal. 1982) (Indian plaintiffs seek to block construction

religious properties located on public lands, and federal land managers have declined to accommodate the Indian concerns, the Indians have not been successful in obtaining the relief they have sought from the courts, with the exception of one very recent case (see Author's Note at end of text).[8] It has been suggested that in their application of the Supreme Court's rulings interpreting the free exercise clause[9] to Indian cases, the courts have been demonstrably ethnocentric and arguably wrong.[10]

In determining whether the burden imposed upon a religious practice by a government policy was an unconstitutional infringement, the Supreme Court in *Wisconsin v. Yoder*[11] emphasized that the Amish religious practice that was at issue was "central to their faith."[12] The courts have relied on this emphasis to fashion a "centrality" standard, which, when applied to traditional Indian religions "eviscerates the Free Exercise Clause."[13] Tribal religions tend to see all life in religious terms, rather than divided into domains clearly religious or nonreligious.[14] The application

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of a major logging road, known as the "G-O road," through Helkau Historic District, a 13,500-acre district in the Six Rivers National Forest, which includes a variety of religious properties, including cemeteries, collecting areas, and power spots/vision quest sites); Crow v. Gullett, 541 F. Supp. 785 (D.S.D. 1982) (Lakota and Tsistsistas religious practitioners objected to certain construction projects and park regulations in Bear Butte State Park, South Dakota.); Badoni v. Higginson, 455 F. Supp. 641 (D. Utah 1977), *aff'd*, 638 F.2d 172 (10th Cir. 1980), *cert. denied sub nom.* Badoni v. Broadbent, 452 U.S. 954 (1981) (Plaintiff Navajo Indians sought (1) to have Glen Canyon Dam operated so that it would not flood religious properties at Rainbow Bridge, and (2) to restrict tourist visitation at Rainbow Bridge so that religious ceremonies could be performed in private. This case was filed before but decided on appeal after the enactment of AIRFA.); Frank v. State, 604 P.2d 1068 (Alaska 1979) (defendant Athabascan Indian sought reversal of conviction for killing moose out of season on ground that moose meat was needed for funeral potlatch, a religious ceremony); Application of Northern Lights, F.E.R.C. License Proceeding, Project No. 2752 (intervenor Kootenai Indians seek to prevent issuance of license for hydroelectric power project which would damage sacred nature of vision quest site at Kootenai Falls).

8. Frank v. State, 604 P.2d 1068 (Alaska 1979), a case in which the Indian religious interest prevailed, did not involve access to a religious property on public land. But see Author's Note following text.

9. U.S. CONST. amend. I. The religion clauses, i.e., the establishment clause and the free exercise clause, state: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

10. Pepper, *The Conundrum of the Free Exercise Clause—Some Reflections on Recent Cases*, 9 N. KY. L. REV. 265, 282-303 (1982). *See also* Note, *Native American Free Exercise Rights to the Use of Public Lands,* 63 BOSTON U.L. REV. 141 (1983).

11. 406 U.S. 205 (1972).

12. *Id.* at 210.

13. Pepper, *supra* note 10, at 283.

14. *See generally* A. HULTKRANTZ, THE RELIGIONS OF THE AMERICAN INDIANS (1967); M. ELIADE, THE SACRED AND THE PROFANE (1959); SEEING WITH A NATIVE EYE: ESSAYS ON

of the centrality standard to such pervasive religions results in one of two conclusions—either all religious practices are "central" or none are—and the courts have not yet found an Indian religious practice to be "central" when the use of public lands is at issue.[15]

This kind of reasoning has been used to avoid applying the basic test that is used to determine whether an infringement of religious freedom is justified,[16] i.e., whether the government has a compelling interest.[17] The courts have also employed an "almost

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NATIVE AMERICAN RELIGION (W. Capps ed. 1976); S. GILL, NATIVE AMERICAN RELIGIONS: AN INTRODUCTION (1982).

15. Pepper, *supra* note 10, notes the irony in this:

> The inseparability of the entire Amish way of life from the Amish religion was the *Yoder* problem, and the Court "solved" it by twisting the situation to emphasize that *everything* in Amish life was at the *core* of religion. The Court could as well have concluded that *no* Amish practice was central, because all conduct, the most trivial as well as the most vital, was covered by religious mandates. The key passage in *Sequoyah* is a pastiche of distinctions, one of which highlights the irony. The problematic nature of the *Yoder* facts (the illimitable which the Court struggled to limit), becomes the basis for distinguishing later cases: plaintiffs "have fallen short of demonstrating that worship at the particular geographic location in question is inseparable from the way of life (*Yoder*)." 620 F.2d at 1164.

9 N. KY. L. REV. 265, 284 n.91.

16. In Sequoyah v. TVA, 620 F.2d 1159, 1164-65 (6th Cir. 1980), the court found that the plaintiff's affidavits did not establish that access to the Little Tennessee Valley was central or indispensable to their religion and that there was therefore no need to determine whether the government's interest was compelling. *Id.* at 1164-65. The district court employed similar logic in *Hopi Indian Tribe*, slip. op. at 6-11. The court of appeals agreed in part with the Indians' challenge to the "centrality" standard, saying that "courts are not competent to rule upon the centrality of religious belief or practice." *Id.* at 16. The court nevertheless followed the analysis in *Sequoyah*, *supra*, at 17, by focusing the enquiry on whether the government land in question is indispensable to religious practice.

17. Sherbert v. Verner, 374 U.S. 398, 403, 406 (1963). *See* Pepper, *supra* note 10, at 292-99. The court of appeals in *Hopi Indian Tribe*, slip op., formulates the test of constitutionality as follows: "The Free Exercise Clause proscribes government action that burdens religious beliefs or practices, unless the challenged action serves a compelling governmental interest that cannot be achieved in a less restrictive manner." *Id.* at 9. It is thus a three-part test in which the plaintiff must first show that the government action challenged constitutes a "burden" on religion. If a burden is demonstrated, then the government must show that its interest is compelling and cannot be achieved by a less restrictive alternative. Although the court found that the challenged action would cause the plaintiffs "spiritual disquiet," it did not find a burden on religion, even though testimony of the Hopi plaintiffs stated that the challenged action would result in the "destruction of these [religious] practices [and] will also destroy our present way of life and culture." *Id.* at 10 n.2. Thus, the Secretary of Agriculture's decision that the expansion of the ski area would best serve the public interest, although it might lead to the destruction of a culture that is five times older than the nation itself, was not examined to see if this decision would advance a compelling governmental interest, and, if so, whether that interest could be achieved by a less restrictive means.

bizarre"[18] interpretation of the establishment clause[19] to avoid a close examination of the nature of the governmental interest. In avoiding the use of the compelling governmental interest test, the courts have not helped to carry out the intent of AIRFA, at least insofar as the congressional intent was expressed by one of the cosponsors: "It is the intent of this bill to insure that the basic right of the Indian people to exercise their traditional religious practices is not infringed without a clear decision on the part of the Congress or the administration that such religious practices must yield to some higher consideration."[20]

The observation that infringements of Indian religious freedom continue to occur despite the policy expressed in AIRFA evokes an inquiry into why such infringements occur and how they might be avoided. It is suggested that it is somewhat euphemistic to say that the reasons for infringements are ignorance and insensitivity. Rather, it may be more accurate to view infringements of Indian religious freedom as a function of an ongoing conflict between Indian cultures and the dominant culture of the United States, a conflict in which the dominant culture has incessantly challenged the core of the value systems of Indian cultures—the traditional

18. Pepper, *supra* note 10, at 292-95. Pepper notes that the free exercise clause and the establishment clause seem to contradict each other because a governmental accommodation to allow free exercise may be seen as an establishment of religion. The court in *Badoni*, 638 F.2d 172, 179, and the district court in *Hopi Indian Tribe*, slip op. at 24-25, took the position that accommodation of Indian religious practices as sought by the Indian plaintiffs would be an unconstitutional establishment. However, the court of appeals in *Hopi Indian Tribe* rejected this reasoning. *Id.* at 24-25. It is clear from the legislative history, however, that Congress intended for some accommodations to be made. H.R. REP. No. 1308, *supra* note 2, at 3.

19. The clause is set out in note 9 *supra*.

20. CONG. REC. H6872 (1978) (daily ed. July 18, 1978) (remarks of Rep. Udall) quoted in AIRFA REPORT, *supra* note 6, at app. A, p. 3. *See also* H.R. REP. No. 1308, *supra* note 2. Although Congressman Udall does not use the term "compelling interest test," this is clearly what he means. Nor does the H.R. Report specifically refer to the compelling interest test. However, in stating that the purpose of AIRFA is "to insure that the policies and procedures of various Federal agencies, as they may impact upon the exercise of traditional Indian religious practices, are brought into compliance with the constitutional injunction that Congress shall make no laws abridging the free exercise of religion," Congress must be implicitly referring to the compelling interest test since it is part of the judicial standard used to determine the constitutionality of acts of Congress.

Compare Hopi Indian Tribe. The plaintiffs contended that "AIRFA proscribes all federal land uses that conflict or interfere with traditional Indian religious beliefs or practices, unless such uses are justified by compelling governmental interest." *Id.* at 21. The court rejected this contention, giving a more limited reading to the congressional intent, holding that only when a burden on religion is demonstrated does the compelling interest test come into play. *Id.* at 9.

tribal religions. This point of view is presented in more detail in Part I of this article.

With regard to the second area of inquiry—how infringements of Indian religious freedom might be avoided—it is suggested that federal administrative decisions regarding Indian access to sacred sites and the protection of the sacred character of such sites can be influenced through the informed use of certain federal statutes and regulations. Two statutes that are seen as providing the most important opportunities for Indians and their advocates to influence administrative decision making are the National Historic Preservation Act of 1966[21] (hereafter NHPA) and the Archaeological Resources Protection Act of 1979[22] (hereafter ARPA). These statutes provide the legislative foundation for an area of administrative activity that, in the parlance of the federal bureaucracy, is increasingly referred to as "cultural resources management."[23] It is important to note that the primary objectives of these statutes are just what one would assume from their titles—historic preservation and protection of archaeological resources. However, the ways in which these objectives are achieved have important implications for our nation's treatment of the religious and cultural concerns of Indians. Moreover, these statutes and the implementing regulations open important institutionalized channels for federal administrative decisions to be influenced by Indian tribes and by those cultural anthropologists, ethnohistorians, and others in related disciplines who see themselves as allies of and advocates for traditional tribal cultures.[24] The two statutes are discussed in Part II of this article and the implementing regulations are discussed in Part III.

21. Pub. L. 89-665, 80 Stat. 915, *codified as amended* at 16 U.S.C. §§ 470-470w-6 (Supp. V 1981).

22. Pub. L. 96-95, 93 Stat. 721, *codified at* 16 U.S.C. §§ 470aa-47011 (Supp. V 1981).

23. See *infra* text accompanying notes 60-64.

24. P. Quick, "Changing Roles for the Anthropologist: Current Work Among Native Americans in North America" (unpublished paper presented at the Annual Meeting of the American Anthropological Association, Washington, D.C., Dec. 1982); H. Holt; "Navajo Sacred Areas: A Guide for Management," Contract Abstracts and CRM Archaeology, 1981, No. 2, at 45; N. Evans, "The California Sacred Lands Inventory: Native American Adaption to Development," and B. Holmes, "American Indian Religious Freedom and Historic Preservation" (unpublished papers presented at the Annual Meeting of the American Anthropological Ass'n, Washington, D.C., Dec. 1982). Although the number of anthropologists who accept the role of intermediary or advocate for Indian concerns seems to be increasing, the discipline's reputation in Indian country is anything but enviable. *See* V. DELORIA, CUSTER DIED FOR YOUR SINS 78-100 (1969).

No pretense is made that all conflicts between the proposed actions of federal agencies and Indian religious and cultural values can be resolved through the use of administrative processes established by the statutes and regulations discussed in this article. Rather, it is suggested that in cases in which Indian religious and cultural values can be accommodated without preventing the federal agency from achieving its objective, involvement in administrative decision making will be more likely than litigation to yield satisfactory results. Further, such involvement will lay a better foundation for litigation should it become necessary. It is recognized that there are cases in which such accommodation does not appear possible. In such cases either the federal agency must forego its proposed action or the Indian religious values will be infringed upon. Such cases provide a meaningful indication of the depth of our nation's commitment to its professed belief in religious freedom as one of the basic rights of its citizens. Some comments on such irreconcilable conflicts are offered in Part IV.

I. *Tribal Religions and Cultural Change*

In traditional Indian cultures, religion was the core of culture. Congress has acknowledged this in the enactment of AIRFA, which states that "the religious practices of the American Indian (as well as Native Alaskan and Hawaiian) are an integral part of their culture, tradition and heritage, such practices forming the basis of Indian identity and value systems."[25] From the beginning of contact between white people and Indians until fairly recently, Indians have experienced a continuing assault on this "basis" of their identity.[26] They were commonly regarded as savages[27] who had no religion.[28] Medicine men, who were the religious leaders of many, perhaps most, tribes,[29] were regarded as sorcerers, con-

25. S.J. Res. 102, *supra* note 2 (from one of the uncodified "Whereas" clauses.)

26. *See generally* E. SPICER, A SHORT HISTORY OF THE INDIANS OF THE UNITED STATES (1969); E. SPICER, CYCLES OF CONQUEST (1962); THE INDIAN AND THE WHITE MAN (W. Washburn ed. 1964); V. DELORIA, JR., GOD IS RED (1973).

27. *See generally* AIRFA REPORT, *supra* note 6, at 1-7; Vogel, *The Indian in American History*, in V. VOGEL, THIS COUNTRY WAS OURS: A DOCUMENTARY HISTORY OF THE AMERICAN INDIAN 284-99 (1972); FINAL REPORT, *supra* note 1, at 52-53, 60-66.

28. HULTKRANTZ, *supra* note 14, at 1-2. *See* H.R. REP. No. 1308, *supra* note 2, at 4, which states the recognition by Congress that many government officials believe that Indian religious practices "do not have the same status as a 'real' religion."

29. HULTKRANTZ, *supra* note 14, at 84-102. *See generally* M. ELIADE, SHAMANISM: ARCHAIC TECHNIQUES OF ECSTASY (1964).

"Medicine," as Indians use the term, encompasses all manifestations of the supernatural, the Great Mystery. The medicine man uses his ability to make contact with the

jurers, and quacks.[30] In the early period of contact between whites and Indians, Christian writers recorded their opinions that the deaths of Indians by disease or at the hands of the colonists were manifestations of God's will.[31] In the nineteenth century, the federal government, in its program to "civilize" Indians, relied on missionary organizations to share its responsibilities for Indian affairs, particularly education, the establishment clause notwithstanding.[32] During the late nineteenth and early twentieth centuries, participation in tribal religious ceremonies such as the sun dance was treated as an offense punishable by criminal penalties.[33]

Although the ruthlessness that characterized earlier periods of this conflict between cultures has subsided, the conflict remains. The missionary organizations that played a prominent role in "civilizing" Indians continue to be active on reservations today, and despite the undeniable amount of good they do in helping to improve the material welfare of reservation Indians, their primary purpose is still spreading the word of God in accordance with the teachings of the sect to which they belong. Since the Judeo-Christian mainstream of the dominant culture tends to view itself as the only true religious tradition, the tendency persists to regard

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supernatural powers for the benefit of his community. Curing illness through the use of medicinal plants or contact with supernatural powers or both is but one aspect of the medicine man's role in traditional tribal cultures. Because of the central role of medicine men in the religious life of many Indian tribes, the term "shamanism" has been widely used to describe these tribal religions, borrowing a name from the tribal religions of Siberia that are also dominated by medicine men. Among agrarian tribes, such as the Pueblos, medicine men tend to be less important, and the religious leaders of these tribes are more accurately described as priests or chieftain-priests. HULTKRANTZ, *supra*.

30. V. VOGEL, AMERICAN INDIAN MEDICINE 22 (1970).

31. AIRFA Report, *supra* note 6, at 2; A. PINKNEY, THE AMERICAN WAY OF VIOLENCE 95 (1972), in B. JOHANSEN & R. MAESTAS, WASI-CHU: THE CONTINUING INDIAN WARS 20-21 (1979).

32. PRICE, *supra* note 1, at 693-703; FINAL REPORT, *supra* note 1, at 53. *See also* Keller, *Christian Indian Missions and the American Frontier*, 5 AM. INDIAN J. 19 (No. 4 1979); Barry, *Church Joins State to Civilize Indians, 1776-1869*, 5 AM. INDIAN J. 7 (No. 7 1979). Nor was the establishment clause an obstacle to the federal government granting patents of Indian trust land to religious organizations. 25 U.S.C. § 280 (1976).

33. Report of the Commissioner of Indian Affairs 29 (1892), *quoted in* AIRFA REPORT, *supra* note 6, at 6. *See also* Dep't of Interior, Officer of Indian Affairs, Commissioner Burke, Cir. No. 1665 (Apr. 26, 1921), *quoted in* PRICE, *supra* note 1, at 700-01. This policy was reversed by Dep't of Interior, Office of Indian Affairs, Cir. No. 2970, "Indian Religious Freedom and Indian Culture" (Jan. 3, 1934), *quoted in* PRICE, *supra*, at 702-03. It should not be overlooked that the victims of the Wounded Knee massacre of 1890 were participating in a religious ceremony. FINAL REPORT, *supra* note 1, at 67-68.

tribal religions as primitive superstitions the Indians must reject if they hope to achieve the Christian afterlife. This continuing backdrop of intolerance helps to explain the widespread ignorance of and the depth of the insensitivity toward traditional Indian religions.

Other factors that help to explain the ignorance and insensitivity are that there are fundamental differences between the tribal religions and the religious tradition of the dominant society and that there are substantial differences among the tribal religions. Because of the differences among the various tribal religions,[34] it is difficult and potentially counterproductive[35] to make generalizations about them. Nevertheless, for the purposes of this article some generalizations are offered that, it is hoped, contain sufficient accuracy to contribute to understanding the infringements of religious freedom from which practitioners of traditional tribal religions suffer.

The Interdependence of Living Things

The tribal religions are profoundly different from Christianity and the other major religions of the world. Certain similarities among these major religions have been noted that can be seen as distinguishing them from the tribal religions.[36] The major religions are described as "commemorative" religions because they "trace their origins back to a specific person or event (The Exodus, Jesus, Mohammed, Buddha, etc.) and the major portion of the religion deals with commemorating these sacred events in the proper ceremonies and rituals (Holy Communion, Passover, etc.)."[37] In contrast, tribal religions are described as "continuing" religions because these religions have been practiced continuously since their origins, which are inseparable from the origins of tribal cultures.[38] Another reason the term "continuing" is appropriate is that many of the rituals and ceremonies are concerned with the continual process of creation that occurs in the

34. HULTKRANTZ, *supra* note 14, at 2. And see generally GILL, *supra* note 14.

35. Quick, *supra* note 24, at 17, suggests that if federal officials rely on a characterization of the various tribal religions as a "grand pan-Indian religion" this might inhibit the development of a "case-by-case approach which recognizes different traditions and newly emergent beliefs and practices."

36. AIRFA REPORT, *supra* note 6, at 8-12.

37. *Id.* at 8.

38. *Id.* at 10. DELORIA, *supra* note 24, at 103, says: "Time itself became irrelevant because custom prevailed long enough to outlive any knowledge of its origin." *See also* DELORIA, *supra* note 26, at 151-67.

natural world and with the proper role of human beings in renewing this continual process of creation.[39]

This concern for the natural world can be seen as one of the most significant common attributes of the different tribal religions—they share the realization that human existence is not possible without the natural environment, that the survival of human beings depends upon the survival of other living things.[40] In the belief systems of the tribal religions, the earth is commonly conceived of as a living being, Mother Earth, which gives life to all other living things.[41] Various plants, animals, birds, fish, geologic features, and bodies of water are treated as having sacred or supernatural characteristics. Many rituals and ceremonies are concerned with giving thanks for the food and other subsistence needs that Mother Earth provides to those who hunt, fish, gather, and/or raise crops. There is an element of stewardship in the performance of such rituals because they are seen as necessary to ensure that the plants, animals, birds, and fish will continue to flourish and make themselves available for human needs. The correct performance of these rituals requires the use of sacred objects made from sacred plants, animals, and mineral materials. The manner of performing a ritual or ceremony, the sacred site at which it is to be performed, and in some cases the time for performance, are strictly prescribed.

The religious leaders who perform these rituals and ceremonies tend to see themselves as caretakers of Mother Earth. One reason for this view is that, with regard to many rituals and ceremonies, they have been instructed that the continued welfare of their people, or even the entire world, depends upon these rituals and ceremonies being properly performed.[42] For example, in the tradi-

39. AIRFA REPORT, *supra* note 6, at 11; HULTKRANTZ, *supra* note 14, at 104; GILL, *supra* note 14, at 114-38.

40. HULTKRANTZ, *supra* note 14, at 44, 104-05; Overholt, *American Indians as "Natural Ecologists,"* 5 AM. INDIAN J. (No. 9) 9 (Sept., 1979); Momaday, *Native American Attitudes to the Environment*, in SEEING WITH A NATIVE EYE: ESSAYS ON NATIVE AMERICAN RELIGION (W. Capps ed. 1976). DELORIA, *supra* note 26, contrasts this view of creation with the Christian account in Genesis, particularly the idea that mankind's role is to dominate nature. *Supra* at 91-109. This is one of his reasons for suggesting that the conflicts between Indians and Christians has been a conflict between "two mutually exclusive religious views of the world." *Id.* at 249.

41. HULTKRANTZ, *supra* note 14, at 31, 53-56. The life-giving nature of Mother Earth is frequently seen as growing out of her union with the sky or the sun, each of which is seen as a male deity.

42. AIRFA REPORT, *supra* note 6, at 10. DELORIA, *supra* note 26, at 102, says: "The task of the tribal religion, if such a religion can be said to have a task, is to determine the proper relationships that the people of the tribe must have with other living things."

tional religion of the Hopi Indians this responsibility is described as follows:

> Hopis are the caretakers for all the world, for all mankind. Hopi lands extend all over the continents, from sea to sea. But the lands at the sacred center are the key to life. By caring for these lands in the Hopi way, in accordance with instructions from the Great Spirit, we keep the rest of the world in balance.
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> . . . .
>
> Eagle shrines are located throughout the Black Mesa area. The prayer feathers that are so essential to our religious life and all our ceremonies must be Eagle feathers. Without them, we cannot place and carry our sacred messages to the spiritual world, we cannot hold the land for the Great Spirit. If the eagles are forced to flee the heart of our Mother Earth because of man's activity, it will no longer be possible for us to live in our spiritual and religious way. The life of all people as well as animal and plant life depend on the Hopi spiritual prayers and song. The world will end in doom.[43]

Against the background of this common realization of the interdependence of living things, and the human responsibility for continual renewal, the differences among the traditional religions of the different tribes can be seen as partly a function of which particular part of the North American environment a particular tribal culture depended upon for its survival. The salmon is of central significance to the cultures of Northwest coastal tribes, and it has an eminent place in their tribal religions. The buffalo was of similar cultural and religious importance to the hunters of the plains, as is corn to the Pueblos and other agrarian tribes. Although it is clear that such animal and plant species are or were of central significance to traditional tribal cultures, subsistence being largely based upon them, it is nevertheless misleading to suggest that such species are of central importance in tribal religions. The reason is that the tribal religions perceive sacredness everywhere.[44] Since the interdependence of living things is recognized, even those species that are of central importance in material culture are recognized to depend upon other species for their own existence.

In the past two decades, awareness of the interdependence of

43. Statement of Hopi Religious Leaders, Appendix to Petition for a Writ of Certiorari at 27a-28a, Susenkewa v. Kleppe, 425 U.S. 903 (1976) *denying cert. to* Lomayaktewa v. Hathaway, 420 F.2d 1324 (9th Cir. 1975).

44. See 2supra notes 13-15 and accompanying text.

living things has become increasingly widespread in the dominant culture. This awareness has for the most part arisen in response to environmental problems that have resulted from ignoring the interdependence of living things. We now have a host of environmental laws and environmental sciences, but perhaps what we need most is what the traditional Indians have—"the ancient, lost reverence for the earth and its web of life."[45]

Cultural Change and Tribal Sovereignty

Cultural change is a normal process that is usually gradual, but the kinds of cultural changes that occurred as millions of Europeans invaded North America were generally anything but gradual. A foreign culture with a fundamentally different value system used a combination of negotiation, force, and treachery to acquire increasingly large portions of the habitats of the indigenous tribal cultures.[46] In conjunction with being dispossessed of their land, the survivors were subjected to "every method . . . to force them to cease being Indians and to conform to the dominant society."[47]

At the individual level, a spectrum of responses to this kind of pressure is possible, from the warrior's refusal to yield at one end to thorough assimilation at the other. One of the more common ways of responding was to accept, at least outwardly, parts of the value system and much of the behavior patterns of the dominant culture and to use this acceptance as a shell to protect the essential values of the traditional culture, including the religion. This mechanism—selectively incorporating values and behaviors from the dominant culture—could be quite elaborate, and a person who uses this response might be described as having "layers" of culture.[48] The degree of assimilation exhibited in an individual Indian's behavior is a function of the social setting in which the interaction occurs; different social settings call for different layers of culture to be shown.

Indian tribes are, of course, more than aggregations of in-

45. J. COLLIER, THE INDIANS OF THE AMERICAS (1947) *quoted in* VOGEL, *supra* note 27, at 292-93.

46. *See generally* F. COHEN, FEDERAL INDIAN LAW 47-107 (1982) [hereinafter cited as COHEN]; FINAL REPORT, *supra* note 1, at 51-69; VOGEL, *supra* note 27; THE INDIAN AND THE WHITE MAN, *supra* note 26; SPICER, CYCLES OF CONQUEST, *supra* note 26, at 567-86.

47. FINAL REPORT, *supra* note 1, at 1.

48. Mark Suagee, personal communication (December, 1982). *See generally* SPICER, CYCLES OF CONQUEST, *supra* note 26; PERSPECTIVES IN AMERICAN INDIAN CULTURE CHANGE (E. Spicer ed. 1961).

dividual Indians. They are distinct political and cultural entities. The ways in which they have responded, at the tribal level, to forced cultural change have largely been shaped by the federal government's recognition of their status as political entities and the ways in which this recognition has been manifested. Of primary importance is recognition in federal law that Indian tribes possess sovereign powers, including the right to govern themselves and their territory.[49] This governmental authority is one of the basic distinctions between the tribes and the other ethnic minorities in the United States, although a general understanding of the nature of tribal sovereignty is not widespread either in the general population or the federal bureaucracy.[50] Tribal sovereignty is generally considered to be limited by the plenary power of Congress[51] and the federal government's trust responsibility.[52] Despite these limitations, recognition of tribal sovereignty has been a major factor in the survival of many tribes as distinct political and cultural entities.

Given the history of pressures toward assimilation, the number of tribes that have survived as tribes is rather remarkable. How-

49. *See generally* COHEN, *supra* note 46, at 229-57.

50. FINAL REPORT, *supra* note 1, at 556. General lack of understanding of the governmental status of Indian tribes is reflected in the regulations discussed at notes 181-210 *infra* and accompanying text. *See* R. BARSH & J. HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 241-56 (1980). A recent comprehensive review of the federal archaeology program provides an example of the federal bureaucracy's lack of awareness of the governmental status of Indian tribes. *See* Comptroller General, "Are Federal Agencies Doing Enough or Too Much for Archeological Preservation? Guidance Needed" (No. CED-81-61, Apr. 22, 1981) [hereinafter cited as GAO REPORT]. BIA comments on the draft of this report were ignored by the staff of the Heritage Conservation and Recreation Service that prepared the consolidated departmental response because that staff said the concerns raised by the BIA regarding tribal governments were not concerned with archaeology. However, since the report devotes an entire chapter to the recommendation that states should play a greater role in determining the significance of archaeological sites, there obviously are implications regarding the role of tribal governments. That the BIA was not able to insist that its concerns be incorporated is a function of the relatively low importance of cultural resources management within the BIA. See note 95, *infra*.

51. *See generally* COHEN, *supra* note 46, at 207-16. The plenary power of Congress is based upon power, pure and simple, and not upon any consistent or equitable logic. *See* BARSH & HENDERSON, *supra* note 50, at 62-134.

52. *See generally* COHEN, *supra* note 46, at 217-28. The trust responsibility is usually seen as a limitation on the powers of Congress and the executive branch, but it is also a limit on the powers of tribal governments. For example, it is because Indian land is held in trust that the Secretary has the authority to approve land transactions. Also, the trust responsibility is a limiting factor on tribes contracting with the BIA to operate BIA programs. 25 U.S.C. § 450f (1976).

ever, the changes from their traditional forms of social and governmental organization typically are substantial. A large proportion of tribes conduct their governmental affairs in accordance with tribal constitutions adopted pursuant to the Indian Reorganization Act of 1934,[53] and many of these constitutions are "standard 'boilerplate' constitutions prepared by the Bureau of Indian Affairs and based [upon] federal constitutional and common law notions rather than on tribal custom."[54] Thus, despite the federal government's recognition that tribes have the right to determine their own form of government,[55] the federal government has in large part shaped the formal governmental structure that most of the tribes now employ. Given the assimilationist values written into tribal constitutions and the unauthorized constraints that have been imposed on tribal governments during the half-century since the Indian Reorganization Act was enacted,[56] it is not surprising that the formal institutions of tribal government have largely been the domain of the more acculturated tribal members.

This situation is a fundamental change from the historic situation in which tribal government was simply one aspect of culture and in which culture was inseparable from tribal religion. Faced with this situation, defenders of tribal religions and cultures may find themselves at odds with a given tribal government, and it may seem expedient to characterize that government as not legitimately representative of its membership and merely an extension of the federal bureaucracy. In some cases such a characterization may be substantially accurate,[57] but is likely to be counterproductive. It is important to keep in mind that the survival of

53. 48 Stat. 984 (codified at 25 U.S.C. §§ 461-79 (1976)). Of the tribes affected by the Indian Reorganization Act, 189 voted to accept it, 77 to reject it. COHEN, *supra* note 46, at 150 n.48. *See also* Berkey, *Implementation of the Indian Reorganization Act*, 2. AM. INDIAN J. (No. 8) 2 (Aug. 1976).

54. COHEN, *supra* note 46, at 149.

55. *See* Solicitor, U.S. Dep't of Interior, Powers of Indian Tribes, 55 Int. Dec. 14, 30-32 (1934) (interpreting the clause in section 16 of the Indian Reorganization Act, 25 U.S.C. § 476, "powers vested in any Indian tribe or tribal council by existing law").

56. FINAL REPORT, *supra* note 1, at 187-91.

57. *E.g.*, the petition for a writ of certiorari filed in Susenkewa v. Kleppe, 520 F.2d 1324 (9th Cir. 1975), *cert. denied*, 425 U.S. 903 (1976), clearly shows that the action of the Hopi Tribal Council in leasing land at Black Mesa for strip mining for coal was beyond the power vested in the Hopi Tribal Council by the constitution and bylaws of the Hopi Tribe, by which the Hopi are organized into a union of self-governing villages. The approval of this lease by the Secretary of the Interior made a mockery of the principle of tribal self-government. *See* Clemmer, *Black Mesa and the Hopi*, in NATIVE AMERICANS AND ENERGY DEVELOPMENT (1978).

tribal religions and cultures depends upon survival of tribes, and this in turn depends upon preserving the tribal right of self-government.

Tribal governmental institutions have historically been subject to recurrent attacks from Congress resulting from the recurrent popularity of the point of view that tribal governmental institutions should be merely transitional and serve to help assimilate Indians into the American mainstream.[58] As a consequence, tribal members live with the constant concern that their governmental institutions will be dismantled by Congress. To alleviate this concern, there should be an irrevocable national recognition of the perpetual right of tribes to exist as tribes.[59] In the absence of such an irrevocable recognition, the defenders of tribal religions and cultures will have a greater likelihood of success if their efforts are also supportive of tribal sovereignty. In some cases this may be a very difficult challenge.

Cultural Resources Management

In contrast to the world view shared by the traditional tribal religions, the world view of the industrialized dominant culture of North America tends to see life on earth as a subject to be divided into categories, with human existence somehow separate. The natural environment is torn apart and rearranged to suit human needs and desires with little regard for the interdependence of living things. It is ironic but not surprising that a culture that divides and categorizes life and tries to remain apart from it should spawn several different academic disciplines that study different aspects of the traditional tribal religions. These disciplines include cultural anthropology, ethnohistory, archaeology, and linguistics. Of course, the subject matter of each of these disciplines is not limited to the traditional religions of Indian tribes. Rather, they are concerned with culture in a broad sense. When their expertise is applied to resource management issues, the term "cultural resources management" is appropriate.

It should be noted that the term "cultural resources" is not a term defined by statute. Because the term is used throughout this article, the following definition is offered:

58. *See* FINAL REPORT, *supra* note 1, at 51-82, 144-60; BARSH & HENDERSON, *supra* note 50, at 62-134.

59. BARSH & HENDERSON, *supra* note 50, at 270-82, propose that such a perpetual recognition be accomplished through a constitutional amendment. *See generally,* Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government,* 33 STAN. L. REV. 979 (1981).

> The term "cultural resources" may be broadly defined as the remains of human activity, both historic and prehistoric. Included within the term are: buildings and other structures, ruins, artifacts and other objects made by people, works of art, human remains, and sites and natural features that have been of importance in human events.[60]

The term "cultural resource" is generic and includes two terms that do have statutory definitions, "historic property" or "historic resource" and "archaeological resource." The term "historic property" or "historic resource" means: "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register [of Historic Places]; such term includes artifacts, records, and remains which are related to such a district, site, building, structure or object."[61] The term "archaeological resource" means

> any material remains of past human life or activities . . . [including] but not . . . limited to: pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal [remains], or any portion or piece of any of the foregoing items . . . [provided] such item is at least 100 years of age.[62]

If an archaeological resource or the site at which archaeological resources are located meets the National Register criteria, the resource or site may also be a historic property or historic resource.

The term "cultural resources" might also be used to describe the "intangible elements of our cultural heritage" such as language, myth, arts, skills, songs, and dance.[63] Such an expansion

60. This definition is taken from a Bureau of Indian Affairs manual bulletin drafted by the author with assistance from H. Barry Holt and William Allan. The bulletin has not yet been released. See note 95 *infra*.

61. 16 U.S.C. § 470w(5) (Supp. V 1981). This definition implies an application of the criteria of eligibility for the National Register codified at 36 C.F.R. § 60.4, discussed *infra* at notes 183-188 and accompanying text. These criteria normally exclude properties that have achieved their significance within the last fifty years.

62. 16 U.S.C. § 470bb (1) (Supp. V 1981). This definition is clarified and expanded upon in section 69.3(a) of the uniform ARPA regulations, which are discussed in Part III of this article.

63. Suggested in a letter from Muriel Crespi (Nov. 1982), noting section 502 of NHPA Amendments of 1980, 16 U.S.C. § 470a n. (Supp. V 1981). This section provides that the Secretary of the Interior shall, in consultation with the American Folklife Center of the Library of Congress, submit a report to the President and the Congress on preserving the intangible elements of our cultural heritage.

of the definition might well be appropriate because the application of cultural resources management to Indian concerns involves the preservation of living cultures. However, since the meaning of the term is usually limited to the physical remains of past human activity, the definition used in this article reflects the common usage.

Because of the legislation discussed in this article, professionals of the disciplines of cultural resources management have institutionalized access to influence federal agency decision making. Thus these professionals often have the opportunity to ensure that the views of traditional Indians are considered by federal decision-makers. Some of these cultural resource professionals, though by no means all, tend to have a heightened sensitivity to the beliefs of traditional Indians. Also, because of their academic training they often have useful insights into the ways that decision-makers work. Indeed, when they work for the federal government they sometimes see themselves not as federal bureaucrats or contractors but rather as participant observers.[64] They can be intermediaries between two very different worlds, and without them there might be little communication between the inhabitants of these two worlds—federal officials and traditional Indians.

II. *Federal Cultural Resources Legislation*

Because cultural resources are irreplaceable, and because of the many ways in which the preservation and study of cultural resources can enrich our lives, Congress has enacted a number of statutes that are concerned with cultural resources. The major provisions of these statutes are discussed in this section.

Antiquities Act of 1906

The Antiquities Act[65] established a permit requirement for archaeological investigations and excavations on federally owned or controlled land. Damaging or removing archaeological resources without a permit is a criminal offense. Although this Act has not been repealed, for practical purposes it has been superseded by the Archaeological Resources Protection Act of 1979.[66]

64. Quick, *supra* note 24, at 20-21, *quoting* Hoben, *Anthropologists and Development*, 11 ANN. REV. OF ANTHROP. 349, 362 (1982).

65. 34 Stat. 225, ch. 3060 (codified at 16 U.S.C. §§ 431-33 (1976)).

66. Pub. L. 96-95, 93 Stat. 721 (1979), 16 U.S.C. §§ 470aa-470ee (Supp. V 1981). The definitional portion of the Antiquities Act was held to be unconstitutionally vague in United States v. Diaz, 499 F.2d 113 (9th Cir. 1974). In addition, the substantial increase

Historic Sites, Buildings, and Antiquities Act

Enacted in 1935, this Act declares a national policy to "preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States."[67] This Act provides the authority pursuant to which the National Historic Landmarks program was established.[68] It also provides the authority for studies of properties with potential national significance and for various educational programs.

In 1949, Congress amended the Act by adding provisions to establish the National Trust for Historic Preservation.[69] The National Trust is authorized to receive donations of sites, money, buildings, and objects significant in American history and culture and to otherwise facilitate public participation in historic preservation.

Further amendments were added in 1960[70] and 1974[71] to direct all federal agencies to notify the Secretary of Interior whenever the agency finds, or is notified by an appropriate authority, that its actions in connection with any federal construction project or any federally licensed project may cause irreparable loss or destruction of significant historical or archaeological data. As used in this Act, the term "data" includes archaeological and historic resources.[72] If the agency has fulfilled its responsibilities under the National Historic Preservation Act,[73] this requirement only surfaces when resources are discovered during construction. Perhaps the most significant provision of these amendments is the express authorization to use funds appropriated for a project to undertake archaeology to salvage resources that would be damaged by the project or to transfer funds to the Secretary of the In-

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in the commercial value of illegally obtained artifacts rendered the 1906 Act an inadequate deterrent to the theft of artifacts. These were the main reasons Congress enacted the Archaeological Resources Protection Act. H.R. REP. No. 311, 96th Cong., 1st Sess. 1-2 (1979), *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS. 1709.

67. 16 U.S.C. §§ 461-467 (1976).

68. *Id.* §§ 462.

69. *Id.* § 468 (corresponds to Act of Oct. 26, 1949, ch. 755, 63 Stat. 927).

70. *Id.* § 469, Pub. L. 86-523, Act of June 27, 1960, 74 Stat. 220. The common title of this is the Reservoir Salvage Act.

71. *Id.* Pub. L. 93-291, Act of May 24, 1974, 88 Stat. 174. As amended, this section is often referred to as the Archaeological and Historic Preservation Act.

72. *Id.* (1976 & Supp. V 1981).

73. 16 U.S.C. §§ 470-470w-6 (Supp. V 1981). See text accompanying notes 76-94 *infra.*

terior to conduct salvage archaeology.[74] Another provision that should be noted is the authorization for the Secretary to conduct salvage archaeology if any federal financial assistance to any private person, association, or public entity might result in irrevocable harm to scientific, prehistorical, historical, or archaeological data, and to compensate the person, association, or entity damaged as a result of delays.[75]

National Historic Preservation Act of 1966

Enacted in 1966[76] and extensively amended in 1980,[77] the NHPA is the primary mandate for federal agencies to provide leadership in preserving significant historic and prehistoric resources. This Act established the Advisory Council on Historic Preservation[78] and authorized the Secretary of the Interior to establish or expand the National Register of Historic Places.[79] Properties listed on the National Register include those of national significance known as national historic landmarks.[80] The criteria of eligibility and the nomination process for both the National Register and the National Historic Landmarks program are governed by regulations issued by the National Park Service.[81]

NHPA also established a grant program to the states and to the National Trust for Historic Preservation.[82] This grant program is known as the Historic Preservation Fund and is administered by the National Park Service, as are most aspects of the federal historic preservation program. In the administration of the grant program, the Secretary (through the Park Service) created the position of the state historic preservation officer, a state official with certain responsibilities prescribed by federal

74. 16 U.S.C. § 469c (1976 & Supp. V 1981).

75. *Id.* § 469a-1.

76. Act of Oct. 15, 1966, Pub. L. 89-664, 80 Stat. 915, codified as amended at 16 U.S.C. §§ 470-470w-6 (Supp. V 1981).

77. National Historic Preservation Act Amendments of 1980, Pub. L. 96-515, 94 Stat. 2987 (1980). Other amendments were enacted as Pub. L. 91-243, Pub. L. 94-422, Pub. L. 94-458, Pub. L. 96-199, Pub. L. 96-244 (Supp. V 1981).

78. 16 U.S.C. § 470 (Supp. V 1981) *See* H.R. REP. No. 1457, 96th Cong., 2d Sess. (1980), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 6378.

79. 16 U.S.C. § 470a(a) (Supp. V 1981).

80. *Id.* §§ 470a(a)(1)(B).

81. The regulations regarding the National Register are discussed in the text accompanying notes 181-206, *infra.* Regulations governing the National Historic Landmarks program were recently promulgated. 48 Fed. Reg. 4652 (Feb. 2, 1983), to be codified at 36 C.F.R. pt. 65. These regulations are not discussed in this article.

82. 16 U.S.C. § 470a(d) (Supp. V 1981).

regulations.[83] This position was incorporated into the Act by the 1980 amendments.[84]

The NHPA contained no specific references to Indian tribes until the enactment of the 1980 amendments. Indian tribes are now mentioned in the policy section of the Act.[85] In addition, the Act now specifically authorizes grants to Indian tribes "for the preservation of their cultural heritage."[86] The addition of these specific statutory provisions regarding Indian tribes may prove to be a significant step toward increasing the involvement of the tribes in the federal historic preservation program. However, this seems likely only if there is a concerted effort by the Department of the Interior and the Advisory Council to seek tribal involvement and to make changes in regulations and program administration so that tribes are treated in a manner consistent with their status as governments. It may well be that a substantial increase in tribal involvement will not occur until there is a comprehensive revision of NHPA to foster increased tribal involvement.[87]

Some of the provisions of NHPA that are particularly relevant to Indian interests in cultural resources are discussed below.

Section 106 Consultation

Section 106 of NHPA is the provision that has consumed more time and attention of federal agencies than any other provision of NHPA. This section states:

83. 36 C.F.R. § 61.2 (1982).

84. 16 U.S.C. §§ 470a(b), (c), (d); 470d(b); 470h-2(a); 470w(12) (Supp. V 1981).

85. *Id.* § 470-1.

86. *Id.* § 470a(d)(3)(B). This provision also authorizes grants to nonprofit organizations representing ethnic or minority groups. With regard to this provision, H.R. REP. No. 1457, *supra* note 78, at 31, states:

> This is a discretionary program which would assist a broad range of groups and activities—for example, for Native Americans to maintain and foster understanding of their traditional subsistence techniques; . . . Activities could include training, studies, oral histories, replications and simulations, documentation and interpretive materials, and other means to retain and enhance the information and values that are part of the nation's historic fabric but which are not necessarily explicitly embodied in the built environment.

87. There is no indication in H.R. REP. No. 1457, *supra* note 78, that the Congress considered that the tribes have interest in the federal historic preservation program as units of government that are distinct from the states. It appears that none of the various interest groups that supported Pub. L. 96-515 saw any need for specific provisions regarding a role for tribes as units of government and that the Indian community did not engage in lobbying regarding this legislation when it was before Congress. *See* BARSH & HENDERSON, *supra* note 50, at 217-40 on the difficulties the tribes face in influencing legislation.

> The head of any Federal Agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i to 470v of this title a reasonable opportunity to comment with regard to such undertaking.[88]

This requirement is implemented through regulations discussed in Part III *infra*. This requirement is only procedural in nature; it has no "teeth." After a federal agency has complied with the procedure by receiving comments from the Advisory Council, the agency can choose to ignore those comments and proceed with its proposed action.

Section 110 Requirements

The 1980 amendments to NHPA added a new section 110[89] to the Act that establishes certain "minimum responsibilities"[90] for federal agencies. Some of these responsibilities are described below.

(a) *Locate, Inventory, and Nominate Eligible Properties.* Paragraph (a)(2) of section 110 states:

> With the advice of the Secretary [of the Interior] and in cooperation with the State Historic Preservation Officer for the State involved, each Federal agency shall establish a program to locate, inventory, and nominate to the Secretary all properties under the agency's ownership or control by the agency, that appear to qualify for inclusion on the National Register in accordance with the regulations promulgated [by the Secretary]. Each Federal agency shall exercise caution to assure that any such property that might qualify for inclusion is not inadvertently transferred, sold, demolished, substantially altered, or allowed to deteriorate significantly.[91]

88. 16 U.S.C. § 470f (1976 & Supp. V 1981).
89. 16 U.S.C. § 470h-2 (Supp. V 1981).
90. H.R. REP. No. 1457, *supra* note 78, at 36.
91. 16 U.S.C. § 470h-2(a)(2) (Supp. V 1981).

Prior to the enactment of the 1980 amendments, the responsibility to inventory eligible properties was specified by executive order.[92]

(b) *Designation of Preservation Officer.* Paragraph (c) of section 110 requires the head of each federal agency to designate a "preservation officer" to be responsible for coordinating agency activities under NHPA.[93] Compliance with this responsibility by the Bureau of Indian Affairs[94] is a necessary step toward compliance with its responsibilities for cultural resources management in general.[95]

(c) *Carry Out Agency Programs in Accordance with NHPA.* Paragraph (d) of section 110 states:

> Consistent with the agency's missions and mandates, all Federal agencies shall carry out agency programs and projects (including those under which any Federal assistance is provided or any Federal license, permit, or other approval is required) in accordance with the purposes of this [Act] and, give consideration to programs and projects which will further the purposes of this Act.[96]

(d) *Protection of National Historic Landmarks.* Paragraph (f) of section 110 states:

> Prior to the approval of any Federal undertaking which may

92. Executive Order No. 11593, 36 Fed. Reg. 8921 (1971), codified at 16 U.S.C. § 470 (1976).

93. 16 U.S.C. § 470h-2(c) (Supp. V 1981).

94. The definition of "agency" used in NHPA is that used in the Administrative Procedure Act, 5 U.S.C. § 551 (1976). The BIA has been held to be an agency subject to the provisions of the Administrative Procedure Act. Morton v. Ruiz, 415 U.S. 199 (1974).

95. Given the nature of Indian interests in historic preservation—especially the benefits that could be realized in providing some degree of protection to off-reservation historic properties that have continuing cultural and/or religious significance, and the fact that the established administrative review process, as described in the text accompanying notes 207-213, *infra,* is seen by many tribes as an infringement on their right to self-government—one might expect the BIA to assert some initiative in establishing a program. Four area offices have established programs—Albuquerque, Navajo, Juneau, and Portland. The establishment of programs at the field level is consistent with congressional expectations. H.R. REP. No. 1457, *supra* note 78, at 37. But by not establishing a program at the national level and designating a "preservation officer" who has had required training and is supported by adequate professional staff, the BIA has failed to meet its minimum responsibilities. In defense of BIA staff, it can be noted that the central office environmental staff has in recent years sought to obtain funds and positions for a national program. Establishment of a program would also help tribes to achieve compliance with section 106 on proposed tribal actions and would thus help to alleviate tensions between tribes and state historic preservation officers.

96. 16 U.S.C. § 470h-2(d) (Supp. V 1981).

> directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark, and shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking.[97]

This provision is very similar to section 106; however, it has added significance: the affirmative requirement to minimize harm to national historic landmarks.[98]

Private Landowner Consent to Nomination

In addition to the provisions which establish responsibilities for federal agencies, there are other provisions of NHPA that should be noted. One such provision is section 101(a)(6), which states that privately owned properties shall not be included on the National Register over the objection of the landowner(s).[99] Section 106 consultation would still apply to such properties because it is triggered by eligibility for the National Register as well as by inclusion on the National Register.

Confidentiality

Section 304 of NHPA[100] authorizes the denial of requests for information pursuant to the Freedom of Information Act.[101] This section states:

> The head of any Federal agency, after consultation with the Secretary [of the Interior], shall withhold from disclosure to the public, information relating to the location or character of historic resources whenever the head of the agency or the Secretary determines that the disclosure of such information may create a substantial risk of harm, theft, or destruction to such resources or to the area or place where such resources are located.[102]

As discussed earlier in this article[103] a "historic property" or "historic resource" is one which is either included on or eligible for the National Register. Thus the determination that a property

97. 16 U.S.C. § 470h-2(f) (Supp. V 1981).
98. *See* H.R. REP. No. 1457, *supra* note 78, at 38.
99. 16 U.S.C. § 470a(a)(6) (Supp. V 1981).
100. *Id.* § 470w-3.
101. 5 U.S.C. § 552 (1976).
102. 16 U.S.C. § 470w-3 (Supp. V 1981).
103. See *supra* note 61 and accompanying text.

is eligible for the National Register may be crucial in preserving confidentiality of information about it because eligibility would render section 304 applicable.

Archaeological Resources Protection Act of 1979

The primary reason that Congress enacted ARPA[104] is that the Antiquities Act had become ineffective in protecting the archaeological resources on public lands and Indian lands from unauthorized excavation, removal, damage, and destruction.[105] Some of the important provisions of ARPA are summarized below.

Prohibited Acts and Criminal Penalties

Section 6 of ARPA[106] prohibits certain acts and provides that criminal penalties can be imposed on violators. The principal prohibition is that: "No person may excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands or Indian lands unless such activity is pursuant to a permit . . . ."[107]

Permits For Excavation and Removal

Section 4 of ARPA[108] contains the provisions regarding the issuance of permits for the excavation and removal of archaeological resources. If a permit has already been issued under the Antiquities Act of 1906, no new permit is needed. With regard to Indian lands the relevant provisions are found in paragraph (g):

> (1) No permit shall be required under this section or under the Act of June 8, 1906 (16 U.S.C. 431), for the excavation or removal by any Indian tribe or member thereof of any archaeological resource located on Indian lands of such Indian tribe, except that in the absence of tribal law regulating the excavation or removal of archaeological resources on Indian lands, an individual tribal member shall be required to obtain a permit under this section.
>
> (2) In the case of any permits for the excavation or removal of any archaeological resource located on Indian lands, the permit may be granted only after obtaining the consent of the

104. Pub. L. 96-95, 93 Stat. 721 (1979), 16 U.S.C. §§ 470aa-470*ll* (Supp. V 1981).
105. See note 66, *supra*.
106. 16 U.S.C. § 470ee (Supp. V 1981).
107. *Id.* at § 470ee(a).
108. 16 U.S.C. § 470cc (Supp. V 1981).

> Indian or Indian tribe owning or having jurisdiction over such lands. The permit shall include such terms and conditions as may be requested by such Indian or Indian tribe.[109]

Thus Congress recognized the authority of tribes to regulate the excavation or removal of archaeological resources. Congress also authorized the use of the permit process as a mechanism through which the tribes and Indian landowners can control archaeological excavations by requiring consent of the tribe or Indian landowners and by inclusion of terms and conditions.[110]

With regard to tribal religious and cultural sites located on public lands that may be adversely affected by archaeological activities undertaken pursuant to a permit, the relevant provision of ARPA is paragraph (c) of section 4. This paragraph states:

> If a permit issued under this section may result in harm to, or destruction of, any religious or cultural site, as determined by the Federal land manager, before issuing such permit, the Federal land manager shall notify any Indian tribe which may consider the site as having religious or cultural importance. Such notice shall not be deemed a disclosure to the public for purposes of section [9]. . . .[111]

Confidentiality

Section 9 of ARPA[112] authorizes federal land managers to withhold from disclosure to the public under the Freedom of Information Act[113] information concerning the nature and location of archaeological resources. This section could be important in preserving confidentiality regarding tribal religious and/or cultural properties if such a site contains sacred objects that are archaeological resources or if other archaeological resources are located at the site. However, this section does contain certain loopholes. First, the federal land manager may disclose the information upon making a determination that "such disclosure would . . . not create a risk of harm to [the archaeological] resources or the site at which such resources are located."[114] Sec-

109. *Id.* at 470cc(g).

110. Permits pursuant to the Antiquities Act, 16 U.S.C. §§ 431-33, have been used for the same purposes. *See* 25 C.F.R. § 132.2, to be redesignated 25 C.F.R. § 261.2 (47 Fed. Reg. 13,327 (Mar. 30, 1982)).

111. 16 U.S.C. § 470cc(c) (Supp. V 1981).

112. 16 U.S.C. § 470hh (Supp. V 1981).

113. 5 U.S.C. § 552 (1976).

114. 16 U.S.C. § 470hh(a) (Supp. V 1981).

ond, regardless of whether such a determination is made, the federal land manager is required to provide information to the governor of the state in which archaeological resources are located if the governor requests such information. This section of ARPA was drafted with the interests of archaeology in mind; any benefits that may accrue to Indians with religious and cultural concerns is purely coincidental.

Custody of Resources

Section 5 of ARPA[115] authorizes the Secretary of the Interior to promulgate regulations governing the exchange and disposition of archaeological resources removed from public and Indian lands. When such regulations have been promulgated, they will govern disposition of archaeological resources removed from public and Indian lands "notwithstanding any other provision of law."[116]

Interface Between ARPA and NHPA

The interface between ARPA and NHPA, discussed in detail in the preamble of the "rule-making document" promulgated by the Secretary of the Interior,[117] often causes confusion. It is quite possible that both statutes will apply to a proposed federal action, although compliance will usually be achieved at different points in the preauthorization review process. It is important to keep in mind that the permit requirement of ARPA is triggered by the presence of archaeological resources on public or Indian land coupled with a proposal to take some action that will affect

115. 16 U.S.C. § 470dd (Supp. V 1981).

116. *Id.* These regulations will govern disposition of archaeological resources whether the authority for removal was ARPA, the Antiquities Act, *supra* notes 65-66 and accompanying text, or the Archaeological and Historic Preservation Act, *supra* notes 70-72 and accompanying text. Issues regarding custody of resources are discussed at notes 170-177, *infra* and accompanying text.

117. The rule-making document will establish final uniform regulations for implementing ARPA, to be promulgated pursuant to section 10(a) of ARPA. 16 U.S.C. § 470ii(a) (Supp. V 1981). As of this writing the rule-making document has not been published in the *Federal Register;* however, it has been transmitted from the Secretary of the Interior to the secretaries of Agriculture and Defense and the chairman of the board of the Tennessee Valley Authority, under cover of a letter from the Secretary of the Interior dated Mar. 15, 1983. The uniform rules will be codified at 36 C.F.R. § 69. References to the uniform regulations are to this rule-making document [hereinafter cited as Rule-making Document]. References to regulatory provisions cite section and paragraph; references to the preamble cite page number. The discussion of the interface between ARPA and NHPA is found in the rule-making document at 14, 34-36, and section 69.12.

such resources, while section 106 of NHPA is triggered by a federal action being proposed that may affect a historic property, regardless of the ownership status of the land on which it is located.

There are basically two sets of circumstances in which an ARPA permit will be sought. The first is where an applicant proposes to conduct archaeological work for purely academic reasons. In such cases, only an ARPA permit is required, not section 106 compliance.[118] The second and more common set of circumstances in which a permit will be required arises when actions proposed to be undertaken on public or Indian land will cause surface disturbance in areas where archaeological resources may exist. In such instances, the issuance of an ARPA permit may either precede or follow section 106 compliance, or section 106 compliance may not be necessary. If the area in which the activity is proposed to occur is known to contain a historic property, i.e., one that is listed in or eligible for the National Register of Historic Places, section 106 compliance will begin before the issuance of an ARPA permit. In such cases, a mitigation plan developed through the section 106 consultation process may stipulate that archaeological work be conducted, and an ARPA permit will be issued.

If the area in which the proposed action is to occur is not known to contain any historic property, issuance of an ARPA permit would normally be the first step in order to determine the likelihood of archaeological resources being found in the area. If archaeological resources are discovered, a determination is made as to whether the site is eligible for the National Register. If it is eligible for the National Register, then compliance with section 106 is required.

Thus the interface of ARPA and NHPA depends to some extent upon how much the federal land manager knows about the archaeological and historic resources of an area before an action is proposed that may affect those resources. The amount of knowledge which a federal agency has will depend in part on the extent to which it has carried out its responsibility under section 110 of NHPA to compile an inventory of historic properties under its ownership or control. How section 106 consultation and the permit requirement of ARPA will be applied with regard to any specific proposed action should be explained in any environ-

118. 16 U.S.C. § 470cc(i) (Supp. V 1981); Rule-making Document, *supra* note 117, preamble at 34-35.

mental assessment or environmental impact statement prepared pursuant to the National Environmental Policy Act.[119]

State Laws and Tribal Laws

The legislation discussed above is only applicable when Indian religious and/or cultural concerns would be affected by a proposed federal action or an action proposed to take place on public or Indian lands. When these statutes are not applicable, state legislative powers might be used to protect the Indian interests. However, state laws typically do not provide much protection. For example, state laws typically distinguish between marked graves and unmarked graves, with marked graves afforded a much greater degree of protection.[120] At least two states, California[121] and North Carolina,[122] have taken steps to rectify this unequal treatment.

Another source of legislative authority that can be used to provide some degree of protection to properties that have tribal religious or cultural importance is tribal sovereignty. As noted earlier, if the properties are located on Indian lands, tribal governments have authority to regulate activities affecting them.[123] A

119. 42 U.S.C. §§ 4321-4347. See notes 224-253, *infra* and accompanying text.

120. *See* Rosen, *The Excavation of American Indian Burial Sites: A Problem in Law and Professional Responsibility,* 82 AM. ANTHROP. 5 (1980).

121. Act of Sept. 27, 1982, ch. 1492. In addition, California has also established the "California Native American Cultural Sites Protection and Inventory Program" under the auspices of the Native American Heritage Commission, discussed in Evans, *supra* note 24.

122. N.C. GEN. STAT. §§ 70-26 to 70-40 (Supp. 1981).

123. *Supra* notes 108-110 and accompanying text. See *infra* notes 161-164 and accompanying text. It should also be noted that tribal regulation of excavation and removal of archaeological resources need not be limited to trust lands but may also include fee land within reservation boundaries. Shoshone & Arapahoe Indian Tribes v. Knight, No. C79-267B (D. Wyo. 1980), *reprinted in part* at 6 I.L.R. 3116 (1980); Trans-Canada Enterp. v. Muckleshoot Indian Tribe, No. C-78-3597 (9th Cir. 1980), 8 I.L.R. 2045 (1981). *See generally* COHEN, *supra* note 46, at 252-57. Such an assertion of tribal regulatory authority based on retained tribal sovereignty could easily demonstrate an important tribal interest in the subject matter, and would thus seem likely to withstand a challenge in the courts. Of course, if Congress were to delegate such authority to tribal governments, their authority in this matter would seem to be beyond question. United States v. Mazurie, 419 U.S. 544, 556-57 (1975). As originally proposed, ARPA would have implicitly contained such a delegation since the term "Indian lands" would have been defined as all lands within the exterior boundaries of a federally recognized Indian reservation. This definition was changed in response to comments by the Departments of Interior and Justice, although neither Department conveyed any concern for how such a change might affect tribal government regulatory efforts. *See* H.R. REP. No. 311, *supra* note 66, at 11-13, 17-18.

variety of approaches to such regulation could be employed and a variety of practical problems will be encountered. An exploration of the approaches tribes have taken and could take would be worthwhile, but is beyond the scope of this article. The more difficult problem seems to be how to influence the decisions of non-Indians who are beyond the reach of tribal government jurisdiction. Some ways of influencing such decisions are discussed in Part III of this article. The credibility of tribal governments in such efforts will be enhanced when they have taken appropriate actions to exercise their governmental authority within their reservations.

III. *The Regulations*

The statutes discussed in the preceding part are, or are supposed to be, implemented through a number of regulations. Some of the more important regulations are discussed in this part. This discussion begins with the uniform regulations promulgated pursuant to section 10(a) of ARPA.[124] The reasons for beginning with these regulations are that they were recently completed and should become effective in the near future,[125] and that substantial efforts to be responsive to Indian interests were made in the development of these regulations. These efforts no doubt would have been much less substantial had Congress not mandated that Indian tribes be consulted in the regulatory process and that the provisions of AIRFA be taken into account.[126] The other regulations discussed below have generally been developed, or are being developed, with less Indian involvement.[127] Thus it is not surprising that these other regulations are generally less sensitive to Indian interests. In order to correct this lack of sensitivity, certain revisions are recommended. It should be noted that, given the comprehensive nature of NHPA (especially the section 110 inventory requirement) in comparison to the site-specific nature of ARPA, appropriate provisions in NHPA regulations to help achieve the comprehensive consideration of Indian interests could tend to minimize site-specific conflicts by informing decision-

124. 16 U.S.C. § 470ii(a) (Supp. V 1981).

125. See note 117, *supra*.

126. 16 U.S.C. § 470ii(a) (Supp. V 1981).

127. For example, regulations regarding the National Register of Historic Places, which are developed by the National Park Service, are routinely circulated to federal agencies and the state historic preservation officers in draft form for review and comment prior to publication in the *Federal Register*. Tribes are not included in this distribution.

makers of the Indian interests early enough for impacts to be avoided or mitigated.

The Uniform ARPA Regulations

The secretaries of the Interior, Agriculture, and Defense and the chairman of the board of the Tennessee Valley Authority are directed by section 10(a) of ARPA[128] to promulgate uniform rules to carry out the purposes of ARPA. As specified in section 10(a), such regulations are to be promulgated "after consultation with other Federal land managers, Indian tribes, representatives of concerned State agencies, . . . [and] only after consideration of the provisions of the American Indian Religious Freedom Act." Pursuant to this mandate uniform regulations have been developed, which are expected to be published as final regulations in the near future.[129]

The purposes and general approach of the uniform regulations, as well as many issues that elicited public comments, are discussed in the preamble of the rule-making document. Only those issues of particular Indian interest are discussed in detail in this article. However, before discussing the Indian issues, a brief description of the general approach of the uniform regulations will be helpful.

The General Approach of the Uniform Regulations

The uniform regulations establish standard definitions, standards, and procedures for all federal land managers in protecting the archaeological resources located on public lands and Indian lands. The uniform regulations are intended to be sufficiently detailed so that federal land managers can "fully exercise their authority under the Act."[130] At the same time, it is recognized that certain issues that are the exclusive concern of particular agencies are inappropriate for detailed resolution in the uniform regulations, and that these issues can be more appropriately addressed in agency-specific regulations promulgated pursuant to section 10(b) of ARPA.[131] Such agency-specific regulations must

128. 16 U.S.C. § 470ii(a) (Supp. V 1981).

129. *Id.* See *supra* note 117. The regulations were the work of an interagency rule-making task force convened by the Secretary of the Interior. Proposed uniform rules were published for comment on Jan. 19, 1981. 46 Fed. Reg. 5565. Six public hearings were held and comments were accepted for a period of 101 days. The author represented the Bureau of Indian Affairs on the rule-making task force.

130. Rule-making Document, *supra* note 117, at 4.

131. 16 U.S.C. § 470ii(b) (Supp. V 1981). *See* Rule-making Document, *supra* note 117, at 4 and at § 69.2(b).

be consistent with the uniform regulations. Because the Department of the Interior is the only federal agency with management responsibilities for Indian lands, the resolution of certain issues regarding Indian lands has been left for section 10(b) regulations to be promulgated by the Secretary of the Interior.[132]

As discussed earlier,[133] ARPA prohibits the excavation and/or removal of archaeological resources from public lands or Indian lands unless such activity is conducted pursuant to a permit. Accordingly, the primary function of the uniform regulations is to specify the procedures that govern the issuance of permits. The uniform regulations inform the affected public regarding permit requirements and exceptions,[134] the information that must be provided in an application for a permit,[135] provisions for suspension or revocation of permits,[136] and provisions for administrative appeals relating to permits.[137] The uniform regulations specify how federal land managers are to administer the permit process, including determinations required prior to issuing a permit,[138] the inclusion of terms and conditions in a permit,[139] and procedures for notifying Indian tribes if the issuance of a permit may result in harm to, or destruction of, tribal religious or cultural sites.[140]

In addition to the permit process, the uniform regulations provide federal land managers with three other mechanisms for protecting archaeological resources: "civil penalties for unauthorized excavation and/or removal, . . . provisions for the preservation of archaeological resource collections and data, and . . . provisions for ensuring confidentiality of information."[141] The civil penalty provisions are especially important because they allow federal land managers to assess monetary penalties based in part

132. These unresolved issues are discussed at notes 149-152, 164 *infra* and accompanying text. It should be noted that the Department of the Interior may decide to promulgate one set of section 10(b) regulations for the entire Department, or bureaus within the Department may be authorized to promulgate bureau-specific regulations.

133. *Supra* at notes 106-109 and accompanying text. The prohibition does not apply if the excavation and/or removal is conducted pursuant to a permit issued under the Antiquities Act (16 U.S.C. §§ 431-33), or if the exemption contained in subsection 4(g)(1) of ARPA regarding excavation or removal by an Indian tribe or member thereof applies.

134. Rule-making Document, *supra* note 117, at § 69.5.

135. *Id.* § 69.6.

136. *Id.* § 69.10.

137. *Id.* § 69.11.

138. *Id.* § 69.8.

139. *Id.* § 69.9.

140. *Id.* § 69.7.

141. *Id.* § 69.1(a). Civil penalties are addressed in §§ 69.14, 69.15, and 69.16. Preservation of archaeological resource collections and data are addressed in §§ 69.6(b)(5) and (6), 69.8(a)(6) and (7), 69.9(a)(3), and 69.13. Confidentiality is addressed in § 69.18.

upon the commercial value of the archaeological resources. As it is not unusual for the commercial value of some kinds of archaeological resources to exceed the maximum amount of criminal fines authorized under section 6(d) of ARPA,[142] the civil penalty provisions are intended to provide an additional deterrent to illegal excavation and removal. The criminal sanctions provided in ARPA are not implemented through the uniform regulations; rather, criminal prosecution is a matter that is to be "pursued independently" from the uniform regulations.[143]

Provisions of Particular Indian Interest

There are many provisions in the uniform regulations that should be noted by Indian tribes and by persons interested in the treatment of Indian religious and cultural concerns in federal administrative decision making. The discussion of these provisions follows the organization of the regulations. Not all provisions that are of interest to Indians are discussed because for some provisions there is no need to supplement the discussion contained in the preamble to the rule-making document.

Purpose. As noted earlier, the purpose of ARPA is the protection of archaeological resources, not the protection of American Indian religious values. However, since AIRFA is specifically mentioned in section 10(a) of ARPA, the purpose section of the regulations does specifically refer to AIRFA.[144]

Definition of "Indian Tribe." The definition in the regulations "clarifies" the statutory definition by employing the criterion of federal recognition to determine whether a particular group is an Indian tribe.[145] This clarification appeared in the proposed uniform regulations, and, although several commentators objected, it was retained in the final version. The reasons for the clarification are that without the criterion of federal recognition, federal land managers would face uncertainty in knowing which groups having American Indian heritage were required to be notified prior to issuance of a permit, and, second, the term "In-

142. 16 U.S.C. § 470ee (Supp. V 1981). For offenses involving archaeological resources for which the commercial or archaeological value and the cost of restoration and repair is $5,000 or less, the offender may be fined not more than $10,000 and/or imprisoned not more than one year; if the $5,000 figure is exceeded, the maximum penalty is $20,000 fine and/or two years imprisonment. For second or subsequent offenses, the maximum penalty increases to $100,000 fine and/or five years' imprisonment.

143. Rule-making Document, *supra* note 117, at 39.

144. *Id.* § 69.1.

145. *Id.* § 69.3(f), and preamble at 25.

dian tribe" as used by the federal government "is a term of art which implies a government-to-government relationship."[146] Nonrecognized groups may become involved in the ARPA permitting process either by successfully petitioning the Bureau of Indian Affairs for acknowledgment of tribal status,[147] or by taking the initiative and informing relevant federal land managers of their desire to be informed of ARPA permit applications for certain areas.[148]

Permit Exemption on Indian Lands. Section 4(g)(1) of ARPA[149] exempts any Indian tribe from the requirement of obtaining a permit for the excavation and removal of archaeological resources located on "Indian lands of such Indian tribe," and similarly exempts tribal members from the permit requirement if there is a tribal law regulating excavation and removal. In the proposed uniform regulations, the language "Indian lands of such Indian tribe" was interpreted to include both tribal lands and allotted lands, and the words "or members of such tribe" were added in order to clarify the statutory language.[150] In the final regulations it was decided that "any clarification of the applicability of the regulations to allotted lands of tribal members should be addressed in Department of the Interior implementing regulations pursuant to section 10(b) of [ARPA]."[151] Thus the clarifying language was omitted from the final uniform regulations.

Some implications of this issue that could be addressed in the section 10(b) regulations are: whether a tribe needs an ARPA permit to conduct excavations on allotted lands; whether the exemption from the permit requirement can, through the enactment of a tribal law, be made to apply to a tribal member's activities on allotted lands if the exemption does not apply to the tribe; and whether Congress intended to affirm tribal regulatory authority over allotted tribal lands. As discussed later in this part, the Department of the Interior has taken the position that tribal

146. *Id.* at 25.

147. Pursuant to regulations promulgated by the Bureau of Indian Affairs, codified at 25 C.F.R. pt. 83 (1982).

148. Pursuant to Rule-making Document, *supra* note 117, §§ 69.7(a)(2) and (b)(2). See discussion at notes 157-158 *infra* and accompanying text.

149. 16 U.S.C. § 470cc(g)(1) (Supp. V 1981), quoted in the text accompanying note 109, *supra.*

150. 46 Fed. Reg. 5565, 5571 (Jan. 19, 1981) (proposed to be codified at 36 C.F.R. § 1215.4).

151. Rule-making Document, *supra* note 117, at 15-16.

regulatory authority does normally apply to allotted lands of tribal members.[152]

Notice to Tribes for ARPA Permits on Public Lands. With regard to the protection of tribal religious and cultural sites located on public land, section 69.7 of the final uniform regulations is the most important section of the regulations. This section establishes a process for providing notice to Indian tribes of applications for ARPA permits for archaeological work on public land that may result in harm to or destruction of sites having tribal religious or cultural importance.[153] This section, which is based upon section 4(c) of ARPA,[154] imposes two requirements on federal land managers, one a site-specific requirement and the other a more comprehensive requirement.

The site-specific requirement is a repetition of the language of section 4(c) of ARPA, with additional language inserted to specify that any such notice to a tribe must be accomplished at least thirty days before the federal land manager issues the requested ARPA permit. The notice is to be provided to the chief executive officer of the tribe or to an official of the tribe specifically designated to receive such notices. If the tribe responds to this notice within the 30-day period, the federal land manager may meet with representatives of the tribe to discuss their concerns, including ways to avoid or mitigate potential harm or destruction. Federal officials are encouraged to provide opportunities for oral presentation of tribal concerns rather than to rely on written communication exclusively, in recognition of the importance of oral tradition in tribal cultures.[155] If avoidance or mitigation measures are adopted as a result of such communica-

152. Notes 161-163 *infra* and accompanying text.

153. Rule-making Document, *supra* note 117, at 19-27, and 36 C.F.R. § 69.7. It is noted that the provisions of this section of the regulations apply only to public lands and not to Indian lands. The language of the statute does not specifically exclude Indian lands from this notice requirement. However, problems associated with sites having religious or cultural importance to one tribe but located on the reservation of another tribe were believed to be such rare occurrences, especially relative to the frequency of such problems on public lands, that there was no need to address such problems in the uniform regulations. If it is necessary to address such problems in regulations, this can be done in section 10(b) regulations issued by the Department of the Interior.

154. 16 U.S.C. § 470cc(c) (Supp. V 1981), quoted in the text accompanying note 111, *supra.*

155. This was the primary reason advanced in the task force meeting, although it seems to have been inadvertently omitted from the preamble discussion. Rule-making Document, *supra* note 117, at 21. On the importance of oral tradition in Indian religions *see* GILL, *supra* note 14, at 39-59.

tion, these measures are required to be incorporated into the terms and conditions of the permit.[156]

While the notice requirement of section 4(c) of ARPA is explicitly stated, there is no provision for how the federal land manager is to find out whether any given application for an ARPA permit may result in harm to or destruction of a tribal religious or cultural site. Thus the final uniform regulations establish a comprehensive requirement to supplement the site-specific requirement discussed above. This comprehensive requirement is stated as follows:

> In order to identify sites of religious or cultural importance, the Federal land manager shall seek to identify all Indian tribes having aboriginal or historic ties to the lands under the Federal land manager's jurisdiction and seek to determine, from the chief executive officer or other designated official of any such tribe, the location and nature of specific sites of religious or cultural importance so that such information may be on file for land management purposes. Information on sites eligible for or included in the National Register of Historic Places may be withheld from public disclosure pursuant to section 304 of the Act of October 15, 1966, as amended (16 U.S.C. 470w-3).[157]

In a world in which Indians and federal officials trusted and understood each other, this paragraph might lead to a substantial reduction in conflicts between Indian religious values and federal land-use practices, including archaeology. However, as noted earlier, federal officials and traditional Indians seem to live in two different worlds, and what communication there is between them is not characterized by trust and understanding. Nevertheless, the requirement that federal land managers identify and initiate communication with all tribes having aboriginal or historic ties to lands over which federal land managers have jurisdiction may yield beneficial developments despite the lack of trust and understanding. The extent to which any tribe participates in such communication and the specificity of information furnished are, of course, matters for each tribe to decide, but, the opportunity to put federal land managers on notice of the areas in which there

156. Rule-making Document, *supra* note 117, at 26, and § 69.9(c).

157. *Id.* § 69.7(b)(1). The language in this section reflects something of a compromise between the desire of federal agencies to have specific locational information and the reluctance of Indians to reveal specific locations. The concept of a "buffer zone" was considered and rejected, but is implicitly accepted because the tribes can control the specificity of information that is provided.

are tribal religious and/or cultural sites well in advance of federal land-use decisions is an opportunity that should be given serious consideration.

There are two other matters regarding this section of the regulations that require attention. These are the concerns of nonfederally recognized groups and the divisions found in some recognized tribes between traditional and acculturated Indians. Subparagraphs (a)(2), (a)(3), (b)(2), and (b)(3) of this section provide discretion to federal land managers to provide notice to Native American groups that are not federally recognized tribes and to include them in discussions and planning regarding sites that have religious or cultural significance.[158] Nonrecognized groups, or for that matter, medicine societies and other traditional factions of recognized tribes, can use these provisions to seek consideration of their concerns. This will require more initiative on the part of such groups than is required of tribes because there is no burden on federal land managers to identify and initiate communication with such groups. Cultural resources professionals serving in the role of intermediary may prove to be especially helpful in this area.

Whether tribal governments will make use of the ARPA permit process to ensure the consideration of the views of traditional tribal members is a question that can only be answered in a speculative way at this time. The rule-making document expresses the view that this matter is best addressed within the tribes themselves, and it suggests that tribes consider designating a tribal official to be the focal point of the permitting process who is well versed in traditional tribal religion.[159] This is well and good, but an important practical matter should also be considered. Tribal governments are generally small governments with many competing demands for scarce financial resources. If the opportunity presented by the ARPA permitting process is to be meaningful, it would seem to be almost a necessity to have a staff person or two who can spend at least part-time responding to notices, initiating correspondence with federal land managers, and seeking and documenting the views of traditional tribal members. But, of course, since ARPA does not contain any provision for funding, this is beyond the scope of the uniform regulations. The appropriate way for the federal government to provide financial assistance to tribal governments to meet the challenges presented

158. *Id.* § 69.7.
159. *Id.* at 26.

by the ARPA permitting process is to provide grants to tribes for "the preservation of their cultural heritage" as authorized by NHPA.[160]

Consent for Excavation on Indian Lands

Section 69.8(a) of the uniform regulations contains a list of determinations that must be made by federal land managers before a permit may be issued. Among these is that, for archaeological work proposed on Indian lands, written consent must be obtained "from the Indian landowner and the Indian tribe having jurisdiction over such lands."[161] This regulatory language differs somewhat from the rather ambiguous statutory language on which it is based, which states that consent is required from "the Indian or Indian tribe owning or having jurisdiction over such lands."[162] This change appeared in the proposed uniform regulation and was not addressed in any of the comments. The reason for the change is that:

> Allotted Indian lands are, in most instances, subject to the regulatory authority of an Indian tribal government. In order to protect the interests of both Indian landowners and tribal governments, [the language in the regulations provides] clear guidance that the consent of both the Indian landowner(s) and the tribal government having jurisdiction over such allotted land will be required.[163]

Further clarification of this consent requirement will be provided in the Department of the Interior regulations issued pursuant to section 10(b) of ARPA. One specific issue likely to be addressed is the situation in which numerous Indians own fractional interests in the allotted land for which a permit is sought. The Department of the Interior is likely to propose that the con-

160. 16 U.S.C. § 470a(d)(3)(B) (Supp. V 1981) See *supra* note 86 and accompanying text. DELORIA, *supra* note 26, at 220, notes that tribal religious leaders do not traditionally receive monetary compensation for their work. However, it is the intermediaries and not the religious leaders who will be charged with documenting and advocating tribal religious and cultural concerns. The need for staff is especially important given the 30-day time limit for responding to the notice.

161. Rule-making Document, *supra* note 117, at § 69.8(a)(5).

162. 16 U.S.C. § 470cc(g)(2) (Supp. V 1981).

163. Rule-making Document, *supra* note 117, at 27. This is based upon the longstanding policy of the Department of the Interior that an "Indian tribe has, among its powers of sovereignty, the power to regulate the use and disposition of individual property among its members." Solicitor, Dep't Int., *supra* note 55, at 50. *See also* BARSH & HENDERSON, *supra* note 50, at 108-11.

sent requirement will be satisfied by something less than the written consent of all owners of fractional interests.[164]

Terms and Conditions of Permits

Section 69.9 of the uniform regulations specifies the matters that federal land managers are either required or have discretion to address through terms and conditions in permits. Failure of the permittee to comply with the terms and conditions may lead to suspension or revocation of the permit pursuant to section 69.10 of the uniform regulations.

Among the terms and conditions that are mandatory are those that "may be requested by the Indian landowner and the Indian tribe having jurisdiction over the lands."[165] This provision is based upon section 4(g)(2) of ARPA,[166] which provides that on Indian lands, tribal governments and Indian landowners not only have the authority to prohibit archaeological work by denying consent, but also to specify how archaeological work that is permitted will be conducted.

For archaeological work on public lands, the permit must include any terms and conditions that may have been adopted pursuant to section 69.7(a)(3) of the uniform regulations in order to avoid or mitigate impacts on tribal religious or cultural sites.[167]

Appeals Relating to Permits

Section 69.11 of the uniform regulations provides that certain appeals relating to permits will be allowed either through existing administrative appeal procedures or through procedures that may be established by regulations issued pursuant to section 10(b) of ARPA.[168] The primary importance of this section for Indian interests is that it provides that "any affected person may appeal permit issuance."[169] Thus, if a tribe or the representatives of traditional religious leaders are not satisfied with a federal land manager's responsiveness to tribal religious or cultural concerns, and the federal land manager issues the permit, an administrative

164. Memorandum from Hans Walker, Jr., Acting Associate Solicitor for Indian Affairs, to the Acting Deputy Assistant Secretary of the Interior for Indian Affairs, June 8, 1981.

165. Rule-making Document, *supra* note 117, at § 69.9(c).

166. 16 U.S.C. § 470cc(g)(2) (Supp. V 1981), quoted in text accompanying note 109, *supra*.

167. Rule-making Document, *supra* note 117, at § 69.9(c).

168. 16 U.S.C. § 470ii(b) (Supp. V 1981).

169. Rule-making Document, *supra* note 117, at § 69.11.

appeal should serve to preserve the status quo and to lay a foundation for litigation should it prove to be necessary.

Custody of Archaeological Resources

This subject is touched upon in section 69.13 of the uniform regulations but is not resolved because section 5 of ARPA[170] authorizes the Secretary of the Interior to promulgate regulations governing custody. No such regulations have been proposed as of this writing. Indian tribes and others concerned with this subject should seek as much involvement as possible in the development of these regulations.[171]

No statutory guidance is provided regarding custody of archaeological resources removed from public lands that happen to be sacred objects or otherwise have religious or cultural significance to Indians, although this has long been a problem area.[172] Section 4(b)(3) of ARPA does specify such archaeological resources are "the property of the United States."[173] The ownership of archaeological resources located on Indian lands is the subject of the following ambiguous statutory guidance: "Any exchange or ultimate disposition under such regulation of archaeological resources excavated or removed from Indian lands shall be subject to the consent of the Indian or Indian tribe which owns or has jurisdiction over such lands."[174] Accordingly, section 69.13(b) of the uniform regulations contains the following ambiguous statement: "Archaeological resources excavated . . . from Indian lands remain the property of the Indian or Indian tribe having rights of ownership over such resources."[175] This statement is based on implications from the consent requirement of section 5 of ARPA quoted above[176] and the forfeiture provision of section 8(c) of ARPA.[177] The unresolved issue is whether sacred objects that are also archaeological resources, and which are located on allotted Indian lands, belong to Indian tribes or to individual In-

170. 16 U.S.C. § 470dd (Supp. V 1981).

171. See note 116 *supra* and accompanying text.

172. AIRFA REPORT, *supra* note 6, at 68-72. Note, *Indian Rights: Native Americans Versus American Museums—A Battle For Artifacts,* 7 AM. INDIAN L. REV. 125 (1979); Blair, *American Indians vs. American Museums: A Matter of Religious Freedom* (pts. 1-2), 5 AM. INDIAN J. 13, 2 (May & June 1979).

173. 16 U.S.C. § 470cc(b)(3) (Supp. V 1981).

174. 16 U.S.C. § 470dd (Supp. V 1981).

175. Rule-making Document, *supra* note 117, § 69.13(b). *See also* §§ 69.6(b)(6), 69.8(a)(7)(ii).

176. 16 U.S.C. § 470cc(b)(3) (Supp. V 1981).

177. 16 U.S.C. § 470gg(c) (Supp. V 1981).

dians. This is an issue that should be addressed in regulations issued pursuant to section 5 of ARPA. The resolution of the issue should provide for deference to the cultural values of the tribes affected by this issue.

Penalty Provisions. Certain other provisions in the uniform regulations relating to civil penalties should be briefly noted, although the discussion in the preamble of the rule-making document is adequate. First, the cost of reinterment of human remains "in accordance with religious custom and State, local, or tribal law"[178] is to be included in the cost of restoration and repair of illegal damage to archaeological resources. Second, in determining the amount of a civil penalty, affected tribes can bring to the attention of federal land managers factors that should be considered other than commercial or archaeological value and the cost of restoration and repair.[179] Finally, it should be noted that, in cases involving Indian lands, "all civil penalty monies and any item forfeited . . . shall be transferred to the appropriate Indian or Indian tribe."[180]

NHPA Regulations

The National Historic Preservation Act, as discussed earlier,[181] is more comprehensive in its application than is ARPA. Although ARPA provides a greater degree of protection for archaeological resources than NHPA provides for historic resources, ARPA does not impose any affirmative requirement on federal land managers to find out where archaeological resources may be located. NHPA, on the other hand, does contain a requirement that each federal agency "establish a program to locate, inventory, and nominate to the Secretary all properties under the agency's ownership or control . . . that appear to qualify for inclusion on the National Register [of Historic Places]. . . ."[182] Once a property has been determined eligible for the National Register, the consultation requirement of section 106[183] affording the Advisory Council on Historic Preservation the opportunity to

178. Rule-making Document, *supra* note 117, at § 69.13(c)(7).

179. *Id.* §§ 69.16(b)(2), (3); preamble at 42.

180. *Id.* § 69.17(c).

181. See text accompanying notes 117-119, *supra.*

182. 16 U.S.C. § 470h-2(a)(2) (Supp. V 1981). This duty was originally imposed by Executive Order 11593, *supra* note 92, which directed federal agencies to complete such inventories by July 1, 1973. But as noted in GAO REPORT, *supra* note 50, at 11, the inventories have never been completed.

183. 16 U.S.C. § 470f (1976 & Supp. V 1981), implemented through 36 C.F.R. § 800.

comment, applies, and any action that might adversely affect such a property becomes administratively inconvenient.[184] The section 106 consultation process is governed by regulations issued by the Advisory Council on Historic Preservation. The starting point for determining whether a property qualifies for the protection of the section 106 consultation requirement is the criteria of eligibility for the National Register, which are established by regulations issued by the National Park Service.[185]

Seeking to have a tribal religious or cultural site placed on or determined eligible for the National Register may not be the most appropriate way to protect such a site, especially if there is little threat of damage to such a site. However, if the threat of damage is a concern, the National Register offers two major benefits: first, there is an established process by which impacts on National Register listed or eligible properties are considered in the environmental review of proposed federal actions; and, second, the fact that federal agencies are authorized to withhold information regarding properties listed on or eligible for the National Register from disclosure pursuant to the Freedom of Information Act.[186]

The National Register Regulations

The Secretary of the Interior is directed by section 101(a)(2) of NHPA[187] to establish criteria of eligibility for the National Register and to promulgate regulations governing nominations of properties to the National Register, determinations of eligibility, and related matters. This mandate has been delegated to the National Park Service, which has recently published amended regulations, certain provisions of which were published as interim regulations and other provisions were published as proposed regulations.[188] These regulations are intended to implement changes in the National Register program mandated by the NHPA Amendments of 1980[189] without causing unnecessary disruption in the preexisting program.

184. But as noted earlier, text accompanying note 88 *supra,* there really are no teeth in this requirement. E.g., in *Northwest Indian Cemetery Protective Ass'n,* 552 F. Supp. 951 (N.D. Cal. 1982), the Advisory Council recommended the Forest Service abandon its road-building project, but the Forest Service decided to proceed. But see author's note following text.

185. See text accompanying notes 193-199 *infra.*

186. See *supra* notes 101-103 and accompanying text.

187. 16 U.S.C. § 470a(a)(2) (Supp. V 1981).

188. Interim regulations: 36 C.F.R. §§ 60.1, 2, 3, 4, 5, 6 (except subsections (i) and (m)), 9, 10, 13, 14, and 15; 46 Fed. Reg. 56,183 (Nov. 16, 1981). Proposed regulations: 36 C.F.R. §§ 60.6(m), 8, 11, and 12; 46 Fed. Reg. 56,209 (Nov. 16, 1981).

189. Pub. L. No. 96-515, 94 Stat. 2987 (1980).

These regulations contain no mention whatsoever of Indian tribes nor any indication that Indian interests were even considered.[190] This omission occurred despite the NHPA Amendments of 1980 specifically providing that the historic preservation policy of the United States is to be carried out "in partnership with . . . Indian tribes. . . ."[191] The omission is particularly unfortunate when one considers that the subject matters with which historic preservation is concerned, especially prehistory and archaeology, are to a large extent concerned with the study of Indian cultures.[192] Some revisions of the National Register regulations in order to increase the involvement of Indians and Indian tribes in our nation's historic preservation program would be beneficial not just to the concerned Indians but to the nation as well. Some ways in which the National Register regulations might be revised are suggested below.

Criteria of Eligibility. The National Register regulations specify that "districts, sites, buildings, structures, and objects" may possess "the quality of significance in American history, architecture, archeology, engineering, and culture" and thus be eligible for the National Register if they:

> (a) . . . are associated with events that have made a significant contribution to the broad patterns of our history; or (b) . . . are associated with the lives of persons significant in our past; or (c) . . . embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or (d) . . . have yielded, or may be likely to yield, information important in prehistory or history.[193]

190. The Bureau of Indian Affairs brought this to the attention of the National Park Service and offered certain specific recommendations for revisions. Memorandum from Kenneth Smith, Assistant Secretary of the Interior—Indian Affairs, to the Keeper of the National Register (Feb. 22, 1982). This letter asserts that tribal sovereignty alone is sufficient reason for specific provisions in these regulations to ensure tribal involvement, citing Nance v. Environmental Protection Agency, 645 F.2d 701 (9th Cir. 1981), *cert. denied sub nom.*, Crow Tribe v. EPA, 454 U.S. 1081. It should be noted that the National Historic Landmark regulations, *supra* note 81, do contain provisions regarding Indian tribes.

191. 16 U.S.C. § 470-1 (Supp. V 1981).

192. Note that the definition of "historic property" or "historic resource" in NHPA includes properties of prehistoric as well as historic importance. 16 U.S.C. § 470w(5) (Supp. V 1981). It can be inferred from this that the term "history" should be interpreted to include "prehistory."

193. 36 C.F.R. § 60.4 (1982); 46 Fed. Reg. 56,189 (Nov. 16, 1981).

Upon applying these criteria to any given tribal religious or cultural site, one could probably find the site eligible under one or more criteria. For example, any major tribal religious or cultural site is likely to have been associated with events and persons that are significant in the tribe's history, and the history of every tribe is a significant, although usually neglected, part of American history.[194] If none of the other criteria apply, criterion (d) will apply to any tribal religious or cultural site since the study of any such site in conjunction with tribal oral tradition will be likely to yield "information important in prehistory or history."[195]

Thus, although the National Register was established to afford some degree of protection to a very broad class of properties that does not specifically include tribal religious and cultural sites, tribal religious and cultural sites can be included and a few have been.[196] However, there is a provision in the National Register regulations that can be relied upon to exclude tribal religious sites—to be determined eligible a religious property must derive its primary significance from "architectural or artistic distinction or historical importance."[197] The apparent reason for this provision is to avoid running afoul of the establishment clause,[198] but its application to disqualify historically significant tribal religious sites exhibits ethnocentric insensitivity to the tribal cultural value that religion permeates all aspects of life. That a tribe considers a site to have primarily religious significance does not necessarily diminish the significance of such a site in American prehistory or history. This provision of the National Register regulations should be revised in order to make the process of listing properties on the National Register more accessible to tribes as a means of providing some protection to religious and cultural sites that are beyond the territorial limits of tribal government jurisdiction.[199]

Nomination Process. The National Register regulations provide for the nomination of properties to the National Register by

194. *See generally* VOGEL, *supra* note 27, and DELORIA, *supra* note 26.

195. The criteria have been criticized because they are so broad that almost any site can be determined eligible. GAO REPORT, *supra* note 50, at 23-26.

196. E.g., Bear Butte, South Dakota; Helkau Historic District, California; Coso Hot Springs, California; Inyan Kara Mountain, Wyoming.

197. 36 C.F.R. § 60.4 (1982); 46 Fed. Reg. 56,189 (Nov. 16, 1981).

198. Set out at note 9 *supra.*

199. Memorandum from Kenneth Smith, *supra* note 190, recommended the following language: "A religious property if it is also significant for architectural or artistic distinction or importance in history or prehistory."

state historic preservation officers and federal agencies.[200] While these regulatory provisions are circumscribed by statutory language,[201] provisions should be established for tribal government involvement in nominations made by the state historic preservation officers and federal agencies.[202] In the absence of such provisions, tribes and other interested parties may appeal to the Secretary of the Interior the nomination of any historic property to the National Register or "the failure or refusal of a nominating authority to nominate a property. . . ."[203]

With regard to the nomination of properties located on Indian lands, the Bureau of Indian Affairs is responsible for establishing "a program to locate, inventory, and nominate to the Secretary all properties under [its] ownership or control . . . that appear to qualify for inclusion on the National Register. . . ."[204] This provision does not appear to give the BIA discretion to decline to nominate a property if it is against the wishes of the affected tribe and/or Indian landowner. However, another provision in NHPA states that when a property located on private land is nominated, it shall not be included if the private landowner(s) object.[205] In such situations, a determination of eligibility is nevertheless made, and, if determined eligible, the relevant parties are informed and

200. 36 C.F.R. § 60.6, .9 (1982); 46 Fed. Reg. 56,189-92 (Nov. 16, 1981).

201. 16 U.S.C. §§ 470a(a)(3),(4), and 470h-2(a)(2) (Supp. V 1981).

202. The problem of there not being a role in the process for Indian tribes is illustrated by the example of San Francisco Peaks, a property of religious significance to both the Hopi and Navajo tribes, and thus also of cultural and historic importance to these tribes. One of the issues in *Hopi Indian Tribe,* slip op., was whether or not the Peaks themselves were eligible for the National Register. Pursuant to the regulations, if a question exists regarding the eligibility of a property, the question is resolved by the Secretary of the Interior. 36 C.F.R. § 63.2,800.4(a)(3) (1982). Although the Hopi Tribe and the Navajo Medicinemen's Association argued that the Peaks are eligible, both the SHPO and the Forest Service determined that they are not eligible. Thus, since section 63.2 specifies: "A question on whether a property meets the Criteria exists when the agency and the State Historical Preservation Officer disagree," this issue was not referred to the Secretary of the Interior for resolution. In upholding the district court's disposition of this issue, the court of appeals stated: "The determination in each case of a property's eligibility is the responsibility of the agency and the SHPO, *see* C.F.R. 800.4(a)(3), and in the absence of an abuse of discretion, their application of the regulations to the facts must be sustained." *Id.* at 42. The regulations should provide that Indian tribes have at least enough influence on the process to determine that a question exists as to eligibility and to have the question resolved by the Secretary.

203. 16 U.S.C. § 470a(a)(5) (Supp. V 1981). *See also* proposed 36 C.F.R. § 60.12, *supra* note 188.

204. 16 U.S.C. § 470h-2(a)(2) (Supp. V 1981); 36 C.F.R. § 60.9(a) (1982); 46 Fed. Reg. 56,192 (Nov. 16, 1981).

205. 16 U.S.C. § 470a(a)(6) (Supp. V 1981).

the section 106 consultation requirement will apply to any proposed federal action affecting the property. The private landowner consent provision should be interpreted to allow Indian landowners to prevent properties from being listed on the National Register.[206]

Section 106 Consultation Regulations

Once a property has been listed on or determined to be eligible for the National Register, the requirement of section 106 of NHPA,[207] applies and the Advisory Council on Historic Preservation must be afforded the opportunity to comment before any federal action is taken that would affect the property. The Advisory Council has promulgated regulations governing compliance with this requirement.[208] These regulations are not discussed in detail in this article. It is noted that the Advisory Council has recently been engaged in a project to review and simplify its regulations, and that publication of proposed revised regulations may be forthcoming.[209]

The Advisory Council's regulations place a great deal of reliance upon the state historic preservation officers to consult with federal agency officials to determine whether proposed federal actions would affect National Register properties.[210] As noted earlier,[211] the position of state historical preservation officer was established by the Secretary of the Interior to assist in implementation of NHPA, which authorized a grant program to the states. The National Park Service, which administers the grant program, promulgated regulations that established criteria for statewide historic preservation plans, including the responsi-

206. The memorandum from Kenneth Smith, *supra* note 190, recommended this, relying in part upon H.R. REP. No. 1457, 96th Cong., 2d Sess., and upon the Department's traditional policy of classifying Indian land as "nonfederal."

207. See text accompanying note 88, *supra*.

208. 36 C.F.R. § 800; 44 Fed. Reg. 6067 (Jan. 30, 1979).

209. On October 19, 1982, the Advisory Council approved a document to be published for comments as proposed rule-making. The document has been submitted to the Office of Management and Budget, which must approve it before publication in the *Federal Register*. Personal communication with Advisory Council staff. However, OMB has determined that the Advisory Council's regulations are in excess of its statutory authority, and since the Advisory Council does not concur in this opinion, the matter has been referred to the Department of Justice for resolution. Memorandum from the Solicitor of the Department of the Interior to the Assistant Secretaries, Apr. 14, 1983. It should also be noted that certain provisions of the Advisory Council's regulations have been suspended. 47 Fed. Reg. 24,306 (June 4, 1982).

210. 36 C.F.R. §§ 800.4., .5, .6 (1982).

211. See text accompanying note 83, *supra*.

bilities of the state historic preservation officers.[212] Some of the responsibilities of these officers are now specified by NHPA as amended.[213]

Because the reliance on state officials to administer the section 106 consultation requirement within Indian reservations was seen as inconsistent with established principles of tribal self-government, the BIA published proposed counterpart regulations to govern section 106 compliance for BIA actions.[214] These proposed regulations would have recognized that: "The protection of Indian cultural resources and the resolution of conflicts arising from proposed uses of resources are governmental functions which are within the retained sovereign authority of the Indian tribes."[215]

The primary approach of these proposed regulations would have been to encourage Indian tribes to designate a tribal official to represent them in consultations regarding cultural resources matters; for tribes that did so, the designated official would have been involved in every step of section 106 consultation, along with the state historical preservation officer.[216] The proposed regulations stated that the tribal official "should be able to represent the views of or provide liaison with the tribe's traditional religious leaders in order to assist the Bureau in meeting its responsibilities under the American Indian Religious Freedom Act."[217]

For a variety of reasons, these proposed regulations never resulted in the publication of final regulations.[218] However, the concept of the federal government consulting with an official designated by a tribal government has been incorporated into the uniform ARPA regulations,[219] and at the recommendation of the BIA, is incorporated into the Advisory Council's proposed revised regulations.[220] In the latter, the term used for such a tribal official is "tribal preservation officer."[221]

212. 36 C.F.R. § 61; 42 Fed. Reg. 47,658 (Sept. 21, 1977).

213. See note 84, *supra.*

214. Proposed as 25 C.F.R. § 281(a) 45 Fed. Reg. 60,924 (Sept. 15, 1980).

215. Proposed 25 C.F.R. § 281.1(b); 45 Fed. Reg. 60,924 (Sept. 15, 1980).

216. Proposed 25 C.F.R. § 281.3, .5; 45 Fed. Reg. 60,925-26 (Sept. 15, 1980).

217. 45 Fed. Reg. 60,925 (Sept. 15, 1980).

218. The enactment of Public Law 96-515 during the comment period; the Advisory Council's project to revise its regulations; bureaucratic reasons within the BIA.

219. Rule-making Document, *supra* note 117, at § 69.7.

220. Personal communication with Advisory Council staff (Feb. 1983).

221. The term is adapted from the NHPA Amendments of 1980, which requires each federal agency to designate a preservation officer. NHPA § 110(c). See notes 93-95, *supra,* and accompanying text.

The development of an association of tribal preservation officers would contribute in many ways to the preservation of the living cultural heritage of the tribes in general and to the preservation of tribal religions and cultural properties in particular. However, this is a development which is not likely to occur until the Department of the Interior implements the provision in NHPA authorizing direct grants to tribes, as discussed earlier,[222] and undertakes a comprehensive revision of its historic preservation program to treat tribes in a manner consistent with both their status as governments and their importance in the history and prehistory of our nation.[223]

National Environmental Policy Act Regulations

Any person or organization that hopes to influence federal agency decisions that are likely to affect the environment should be familiar with the National Environmental Policy Act of 1969 (NEPA)[224] and the regulations promulgated by the Council on Environmental Quality.[225] NEPA is "our basic national charter for protection of the environment."[226] Although no detailed commentary on NEPA is offered in this article because such commentary is available in many other sources,[227] a brief discussion may be helpful to explain how concerns such as cultural resources management and tribal religious values can be integrated into the comprehensive environmental review process established by the NEPA regulations.

222. See *supra* notes 86-87, and accompanying text.

223. There are at least two alternative approaches that might be taken in such a comprehensive revision of the program: (1) providing tribes with influence over the program in a manner parallel to but separate from the way that states influence the program, and (2) providing tribes with rights to influence and be involved in the existing state programs. The second approach may work adequately if federal regulations specify that state historic preservation officers have a nondiscretionary duty to consult with tribes, or with tribal preservation officers, in all relevant aspects of the program, and if tribes are represented on state review boards. Ethnohistory should also be one of the required disciplines for state review boards. 16 U.S.C. § 470w(12) (Supp. V 1981). Tribes should also be represented on the Advisory Council.

224. Pub. L. 91-190, 83 Stat. 852, 42 U.S.C. §§ 4321-47, Jan. 1, 1970, *as amended by* Pub. L. 94-52, 89 Stat. 258, July 3, 1975, and Pub. L. 94-83, 89 Stat. 424, Aug. 9, 1975.

225. 40 C.F.R. §§ 1500-1508; 43 Fed. Reg. 55,978-56,007 (Nov. 29, 1978).

226. 40 C.F.R. § 1500.1(a) (1982).

227. *See generally* F. SKILLERN, ENVIRONMENTAL PROTECTION: THE LEGAL FRAMEWORK (1981); F. GRAD, TREATISE ON ENVIRONMENTAL LAW (1979). Tribal officials may also find the BIA's NEPA HANDBOOK (30 BIAM Supp. 1) useful. *See also Symposium on Law-Science Cooperation Under the National Environmental Policy Act*, 15 NAT. RES. LAW. 569-62 (1983).

Basic Requirement of the NEPA Regulations

The primary requirement of NEPA is that an environmental impact statement (EIS) be prepared for every federal action that will or may significantly affect the quality of the human environment.[228] The NEPA regulations establish the procedural requirements that apply to federal agencies in the preparation of EISs. These requirements include many provisions concerning public involvement.[229] Indian tribes are part of the public, and several provisions of the NEPA regulations specifically direct federal agencies to seek comments or other involvement from Indian tribes.[230] In some circumstances a tribe may be directly involved in the preparation of an EIS by becoming a "cooperating agency."[231] For any specific proposed action, whether a federal agency is required to seek the views of a tribe depends upon whether the tribe or its reservation is likely to be affected.[232] Clearly a tribe may suffer cultural, religious, and/or socioeconomic impacts from an action occurring at some distance from its reservation that does not result in any physical environmental impacts occurring on the reservation. However, federal agencies do not tend to include tribes in their distribution unless proposed actions would occur on or near reservations. To ensure being involved in the review of EISs, tribes could affirmatively notify federal agencies of their interests in certain areas.[233]

Not all federal actions that affect the environment require the preparation of EISs, only those that may or will have significant impacts.[234] A much greater number of actions are taken on the basis of an environmental assessment (EA)[235] and a finding of no significant impact.[236] An EA is a less detailed analysis of the environmental impacts of a proposed action. The primary purpose of an EA is to determine whether an EIS is required.[237] The

228. *See* 40 C.F.R. § 1502.3 (1982).

229. 40 C.F.R. §§ 1502.19, 1503.1, 1503.2, 1506.6 (1982).

230. 40 C.F.R. §§ 1501.7(a), 1502.16(c), 1503.1(2) (1982).

231. 40 C.F.R. §§ 1501.6 and 1508.5 (1982).

232. 40 C.F.R. § 1501.7(a)(1) (1982).

233. Such notification need not be limited to religious and cultural properties pursuant to the ARPA regulations discussed *supra* notes 153-160. In order to handle the volume of environmental documents that are generated, intertribal review offices might be appropriate.

234. 40 C.F.R. §§ 1502.3, 1508.27 (1982).

235. 40 C.F.R. § 1508.9 (1982).

236. 40 C.F.R. § 1508.13 (1982).

237. 40 C.F.R. § 1508.9(a)(1) (1982).

NEPA regulations provide much less guidance for the preparation of EAs than for EISs, and, accordingly, there is a considerable amount of variation among federal agencies in the way EAs are prepared.[238]

Whether a proposed action is the subject of an EIS or an EA, the important step for concerned groups and individuals to take is to inform the responsible federal officials at the earliest possible time that they want to review and comment on the environmental documents. These documents are public documents,[239] and the earlier affected people know what is in them the better their chances are for influencing the decisions that are made based on these documents.[240]

Review and Consultation Requirements

The NEPA regulations specifically require that: "To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by . . . other environmental review laws and executive orders."[241]

Among the "other environmental review laws" that must be addressed in the EIS are ARPA, NHPA, and AIRFA.[242] If an EA rather than an EIS is prepared for a proposed action, the EA must list the persons and agencies consulted pursuant to these other review and consultation requirements.[243] Although actual compliance with these other requirements may not be practicable at the EA stage, the EA should at least explain how such compliance will be achieved.[244]

The requirements of the NEPA regulations to address other environmental review and consultation requirements in the preparation of EISs and EAs has helped to make the NEPA process into a comprehensive environmental review process. In light of the reverence for the natural environment that characterizes tradi-

238. *See, e.g.*, the BIA's NEPA HANDBOOK (30 BIAM Supp. 1, ch. 3).

239. 40 C.F.R. § 1506.6(b) (1982).

240. *See Sequoyah, Badoni,* and *Northwest Indian Cemetery Ass'n,* cited *supra* note 7. In all of these cases the federal agency had either completed or substantially completed its proposed action.

241. 40 C.F.R. § 1502.25 (1982).

242. All three of these statutes are included in the Department of the Interior's guidance on review and consultation requirements. 516 DM 4, app. 1.1. However, AIRFA was included at the request of the BIA and, since it does not contain any "action-forcing" requirements, it is unlikely that many other federal agencies so list it.

243. 40 C.F.R. § 1508.9(b) (1982).

244. *See, e.g,* 30 BIAM Supp. 1, § 4.3G.

tional Indian cultures, the involvement of Indian tribes and organizations in the NEPA process has not been as commonplace as one might have expected. In part, this can be attributed to the way in which the BIA responded to the added responsibilities imposed upon it by NEPA.[245] This can also be attributed in part to the general lack of awareness of the governmental status of the tribes that is found in the federal bureaucracy.[246] However, involvement of tribes and Indian organizations in the NEPA process has been increasing in recent years, and there are indications that such attempts to influence federal decisions have met with some success.[247]

Federal Agency Duty to Comment

The NEPA regulations specify that "Federal agencies with jurisdiction by law or special expertise with respect to any environmental impact involved" in a proposed action, which is the subject of an EIS, "shall comment" on such an EIS.[248] This duty to comment often applies to the BIA, since it has special expertise in matters affecting Indians and since it normally has jurisdiction by law if Indian lands are affected. Tribes and Indian organizations may use this BIA duty to comment to their advantage to ensure that their concerns are documented in the final EIS.[249] Tribal involvement in BIA commenting will tend to result in more thorough BIA comments and in federal agencies being more responsive to tribal concerns. Furthermore, for proposed actions with unsatisfactory environmental effects, this kind of involve-

245. *See* Davis v. Morton, 469 F.2d 593 (10th Cir. 1972). The BIA resisted the application of NEPA, and, when it was ruled applicable, only a minimal environmental staff was established. Although the NEPA process emphasizes interdisciplinary analysis, 42 U.S.C. § 4332 (1976); 40 C.F.R. § 1502.6, the BIA has never seen the need for its environmental review staff to include personnel with expertise in cultural anthropology. This is particularly disturbing since virtually any action that will have significant environmental impacts, and many actions with less than significant impacts, will result in impacts on tribal cultures. The BIA should have the institutional capacity to evaluate such impacts. If the BIA had begun to develop its staff expertise in this area following the decision in *Davis,* it would be in a much better position to comply with its statutory responsibilities for cultural resources management. See notes 93-95, *supra,* and accompanying text.

246. See *supra* note 50, and accompanying text.

247. *See, e.g.,* Evans, *supra* note 24; Holmes, *supra* note 24.

248. 40 C.F.R. § 1503.2 (1982).

249. The BIA's environmental review effort might also be expanded if tribes insisted on the BIA living up to its "duty" to comment.

ment lays a foundation for referral of proposed actions to the executive office of the President.[250]

To illustrate how tribal involvement can contribute to BIA comments, consider the example of the EIS prepared by the air force on its proposal to deploy the MX missile in a basing mode that would have used large land areas in Nevada and Utah. This proposal generated such controversy that the proposal was eventually abandoned. Among the opponents of the proposal were several Indian tribes, who were concerned with a variety of issues, including potential impacts on tribal religious and cultural practices. The BIA, in accordance with its duty to comment, submitted comments that were included within the consolidated comments submitted by the Department of the Interior.[251] Some of the tribes also submitted comments. The amount of staff time that was devoted to the BIA comments was largely a function of the amount of concern expressed by the tribes. The comments of the BIA included the following statements:

> The EIS and supporting documentation lead to the conclusion that desecration of sacred sites will occur on a massive scale. Severe impacts on plant and animal life, which the EIS predicts, will also result in severe impacts on hunting and gathering and religious practices. For example, recovery of native vegetation is predicted to take from a few decades to more than a century (EIS p. 4-83). This could result in many medicine plants being generally unavailable for Indian use, perhaps for generations. This would prevent the elders from passing on much of their traditional knowledge. . . .
>
> . . .
>
> The DEIS, as currently written, does not fully consider that the proposal to build the MX in Nevada and Utah could threaten the survival of a way of life, a *living culture*, which is based upon a value system fundamentally different from that of the dominant American culture. . . . The EIS should recognize that the proposed action, and all alternatives except #7, could constitute *an irreversible and irretrievable commitment of resources*, which would deprive traditional Indian people of

250. 40 C.F.R. § 1504 (1982). A predecision referral must "identify any existing environmental requirements or policies which would be violated by the matter." § 1504.3(c)(2)(ii). Infringement of Indian religious freedom violates AIRFA, which can be considered an environmental policy.

251. Transmitted under cover letter from Robert Burford, Director, Bureau of Land Management, to Verne Orr, Secretary of the Air Force (June 18, 1981).

the resource base necessary to carry on a culture which is based on long-term balance in the use of resources.

. . .

[T]he adverse impacts associated with the worst case [analysis required by 40 C.F.R. 1502.22] could include total and irreversible destruction of the traditional culture of the Indians of the project area.[252]

Such language in the administrative record may help lead to more sensitive federal decisions and would at least help to lay a foundation for administrative appeal.[253] It would also help to establish that an action constitutes a "burden" on religion should litigation become necessary.

IV. *Irreconcilable Conflicts*

In some cases, the resolution of conflicts involving Indian religious properties does not seem to be possible. As noted earlier, there are two kinds of situations in which the need for an ARPA permit arises: scholarly interest in a particular location and the need to salvage archaeological resources that would otherwise be destroyed by terrain-altering activities associated with various kinds of development projects. It might also be said that potentially irreconcilable conflicts involving Indian religious properties can be divided into these categories. In one kind of conflict, the opponents of the Indian religious practitioners are archaeologists; in the other, Indians are opposed by the proponents of terrain-altering activities such as strip mining, highway construction, and reservoir development.

Indians Versus Archaeologists

There is a basic conflict between archaeologists and traditional Indians. Many Indians have a fundamental belief that interred human remains and associated grave offerings must not be disturbed.[254] Archaeologists tend to regard human remains and grave offerings as source material from which knowledge of pre-

252. *Id.*

253. 40 C.F.R. § 1504 (1982).

254. Several of the comment letters submitted by Indians on the proposed uniform ARPA regulations argued that permits should not be issued to excavate human remains and that such a policy be effected by omitting the term "human remains" from the definition of the term "archaeological resource." Such comments were rejected because the statutory definition in section 3(a) of ARPA specifically includes human remains. 16 U.S.C. § 470bb(1) (Supp. V 1981). *See* Rule-making Document, *supra* note 117, at 23.

history can be gained that cannot be gained from other sources, and they have fundamental beliefs about "the sanctity of [this] scientific data, and the inappropriateness of destroying it, or destroying potential access to it."[255] Thus when conflicts of this nature arise, each side sees its fundamental beliefs challenged. Archaeologists may be willing to mitigate the damage that would result from their excavation of a cemetery, and some may be agreeable to the reinterment of human remains after they have been studied.[256] To many traditional Indians, there is no way that the damage can be lessened—the graves *must* be left undisturbed.[257]

In such conflicts, the interests of one party must be subordinated to the interests of the other. Prior to the enactment of AIRFA, the suggestion that archaeology should yield to Indian religious beliefs would not have been given much serious attention. Unfortunately for traditional Indians, there are no clear indications that the enactment of AIRFA has substantially changed this situation. For example, although some federal land-managing agencies have issued directives to consider Indian religious concerns,[258] these directives typically require that actions to accommodate such concerns be consistent with other laws and regulations.[259] Among these other laws are, of course, ARPA, NHPA, and the Historic Sites Act, which express the national

255. Quick, *supra* note 24, at 19. In her analysis, Quick uses an analytical framework which she attributes to Clemmer, *Resistance and the Revitalization of Anthropologists: A New Perspective on Cultural Change and Resistance*, in REINVENTING ANTHROPLOGY 213-47 (D. Hymes ed. 1972).

256. Many archaeologists strongly resist the idea of reinterment. For example, when the state of California decided to allow reinterment of remains in its custody, archaeologists sought to have the Department of Interior block the plan. Letter from John W. Foster, President, Central California Archaeological Foundation to the Secretary of the Interior (Nov. 21, 1981). Reinterment was also an issue in *Sequoyah,* 620 F.2d 1159, *supra* note 7. Although there are continuing negotiations between the Eastern Band of Cherokees and the Tennessee Valley Authority on this issue, as part of the planning for a memorial for which TVA has established a trust fund, the remains have not yet been reinterred.

257. However, there seems to be an increasing willingness to allow study of human remains, if the time for such study is limited and if reinterment is assured. Conversation with William Pink, Executive Secretary, California Native American Heritage Commission (Apr. 1983).

258. *E.g.*, U.S. Forest Service, described in E. DeBloois, "The U.S. Forest Service and the American Indian Religious Freedom Act," paper presented at the annual meeting of the American Anthropological Ass'n (Washington, D.C. 1982); Department of Interior NEPA procedures, 516 DM 4, app. 1.1; National Park Service proposed Native American Relationships Policy, 47 Fed. Reg. 53,688 (Nov. 26, 1982).

259. DeBloois, *supra* note 258; NPS Policy, *supra* note 258.

policy in support of the fundamental belief of archaeologists—the sanctity of archaeological data. When compliance with these laws results in infringement of Indian religious freedom, the test federal agencies should apply is not whether the religious interests can be accommodated while still fully complying with all other laws. Rather, the test should be whether the government's interest in compliance is compelling. It is possible, though perhaps not likely, that when federal land-managing agencies are faced with such conflicts in the context of the ARPA permitting process, with the opposing views clearly presented, the subordination of archaeological values to Indian religious freedom will become much less infrequent.[260]

Indians Versus Earth-disturbing Actions

The other kind of situation in which apparently irreconcilable conflicts arise is when an action is proposed to take place that would cause alteration of the terrain in an area in which an Indian religious property is located.[261] Such actions include strip mining, highway construction, reservoir development, and similar actions. The proponents of such actions tend to see the earth in terms of resources for people to exploit as opposed to the traditional Indian view of interrelated living things that humans have a responsibility to help renew. It is easy to see how such proposed actions can lead to irreconcilable conflicts because these activities are fundamentally inconsistent with the traditional Indian view of how religious properties are to be treated.

What is not so easy to see is how such conflicts might be avoided before they become irreconcilable. Since the commitment of a proponent of such an earth-disturbing project is largely a function of how much money has already been invested, it is obvious that the earlier in planning that Indian religious concerns are brought forward, the more likely it is that alternative sites or projects will be given serious consideration. Several of the statutory and regulatory provisions discussed earlier can help focus attention on Indian religious concerns early in planning.[262]

260. Perhaps the subordination of archaeological interests to Indian religious interests would not be so infrequent if legislative recommendations had been submitted to Congress pursuant to AIRFA. See *supra* note 6.

261. All of the cases cited *supra* note 7, except *Frank,* involved such earth-disturbing activities. Another example worth attention is the strip mining of Black Mesa, *supra* note 57.

262. Especially the NHPA § 110 inventory requirement combined with § 106 consultation and NEPA; and ARPA regulations § 69.7(b).

As important as early involvement in planning is, it is often not enough. Major earth-disturbing projects are often supported by substantial financial resources and rationalized by rhetoric based more on ideology than logic.[263] In such cases, when lands or funds of the federal government are involved, the most successful approach may be to challenge the proposal's formulation of the public interest and to advocate an alternative formulation that would safeguard the Indian religious interests. For example, in conflicts in which the infringement would result from extraction of energy minerals, such as the surface mining of coal or uranium, it is relatively simple to advance an alternative formulation of the public interest—conservation and renewable energy can provide enough energy-related benefits that the asserted "need" for mining is eliminated.[264]

In other cases, an alternative formulation of the public interest may be more of a challenge, but the key will likely be found in linkages with other interest groups, such as environmentalists, historic preservationists, and cultural resource professionals whose interests are compatible with those of traditional Indians. For example, wilderness designation may serve to protect religious properties, allowing traditional Indians access and also serving other public purposes.[265] In this regard it is unfortunate

263. *E.g.*, Tellico Dam. *See* Pepper, *supra* note 10, at 277-78, and nn. 66, 67. *See also* U.S. DEP'T. OF THE INTERIOR, ENDANGERED SPECIES COMM., STAFF REPORT ON TELLICO DAM AND RESERVOIR (Jan. 19, 1979); U.S. COMPTROLLER GENERAL, TVA'S TELLICO DAM PROJECT: COSTS, ALTERNATIVES, AND BENEFITS (1977).

264. *See generally* SOLAR ENERGY RESEARCH INSTITUTE, A NEW PROSPERITY: BUILDING A SUSTAINABLE ENERGY FUTURE; SERI SOLAR CONSERVATION STUDY (1981); ENERGY FUTURE: REPORT OF THE ENERGY PROJECT AT THE HARVARD BUSINESS SCHOOL (R. Stobaugh and D. Yergin eds. 1979); U.S. DEP'T. OF STATE & COUNCIL ON ENVIRONMENTAL QUALITY, THE GLOBAL 2000 REPORT TO THE PRESIDENT (G. Barney ed. 1980); U.S. DEP'T. OF STATE & COUNCIL ON ENVIRONMENTAL QUALITY, GLOBAL FUTURE: TIME TO ACT, REPORT TO THE PRESIDENT ON RESOURCES, ENVIRONMENT, AND POPULATION (1981). However, ideology and conventional wisdom still carry much weight in federal decision making, and the courts will not substitute their judgment for that of administrative officials except for abuse of discretion or arbitrary and capricious actions. *E.g.*, in *Inupiat Community*, 548 F. Supp. 182, 189 (D. Alaska 1982), the court held that the government has a compelling interest in extraction of off-shore oil.

265. The Wilderness Act, Pub. L. 88-577, 78 Stat. 890 (1964), 16 U.S.C. §§ 1131, 1133(b) (1976) provides that "wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use." This seems readily compatible with Indian religious use; for example, allowing traditional Indians to perform ceremonies to help maintain the processes of renewal in the natural world is clearly a conservation purpose. Inclusion in the wilderness system as a means of protecting an area sacred to the Papago Tribe is currently under consideration. 48 Fed. Reg. 16,975 (Apr. 20, 1983).

that the general public's lack of awareness of the governmental status of the tribes seems to be shared by the environmental community.[266] Although environmental leaders often pay verbal respect to the spirituality of Indian attitudes toward the environment, working relationships between environmental leaders and Indians, particularly tribal government officials, are all too uncommon given the benefits that might be realized by both groups.

The severe nature of the threats to the earth's living resources and the momentum of the trends of recent decades have been well documented.[267] From the perspective of the environmental community, reversing these trends requires a combination of applied science and political action to translate the recommendations of science into governmental policy.[268] From the perspective of the traditional Indian, what is needed is reverence.

Conclusion

Despite the statement of federal policy enacted in AIRFA, practitioners of traditional tribal religions continue to suffer infringements. This article has sought to shed some light on such infringements by suggesting they be seen in the context of an on-

266. *E.g.*, LIFE AFTER '80: ENVIRONMENTAL CHOICES WE CAN LIVE WITH (K. Courrier ed. 1980) and RESETTLING AMERICA: ENERGY, ECOLOGY, AND COMMUNITY (G. Coates ed. 1981). It should be noted, however, that several environmental groups, including the Sierra Club, the Wilderness Society, and the Redwood Region Audubon Society, are parties plaintiff in Northwest Indian Cemetery Protective Association v. Peterson, 552 F. Supp. 951 (N.D. Cal. 1982).

267. GLOBAL FUTURE: TIME TO ACT, *supra* note 264, at 66-102. This study provides a glaring example of overlooking Indian environmental concerns, albeit South American Indians. The likely extinction of thousands of species of plants and wildlife as a result of deforestation of tropical rain forests, particularly the Amazon, is noted, as well as the loss of medicinal plants for which science has not yet discovered a use. There is no mention in the *Report* of the cultural genocide of Amazonian tribes who depend upon the rain forest environment, and who, for centuries, have been using many of the medicinal plants that science has yet to discover. An oversight such as this might be seen as a manifestation of what has been called "ecological imperialism." Rappaport, *The Flow of Energy in an Agricultural Society*, 224 SCIENTIFIC AMERICAN (no. 3) 116, 132 (1971). Our world organization which is "centered in industrialized societies . . . degrades the ecosystems of the agrarian societies it absorbs." *Id.* The governments of the industrialized nations tend to recognize the legitimacy of the territorial claims of other governments without much inquiry into whether indigenous nonindustrialized populations regard such claims as legitimate. There is an interface here between environmental protection and human rights that should not be ignored. *See also* R. RAPPAPORT, ECOLOGY, MEANING, AND RELIGION (1979); G. SNYDER, THE OLD WAYS (1977).

268. N. Yost, *Global Future—Meeting the Challenge,* 11 ENVIRON. L. REP. 50011 (1981).

going conflict between the dominant culture and tribal cultures. In trying to avoid such infringements, the use of administrative decision-making processes has been recommended as an alternative to and foundation for litigation. The statutes and regulations that govern the relevant administrative processes have been discussed. Whether the potential opportunities presented by these statutes and regulations actually prove to be useful in protecting Indian religious and cultural interests will depend largely upon the professionals of cultural resources management because the statutes and regulations create institutionalized channels by which they can influence administrative decisions. Such institutionalized channels have also been opened for tribal governments. Whether these channels are meaningful will depend to a large degree on whether financial assistance is made available to tribal governments to administer their own cultural resources programs.

It has also been suggested that, even when conflicts involving Indian religious freedom seem to be irreconcilable, resolution may still be possible if the Indian interests are asserted early in planning and decision making. Resolution is more likely if it can be shown that protection of the Indian interests is also in the interests of the public in general, or at least in the public interest as defined by such groups as the environmental and cultural resource preservation communities.

Because religious freedom is a constitutional right, such alliances should not be necessary. Perhaps the only justice in the need for such alliances is that in helping to protect the religious freedom of traditional Indians, the protectors may be serving the public interest as well. If the traditional Indians really are the caretakers of Mother Earth, they are taking care of her for all of us.

Author's Note: After this article was written but before going to press, the U.S. District Court for the Northern District of California issued its decision in *Northwest Indian Cemetery Protective Association v. Peterson*[269] listed in note 7 *supra*. The court permanently enjoined the U.S. Forest Service from constructing the Chimney Rock section of the "G-O road" and from engaging in commercial timber harvesting in the high country of Six Rivers National Forest. The court reasoned that such activities would constitute a "burden" on religious practices of the Yurok,

269. 565 F. Supp. 586 (N.D. Cal. 1983), *app. docketed*, No. 83-2225 (9th Cir. July 22, 1983).

Karok, and Tolowa Indians because the use of the high country to communicate with the Creator, to perform rituals, and to prepare for religious and medicinal ceremonies is "central and indispensable" to these tribal religions.[270] Having found a burden on the free exercise of religion, the court then examined the government's rationale for its proposed actions and did not find a compelling governmental interest that might have justified the religious infringement that would have resulted. This decision supports one of the main themes of this article—that consideration and documentation of Indian religious concerns during administrative decision making will lay a better foundation for litigation in the event that the administrative decision is not sensitive to the Indian religious concerns. In *Northwest Indian Cemetery* the Indian religious concerns and the impacts upon religious beliefs and practices were well-documented in the final environmental impact statement and in an anthropological study by D. Theodoratus that was adopted by the Forest Service. The court relied heavily on these documentary sources in its decision.

270. Slip Opinion at 11-13.