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Handout for
"Major Laws & Policies Dealing With
Environmental & Cultural Resources Protection / Impacts on DoD Activities"
for DoD's American Indian Cultural Communications Course/Workshop

OVERVIEW

I. INTRODUCTION

Federal agencies routinely interact with Native American tribes regarding environmental matters in two ways. First, agencies may interact with tribes that have regulatory authority over actions taking place on Indian lands and affecting agency's plans or undertakings. Second, agencies will often be required to consult with tribes that may be affected by proposed agency actions. Both requirements are statutorily and policy driven.

II. REGULATORY AUTHORITY BY TRIBES

Congress has adopted a policy of authorizing the EPA to treat tribes as states under an increasing number of federal environmental laws. As a result federal agencies may have to interact with a tribe in lieu of the state.

A. Clean Water Act (CWA). 33 U.S.C. § 1251, *et seq.* The 1987 amendments allowed tribes to be treated for certain purposes. See also Montana v. EPA, 137 F.3d 1135 (9th Cir. 1988).

B. Clean Air Act (CAA). 42 U.S.C. § 7401, *et seq*. The 1990 amendments to the Act empowered tribes meeting certain requirements to administer their own programs to meet federal standards within the reservation.

C. Safe Drinking Water Act (SDWA). 42 U.S.C. § 300(f)-(j). The 1986 amendments authorize the EPA to treat tribes as states for certain purposes outlined in the CWA.

D. Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 USC § 9601, *et seq*. Congress took similar action when it amended CERCLA in 1986. Tribes can also assert claims against the federal government for damages to tribal natural resources.

III. DUTY TO WITH CONSULT TRIBES / AMERICAN INDIANS

Unlike the substantive federal environmental statutes, such as CAA and CWA, federal agencies may have to engage the tribes in consultations and meetings during the planning process under several different statutes.

A. National Environmental Policy Act (NEPA). 42 U.S.C. § 4321, *et seq.*; as implemented by 40 CFR 1500-1508, CEQs 40 Questions, DoD Dir. 6050.1 & .7.

1. In short, NEPA requires federal agencies to make decisions that are based on understanding of environmental consequences and take actions that protect, restore, and enhance the environment. 42 U.S.C. § 4321-4347; 40 CFR Parts 1500-1508.

2. Act establishes environmental policy for the nation, provides an interdisciplinary framework for federal agencies to prevent environmental damage, and contains 'action-forcing' procedures to ensure that federal agency decision-makers take environmental factors into account. 42 U.S.C. § 4321; 40 CFR 1500.1.

3. Federal agencies must consider the environmental impacts of its proposals for *legislation and other major federal undertakings significantly affecting the quality of the human environment* prior to commitment of resources.

4. Documentation of analyses:

a. Categorical exclusions (CATEX),

b. Environmental analyses (EA): either with a FONSI, or with recommnedation to accomplish an EIS.

c. Environmental impact statements (EIS).

5. Consultation process

a. None required a CATEX.

b. During an EA, agency may seek public involvement.

c. During the preparation of the draft EIS, agency must seek public involvement. 40 CFR 1505.6(a)(6).

i. may include NEPA-related hearings, scoping meetings, public meetings, and availability of NEPA-prepared documents. 40 CFR 1505.6(a),(b).

6. Consultations may take place during the environmental impact analysis process – in the NEPA context . Outreach to the community; including tribes. May mean including the tribe as a cooperating agency or simply providing draft copies for review and comment.

7. Some suggest that NEPA requires consideration of impacts on Indian religious practices. NEPA does bring within its reach impacts on "historic, cultural and natural aspects of our national heritage." 42 U.S.C. § 4331(b). But the consequences of failure to address such impacts are unclear. [1]

B. National Historic Preservation Act (NHPA), 16 U.S.C. § 470, *et seq*.; as implemented by 36 CFR Parts 60-65, & 800.

1. Requires federal agencies to *locate and inventory* historic resources that appear to be eligible for inclusion in the National Register and *nominate* them for the same. 16 U.S.C. § 470h-2(a)(2); 36 CFR § 60.9(a).

2. Agencies must manage historic resources in ways that promote preservation. If eligible, treat the properties as if they were already nominated and entered in the National Register. § 106 consultation process applies if the property is eligible for inclusion in the National Register. Key is *eligibility*, not *nomination*. 16 U.S.C. § 470h-2(a)(1).

3. Where a federal *undertaking* may affect property that is eligible for the National Register, agency *must consult* with the State Historic Preservation Officer (SHPO), local interested parties, and, where appropriate, the Advisory Council on Historic Preservation. 16 U.S.C. § 470f; 36 CFR Part 800; Exec. Order No. 11593. See also Boyd v. Roland, 789 F.2d 347 (5th Cir. 1986).

a. 'Local interested parties' is read very broadly and includes Native American tribes, Native Hawaiians, and Native Alaskan Corporations. Probably includes tribes not currently recognized by the Federal government, but their status may be limited.

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1 . Some courts suggest that cultural impacts on Native Americans may/should be analyzed. Havasupai Tribe v. U.S., 752 F.Supp. 1471 (D. Ariz. 1990), *aff'd,* 943 F.2d 32 (9th Cir. 1991), *cert. denied* 503 US. 959 (1992); Goodman Group, Inc. v. Dishroom, 679 F.2d 182 (9th Cir. 1982); Sierra Club v. Adams, 578 F.2d 389 (D.C. Cir. 1978). Others reject that approach. Lockart v. Kenops, 927 F.2d 1028 (8th Cir. 1991).

b. Duty to consult, not a duty to preserve.

c. No veto power resides with SHPO or interested parties.

4. Consultation with Native American groups may occur in two ways.

a. When an undertaking will affect Indian lands, the Agency shall invite the governing body of the responsible tribe to be a *consulting party* and to concur in any agreement. 36 CFR § 800.1(c)(2)(iii).

b. An Indian tribe *may participate* in activities under NHPA regulations *in lieu of the SHPO* with respect to undertakings affecting its lands. 36 CFR § 800.1(c)(2)(iii).

i. the tribe makes the request,

ii. the SHPO concurs, and

iii. the Advisory Council determines the tribe's procedures meet the purposes of the NHPA regulations. [2]

4. Agencies must take National Register eligible properties into account when planning undertakings. 16 U.S.C. § 470h-2(f); 36 CFR § 800.1(a); Exec. Order No. 11593.

a. Pueblo of Sandia v. U.S., 50 F.3rd 856 (10th Cir. 1995). Court of Appeals found that that Forest Service had not made "a reasonable good faith effort" to identify and evaluate traditional cultural properties that may be adversely affected by road construction in Las Huertas Canyon in the Cibola National Forest. The FS ignored and failed to evaluate two affidavits concerning the existence of ceremonial paths and sites used by the Pueblos. The FS also withheld the same information from the SHPO.

b. Morongo Band of Mission Indians v. FAA, 161 F.3d 569 (9th Cir. 1998). Court found the FAA did not violate the NHPA where the MBMI challenged the adequacy of FAA's EIS. The MBMI alleged that the agency did not take into account the effect of the noise of over-flights on properties where traditional ceremonies were performed. The Court noted that the FAA did not respond to the Tribe's correspondence, but found the noise from high altitude flights was de minimus.

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2. The term Indian Tribe means -

1. The governing body of any Indian tribe, band, nation, or other group that is recognized as an Indian tribe by SecDOI, and

2. For which the U.S. Government holds in trust or restricted access for that entity or its members.

3. Includes any Native village corporation, regional corporation, and Native Group established pursuant to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1701, *et seq*.

4. Does not include Hawaiians, Polynesians, or Puerto Ricans.

c. Attakai v. U.S., 746 F.Supp. 1395 (D. Ariz. 1990). Injunctive relief was applied against BIA for failure to consult with tribe or SHPO on a fence construction project where survey revealed the presence of historic properties despite the fact that BIA modified project to avoid the sites.

d. Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983), *cert. denied*, 104 S.Ct. 371 (1983). U.S. Forest Service did not violate AIRFA with its plan to expand a government-owned ski lodge atop San Francisco Peaks in Coconino National Forest. While the Navajo and Hopi may have been hampered in the exercise of their beliefs, they were not denied access to the sacred peaks.

e. National Indian Youth Council v. Andrus, 501 F.Supp. 649 (D.N.M. 1980), *aff'd* 664 F.2d 220 (10th Cir. 1981). Court found DOI did not violate NHPA with approval of mining lease of Indian land despite the failure to do a complete inventory and analysis of historic property on the 40,286 acre leasehold. Court found § 106 process did not need to be completed before mining plan was approved or executed. Rather, a phased consultation process was allowed provided consultation was completed prior to any ground-disturbing activity in that area.

C. Archaeological Resources Protection Act of 1979 (ARPA), 16 U.S.C. § 470aa, *et seq*.; 32 CFR Part 229; 43 CFR Parts 3 & 7; DoD Dir. 4710.1.

1. The Act works to protect and preserve historic and cultural resources through a permit system authorizing scholarly study and excavation of cultural properties, as well as provide sanctions for the unauthorized use, removal, or damage to any archeological resource. 16 U.S.C. §§ 432-33; 36 CFR Part 296.

2. The term archeological resource includes human remains, pottery, basketry, bottles, weapon projectiles, rock carvings and paintings, tools, structures or portions thereof, graves, skeletal remains. 16 U.S.C. § 470bb(1).

3. ARPA is intended to apply to purposeful exploration and removal of archaeological resources, not excavation that may inadvertently uncover such resources. U.S. v. Austin, 902 F.2d 743 (9th Cir. 1989), *cert. denied*, 498 U.S. 874 (1990); U.S. v. Smyer, 596 F.2d 939 (10th Cir.), *cert. denied*, 444 U.S. 843 (1979).

4. Resources of 'recent' origin (less than 100 years) are not protected by ARPA. U.S. v. Shivers, 96 F.3d 120 (5th Cir. 1996).

5. The agency should have established protocols to cover the situations of inadvertent discovery.

D. American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996.

1. AIRFA states it is the policy of the United States to protect and preserve the inherent

right of American Indians, Eskimos, Aleuts, and Native Hawaiians to believe, express, and exercise their traditional religions. This includes, but is not limited to worship through ceremonials and traditional rights. 42 USC § 1996.

2. In other words, the Act applies the Free Exercise Clause of the First Amendment protections to American Indians' traditional religious beliefs. Attakai v. U.S., 746 F.Supp. 1395 (D. Ariz. 1990); Lyng v. Northwest Indian Cemetery Protective Assoc., 485 U.S. 455, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988); Crow v. Gullet, 541 F.Supp. 785 (D.S.D. 1982). See also Exec. Order No. 13007.

3. Act creates neither a veto power nor new substantive rights for American Indians. Lyng v. Northwest Indian Cemetery Protective Assoc., 485 U.S. 455, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988).[3] The Act does not create a cause of action nor procedural duties enforceable in court. Lockart v. Kenops, 927 F.2d 1028 (8th Cir. 1991).

4. Duty to consult. Act also requires federal agencies to consult with native traditional religious leaders and to consider, but necessarily defer to, Native American values. Havasupai Tribe v. U.S., 753 F.Supp. 1471 (D. Ariz. 1990), *aff'd,* 943 F.2d 32 (9th Cir. 1991), *cert. denied* 503 US. 959 (1992); Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983).

5. Consultations may take place during and in conjunction with the NEPA environmental impact analysis process (EIAP) where agency actions directly affect tribal lands, agency actions may affect tribal resources, or where Native Americans allege the locus of agency action is a sacred site.

6. AIRFA/Free Exercise Clause does not create a super-status for those who would use sacred lands located on public property. [4]

a. U.S. v. Means, 858 F.2d 404 (8th Cir. 1988). Forest Service did not violate the right to free exercise of religion by denying a special use permit for Sioux Indians who sought to use 800 acres of the Black Hills National Forest for a religious, educational, and cultural permanent, residential community. Court found that Indians could not show that FS

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3. In Lyng the U.S. Supreme Court reverse the lower courts' holdings and found that the construction of a logging road through an area several Tribes held sacred and had consistently used in their religious practices for generations did not violate AIRFA or 1st Amendment. The Supreme Court placed the burden on the Tribes to prove that the land was central to their beliefs. The Court did not reach the 'compelling government interest' test applied under the 1st Amendment. See also Manybeads v. U.S., 730 F.Supp. 1515 (D.Ariz. 1989), citing Lyng.

4 The Supreme Court has crafted a sequential analysis for claims arising under the Free Exercise Clause. First, does the governmental action in fact create a burden on the exercise of the claimant's religion? Second, if such a burden is established, consider the nature of the burden, the significance of the governmental interest at stake, and the degree to which that interest would be impaired by an accommodation for the religious practice. That is, once the burden is shown, the government must demonstrate that it used the least restrictive means of achieving some compelling state interest. Bowen v. Roy, 476 U.S. 693, 707-08 (1986).

had burdened the Indians' exercise of religion where short term permits had been consistently granted to the tribe.

b. U.S. v. Thirty Eight (38) Golden Eagle Parts, 649 F.Supp. 269 (D. Nev. 1986). Seizure and confiscation of illegally obtained eagle parts by the government from a tribe member did not violate AIRFA or the Free Exercise Clause. [5]

c. Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983), *cert. denied*, 104 S.Ct. 371 (1983). Forest Service did not violate AIRFA with its plan to expand a government-owned ski lodge atop San Francisco Peaks in Coconino National Forest. While the Navajo and Hopi may have been hampered in the exercise of their beliefs, they were not denied access to the sacred peaks.

d. Crow v. Gullet, 541 F.Supp. 785 (D.S.D. 1982). Partial restriction and regulation of access to site of traditional ceremonial grounds located on Bear Butte State Park in the Black Hills by State did not violate AIRFA or the Free Exercise Clause. Lakota and Tsistsistas claimed that State's permanent improvements to the area, restrictions on access (albeit with preference towards Indians' access vs. general public), and permit process, all violated the Tribes' right to free, unrestricted and uninterrupted religious use of the Butte. State responded that the restrictions protected the Tribes' access while impeding the general public's intrusion on religious ceremonies.

e. Sequoyah v. TVA, 620 F.2d 1159 (6th Cir. 1980). Cherokee's effort to invoke AIRFA to prevent the flooding of sacred land failed. Indians failed to show constitutionally cognizable infringement on a First Amendment right under the Free Exercise Clause to Cherokee religious observances by the Tellico Dam back-flooding of land containing burial and archeological sites.

f. Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980). Indian's effort to prevent the flooding of sacred sites in the Rainbow Bridge National Monument by invoking the Free Exercise Clause failed.

g. U.S. v. Top Sky, 547 F.2d 486 (9th Cir. 1976). Prosecution of Native American for sale of eagle feathers and 'eagle parts' in violation of the Bald Eagle Protection Act did not infringe on defendant's free exercise of religion with respect to the Original Native American Church. The Court noted that tribal elders testified that the sale of eagle parts is incompatible with Indian religious beliefs.

E. Native American Graves Protection & Repatriation Act (NAGPRA), 25 U.S.C. § 3001, *et seq*.; 43 CFR Part 10.

1. Federal agencies must make an inventory of all Indian human remains and funerary objects in its possession and control, attempt to identify the affiliated tribe, and repatriate the

5 Cf. U.S. v. Abeyta, 632 F.Supp. 1301 (D.N.M. 1986). District Court found that prosecution of a Native American for possession of eagle parts without a permit in violation of the Bald Eagle Protection Act was barred by 1st Amendment. Abeyta appears to be an anomaly.

items to the appropriate group. 25 U.S.C. §§ 3003, 3005; 43 CFR §§ 10.9, 10.10.

2. Also applies to intentional excavation and removal or inadvertent discovery of Native American human remains, cultural items, funerary objects, sacred objects, objects of cultural patrimony. 25 U.S.C. § 3001(3); 43 CFR § 10.2(b); Na Iwi O Na Kupuna O Mokapu v. Dalton, 894 F.Supp. 1397 (D. Haw. 1995).6

3. Inadvertent discovery requires a delay in the disturbance of the site until consultation with affiliated tribes accomplished. Duty to protect & consult. 25 U.S.C. § 3002(d)(1); 43 CFR §§ 10.4(c), 10.5; Yankton Sioux Tribe v. U.S. Corps of Engineers, 83 F.Supp.2d 1047 (D.S.D. 2000) (USCOE enjoined after failure to notify Tribe of inadvertent discovery of lost cemetery near man-made Francis Case Lake).

4. For the purposes of NAGPRA the term 'Native American' applies to American Indians, Hawaiian and Alaskan Native people. 25 U.S.C. § 3001(9).

5. The agency should have established protocols to cover the situations of inadvertent discovery.

F. Religious Freedom Restoration Act of 1993. RFRA was ruled unconstitutional, but is included for historical purposes.

1. RFRA was designed to prohibit the Government from "burden[ing] a person's exercise of religion […]." 42 U.S.C. § 2000bb (1994).

2. Prior to the Supreme Court effectively striking the Act down as unconstitutional,7 reliance on RFRA to assert Native American religious interests proved generally ineffective.

a. Thiry v. Carlson, 78 F.3d 1491 (10th Cir. 1996). Native American challenge under RFRA of condemnation action for construction of public highway was properly denied. The parcel of land contained a family grave site and family claimed that moving the grave site would violate their religious beliefs. Court ruled relocation of grave site did not violate the free exercise rights.

b. U.S. v. Hugs, 109 F.3d 1375 (9th Cir. 1997). Enforcement of the Migratory Bird Treaty Act and Golden Eagle Protection Act prohibition of the illegal possession and sale of protected bird species' parts did not violate the defendant's free exercise rights. The government showed that it had a compelling interest and used the least restrictive means. See also U.S. v. Sandia, 6 F.Supp. 2d 1278 (D.N.M. 1997) (Same holding as Hugs).

c. Werner v. McCotter, 106 F.3d 414 (10th Cir. 1997). Failure to provide a

6. To be judged "cultural patrimony" under NAGPRA the object must have ongoing historical, cultural or traditional importance, and be considered inalienable by tribe by virtue of the object's centrality in tribal culture. Yei B'Chei ceremonial adornments purchased and resold for profit were cultural patrimony. U.S. v. Corrow, 119 F.3d 796 (10th Cir. 1997).

7. City of Boerne v. P.F. Flores, 521 U.S. 507, 117 S. Ct. 2157, 138 L.Ed. 2d 624 (1997).

Native American shaman to Cherokee prisoner did not violate RFRA. Other prisoner rights cases followed the same rationale and balancing test. See also Arguello v. Duckworth, 106 F.3d 403 (7th Cir. 1997); Cubero v. Burton, 96 F.3d 1450 (7th Cir. 1996); Hamilton v. Schiro, 74 F.3d 1545 (8th Cir. 1996). Cf. Rourke v. New York State Dep't. of Correctional Servs., 915 F.Supp. 525 (N.D.N.Y. 1995) (Prison regulation barring long hair on corrections officers violated RFRA as applied to a Mohawk who followed traditional religious practices).

Attachment
List of Related Articles

Attachment

LIST OF ADDITIONAL ARTICLES RELATING TO AMERICAN INDIAN ISSUES

Atkinson, Matthew. *Red Tape: How American Laws Ensnare Native American Lands, Resources, and People.* 23 Okla.City U.L.Rev. 379 (1998)

Boggs, James P. *NEPA in the Domain of Federal Indian Policy: Social Knowledge and the Negotiation of Meaning.* 19 B.C. Envtl. Aff. L. Rev. 31 (1991).

Brady, Joel. *Land Itself is Sacred: Native American Sacred Site Protection on Federal Public Lands Amidst the Shadows of Bear Lodge*, 24 Am. Indian L.Rev. 153 (2000).

Cochran, Steffani A. *Treating Tribes as States under the Federal Clean Air Act: Congressional Grant of Authority – Federal Preemption – Inherent Tribal Authority*. 26 N.M. L.Rev. 323 (1996).

Coursen, David F. *Tribes as States: Indian Tribal Authority to Regulate and Enforce Federal Environmental Laws and Regulations*. 23 ELR 10579 (10-1993).

Falk, Donald. *Lyng v. Northwest Indians Cemetery Protective Association: Bulldozing the First Amendment Protection of Indian Lands*. 16 Ecology L.Q. 515 (1989).

Gerstenblith, Patty. *Identity and Cultural Property: The Protection of Cultural Property in the United States.* 75 B.U. L.Rev. 559 (May 1995).

Grijalva, James M. *Tribal Governmental Regulation of Non-Indian Polluters of reservation Waters*, 71 N.D. L.Rev. 433 (1995).

Haskew, Derek C., *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?* 24 Am. Indian L.Rev. 21 (2000).

Holt, H. Barry. *Archeological Preservation on Indian Lands: Conflicts and Dilemmas in Applying the National Historic Preservation Act.* 15 Envtl. L. 413 (1985).

Kobylak, Wesley. *Application & Construction of § 106 of NHPA, Dealing with Federally Sponsored Projects Which Affect Historic Properties*. 68 ALR Fed 578.

Kosslak, Renee M. *The Native American Graves Protection and Repatriation Act: The Death Knell For Scientific Study?* 24 Am. Indian L.Rev. 129 (2000).

Linge, George. *Ensuring the Full Freedom of Religion on Public Lands: Devil's Tower and the Protection of Indian Sacred Sites.* 27 B.C. Envtl. Aff.L.Rev. 307 (2000).

Manus, Peter M. *The Owl, the Indian, the Feminist, and the Brother: Environmentalism*

Encounters the Social Justice Movement. 23 B.C. Envtl. Aff.L.Rev. 249 (1996).

Michaels, Mark A. *Indigenous Ethics and Alien Laws: Native Traditions and the United States Legal System.* 66 Fordham L. Rev. 1565 (1998).

Monette, Richard A. *Treating Tribes as States under Federal Statutes in the Environmental Area; Where Laws of Nature and Natural Law Collide.* 21 Vt. L.Rev. 111 (1996).

Phelan, Marilyn. *A Synopsis of the Laws Protecting Our Cultural Heritage.* 28 New Eng. L. Rev. 63 (Fall 1993).

Rievman, Joshua D. *Judicial Scrutiny of the Native American Free Exercise Rights: Lyng and the Decline of the Yoder Doctrine.* 17 B.C. Envtl. Aff. L. Rev. 169 (1989).

Spyke, Nancy Perkins. *The Promotion and Preservation of Culture as Part of Environmental Policy.* 20 Wm. & Mary Envtl. L. & Pol'y Rev. 243 (Spring 1996).

Stern, Water E. & Slade, Lynn H. *Effects of Historic and Cultural Resources and Indian Religious Freedom on Public Lands Developments: A Practical Primer.* 35 Nat. Resources J. 133 (1995).

Suagee, Dean B. & Funk, Karen J. *Cultural Resources Conservation in Indian Country.* 7 NR&E 30 (1993).

Suagee, Dean B. *The Cultural Heritage of American Indian Tribes and Preservation of Biological Diversity.* 31 Ariz.St. L.J. 483 (1999).

Suagee, Dean B. *Tribal Voices in Historic Preservation: Sacred Landscapes Cross-Cultural Bridges, and Common Ground.* 21 Vt. L.Rev. 145 (1996).

Ward, Robert Charles. *The Spirits Will Leave: Preventing the Desecration and Destruction of Native American Sacred Sites on Federal Land.* 19 Ecology L.Q. 795 (1992).

Williams, Teresa A. *Pollution and hazardous Waste on Indian Lands: Do Federal Laws Apply and Who May Enforce Them?* 17 Am.Ind. L.Rev. 269 (1992).

Wood, Mary Christina. *Fulfilling The Executive's Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performances.* 25 Envtl. L. 733 (1995).