Oregon State Bar Environmental & Natural Resources Section

OUTLOOK

Environmental & Natural Resources Section

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CULTURAL RESOURCES

Introduction

Amid all the issues developers, landowners and government officials face, the laws regulating cultural resources are often the most overlooked. A myriad of federal, state and local laws touch on cultural resources, and these laws commonly overlap and intersect. As a result, cultural resource protection requirements are easily lost in a sea of statutory and regulatory obligations.

Wrestling with cultural resource issues can be difficult. These resources are deeply important to the people connected to them, and opportunities for misunderstanding and disagreement abound. What "cultural resources" are, for example, can be a source of great debate. Depending on the point of view, cultural resources can mean historic buildings, archaeological sites, human remains, fish and plant populations, or even entire landscapes. Naturally, the diversity of perspectives—including what is and is not required by law—can lead to conflict. And, as the protection of cultural resources collides with other important interests, the path to resolution is often steep.

The articles in this issue of *Outlook* cover a variety of legal topics related to cultural resources, addressing subjects as varied as the treatment of human remains and religious freedom. Though by no means an exhaustive list, the topics were selected to give the reader a sense of what issues may arise when a project, decision or program affects cultural resources.

The opinions expressed are those of the authors, not necessarily of their respective organization, their clients, the Oregon State Bar, the Section of Environment and Natural Resources, or the editor of this issue.

NAGPRA After Bonnichsen

By Sara S. Kelly

Although the desecration of burial grounds and unauthorized disinterment of bodies are offenses at common law,[1] human remains have not always been treated equally. Archaeologists and anthropologists have long treated Native American remains and funerary artifacts as objects for study and the common law provided little protection for these items, let alone for their looting, sale, or display. Today, Oregon state codes address the protection of archaeological resources and return of human remains and other sacred objects.[2] Unfortunately, many state laws still fail to adequately protect Native American human remains.

The Native American Graves Protection and Repatriation Act

The Native American Graves Protection and Repatriation Act ("NAGPRA" or 'the Act") was passed to correct past abuses in the treatment of Native American human remains and items of cultural importance.[3] The Act not only banned unlawful excavation and trafficking in Native remains and associated artifacts, it also created a protocol to return human remains and important cultural artifacts to federally recognized Indian tribes.[4] It served to elevate the status of Native American human remains to the status Anglo remains had always enjoyed. NAGPRA was intended to protect the dignity of indigenous human remains and ensure that Native American graves and remains be treated with respect.[5]

While archaeologists were happy to have additional protections for ancient sites, many were upset at the prospect of returning human remains and artifacts to Native groups. Often, the culturally appropriate manner for taking care of Native human remains requires re-interring them in the earth with the appropriate ceremony. However, archaeologists argue that cultural resources are finite and fragile, and many scientists fear that reburying them, while culturally appropriate, is akin to throwing knowledge away. Human remains contain valuable information about past lifeways, including diet, disease, and lifestyle, and some archaeologists went so far as to label NAGPRA the "death knell" for archaeology.[6]

Bonnichsen v. United States

The most famous of the cases challenging NAGPRA pit Native American interests against scientific inquiry. A series of cases titled *Bonnichsen v. U.S.* concerned a 9,000-year-old skeleton which became known as "Kennewick Man." Kennewick Man was found in July of 1996 and was initially thought to have Caucasian features. In fact, many early European groups made claims to the remains, including the Asatru Folk Assembly. This created a great deal of interest and media because some believed the remains might therefore be proof of Caucasians in North America from a very early date. This was eventually disproved; in fact, the remains were not Caucasian, but similar to other ancient Native American people. The Kennewick remains are culturally significant to Native groups in the region, who would like Kennewick Man reburied in a respectful manner. However, because the skeleton is very old and mostly intact, it is of great scientific value, as well.

The U.S. Army Corps of Engineers was the government agency in charge of overseeing the management of Kennewick Man because the remains were found on Corps land. The agency looked to NAGPRA to determine the disposition of the remains, and found that Kennewick Man was Native American under the Act and awarded custody of the remains to a coalition of Indian tribes, including the Umatilla, Nez Perce, Yakama, Colville and Wanapum Band, who planned to rebury the skeleton. A group of scientists, including archaeologists, physical anthropologists, and others, wanted to conduct further studies of the remains, and challenged the decision of the Corps.

The scientist/plaintiffs sought a temporary restraining order against the repatriation of the remains in the United States District Court, District of Oregon, and Magistrate Judge Jelderks held that NAGPRA did establish a private right of action to obtain declaratory and injunctive relief that allowed the scientists to move forward with their challenge.[7] The Corps then moved for summary judgment arguing that the scientists did not have standing, and the scientists filed cross-motions to be allowed to study the remains.[8] The court found that the scientists did have standing and retained jurisdiction over the case pending remand of the matter back to the Corps for further reconsideration of whether the remains were Native American under the Act and if the scientists could conduct studies on Kennewick Man.[9]

The definition of "Native American" under NAGPRA became an important issue in *Bonnichsen*. NAGPRA defines human remains as "Native American" if they are "of, or relating to, a tribe, people, or culture that is indigenous to the United States." (emphasis added)[10] Judge Jelderks questioned whether human remains that are not directly related to a modern native group would be subject to NAGPRA. He stated that "the age of the remains is not, by itself, conclusive proof that these remains are related to contemporary Native Americans," and, therefore, they lack the cultural affiliation required for a tribe or native group to claim the remains.[11] After articulating these concerns, he vacated the Corps'

previous decision to repatriate the remains to the coalition of tribes for reconsideration by the Army Corps and denied study of the remains by the scientists in the interim.[12]

In 2000, the Department of the Interior determined that the Kennewick remains were "Native American" as defined by NAGPRA, and that the remains would go to the coalition of Tribal claimants based on their determination of cultural affiliation with the coalition tribes. Based on this decision, the scientists were denied the right to study the remains. The scientists then filed a complaint that brought seven claims for relief. In 2002, Judge Jelderks found that: (1) the remains were not Native American within the meaning of NAGPRA, (2) the coalition of tribes was not a proper claimant, (3) there was not enough evidence of a "cultural affiliation" between the remains and the tribal claimants, and (4) the scientist/plaintiffs could study the remains.[13]

The Department of the Interior appealed Judge Jelderks decision to the Ninth Circuit, and the tribes intervened for purposes of that appeal. However, in 2004, the Ninth Circuit also held that there must be some relationship between the human remains and a presently existing tribe, people, or culture to be "Native American" within the meaning of NAGPRA. The court also concluded that there was not enough evidence to show that link between Kennewick Man and the tribal claimants.[14] The Ninth Circuit found that the "remains are *so* old and the information about his era is *so* limited, the record does not permit [the government] to conclude reasonably that Kennewick Man shares special and significant genetic or cultural features with presently existing indigenous tribes, people, or cultures."[15]

Fallon Paiute – Shoshone Tribe v. U.S. Bureau of Land Management

In 2006, the court again considered NAGPRA in what has become known as the Spirit Cave case. Like in *Bonnichsen*, the issue before the court in *Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Management* also involved a determination of cultural affiliation between an ancient human skeleton and a current tribal group. However, the court in *Fallon Paiute-Shoshone Tribe v. U.S.* stopped short of reaching a conclusion about whether the "Spirit Cave Man" is culturally affiliated with the Fallon Paiute-Shoshone Tribe ("Tribe"), and remanded the issue to the Bureau of Land Management ("BLM") for further consideration.[16]

The case involves a skeleton found on BLM land near Fallon, Nevada in a place referred to as Spirit Cave. Although first excavated in 1940, the skeleton of Spirit Cave Man came into the public eye in 1995 when the remains were dated as part of the inventory process required by NAGPRA.[17] Originally thought to be only 1,500 to 2,000 years old, radiocarbon dating showed the bones to be nearly 10,000 years old.[18] As with Kennewick Man, the age of the bones brought requests for scientific inquiry and national media coverage as well as a request from the Tribe for repatriation of the remains under NAGPRA.[19]

The Bureau of Land Management eventually determined that the remains were Native American, but unaffiliated, and therefore denied the Tribe's request for repatriation of the remains, and allowed scientific study of the skeleton. After the denial, the Tribe submitted additional research into the affiliation between Spirit Cave Man and the Tribe, but the BLM maintained that the remains were not affiliated. In 2000, the Tribe requested a hearing with the NAGPRA Review Committee.[20] In 2001, the Review Committee found that the BLM had "failed to fairly and objectively consider all the available and relevant information, that the Spirit Cave Man remains were in fact culturally affiliated with the Tribe, and that the remains should be repatriated to the Tribe."[21]

In 2002, the BLM, stating that the NAGPRA Review Committee's findings were advisory only, and since there were regulations in the process of being promulgated regarding unaffiliated remains, it was premature to take up the issue at that time.[22] In 2004, the Tribe told the BLM that they considered that the BLM's determination that the remains were unaffiliated was a final agency action and filed their lawsuit.

The court considered the BLM's actions under the Administrative Procedure Act's "arbitrary, capricious, and abuse of discretion" standard for agency actions.[23] The court found that the BLM need only consider the additional evidence of affiliation from the Tribe. In addition, the court agreed with the BLM's assertion that the findings of the NAGPRA Advisory Committee were only advisory and not binding. However, the court found that the BLM could not show that it had actually considered the additional research from the Tribe or the findings of the Advisory Committee, and that the decision that the remains were unaffiliated without proof of consideration of this information was arbitrary and capricious and must be vacated.[24] The court stated that it was "incumbent upon BLM to reconsider its view on affiliation based on the Tribe's repatriation request, the findings of the Review Committee, and the evidence provided to BLM by the Tribe."[25] The case is currently remanded to the BLM for reconsideration of the question of cultural affiliation of Spirit Cave Man.

What Now?

Bonnichsen is still good law, and any indigenous human remains must currently meet the requirement that they can be linked to a presently existing indigenous tribe, people, or culture to be treated as "Native American" under NAGPRA as it is currently written. In response to the tension between the stated goals of NAGPRA—to restore respect for Native human remains by

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vesting ownership and control in the remains in Native descendents—and the interpretation of NAGPRA under the *Bonnichsen* cases, a legislative fix has been proposed. The legislation was first introduced in March of 2005 as part of the Native American Omnibus Act of 2005, but stalled in Congress.[26]

In March 2007, legislation was again proposed to broaden NAGPRA to provide repatriation of ancient remain to Native peoples.[27] Senate bill 2087, the Native American Omnibus Technical Corrections Act of 2007, amends the definition of "Native American" by adding the words "or was" so that it reads: "'Native American' means of, or relating to, a tribe, people, or culture *that is, or was* indigenous to the United States."[28] (emphasis added). This change would address the requirement from *Bonnichsen* that affiliation must be shown to a "currently existing" tribe, potentially providing more opportunities for ancient remains to be repatriated to modern tribes. S. 2087 has been approved by the Senate Indian Affairs Committee, and is currently pending. The future of the change is unsure, though, and counter legislation has been introduced in the House of Representatives both times that the changes to NAGPRA have been proposed.[29] The counter legislation seeks to protect scientific access to remains by formalizing the affiliation requirements laid out in *Bonnichsen*.[30]

In addition to the legislative fix, regulatory changes are being proposed to clarify how to deal with "culturally unidentifiable" human remains. On October 16, 2007, the Department of the Interior published a Proposed Rule to amend the NAGPRA regulations titled "Native American Graves Protection and Repatriation Act Regulations – Disposition of Culturally Unidentifiable Human Remains."[31] The proposed rule lays out the priorities for repatriating remains and artifacts, but includes "culturally unidentifiable" remains. First priority would go to the Indian tribe or Native Hawaiian organization on whose land, at the time of recovery, the remains were recovered. Second priority would go to the group recognized as aboriginally occupying the area where the remains are discovered. Third priority would be to aboriginal tribes or organizations with a cultural relationship to the region from which the remains were removed. The proposed rule also allows museums and other organizations to voluntarily transfer human remains and items of cultural patrimony.

While *Bonnichsen* remains the law of the land for now, it is possible that the legislative action to fix what was seen as either a gap in the original language of NAGPRA or a misreading of the statute will change future interpretations under the law. Meanwhile, from a cultural, scientific, or legal standpoint, Kennewick Man remains one of the more fascinating humans to be in the news in past years.

Endnotes

1 22 Am. Jur. 2d, Dead Bodies § 50.

2 ORS § 97.745. *See also,* ORS § 358.924 (archaeological resources that are illegally held in violation of Oregon law "shall be returned to the appropriate tribe for reinternment or other disposition").

3 Buckman, Deborah F., *Validity, Construction, and Applicability of Native American Graves Protection and Repatriation Act* (25 U.S.C. §§ 3001-9013 and 18 U.S.C. § 1170), 173 A.L.R. Fed. 585 (originally published in 2001).

4 NAGPRA, 25 U.S.C. § 3001 et seq.

5 H.R. REP. NO. 101-877 (1990), *see also* S. Rep. No. 101-473, at 6 (1990).

6 See e.g., Kosslak, Comments, *The Native American Graves Protection and Repatriation Act: The Death Knell for Scientific Study?*, 24 Am. Indian L. Rev. 129 (2000).

7 *Bonnichsen v. U.S.,* 969 F. Supp 614 (1997).

8 *Bonnichsen v. U.S.*, 969 F. Supp. 628 (1997).

9 *Id.* at 654.

10 25 U.S.C. § 3001(9).

11 *Id.* at 651.

12 *Id.* at 654.

13 *Bonnichsen v. U.S.,* 217 F.Supp.2d 1116.

14 *Bonnichsen v. U.S., Dept. of the Army,* 367 F.3d 864.

15 *Id.* at 882.

16 *Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Management,* 455 F.Supp.2d 1207, 1226.

17 *Id.* at 1210.

18 *Id.*

19 *Id.* at 1209-1210.

20 The Native American Graves Protection and Repatriation Review Committee was established to monitor and review the implementation of the inventory and identification process and repatriation activities required under NAGPRA. The Committee also hears disputes on factual matters to resolve repatriation issues and facilitate the resolution of any disputes between Indian tribes, Alaska Native villages and corporations, and Native Hawaiian organizations among Native peoples and Federal agencies or museums relating to the repatriation of human remains, funerary objects, sacred objects, and objects of cultural patrimony. From http://www.nps.gov/history/nagpra/REVIEW/Charter_2006.htm.

21 *Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Management,* 455 F.Supp.2d at 1212.

22 *Id.* The BLM is referring to C.F.R. § 10.11, which has been reserved in the Code of Federal Regulations for a regulation entitled "Disposition of culturally unidentifiable human remains." See discussion below.

23 *Id.* at 1216-1217, *citing* 5 U.S.C. § 706(2)(A).

24 *Id.* at 1224.

25 *Id.*

26 S. 536, 109th Cong. § 108 (2005).

27 S. 2087, 110th Cong. § 2 (2007).

28 *Id.*

29 H.R. 4027, 110th Cong. (2007).

30 *Id.*

31 43 C.F.R. Part 10, Fed. Reg., Vol. 72, No. 199.

Early and Frequent Consultation Gets Best Results with the National Historic Preservation Act's Section 106 Process

By Diane Henkels[1]

The purpose of the National Historic Preservation Act of 1966 (NHPA), as amended, 16 U.S.C. §§470-470W-6, is to preserve the history and prehistory of this country and protect for future generations the historical and cultural properties that are part of the nation's heritage. Section 106 of the NHPA[1] requires federal agencies to consider the impact of their "undertakings"[2] on historic properties.[3] Many different persons and entities use the NHPA to protect the nation's heritage, but the statute as amended in 1992, and regulations adopted by the Advisory Council on Historic Preservation ("ACHP")[4], also focused specifically on Indian tribes. The statute requires each federal agency to make a reasonable and good faith effort to consult with appropriate Indian tribes in evaluating the potential effect of any undertaking which may affect a historic property that may have significance to a tribe.[5] The goal of consultation is to give the affected Indian tribe a meaningful role in identifying historic properties potentially affected by the undertaking, assessing the undertaking's potential effects on the historic properties, and seeking ways to avoid, minimize or mitigate any adverse effects on historic properties.[6] Timely and meaningful consultation with tribes, therefore, is key to complying with Section 106.

Section 106 mechanics

The text of Section 106 reads:

> 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." 16 U.S.C. §470f .[7]

Besides tribes, the core participants in the Section 106 process include the federal agency, State Historic Preservation Officer ("SHPO"), the tribal equivalent of the SHPO (the Tribal Historic Preservation Officer, or "THPO") if the undertaking is on tribal lands,[8] and the ACHP.[9]

The existence of an undertaking with the potential to cause effects on historic properties triggers the Section 106 compliance process.[10] Generally, to determine whether an action is an "undertaking," the agency must evaluate whether the project at issue is to be completed by a federal agency, with the use of any federal funds, or whether it requires federal approval such as a federal permit or license. At that point the government agency should also invite the SHPO/THPO, and affected tribes, and other "consulting parties" to participate early in the process.[11]

The statute provides that properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register. If a property of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register, the statute specifically requires the agency to consult with any Indian tribe that attaches significance to the property.[12] For Section 106, "consultation" means the process of seeking, discussing, and considering the views of the other participants, and, where feasible, seeking agreement with them regarding matters arising in the Section 106 process.[13]

In consultation with the applicable SHPO/THPO, the agency must determine the area of potential effects ("APE"[14]) of the undertaking, and gather information on historic properties, including those located off tribal land, within the APE.[15] To that end, the ACHP regulations direct the action agency to gather information from any Indian tribe identified in 36 C.F.R. § 800.3(f) to assist in identifying properties which may be of religious and cultural importance to the tribe.[16] Based on that information, the agency must make a "reasonable and good faith effort" to identify historic properties.[17] Then, applying the National Register criteria, the agency must assess whether properties within the APE are eligible for the National Register.[18] For tribes, historic properties include but are not limited to those known as "traditional cultural properties."[19]

If the results indicate that the undertaking would not affect any historic properties, the agency must provide documentation of that finding to the SHPO/THPO, notify all the consulting parties, including an Indian tribe which does not have a THPO, and make the documentation available for public inspection before approving the

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undertaking.[20] If the applicable SHPO/THPO does not object within 30 days of receiving the documentation, and no consulting party has objected, then the agency's Section 106 responsibilities are complete.[21] If the applicable SHPO/THPO or any Indian tribe that has made known that it attaches religious and cultural significance to a property subject to the finding does timely object to the agency's finding, the agency must consider how to move forward in the Section 106 process.[22]

After receiving input from all consulting parties, if the agency determines that the undertaking would affect historic properties, then the agency must determine whether the undertaking would cause any "adverse effects."[23] The regulations define adverse effects as occurring when the proposed undertaking alters, either directly or indirectly, any of the characteristics of the property that qualify it for inclusion in the National Register "in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling or association."[24] If the agency concludes there are no adverse effects, it must notify all the consulting parties of this proposed finding and provide them with supporting documentation.[25] Thereafter the parties will have 30 days to disagree and specify their reasons, and then the agency shall either consult further with the party to resolve the issue or request the ACHP to review the finding.[26]

If there are adverse effects, the agency must consult with the SHPO/THPO and other consulting parties (including affected tribes) to seek ways to avoid, minimize or mitigate the adverse effects.[27] Section 106 does not require avoidance of adverse effects, or require that the undertaking have no effect on the historic property, but in some cases the agency may relocate the undertaking entirely. For example, when siting communications facilities on the Hanford Nuclear Reservation ("HNR") the Department of Energy has engaged in consultation regarding sacred sites on the HNR to the point where some facilities are relocated to another part of the HNR or a plan may be scrapped entirely.

After consulting to resolve adverse effects, the agency, SHPO/THPO, or the ACHP may determine that further consultation will not be productive and terminate consultation.[28] Any party that terminates consultation must notify the other consulting parties and provide reasons for the termination in writing.[29] If the agency terminates consultation the agency must request the ACHP to comment by providing its views and the agency must notify all consulting parties of the request.[30] The ACHP then provides an opportunity for the agency and all the consulting parties and the public to comment, and the agency must provide upon the ACHP's request any additional information concerning the undertaking and assist with an onsite inspection and opportunity for public participation.[31] The ACHP has 45 days from the agency's request to provide comments to the agency, the other consulting parties, and others as appropriate.[32] The agency head must take these comments into account in reaching a final decision, and document the decision including providing a summary of the decision that includes the rationale and evidence supporting it to the ACHP prior to approving the undertaking.[33] The agency must provide a copy of the summary to the other consulting parties.[34]

If there are adverse effects that the agency and SHPO/THPO agree can be avoided, minimized, or mitigated by taking certain actions or approaches in the undertaking, the parties will negotiate a Memorandum of Agreement ("MOA").[35] The MOA will identify how the adverse effects will be resolved, and the execution of the MOA evidences agency compliance with Section 106.[36] If the agency and the SHPO or THPO fail to agree on the terms of an MOA, the agency must request that the ACHP join the consultation and the parties to the consultation will seek ways to avoid, mitigate or minimize the adverse effects of the undertaking.[37] If the parties agree on how to resolve the adverse effects they will execute the MOA.[38] Only the signatories have the right to amend or terminate a Section 106 MOA.[39] The agency may also invite all consulting parties to concur in the MOA, and Indian tribes have often signed MOAs under the NHPA as "concurring parties."[40] However, concurring parties do not have rights to enforce the terms of an MOA. Further, the refusal of a party invited to concur does not invalidate the MOA.[41]

It is possible for tribes, and any other entity, at the invitation of the agency, to be an MOA signatory party with the authority to enforce the agreement. The agency official should invite any party that assumes a responsibility under an MOA to be a signatory.[42] There are many reasons why agencies might consider inviting tribes to be signatory parties. Tribes often provide cultural resources expertise which enables the agency to perform the due diligence necessary when agency action involves ground disturbing activities. Also, tribal participation in an agreement concerning a development project ensures some minimum tribal support for the activity, and possibly eligibility for other federal aid to further the project.

Note that when an MOA is filed with the ACHP, the documentation must include substantive revisions or additions, an evaluation of any measures considered to avoid or minimize the undertaking's adverse effects and a summary of the views of consulting parties and the public.[43] Therefore, if the tribes or other consulting parties do not sign the MOA, the agency should request a summary of the consulting parties' views and include that summary with the MOA submitted to the ACHP.

Section 106 consultation in practice

Consultation is important at all stages of an undertaking and can greatly assist an agency to identify adverse effects and find resolution

or mitigation. If begun early and properly in the process, consultation can improve the project's long-range efficiency. Agencies that do not consult in good faith put their undertakings in jeopardy. In *Pueblo of Sandia v. U.S.*, the U.S. Forest Service ("Forest Service") decided to construct a road and other improvements in Las Huertas Canyon in the Cibola National Forest, and the Sandia Pueblo near the canyon voiced concerns over the alternative chosen, appealing the Forest Service's decision in 1990.[44] Despite knowing that the area was of religious and traditional importance to the Pueblo, and that tribal members were not disclosing specific information about site locations and activities because of the sensitive nature of such sites and activities, the Forest Service only found that certain identified sites were not eligible for the National Register and concluded its Section 106 review. The court found that, because the Forest Service did not make a good faith and reasonable effort to identify historic properties in the canyon, the agency did not comply with the NHPA.[45] Failure to consult, therefore, can have real consequences for the future of an undertaking.

In comparison, the court in *Navajo Nation v. U.S. Forest Service* reviewed whether the Forest Service complied with the NHPA in allowing the Snowbowl ski resort, located in the San Francisco Peaks of Arizona, to increase the resort's area and to use reclaimed wastewater for snowmaking at the resort.[46] The court held that the Forest Service made extensive, good faith efforts to seek tribal input on the religious and cultural significance of the Peaks, and provided a reasonable opportunity for the tribes to participate in the resolution of the proposal's potential adverse effects.[47] The court's decision was recently upheld in an en banc decision of the Ninth Circuit Court of Appeals.[48]

Effectiveness and enforceability of Section 106 MOAs

While the consultation process is perhaps the most influential aspect of Section 106, the MOA provides grounds for forcing action. The value of being a concurring party lies in being able to influence the process of resolving the adverse effects, rather than in being able to enforce the MOA. A concurring party may influence the process when that concurring party withdraws from the process and thereby sheds doubt on the agency's good faith. However, given the lack of enforceability of concurrence, some parties may choose to resist signing the MOA altogether.

Even if a person or entity is neither a signatory nor a concurring party to the MOA or even referenced in the document, a third party may enforce the MOA depending on its terms. In *Tyler v. Cuomo*, homeowners near the site of low-income housing project in San Francisco's Mission District brought action against the developers, the City, and Department of Housing and Urban Development (HUD).[49] In *Tyler*, a stipulation of the MOA specifically provided that if a "member of the public" makes a written complaint, "the City shall take the objection into account and consult as needed with the objecting party." The homeowners were neither signatories nor concurring parties to the MOA, however, the court concluded that they had standing under the MOA. Even though the project buildings were built and occupied by the time the court heard this matter, the court found that consultation would require the assertedly injured homeowners and representatives of the City, which caused the injury, to sit down together in a face-to-face meeting. The homeowners could, conceivably, directly impact the City's decisions. Although the project was substantially completed, the court found that changes could still be made to minimize any adverse impacts on the homeowners' properties.

NHPA and NEPA

Much of Section 106 is similar to the National Environmental Policy Act (NEPA) process. Both statutes are procedural and entail identifying a geographic scope of an undertaking or project, involving necessary parties, analyzing alternatives, and making a final decision. NHPA regulations require coordinating with the NEPA process, and the NEPA process can be used to comply with Section 106.[50] And Section 106 regulations specifically describe how to integrate Section 106 consultation when preparing the NEPA environmental assessments or the environmental impact statements.[51] However, while some of the procedures may be integrated, compliance with NEPA does not mean compliance with NHPA. There is no SHPO or THPO equivalent in NEPA, and a categorical exclusion under NEPA does not remove the obligation to comply with the Section 106 obligations under the NHPA.[52]

The NHPA is a widely litigated federal cultural property law, and a basic understanding of the statute and the Section 106 regulations is essential for any lawyer working with clients dealing with federally funded or permitted projects. Section 106's key effectiveness is the power of consulting parties to influence the process of the undertaking, and the earlier consultation begins, the better. Consultation between agencies and Indian tribes is an important exercise of tribal influence in government undertakings, and tribes are increasingly demanding compliance with NHPA procedures. It is essential to understand the role of consultation and to develop best practices in this area to get best results.

Endnotes

1 Diane Henkels, Attorney at Law, is in private practice based in Portland, Oregon. She has worked on projects which have included protection of Native American cultural resources and federal government projects.

2 16 U.S.C. § 470f.

3 An "undertaking" is a project, activity or program funded in whole or in part, under the direct or indirect jurisdiction of a Federal agency including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance, and those requiring a federal permit, license or approval. 36 C.F.R. § 800.16(y).

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OUTLOOK
Environmental & Natural Resources Section

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CULTURAL RESOURCES

There are Issue Editor and author opportunities available for upcoming newsletters. As Issue Editor you can coordinate writers and articles to educate ENR Section members on a timely topic. Each issue has at least one volunteer issue editor.

We are also seeking volunteers to write case summaries of leading environmental and natural resources cases. If interested, please contact David Ashton.

Those wishing to follow up on topics addressed in *Outlook* should consider purchasing the 2006 Supplement to the Environmental and Natural Resources Law Deskbook. With 43 chapters of detailed information, the Deskbook and Supplement present discussions on national and Oregon environmental statutes, rules, and cases. Contact OSB CLE Publications or an ENR Executive Committee Member for more information.

Attorneys using *Outlook* should also research original and other sources.

4 "Historic property" is any property included in, or eligible for inclusion in, the National Register of Historic Places ("National Register"). 25 C.F.R. § 800.16.

5 The ACHP promulgates the regulations, generally oversees the Section 106 process, and may enter the process to help resolve disagreements among the parties. 36 C.F.R. 800.2 (b)(1). For a case addressing the ACHP's statutory authority, see *National Mining Association v. Fowler,* 324 F.3d 752 (C.A.D.C. 2003).

6 36 C.F.R. § 800.2 (c).

7 36 C.F.R. § 800.1.

8 The Advisory Council on Historic Preservation website (www.achp.gov) includes many useful materials on NHPA compliance.

9 With approval by the Secretary of the Interior, a Tribal Historic Preservation Officer (THPO) may assume the SHPO functions with respect to tribal lands, that is, lands within the exterior boundaries of an Indian reservation and all dependent Indian communities. 16 U.S.C. § 470a(d)(2), 36 C.F.R. § 800.16(x).

10 36 C.F.R. § 800.2.

11 Pursuant to 36 C.F.R. § 800.3(a)(1), an agency has no consultation obligations under Section 106 only if the undertaking "is a type of activity that does not have the potential to cause effects on historic properties." By definition, this is a narrow exception to the Section 106 consultation process.

12 36 C.F.R. § 800.3.

13 16 U.S.C. § 470a(d)(6), 36 C.F.R. § 800.2(c).

14 36 C.F.R. § 800.16(f).

15 The APE is the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. 36 C.F.R. § 800.16(d).

16 36 C.F.R. § 800.4(a).

17 36 C.F.R. § 800.4(a)(4).

18 36 C.F.R. § 800.4(b).

19 36 C.F.R. § 800.4(c).

20 For National Park Service guidance on traditional cultural properties, see National Register Bulletin 38 at http://www.nps.gov/history/nr/publications/bulletins/nrb38/.

21 36 C.F.R. § 800.4(d).

22 *Id.*

23 *Id.*

24 36 C.F.R. § 800.5(a).

25 *Id.*

26 36 C.F.R. § 800.5(c).

27 *Id.*

28 36 C.F.R. § 800.6(a).

29 36 C.F.R. § 800.7(a).

30 *Id.*

31 *Id.*

32 36 C.F.R. § 800.7(c).

33 *Id.*

34 *Id.*

35 *Id.*

36 36 C.F.R. § 800.6(b).

37 36 C.F.R. § 800.6(c).

38 36 C.F.R. § 800.6(b).

39 *Id.*

40 36 C.F.R. § 800.6(c).

41 *Id.*

42 *Id.*

43 36 C.F.R. § 800.6(c)(2).

44 36 C.F.R. § 800.11(f).

45 50 F.3d 856, 858 (9th Cir. 1995).

46 For another case decided in part on an agency's failure to consult under Section 106, see *Pit River Tribe v. U.S. Forest Service,* 469 F.3d 768 (9th Cir. 2006).

47 408 F.Supp.2d 866 (2006).

48 *Navajo Nation,* 408 F.Supp.2d at 879-880. The court found the record replete with agency efforts to involve the tribes. For example, three separate letters were sent out and three sets of phone calls were made requesting tribal input, and to meet and discuss. Throughout the tribal consultation process, the Forest Service made over 200 calls, held 41 meetings, and exchanged 245 letters with tribal representatives. The Forest Service sent each tribe a draft MOA along with invitation to participate as a consulting party to develop the agreement, which consultation ended up in execution of the MOA with the required parties, and four Indian tribes signed the agreement. *Id.*

49 2008 WL 3167692 (9th Cir. 2008). (Adopting the lower court's reasoning.)

50 236 F.3d 1124 (2000).

51 36 C.F.R. § 800.8.

52 *Id.*

53 36 C.F.R. § 800.8(b).

Relics and Ruins: An Introduction of Cultural Resource Procedures in Oregon

By David V. Ellis, M.P.A.[1]

Addressing cultural resource procedures can be challenging, even for those who have made it their profession. Understanding the basics of the procedures can substantially improve your ability to successfully meet the requirements and maintain good working relationships with the agencies and tribes that are key players in the process. Having been in practice as an archaeologist and project manager for over 30 years, I've tried to outline below some of the main steps in the process, as well as some of the technical details that can influence important variables such as schedule and costs. I've also focused on those elements that can help in selecting the right cultural resource consultant for those projects that involve retaining the services of a consultant.

Under Oregon and federal law, cultural resources consist of archaeological and historical resources and traditional cultural properties (TCPs). Cultural resource consultants also often play an important role in addressing Indian burials. Both Oregon and federal law assign the highest level of protection to resources that are considered "significant." The definition of significance under Oregon and federal law are similar and will be outlined in more detail below. Differences between Oregon and federal requirements in this regard will be noted in the discussion that follows. The federal process is defined first and in some detail since it provides the general framework for the state process in Oregon.

The Federal Process

Federal agencies address potential project effects to cultural resources primarily through Section 106 of the National Historic Preservation Act. Two other pieces of federal legislation—the Archaeological Resources Protection Act (ARPA) and the Native American Graves Protection and Repatriation Act (NAGPRA)—apply only to actions on federal and tribal lands. Section 106 applies to any federal "undertaking" and includes federally funded projects, whether on federal or non-federal land, and the issuance of federal permits and licenses. Private developers are most likely to encounter these requirements when applying for wetland fill (Section 404) permits from the U.S. Army Corps of Engineers. Municipalities often have to address Section 106 requirements in order to obtain federal funding for infrastructure development.

The Section 106 requirements are defined in 36 CFR 800, which lays out a phased approach to identifying, evaluating, and mitigating adverse effects to significant cultural resources. "Significant" resources are those listed on or considered eligible for listing on the National Register of Historic Places (NRHP). The NRHP in turn has four criteria for listing/eligibility, which are defined in 36 CFR 60.4. In general, historic buildings are significant if they have associations with important individuals or events or if they have unusual architectural style, construction methods, or technological features. They may also be significant if they are a good representative of a particular style or construction method. Archaeological sites are usually significant if they can contribute to important research questions. TCPs can also be significant for their associations with important individuals or events but may also be important for their legendary or mythic associations or if they are important to the cultural identity of a community. Generally, resources 50 years or older have to be evaluated for their significance, and even resources that achieve significance in the past 50 years can be eligible for the NRHP if they are exceptionally important (36 CFR 60.4). In the federal process, all significant cultural resources are designated "historic properties," including archaeological sites and TCPs.

The key players in the federal process are (1) the agency responsible for the undertaking, (2) tribes with interests in or associations with the project location, (3) the relevant State Historic Preservation Office(s) (SHPO), (4) the project proponent, if not the agency itself, and (5) other interested parties (e.g., historic societies and museums, the local community). The 106 regulations require coordination and consultation with these players throughout the process. Federal agencies typically delegate some of their responsibilities for meeting the 106 requirements to proponents, who usually contract with professional cultural resource consultants to conduct the necessary studies. But agencies have ultimate responsibility for ensuring compliance with cultural resource laws and regulations (except, at least in one case, when assumed by other entities under U.S. Department of Housing and Urban Development rules; see 24 CFR Part 58).

It is important that any consultants retained in the federal process meet the Professional Qualifications Standards of the *Secretary of the Interior's Standards and Guidelines in Archaeology and Historic Preservation*. Minimally, supervisory personnel and those with oversight on the studies must have graduate degrees in their

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respective disciplines (e.g., archaeology, anthropology, history).

The first step in this process is to identify any cultural resources that may be affected by the proposed action. An "area of potential effects" (APE) is usually defined by the agency, in consultation with the players listed above. As a general rule, any known or likely-to-be-present resources within the APE that meet the 50-year threshold are to be identified. This step in the process requires a review of records maintained by the SHPO on previous studies in the project area and the results of those studies and a review of literature on the archaeology and prehistory, Native peoples, and historical development of the project location. If no resources are likely to be affected by the undertaking and the consulting parties agree, the process is finished.

If there are resources identified, those resources must be evaluated for National Register eligibility (unless they have been previously listed on or determined eligible for listing on the NRHP). Evaluation of archaeological resources usually entails systematic fieldwork. Most archaeological field studies on federal or tribal lands require obtaining an ARPA permit from the appropriate agency. ARPA permits are issued only to qualifying archaeologists or institutions, and issuance of permits can take periods ranging from a few weeks to months. For historic-period buildings and structures, evaluation usually requires both research and field studies. Evaluation of TCPs typically involves ethnographic and historical research and gathering of oral histories.

If this step results in a determination that no resources are significant and the consulting parties agree, no further actions are necessary. It is important to note that consultants can only provide recommendations regarding resource significance. The final decision regarding NRHP eligibility is the prerogative of the agency, with concurrence from the SHPO.

If significant cultural resources are determined to be present and those resources would be adversely affected by the proposed undertaking, the agency must try to avoid, minimize, or mitigate the adverse effects. Avoidance often requires relocating, redesigning, or re-engineering the project or project elements. In some instances it is possible to undertake "preservation in place." For example, it may be possible to place fill over an archaeological site and proceed with development on the fill (but a number of factors such as the type of fill, its thickness, how it is placed, etc., will determine if this is an acceptable option). If avoidance or preservation in place is not a practicable alternative, mitigation may take several forms. For archaeological sites, data recovery excavations are often conducted to recover a sample of the archaeological deposits prior to disturbance or destruction. For historic buildings, comprehensive documentation of the building may be required or an effort may be made to locate an organization or individual who will take ownership and move the building off-site. Off-site mitigation measures may also be an option, as well as development of interpretive and educational exhibits and publications. As with the other steps in this process, agreement among the consulting parties is preferred but not necessary before any mitigation measures are implemented.

Oregon State Process

It is important to emphasize that Oregon has established a policy that protects archaeological resources on both private and public lands (ORS 358.920). There is no formally defined process for addressing cultural resources in Oregon, but the SHPO informally follows the federal process; i.e., identification, evaluation, and mitigation of adverse effects. The Oregon Department of Energy has regulations that require addressing effects to archaeological and historical resources in the Energy Facilities Siting Council process (OAR 345-022-0090), and the Department of State Lands requests applicants for removal-fill permits to provide information regarding archaeological and historical resources (OAR 141-085-0025(3)(o)). The Oregon Department of Environmental Quality has prepared *Guidance for Protecting Cultural Resources During Cleanup Work* http://www.deq.state.or.us/lq/pubs/docs/cu/GuidanceProtectingCulturalResources.pdf. These agencies, however, generally defer to the SHPO and Tribes on how the appropriate studies should be conducted. The Oregon Department of Transportation, on the other hand, has specific internal procedures for addressing cultural resources in its projects, which closely follow the federal process.

There are also standards and procedures of the SHPO that differ from or influence the federal process. Oregon law (ORS 358.905) has a 75-year threshold for "archaeological objects" rather than the 50-year threshold, although the 50-year threshold generally applies to historic buildings in both the state and federal processes. The SHPO distinguishes between archaeological "isolates" and "sites." "Isolates" are occurrences of fewer than 10 artifacts; "sites" are occurrences of 10 or more artifacts (*see Guidelines for Conducting Field Archaeology in Oregon* at http://www.oregon.gov/OPRD/HCD/ARCH/ docs/draft_field_guidelines.rtf). The general SHPO policy is that isolates are, by definition, not significant resources.

Oregon law (ORS 358.920, 390.235) requires obtaining a State of Oregon Archaeological Permit from the SHPO for any proposed excavations within a known archaeological site, to collect artifacts (whether on private or non-federal public lands), or for any exploratory excavations to determine if archaeological resources are present on non-federal public lands; and, to excavate an Indian burial, Oregon law (ORS 97.750) requires prior written notice to the SHPO and the State Police and the prior written consent of the appropriate Tribe. Permits are issued only to "qualified" archaeolo-

gists as defined in ORS 390.235(6)(b). The usual processing time for permit application is approximately five weeks but permits in emergency situations can be issued within 48 hours. The procedures for obtaining permits are defined in OAR Chapter 736, Division 51. Excavations of an Indian burial may only be performed by a "professional" archaeologist.

Finally, the SHPO maintains a list of consultants who have passed the SHPO's vetting process (http://www.oregon.gov/OPRD/HCD/ARCH/docs/archaeologists.pdf). The SHPO does not guarantee the performance of any of these consultants, however, and therefore you should not assume that retaining any of these consultants will guarantee acceptance of their work by agencies, Tribes, or the SHPO. But all of these consultants should have staff who meet federal and state professional standards and have familiarity with federal and state procedures and requirements.

Some Final Observations

Addressing cultural resource requirements can become a convoluted process, consuming time and money. But the vast majority of projects are fairly routine. In general, small-scale projects occupying small acreages can move through this process with relative ease. Of critical importance is to bring the key players—agencies, SHPO, and the appropriate Tribes—into the process at the earliest possible stage. "Consult early and consult often" should be a guiding principle. And when it is necessary to hire a cultural resource contractor, make sure who you hire has the professional credentials, understands both the technical requirements and the procedures, and is in good standing with the relevant agencies, SHPO, and Tribes.

Useful links:

The federal Advisory Council on Historic Preservation Website (http://www.achp.gov/) provides guidelines for meeting Section 106 requirements.

Copies of federal cultural resource laws and regulations are available on the National Park Service's Website (http://www.nps.gov/history/laws.htm).

The Oregon SHPO Website (http://www.oregon.gov/OPRD/HCD/) provides links to Oregon statutes and SHPO policies and procedures.

Endnotes

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Cultural Resources – Local Land Use Regulation

By Ellen Hawes Grover[1]

Introduction

Local land use regulation of cultural resources is most often within the purview of Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces).[2] Goal 5 has been called by some "the kitchen sink"—meaning any resource that no one knew quite what to do with went under the purview of Goal 5. Indeed, Goal 5 attempts to deal with a very diverse set of resources (e.g., riparian areas, fish habitat, wildlife habitat, scenic rivers and sites, natural areas, and cultural and historic resources) and does so through, primarily, procedural/planning means. The result of local planning procedures and requirements can impose mandatory obligations on a land use applicant that may impact its ability to get permits and/or could result in local land use enforcement, in addition to state and federal enforcement of cultural resource protection standards.

Cultural Resources Defined

Taken alone, cultural and historic resources can include a very diverse set of resources. For example, the cultural resource managers of the Confederated Tribes of the Warm Springs Reservation of Oregon ("CTWS") consider cultural resources to include prehistorical, historical and traditional sites, both below and above ground. These can include (among many others) buried lithic scatters or human remains, pioneer or native trails, ceremonial sites, traditional food hunting, gathering or fishing sites and resources, and pioneer or native settlements. At bottom, cultural and historic resources deal with human societies. The Statewide Planning Goals define "historic resources" as "those districts, sites, buildings, structures, and artifacts which have a relationship to events or conditions of the human past."[3] The definition is sufficiently broad to identify that Goal 5's management direction related to wildlife and fish habitat, riparian corridors, scenic waterways, open space and natural areas also in large respects includes cultural and historic resource management.

For example, Goal 5 provides a tool, in addition to other federal and state authorities, through which tribes may participate and provide expertise to help preserve their unique culture, history and traditions and also to help protect their ability to exercise reserved federal treaty

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rights. Designated wildlife habitat, for example in Jefferson County, helps to protect necessary habitat and forage needed to sustain culturally significant deer herds that migrate across tribal, federal, state, county, and private ownerships and jurisdictions. Without this tool, these herds would quickly diminish and it would be difficult for the CTWS to exercise any reserved treaty rights on federal lands (or on the reservation) to hunt these species.

Goal 5 Direct Treatment of Historic Resources

The more mainstream conception of "cultural resources" management is Goal 5's direct treatment of it. Goal 5 and its implementing regulations require local jurisdictions to inventory "cultural areas" and encourage them to maintain current inventories of "historic resources."[4] "Cultural areas" is not defined, but it appears to be a subset of the fairly broadly defined "historic resources."[5]

Local Designation of Significant Historic Resources

Local governments are required to "designate"—formally adopt as a land use regulation—"significant" historic resources.[6] The determination of significance is to be guided largely by the National Register Criteria for Evaluation (meaning resources that are eligible to be listed on the National Register) and any locally developed criteria.[7] The National Register Criteria for Evaluation are worded purposefully in a manner to provide for a wide diversity of resources. Local designation is entirely voluntary on the part of the land owner.[8] A land owner may opt out of initial designation or request removal from the designation.[9] Jurisdictions are also encouraged to adopt historic preservation regulations regarding the demolition, removal, or major exterior alteration of all locally "designated" resources in that jurisdiction.[10] It is encouraged for these regulations to be consistent with Department of Interior's Standards and Guidelines for Archeology and Historic Preservation.[11] These standards provide guidance for organizing into a logical sequence, preservation information pertaining to the identification, evaluation, registration and treatment of historic properties, and set priorities for accomplishing preservation activities.

Protection of Historic Resources of Statewide Significance

A mandatory obligation is for local jurisdictions to "protect" all historic resources of "statewide" significance through local historic protection regulations regardless of whether they are "designated" in local regulations.[12] These are resources that are actually listed—rather than just eligible to be listed—in the National Register of Historic Places or within national historic districts under the National Historic Preservation Act. Actual designation under these federal lists is also largely voluntary. "Protect" means only that the local jurisdiction must review applications for demolition, removal or major exterior alteration of a historic resource.[13]

Authorization for Historic Resource Programs

At bottom, the mandatory Goal 5 regulatory obligations are fairly minimal; however, Goal 5 provides authorization for adoption of comprehensive historic preservation planning programs. These can focus regulations on the preservation of specific designated resources. Another approach is to adopt ordinances whose provisions are triggered by proposed uses within high probability areas for archeological resources (i.e., those below ground) that may not yet be designated. Although Goal 5 considers both above- and below-ground designated resources together as historic resources, many jurisdictions address above-ground resources and below-ground resources in separate code provisions. That is, in part, because many archeological resources are not yet discovered or designated and because there are non-Goal 5-oriented state and federal provisions that can be codified into local law that deal with archeological resources.

For example, the City of Hood River, Jefferson County, Multnomah County and the City of Portland have Historic Preservation/Historic Resource overlay zones that focus on protecting "designated" resources through various review, mitigation and design methods. These are clear Goal 5 ordinances, and the majority of the resources designated are above-ground.

The City of Portland, Multnomah County and Hood River County have recognized that the Columbia River area was traditionally and still is used by Native Americans for subsistence, ceremonial, religious, commercial and cultural purposes. There is, therefore, a threat that ground disturbing activities may adversely impact significant archeological historic resources. Multnomah County and Hood River County have adopted local provisions that pertain to those portions of the counties that are within the Columbia River National Scenic Area and that are required under the Columbia River Gorge National Scenic Act. These require, among other things, coordination with interested Indian tribes, historic and/or reconnaissance surveys, and avoidance and/or mitigation of impacts.[14] These code provisions also include protocols when archeological resources are discovered after construction has begun.[15] The City of Portland's Columbia South Shore Plan District contains similar provisions.[16] All of these programs, too, appear to be Goal 5 programs, since OAR 660-023-0200(3) and (7) provide for the creation of programs to manage and/or protect historic resources, whether the historic resources are designated in the local plan or not.

In addition to the stated purposes of the archeological resource-focused ordinances, a benefit of these provisions is to assist land owners

or developers from violating state law which prohibits the excavation, injury, destruction, or alteration of archeological sites or objects unless authorized by a state permit under ORS 390.235.[17] For example, while Jefferson County has opted not to identify high probability areas and require pre-disturbance surveys, it has codified some of these state prohibitions/requirements into local law.[18] Because the provision is not tied to an identified resource site or district, it is unclear whether this would be considered a Goal 5 program (*compare* OAR 660-023-0050(1) (for each resource site, local governments shall adopt comprehensive plan provisions and land use regulations) *with* OAR 660-023-0200(2) (addressing the need for local governments to enact local provisions in order to provide new or amended programs regarding historic resources, which need not be specifically designated or identified in advance)). Violation of local ordinance provisions can include enjoining further action, local damage assessments, or removal of development among others.[19]

In summary, all of the above local code provision examples appear to be Goal 5 programs. Accordingly, to the extent a practitioner seeks to modify or propose cultural resource regulations, one must carefully review the Goal 5 rule to determine the process required for any such amendment. Under fairly recent case law, it appears that most such modifications will be exempt from conducting the rather significant requirement to conduct an Environmental, Social, Economic, and Energy (ESEE) analysis.[20] In any event, however, all of the above local code provisions also may impact the scope and nature of the land use entitlement sought through a land use permit and they provide yet another avenue for enforcement action on the local level for any violations of the same.

Endnotes

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2 OAR 660-015-0000(5).

3 Oregon Statewide Planning Goals & Guidelines, Definitions; *see also* OAR 660-023-0200(1)(c).

4 OAR 660-015-0000(5); OAR 660-023-0200.

5 *Id.*

6 OAR 660-023-0200(5).

7 OAR 660-023-0200(4).

8 OAR 660-023-0200(5).

9 OAR 660-023-0200(6).

10 OAR 660-023-0200(7).

11 *Id.*

12 OAR 660-023-0200(8).

13 OAR 660-023-0200(1)(d),(e).

14 *See* Multnomah County Code, Chapter 38.7045 and .7050; Hood River County Zoning Ordinance Article 75, Section 540.

15 *Id.*

16 *See* Portland City Code, Chapter 33.515.

17 *See* ORS 358.905 et seq.

18 *See* Jefferson County Zoning Ordinance ("JCZO"), Section 429.

19 *See e.g.,* JCZO, Section 1002.

20 *NWDA v. City of Portland,* 50 Or LUBA 310 (2005); OAR 660-023-0200(7).

Can the Religious Freedom Restoration Act Protect the Peaks?

By Lisa Bluelake[1]

I. Introduction

The San Francisco Peaks stand over much of the high desert landscape of northern Arizona. The Peaks, as they are commonly referred, consist of Humphrey's Peak (the highest point in Arizona at 12,633 feet), Agassiz Peak, Doyle Peak, and Fremont Peak. The Peaks rise out of the Colorado Plateau just north of the City of Flagstaff and are located within the Coconino National Forest. The religious beliefs and practices of many tribes in the area have revolved around the Peaks for centuries and require pure, natural resources from the Peaks. For the Navajo, the Peaks are the sacred mountain to the west where medicine men collect herbs for healing ceremonies and are called *Doko'oo'sliid*, or "Shining on Top." For the Hopi, the Peaks are the home of the spiritual beings—the *Katsinam*—and are called *Nuvatukaovi*, or "The Place of Snow on the Very Top."[1]

Following the preparation of an Environmental Impact Statement, the United States Forest Service (Forest Service) authorized Arizona Snowbowl (Snowbowl), a commercial ski area located on the Peaks, to expand its existing facilities and use treated sewage effluent on the Peaks to make artificial snow. A number of Indian tribes, individual members of Indian tribes, and environmental groups challenged the Forest Service's action under the Religious Freedom Restoration Act (RFRA)[2] and other acts. On March 12, 2007, a three-judge panel of the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) held that the Forest Service's approval of Snowbowl's use of treated sewage effluent to make artificial snow on the Peaks violates RFRA.[3] This article addresses RFRA's potential as a

viable tool for Indian tribes and their members to protect areas such as the Peaks that have important cultural and religious significance.

II. RFRA

Congress enacted RFRA in 1993 as a response to the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith* (*Smith*).[4] *Smith* involves a challenge under the First Amendment Free Exercise Clause of the application of an Oregon statute denying unemployment benefits to drug users, including Indians who use peyote in religious ceremonies.[5] The Court held that the Free Exercise Clause does not prohibit burdens on religious practices if they are imposed by laws of general applicability, such as the Oregon statute at issue in the case. In reaching this conclusion, the Court refused to apply the "compelling government interest test" which had been applied to prior Free Exercise Clause challenges.[6] In enacting RFRA, Congress's purpose was to restore the compelling interest test that was used in pre-*Smith* Free Exercise Clause cases.[7]

RFRA's general rule is that the federal government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)."[8] "Exercise of religion" is defined to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief" and includes the "use, building, or conversion of real property for the purpose of religious exercise."[9] Subsection (b) of RFRA contains the exceptions to the general rule, and the location of the compelling interest test:

> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person –
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.[10]

Congress's intent in enacting RFRA is not only clear from its general rule, but also from the findings stated in the Act:

> The Congress finds that –
>
> (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
>
> (2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
>
> (3) governments should not substantially burden religious exercise without compelling justification;
>
> (4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
>
> (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.[11]

RFRA also gives plaintiffs a specific cause of action.[12] However, RFRA is limited to challenges against the federal government as the use of RFRA to challenge actions of state and local governments was declared unconstitutional by the Supreme Court in *City of Boerne v. Flores* because it exceeded Congress's authority under Section 5 of the Fourteenth Amendment.[13]

III. *Navajo Nation v. United States Forest Service*

In *Navajo Nation v. United States Forest Service* (*Navajo Nation*), the Ninth Circuit held that the Forest Service's approval of the use of treated sewage effluent to make artificial snow on the Peaks violates RFRA.[14] The case involves a challenge to the Forest Service's action by a number of Indian tribes, individual members of Indian tribes, and environmental groups.[15] In September 2002, the owner of Snowbowl submitted a proposal to the Forest Service for facility improvements. In February 2004, the Forest Service issued a Draft Environmental Impact Statement. In February 2005, the Forest Service issued a Final Environmental Impact Statement (FEIS) and Record of Decision approving Snowbowl's preferred alternative which included the proposal to make artificial snow using treated sewage effluent.[16] Under the proposal, the City of Flagstaff would provide Snowbowl up to 1.5 million gallons per day of its treated sewage effluent between November and February. A 14.8 mile pipeline would be built between Flagstaff and Snowbowl to carry the treated effluent. Snowbowl would use the effluent at the beginning of the ski season, during November and December, to make artificial snow to cover 205.3 acres of Humphrey's Peak as a base layer. During the rest of the season, Snowbowl would use the effluent to make artificial snow as needed based on the amount of natural snow.[17] Before treatment, the effluent consists of wastes discharged into Flagstaff's sewers by households, businesses, and industry.[18] Snowbowl would be the first ski resort in the country to make its snow entirely from undiluted treated sewage effluent.[19]

To establish a prima facie case under RFRA, the Plaintiffs had to show that the Forest Service's action – approval of the use of treated sewage effluent to make artificial snow on the Peaks – imposes a substantial burden on the Plaintiffs' ability to freely practice their religion.[20] To show that the burden was substantial, Plaintiffs had to show that the burden was "more than an inconvenience"[21] and must prevent the Plaintiffs "from engaging in [religious] conduct or having a religious experience."[22] After noting that the precise

burdens on religious exercise vary among the Plaintiffs, the Ninth Circuit characterized the burdens as falling into two categories:

> (1) the inability to perform a particular religious ceremony, because the ceremony requires collecting natural resources from the Peaks that would be too contaminated – physically, spiritually, or both – for sacramental use; and
>
> (2) the inability to maintain daily and annual religious practices comprising an entire way of life, because the practices require belief in the mountain's purity or a spiritual connection to the mountain that would be undermined by the contamination.[23]

The Ninth Circuit focused its analysis on the Navajo and the Hopi. As to the Navajo, the Ninth Circuit recognized that the Peaks are the "holiest of shrines in the Navajo way of life."[24] The court also recognized that the Navajo creation story revolves around the Peaks, that the Peaks are represented in the Navajo medicine bundles found in most Navajo households and which are used in Navajo healing ceremonies, and that the Peaks play a role in every Navajo religious ceremony such as the prominent Blessingway ceremony.[25] The testimony of a Navajo practitioner described the burden as follows: "once water is tainted and if water comes from mortuaries or hospitals, for Navajo there's no words to say that the water can be reclaimed."[26] The court found that the Navajo Plaintiffs presented evidence that were the proposed action to go forward, the contamination from the treated sewage effluent would prevent Navajo practitioners from making medicine bundles and from performing the Blessingway and healing ceremonies.[27]

As to the Hopi, the Ninth Circuit recognized the Hopi religious practices center on the Peaks, that the Hopi creation stories focus on the Peaks, that the Peaks are the primary home of the spiritual beings – the *Katsinam*, that the Hopi believe their spirits will join the *Katsinam* on the Peaks when they die, and that the Hopi have at least fourteen shrines on the Peaks to which pilgrimages are made every year.[28] The court found that the Hopi Plaintiffs presented evidence that were the proposed action to go forward, the contamination from the effluent would "fundamentally undermine their entire system of belief and the associated practices of song, worship, and prayer, that depend on the purity of the Peaks, which is the source of rain and their livelihoods and the home of the *Katsinam* spirits."[29]

Even the Forest Service acknowledged the substantial burdens to the Plaintiffs in its FEIS. Consistent with the first burden characterized by the Ninth Circuit, the FEIS states: "Snowmaking and expansion of facilities, especially the use of reclaimed water, would contaminate the natural resources needed to perform the required ceremonies that have been, and continue to be, the basis for the cultural identity for many of these tribes."[30] The FEIS also admits that the

> Peaks are the most sacred place of both the Navajo and the Hopi: that those tribes' religions have revolved around the Peaks for centuries; that their religious practices require pure natural resources from the Peaks; and that, because their religious beliefs dictate that the mountain be viewed as a whole living being, the treated sewage effluent would in their view contaminate the natural resources throughout the Peaks.[31]

After the plaintiffs established a prima facie case under RFRA—that the Forest Service's action substantially burdened their ability to freely practice their religion—the burden shifted to the Forest Service and Snowbowl to show that approval of the use of treated sewage effluent to make artificial snow at a commercial ski resort is "in furtherance of a compelling governmental interest" and "the least restrictive means of furthering that compelling governmental interest."[32] The Supreme Court has described the test as the most demanding test known to constitutional law.[33] In addition, the Court has declared that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[34] Furthermore, the Court has said that even with respect to interests of the highest order, a general assertion of a compelling interest is not sufficient.[35] In *Navajo Nation*, the Forest Service and Snowbowl argued that approving the use of treated sewage effluent to make artificial snow serves the following compelling interests: (1) achieving the Forest Service's multiple-use mandate under the National Forest Management Act, which includes recreational uses such as skiing; (2) protecting public safety by authorizing upgrades at Snowbowl; and (3) complying with the Establishment Clause.[36]

As to the first interest – the Forest Service's interest in managing the forest for multiple uses, including recreational skiing – the Ninth Circuit concluded:

> We are unwilling to hold that authorizing the use of artificial snow at an already functioning commercial ski area in order to expand and improve its facilities, as well as to extend its ski season in dry years, is a governmental interest "of the highest order."[37]

In reaching this conclusion, the Ninth Circuit found that the Forest Service's interests in managing the forest for multiple uses are "broadly formulated interests" and insufficient on their own to meet RFRA's compelling interest test.[38] In addition, the court found that the record did not indicate that Snowbowl will go out of business if it has to continue to rely on natural snow; and even if the record did indicate that, the court did not believe there was a compelling *governmental* interest in allowing Snowbowl to make artificial snow from treated sewage effluent to avoid that result.[39]

As to the second interest—protecting public safety by authorizing

upgrades at Snowbowl—the Ninth Circuit concluded that although the Forest Service has a general interest in ensuring public safety on federal lands, there was no showing that approval of the proposed action advances that interest by the least restrictive means. Furthermore, the court stated that there was no evidence that skiing at Snowbowl in its current state is unsafe; any existing safety concerns are caused by non-skiers who stop along the road to play in the snow.[40]

Finally, as to the third interest—complying with the Establishment Clause—the Ninth Circuit held that the proposed action does not serve a compelling governmental interest in avoiding conflict with the Establishment Clause.[41] In reaching this conclusion, the Ninth Circuit cited the Supreme Court which "has repeatedly held that the Constitution 'affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. … Anything less would require the callous indifference we have said was never intended by the Establishment Clause.'"[42] The Ninth Circuit found that disapproving a commercial ski resort in a national forest to put treated sewage effluent on a sacred mountain is an accommodation that falls far short of an Establishment Clause violation. To the contrary, such disapproval is a permitted accommodation to avoid "callous indifference."[43]

The Ninth Circuit's final word on the case is yet to be heard, however. On October 17, 2007, following a request by the Forest Service and Snowbowl, the Ninth Circuit ordered the case to be reheard en banc.[44] Oral argument before the en banc court was held on December 11, 2007. At the time of the writing of this article, a decision is still pending.

IV. If RFRA Cannot Protect the Peaks, What Can?

Considering the protective purpose and language in RFRA, one wonders if RFRA cannot protect the Peaks, what can? A quick review of other federal statutes shows that RFRA may be the most viable tool for Indian tribes and their members to protect areas such as the Peaks that have important cultural and religious significance. The American Indian Religious Freedom Act of 1978 (AIRFA),[45] for example, will not protect the Peaks. AIRFA declares that is shall be the federal policy "to protect and preserve for American Indians their inherent right of freedom to believe, express and exercise the traditional religions . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."[46] However, the Act is just a feel-good policy statement. It does not give Native Americans any additional rights[47] and does not provide them with a cause of action.[48]

The National Environmental Policy Act (NEPA)[49] and the National Historic Preservation Act (NHPA)[50] are not viable tools either. Both NEPA and NHPA are procedural statutes; they provide no substantive protections. Both statutes were also the basis of claims brought by the Plaintiffs in *Navajo Nation*. NEPA requires federal agencies to prepare a detailed environmental impact statement (EIS) for all "major Federal actions significantly affecting the quality of the human environment."[51] The purpose of the EIS requirement is to ensure that the agency has and considers relevant information in making its decision.[52] The Ninth Circuit has previously stated that "NEPA 'does not mandate particular results,' but 'simply provides the necessary process' to ensure that federal agencies take a 'hard look' at the environmental consequences of their actions."[53] In *Navajo Nation*, the Forest Service had and considered information pertaining to the effects of its action on Tribal religious beliefs and practices and authorized the use of treated sewage effluent anyway.[54] NHPA requires federal agencies to consult with affected Indian tribes before proceeding with a proposed undertaking that will have an effect on historic properties to which Indian tribes attach religious and cultural significance.[55] In Navajo Nation, the Forest Service consulted with the affected Indian tribes and authorized the use of treated sewage effluent anyway.[56]

A number of Supreme Court decisions, including the *Smith* case that prompted the enactment of RFRA, indicate that the Free Exercise Clause of the First Amendment is not a viable option for protecting the Peaks. The Free Exercise Clause accompanies the Establishment Clause of the First Amendment to the United States Constitution - "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[57] As summarized above, *Smith* involves a challenge under the First Amendment Free Exercise Clause of the application of an Oregon statute denying unemployment benefits to drug users, including Indians who use peyote in religious ceremonies.[58] The Court held that the state's passage and enforcement of a neutral law of general applicability did not violate rights under the Free Exercise Clause of the First Amendment.[59] The Court abandoned the "compelling interest" test adopted in *Sherbert v. Verner*[60], *Wisconsin v. Yoder*[61], and other Free Exercise cases – requiring the government to justify any substantial burden on religion by a compelling state interest and by means narrowly tailored to achieve that interest.

In *Lyng v. Northwest Indian Cemetery Protective Ass'n*,[62] the Court upheld the right of the federal government to permit construction of a road and harvesting of timber on a portion of national forest land that had long been used for religious purposes by members of three tribes. Specifically, the Forest Service approved the building of a six-mile section of road connecting two pre-existing roads in the Chimney Rock area of the Six Rivers National Forest in northern California.[63] An Indian organization and several individual tribal members challenged the

action under the Free Exercise Clause asserting that their religious practices required use of undisturbed "prayer seats" in the area.[64] Prayer seats require an unobstructed view and undisturbed naturalness.[65] The Court held that construction of the road did not violate the Free Exercise Clause. In the Court's view, there was no basis for distinguishing the plaintiffs' suit from a suit in which tribal members "might seek to exclude all human activity but their own from sacred areas of the public lands."[66]

Moreover, the Free Exercise Clause of the First Amendment has shown to not be a viable option for protecting the Peaks as it previously failed to protect the Peaks in *Wilson v. Block*.[67] In that case, the Hopi Tribe and the Navajo Medicinemen's Association challenged the decision of the Forest Service authorizing the clearing of 50 acres, the construction of a new lodge, construction of new lifts, and other development at Snowbowl under the Free Exercise Clause.[68] The DC Circuit found that the plaintiffs did not show that the development would impermissibly burden their religion because the development would not impair the plaintiffs' access to the Peaks or their ability to gather sacred objects and conduct ceremonies.[69]

RFRA is a more viable tool than the Free Exercise Clause for Indian tribes and their members to protect areas such as the Peaks because it is much broader than the test one has to meet to have a successful Free Exercise claim, even broader than the pre-*Smith* test. As stated above, the primary purpose of RFRA was to revive the *Sherbert* and *Yoder* compelling interest test as the standard for evaluating claims against neutral laws of general applicability. The Ninth Circuit found that RFRA provides greater protection for religious practices than the Supreme Courts pre-*Smith* Free Exercise cases.[70] First, RFRA's use of the verb "burden" is broader than the language of the Free Exercise Clause which "prohibits" the free exercise of religion. Second, RFRA imposes a least restrictive means requirement which was not used in the pre-*Smith* cases. Third, RFRA provides greater protection because it applies the compelling interest test "in all cases where free exercise of religion is substantially burdened."[71] Prior to *Smith*, the Supreme Court had refused to apply the compelling interest test in many contexts, including prison regulations,[72] military regulations,[73] and the enforcement of "facially neutral and uniformly applicable requirement for the administration of welfare programs."[74] The Court acknowledged as much in *Smith* – "In recent years, we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all."[75] Finally, Congress expanded the statutory protection for religious exercise in 2000 by amending RFRA's definition of "exercise of religion." This expanded definition— "any exercise of religion, whether or not compelled by, or central to, a system of religious belief"—protects a broader range of religious conduct than the Supreme Court's interpretation of "exercise of religion" under the First Amendment. Under the First Amendment, the Court interprets "exercise of religion" as "the observation of a central religious belief or practice,"[76] as behavior and beliefs "compelled" by a particular religion,[77] as adherence to the central precepts of a religion.[78] As a result, the standard that must be satisfied to justify a burden on the exercise of religion under RFRA is significantly more demanding than the standard under the Free Exercise Clause of the First Amendment.

V. If the Peaks Cannot be Protected By RFRA, What Can?

Considering the devastating impacts the use of treated sewage effluent to make artificial snow on the Peaks would have on the exercise of Plaintiffs' religion in *Navajo Nation*, one wonders if the Peaks cannot be protected by RFRA, could any area that has important cultural and religious significance be protected by RFRA? Or, are successful RFRA cases going to be limited to challenges to laws barring the use of religious substances, such as the *Smith* case that prompted the enactment of RFRA,[79] rather than to challenges to land uses that impair specific religious practices such is the case with the Peaks? This would be contrary to the intent and the clear language in RFRA, which defines "exercise of religion" to include the use of real property for the purpose of religious exercise.[80] The Ninth Circuit summed it up well: "The Court in *Lyng* denied the Free Exercise claim in part because it could not see a stopping place. We uphold the RFRA claim in this case in part because otherwise we cannot see a starting place. If Appellants do not have a valid RFRA claim in this case, we are unable to see how any Native American plaintiff can ever have a successful RFRA claim based on beliefs and practices tied to land that they hold sacred."[81] Let's hope the en banc panel of the Ninth Circuit sees it the same way.

Postscript

On August 8, 2008, following the completion of this article, the Ninth Circuit issued its en banc decision in *Navajo Nation v. United States Forest Service*.[82] In the 8-3 decision, the majority denied Plaintiffs' RFRA claim holding that the Plaintiffs failed to show that the presence of treated sewage effluent on the Peaks imposes a substantial burden on the free exercise of their religion. Specifically, the majority found:

> The presence of recycled wastewater on the Peaks does not coerce the Plaintiffs to act contrary to their religious beliefs under the treat of sanctions, nor does it condition a governmental benefit upon conduct that would violate their religious beliefs, as required to establish a "substantial burden" on religious exercise under RFRA.[83]

Furthermore, the majority found that "the burden of the recycled wastewater can only be expressed by

the Plaintiffs as damaged spiritual feelings. Under Supreme Court precedent, government action that diminishes subjective spiritual fulfillment does not 'substantially burden' religion."[84] The majority's holding restricts the circumstances under which a plaintiff can show a substantial burden to the specific types of circumstances set forth in the two previous Supreme Court cases cited in RFRA – *Sherbert v. Verner*[85] and *Wisconsin v. Yoder.*[86] The majority found:

> The Supreme Court's decisions in *Sherbert* and *Yoder*, relied upon and incorporated by Congress into RFRA, lead to the following conclusion: Under RFRA, a "substantial burden" is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the treat of civil or criminal sanctions (*Yoder*). Any burden imposed on the exercise of religion short of that described by *Sherbert* and *Yoder* is not a "substantial burden" within the meaning of RFRA, and does not require the application of the compelling interest test set forth in those two cases.[87]

In a comprehensive dissenting opinion, Judge Fletcher[88] argues that Congress did not restore any technical definition of "substantial burden" found in pre-RFRA case law. To the contrary, the text of RFRA explicitly states that its purpose is "to restore the compelling interest test" set forth in *Sherbert* and *Yoder.*[90] As explained by the dissent:

> That is, by restoring the "compelling interest test," Congress restored the application of strict scrutiny, as applied in *Sherbert* and *Yoder*, to all government actions substantially burdening religion . . . But this directive does not specify what government actions substantially burden religion, thereby triggering the compelling interest test. RFRA did not "restore" any definition of "substantial burden."[91]

The final word on RFRA's potential as a viable tool for Indian tribes and their members to protect important cultural and religious areas such as the Peaks is likely still to come. At the time this article was being prepared for publication, the Plaintiffs were considering whether to pursue an appeal to the Supreme Court.[92] Counting the two judges who agreed with Judge Fletcher in the March 2007 decision (but were not present for the en banc decision), the split over the application of RFRA is much closer than the 8-3 vote in the en banc decision suggests. Given this split and the controversial nature of the case, an appeal has a good chance to be heard by the Supreme Court. In addition, the Comanche Nation is currently battling the construction of a U.S. Army warehouse near the foot of Medicine Bluffs – a sacred site at Fort Sill in Oklahoma. The Comanche Nation is relying on RFRA to protect the sacred site which is a place of healing and spiritual medicine for the Comanche people.[93] On August 18, 2008, the Comanche Nation secured an order temporarily restraining the U.S. Army from proceeding with the construction.[9]

Endnotes

1. Lisa Bluelake has been a Staff Attorney for the Confederated Tribes of the Grand Ronde Community of Oregon since October 2000. Prior to working for Grand Ronde, Lisa was Assistant General Counsel for the Hopi Tribe in Arizona. She met her husband, a member of the Navajo Nation, in Flagstaff, Arizona, and was married on the San Francisco Peaks. The views and opinions expressed in this article are the author's and not those of the Confederated Tribes of the Grand Ronde Community of Oregon, the Hopi Tribe, the Navajo Nation, or any of their members.
2. Save The Peaks Coalition website, http://www.savethepeaks.org/background.html, last accessed April 7, 2008.
3. 42 U.S.C. §§ 2000bb et seq.
4. *Navajo Nation v. U.S. Forest Serv.,* 479 F.3d 1024, 1029 (9th Cir. 2007). The Ninth Circuit subsequently reheard the case en banc. The en banc decision was issued following completion of this article, but is summarized in the postscript below.
5. 494 U.S. 872 (1990).
6. *Id.* at 890.
7. *Id.* at 881-82, 885-86.
8. 42 U.S.C. § 2000bb(b)(1) (The purpose of RFRA is "to restore the compelling interest test as set forth in *Sherbert v. Verner,* 374 U.S. 398 (1963) and *Wisconsin v. Yoder,* 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened.").
9. 42 U.S.C. § 2000bb-1(a).
10. 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7).
11. 42 U.S.C. § 2000bb-1(b).
12. 42 U.S.C. § 2000bb(a).
13. 42 U.S.C. § 2000bb-1(c) ("A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.").
14. 521 U.S. 507, 536 (1997). In response to Boerne, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). 42 U.S.C. §§ 2000cc *et seq.* RLUIPA prohibits state and local governments from imposing substantial burdens on the exercise of religion through prisoner or land-use regulations. In addition to the limitation to prisoner and land-use regulations, RLUIPA only applies if one of three conditions is present: (1) if the state or local program or activity receives Federal financial assistance, 42 U.S.C. § 2000cc(2)(A)(implicating congressional authority pursuant to the Spending Clause); (2) if the substantial burden imposed by the state or local law affects commerce with foreign nations, among the several States, or with Indian tribes, 42 U.S.C. § 2000cc(2)(B)(implicating congressional power pursuant to the Commerce Clause); or (3) if "the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved." 42 U.S.C. § 2000cc(2)(C). The Ninth Circuit upheld the constitutionality of RLUIPA in *Guru Nanak Sikh Soc'y v. County of Sutter,* 456 F.3d 978 (9th Cir. 2006). In that case, the Ninth Circuit found that Sutter County's denial of a religious group's application for a conditional use permit to construct a temple on a parcel of land zoned agricultural constituted a substantial burden under RLUIPA, that the County did not assert or prove a compelling interest for its action, and that RLUIPA is a permissible exercise of Congress's remedial power under Section Five of the Fourteenth Amendment. *Id.* at 981.
15. 479 F.3d 1024, 1029 (9th Cir. March 12, 2007).
16. The Plaintiffs include the Navajo Nation, the Hopi Tribe, the Havasupai Tribe, the Hualapai

Tribe, the Yavapai-Apache Nation, the White Mountain Apache Nation, individual members of the Navajo Nation, Hopi Tribe, and Havasupai Tribe, the Sierra Club, the Center for Biological Diversity, and the Flagstaff Activist Network. *Id.* at 1029.

17 *Id.* at 1030.

18 *Id.* at 1030-31, 1039.

19 *Id.* at 1038.

20 *Id.* at 1039.

21 *Id.* at 1042.

22 *Id.* at 1033, 1042 (quoting Guam v. Guerrero, 290 F.3d 1210, 1222 (9th Cir. 2002)).

23 *Id.* at 1033, 1042 (quoting Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir. 1995)).

24 *Id.* at 1039.

25 *Id.* at 1035 (quoting Navajo Nation v. U.S. Forest Serv., 408 F.Supp.2d 866, 889 (D. Ariz. 2006)).

26 *Id.* at 1035-36.

27 *Id.* at 1039-40.

28 *Id.* at 1043.

29 *Id.* at 1034-35.

30 *Id.* at 1043.

31 *Id.* at 1039.

32 *Id.* at 1043.

33 *Id.*

34 *City of Boerne,* 521 U.S. at 534.

35 *Yoder,* 406 U.S. at 215.

36 *Gonzales v. O Centro Espirita Beneficente,* 546 U.S. 418 (2006)(holding that under RFRA, the government's general interest in promoting public health and safety through enforcement of the Controlled Substances Act was insufficient to justify the substantial burden on the religious exercise of a small religious group resulting from a ban on a hallucinogenic plant).

37 *Navajo Nation,* 479 F.3d at 1043-44.

38 *Id.* at 1044 (*quoting Yoder,* 406 U.S. at 215).

39 *Id.* at 1044 (*quoting Gonzales v. O Centro Espirita Beneficente,* 546 U.S. at 431).

40 *Id.* at 1044-45.

41 *Id.* at 1045.

42 *Id.*

43 *Id.* at 1045 (*quoting Lynch v. Donnelly,* 465 U.S. 668, 673 (1984)).

44 *Id.* at 1046.

45 *Navajo Nation v. U.S. Forest Serv.,* 506 F.3d 717 (9th Cir. 2007).

46 42 U.S.C. § 1996.

47 *Id.*

48 *See* 42 U.S.C.A. § 1996 note of decision 3 (West 2008) ("American Indian Religious Freedom Act was meant to insure that American Indians were given protection guaranteed under First Amendment and was not intended to grant them rights in excess of those guarantees.")(*citing Attakai v. United States,* 746 F.Supp. 1395 (D. Ariz. 1990)).

49 *See* 42 U.S.C.A. § 1996 note of decision 4 (West 2008) ("American Indian Religious Freedom Act (AIRFA) is a policy statement and does not create a cause of action or any judicially enforceable individual rights.") (*citing United States v. Mitchell,* 502 F.3d 931 (9th Cir. 2007)).

50 42 U.S.C. §§ 4321 et seq.

51 16 U.S.C. §§ 470 et seq.

52 42 U.S.C. § 4332(2)(C).

53 *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 349 (1989).

54 *Muckleshoot Indian Tribe v. U.S. Forest Serv.,* 177 F.3d 800, 814 (9th Cir. 1999) (quoting Robertson, 490 U.S. at 350).

55 *Navajo Nation,* 479 F.3d at 1059 (After noting that the FEIS makes clear that the Forest Service conducted an extensive analysis on the religious beliefs and practices of the Hopi and Navajo and the impact the proposed action would have on those religious beliefs and practices, the Ninth Circuit held that the Forest Service had satisfied its obligations under NEPA). The Ninth Circuit did find that the FEIS did not satisfy NEPA with respect to the risks posed by human ingestion of the artificial snow made from treated sewage effluent. *Id.* at 1054.

56 16 U.S.C. §§ 470a(d)(6), 470(f); 36 C.F.R. §§ 800.1 et seq.

57 *Navajo Nation,* 479 F.3d at 1060 (*citing* 408 F.Supp.2d at 879 n.11) (The Ninth Circuit agreed with the district court that "[a]lthough the consultation process did not end with a decision the tribal leaders supported, this does not mean that the Forest Service's consultation process was substantively and procedurally inadequate.").

58 U.S. CONST. amend. I.

59 494 U.S. at 890.

60 *Id.* at 878-79.

61 374 U.S. 398 (1963) (The Court held that the state violated the Free Exercise rights of a Seventh-Day Adventist when it denied her unemployment compensation after she was terminated from her job and unable to obtain other employment due to her refusal to work on Saturday, the Adventist Sabbath, where the state failed to establish a compelling interest to justify the policy).

62 406 U.S. 205 (1972) (The Court held that state compulsory education law requiring children to attend school until age sixteen violated the Free Exercise rights of a member of the Older Order Amish sect, where the state could not show a compelling interest in keeping children in school beyond the eighth grade level permitted by the Amish).

63 485 U.S. 439 (1988).

64 *Id.* at 442.

65 *Id.* at 443.

66 *Id.* at 453.

67 *Id.* at 452-53.

68 708 F.2d 735 (D.C. Cir. 1983).

69 *Id.* at 738-39.

70 *Id.* at 744-45.

71 *Navajo Nation,* 479 F.3d at 1032-33.

72 42 U.S.C. § 2000bb(b)(1).

73 *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 349 (1987).

74 *Goldman v. Weinberger,* 475 U.S. 503, 506-07 (1986).

75 *Bowen v. Roy,* 476 U.S. 693, 707 (1986).

76 *Smith,* 494 U.S. at 883.

77 *Hernandez v. Commissioner,* 490 U.S. 680, 699 (1989).

78 *Thomas v. Review Bd. of the Indiana Employment Sec. Div.,* 450 U.S. 707, 718 (1981).

79 Sherbert v. Verner, 374 U.S. at 404.

80 *See also Gonzales v. O Centro Espirita Beneficente,* 546 U.S. 418 (2006)(holding that under RFRA, the government's general interest in promoting public health and safety through enforcement of the Controlled Substances Act was insufficient to justify the substantial burden on the religious exercise of a small religious group resulting from a ban on a hallucinogenic plant).

81 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7).

82 *Navajo Nation,* 479 F.3d at 1048.

83 *Navajo Nation v. U.S. Forest Serv.,* 2008 WL 3167692 (9th Cir. 2008).

84 *Id.* at *5.

85 *Id.* at fn 12.

86 374 U.S. 398 (1963). In *Sherbert,* a Seventh-Day Adventist was fired by her employer because she refused to work on Saturdays, the Adventist Sabbath. South Carolina denied her claim for unemployment compensation benefits because she failed to accept work without good cause.

87 406 U.S. 205 (1972). In *Yoder,* members of the Amish religion were convicted of violating a Wisconsin compulsory education law requiring children to attend school until age sixteen under the threat of criminal sanctions. The Amish members believed their children's attendance in high school was contrary to the Amish religion and way of life.

88 *Navajo Nation,* 2008 WL 3167692 at *7.

89 Judge Fletcher, the author of the unanimous March 2007 decision, was joined by two other judges – Judge Pregerson and Judge Fisher.

90 42 U.S.C. § 2000bb(b)(1) (The purpose of RFRA is "to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened.").

91 *Navajo Nation,* 2008 WL 3167692 at *22.

92 *Plaintiffs in Peaks case considering appeal,* Navajo Times, August 21, 2008.

93 *Comanche Nation battles Army over sacred site,* Indianz.com, August 20, 2008, available at http://64.62.196.98/News/2008/010446.asp.

94 *Comanche Nation v. United States,* Case No. CIV-08-849-D (WD Okla. August 18, 2008) (Temporary Restraining Order).

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