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Tribal-Agency Confidentiality: A Catch-22 for Sacred Site Management?

Ethan Plaut[*]

Numerous laws direct federal land management agencies to consider the impact of their decisions on sites sacred to American Indians. These laws require agencies to consult with tribes and practitioners in order to locate sacred sites and understand how land use affects them. But for a variety of religious, historical, and practical reasons, tribes and individual practitioners hesitate to disclose this information to federal land managers. As a result, agencies find themselves directed to protect sacred sites but unable to get relevant information from the people who possess it. Meanwhile, practitioners question the value of federal laws requiring sacred site consultation when such consultation may violate their religious beliefs and expose their sacred sites to overuse and misuse. To reduce the communication barrier, land management agencies may promise confidentiality to those with sacred site information. But once in an agency's possession, the information may be subject to disclosure if it is requested under the Freedom of Information Act, or if the National Environmental Policy Act requires it to be included in a publicly available analysis. This Comment explores this interaction between the Freedom of Information Act, the National Environmental Policy Act, and land management laws favoring tribal consultation, and analyzes the degree of confidentiality agencies can promise those with sacred site information. It analyzes options for agencies and tribes, and concludes a legislative solution would be both beneficial and appropriate.

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INTRODUCTION

Before they were confined to a reservation in Havasu Canyon, the Havasupai hunted and farmed throughout the Grand Canyon region. While the federal government circumscribed tribal lands to make way for white settlers and Grand Canyon National Park, many sites now on non-tribal federal land remain sacred according to the tribe's place-based religion. More detailed information about Havasupai religious beliefs is hard to come by: for the Havasupai, "it is sacrilege to tell about their religion."[1] The Havasupai are especially secretive about sacred sites because if uninitiated people visit certain sites, they "violate the universe," which may bring "calamity" to the tribe.[2]

The importance of Havasupai sacred sites and emphasis on tribal secrecy put tribal members in a difficult predicament in 1984, when the U.S. Forest Service considered approving a proposal from Energy Fuels Nuclear Company to build a uranium mine near Havasu Canyon. What the Havasupai knew, and the Forest Service did not, was that the proposed mine site was in the path of a Coconino Kachina, and the Red Paint and Salt trails, lands which are sacred to the tribe.[3] Mining on these sacred sites would "destroy the continuum of life which is indispensable and central to the Havasupai religion."[4] Yet it would be sacrilegious for the Havasupai to discuss the issue with the Forest Service. As required by the National Environmental Policy Act (NEPA), the agency consulted with the tribe to see whether the proposed mine would affect any sacred sites. Because of secrecy concerns, the tribe delayed in responding. When it finally informed the agency of the site's sacredness, the tribe withheld important details such as which parts of the area were sacred, and how the tribe used the area.[5] The Forest Service approved the mine and the tribe challenged the agency's decision in federal court.

Ultimately, the federal district court concluded that any insufficiency of the agency's cultural impacts analysis or land management decision was the

1. Havasupai Tribe v. United States, 752 F. Supp. 1471, 1496 (D. Ariz. 1990).

2. *It's Their Rite, Religion Links Tribe to Canyon Home*, SAN DIEGO UNION-TRIBUNE, Dec. 5, 1989, at C1.

3. *Havasupai Tribe*, 752 F. Supp. at 1496. The Coconino Kachina is sacred to the Havasupai and the Hopi believe the Coconino Kachina to be guardian of the canyon. *Id.* A general definition of a kachina is "one of the deified ancestral spirits believed among the Hopi and other Pueblo Indians to visit the pueblos at intervals." MERRIAM–WEBSTER'S COLLEGIATE DICTIONARY 635 (10th ed. 1993).

4. *Havasupai Tribe*, 752 F. Supp. at 1499.

5. *Id.* at 1499–1500.

tribe's fault. The court explained, "[t]he Havasupai continuously claim that they are the only ones that know their religion, yet the record clearly shows that they were not forthcoming on the subject during the [analysis] leading up to the [mine approval], nor would they identify specific sites of religious significance."[6] In the end, the tribe suffered because its sacred site was unaccounted for in the land management decision. The agency's decision suffered because it failed to achieve the federal objective that sacred-site information factor into land management decisions. Meanwhile, Energy Fuels reaped the benefit of this communication breakdown; the agency green-lighted the mine without fully considering the project's adverse impact.

This incident at the Grand Canyon underscores a basic paradox concerning sacred-site protection. Federal law requires land management agencies to consider the impact of their decisions on sacred sites through tribal consultation about sacred-site locations and uses. For a variety of reasons, however, tribes and individual religious practitioners[7] hesitate to disclose this information to federal land managers. As a result, agencies find themselves unable to fulfill their mandate. Furthermore, Native practitioners question the value of federal laws requiring sacred-site consultation that may violate their religious beliefs and expose their sacred sites to overuse and misuse. While only Native practitioners realize the full extent of this communication problem, it has arisen enough publicly to demonstrate that it is pervasive and deserves attention.[8]

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6. *Id.* at 1500.

7. This Comment will refer to Native Americans who practice Native religions as "Native practitioners."

8. Besides the Havasupai example, there is evidence that Native practitioners hesitate to fully disclose information to federal land management agencies. When completing an EIS for a project in Las Huertas Canyon, New Mexico, the Forest Service sought to comply with the National Historic Preservation Act's mandate to make reasonable efforts to identify properties that are eligible for the National Register of Historic Places. Pueblo of Sandia v. United States, 50 F.3d 856, 859–60 (10th Cir. 1995). The agency mailed letters to local tribes requesting information on location of sacred sites, activities conducted on the sites, and the frequency of those activities. *Id.* at 860–61. While non-tribal individuals indicated the canyon was used for religious purposes, the Pueblo of Sandia refused "to disclose any specific details of site locations or activities." *Id.* at 861. Based on this lack of information, the Forest Service concluded there were no cultural sites that were eligible for the Register in the project area. *Id.* at 861. Information provided by non-Indians and the very limited information provided by Indians indicated that sacred sites were likely abundant in the project area. *Id.* at 859–61. The Tenth Circuit ultimately held that because the Forest Service knew tribal members would be hesitant to disclose specific information, and because there was strong indication that sacred sites were within the project area, the agency efforts were inadequate. *Id.* at 861–62. Similarly, the Lakota Tribe declined to identify the location and significance of sacred sites that would be impacted by a missile system the Air Force was considering in Wyoming. *See* U.S. NAT'L PARK SERV., NAT'L REGISTER BULL. 38: GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES 19 (1998) [hereinafter BULLETIN 38], *available at* http://www.nps.gov/nr/publications/bulletins/nrb38/. More broadly, agency discussions with Native practitioners suggest the problem is pervasive: after meeting with tribal representatives to analyze how agencies can improve sacred-site protection, the Department of Interior (the "DOI") noted that "the confidentiality of information concerning the nature and location of Sacred Sites was the one issue about which there was virtually complete consensus [among tribal representatives]." DEP'T OF INTERIOR, IMPLEMENTATION REPORT FOR EXEC. ORDER NO. 13,007 13 (1997) [hereinafter IMPLEMENTATION REPORT].

The tribal-agency communication barrier may diminish if land management agencies promise confidentiality to those with sacred-site information.[9] While seemingly simple, this solution is complicated by the Freedom of Information Act (FOIA) and NEPA's disclosure requirements. Once in an agency's possession, the information may be subject to disclosure if it is requested under FOIA, or if NEPA requires it to be included in a publicly available analysis. Thus, these laws restrict agencies' ability to guarantee unconditional confidentiality during consultations.

Though some agencies and commentators have noted the potential conflict between FOIA and sacred-site protection,[10] no courts, agencies, or commentators have conducted a close analysis of agencies' ability to promise confidentiality.[11] This Comment does so by exploring the interaction between FOIA, NEPA, and land management laws favoring tribal consultation. It begins by summarizing the obligations of federal agencies to consider sacred-site protection and to consult with tribes about actions that might affect such sites. It then describes the importance of secrecy in Native American culture and religion. Next, it introduces FOIA and NEPA's disclosure requirements, and describes why the ability of agencies to promise confidentiality hinges entirely on the former statute. After applying FOIA, it concludes that while agencies can maintain confidentiality relating to most information about sacred sites, significant barriers remain. Last, it assesses options to address these obstacles and concludes that legislative action would be the most effective and appropriate solution.

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9. *See* IMPLEMENTATION REPORT, *supra* note 8, at 13.

10. *See id.*; Lauryne Wright, *Cultural Resource Preservation Law: The Enhanced Focus on American Indians*, 54 A.F. L. REV. 131, 153 n.154 (2004) ("Section 9 of ARPA and Section 304 of NHPA may provide some protection from a request for [tribal information concerning sacred sites], but may not be enough to guarantee confidentiality in the face of a Freedom of Information Act (FOIA), *5 U.S.C. § 552*, request for disclosure--especially under NHPA, which does not cross-reference FOIA."); Rebecca Tsosie, *The Conflict Between the "Public Trust," and the "Indian Trust" Doctrines: Federal Public Land Policy and Native Nations*, 39 TULSA L. REV. 271, 306 (2003) ("In some cases, federal statutes specifically protect the confidentiality of certain types of cultural information. However, to the extent that the information falls outside of these limited statutory dictates, Native practitioners' interest in confidentiality may not be protected. Thus, the cultural concerns and requirements of Native practitioners must become an important part of the process of identification and protection of sacred sites on public lands.").

11. In the only known agency analysis of the issue, the DOI only briefly addressed the topic and concluded that its "ability to guarantee confidentiality is substantially constrained by FOIA [because] . . . none of [FOIA's exemptions] . . . guarantee that the information will be protected to the degree expected by tribes." IMPLEMENTATION REPORT, *supra* note 8, at 13. The only discussion by a commentator provides no helpful analysis and simply concludes that information about many sacred sites "may not" be protected and "[u]ntil the issue is settled, the best approach may be to resist the temptation to include in any system of records even that information a tribe is willing to share with Federal agencies concerning . . . sacred sites." *See* James G. Van Ness, CLE ALI–ABA Course, *Cultural Resources Management in the Department of Defense*, in Federal Lands Law Conference SG039 ALI–ABA 91, 99 (2001).

I. THE NEED FOR FEDERAL AGENCIES TO KNOW ABOUT SACRED SITES

Federal agencies are legally required to consider the impacts of their land management decisions on cultural resources, including Native American sacred sites. Some of these laws are agency-specific,[12] while others apply to all federal agencies with land management authority. This Part shows how several laws promote sacred-site protection based on the assumption that Native practitioners will share information about sites.[13]

The National Historic Preservation Act (NHPA) aims to protect cultural and historic resources on federal land.[14] To accomplish this goal, NHPA requires federal agencies to consult with interested parties to identify sites eligible for inclusion in the National Register of Historical Places (Register), and to evaluate possible adverse impacts on the sites from proposed federally funded or permitted "undertakings."[15] "[P]roperties of traditional religious and cultural importance" to tribes may be eligible for the Register.[16] Accordingly, under NHPA, any agency considering an undertaking must first engage in a "reasonable and good faith effort" to identify tribes with religious attachment to properties within the potentially affected area.[17] Next, the agency must consult those tribes to identify potential historic properties and evaluate their eligibility for Register status.[18] If properties qualify, further consultation requires identification of "adverse effects" the undertaking may have on those properties.[19] The agency must collaborate with the consulting parties to develop and evaluate alternatives for minimizing any potential adverse effects.[20] Ultimately, the agency can proceed with its undertaking despite its potential adverse effects.[21] Thus, NHPA does not prohibit agencies from

12. For example, the National Park Service Organic Act provides that the Park Service "shall promote and regulate" areas subject to its control to conform to the "fundamental purpose" of conserving "the scenery and the natural and historic objects and the wild life therein." 16 U.S.C. § 1 (2008). This Comment discusses generally applicable laws, rather than agency-specific laws.

13. Complete summaries of these laws are beyond the scope of this paper. For a more detailed description of these laws *see* Sandra B. Zellmer, *The Protection of Cultural Resources on Public Lands: Federal Statutes and Regulations*, 31 ENVTL. L. REP. 10689 (2001). Several of these laws, especially NHPA, are discussed in more detail below as possible bases for an exemption from FOIA. *See infra* Part V.

14. *See* National Historic Preservation Act (NHPA) of 1966, 16 U.S.C. §§ 470–470x-6 (2006).

15. 16 U.S.C. § 470f. Federal "undertakings" and "major federal action" are distinct concepts; the former controls the applicability of NHPA, and the latter controls the applicability of NEPA. *See id*., 42 U.S.C. § 4332(C).

16. 16 U.S.C. § 470a(d)(6)(a). See Part IV, for a more detailed discussion of when sacred sites are eligible for the Register.

17. 36 C.F.R. § 800.4(b)(1) (2008).

18. 36 C.F.R. § 800.2(c)(2)(ii) (2008). Tribes have additional authority when eligible properties are on tribal lands. This paper discusses sacred-site protection on federal lands only.

19. 16 U.S.C. § 470f. *See* 36 C.F.R. § 800.5(a)(1) (defining "adverse effects").

20. 36 C.F.R. § 800.6(a), (b).

21. *See, e.g*., Valley Cmty. Pres. Comm'n v. Mineta, 373 F.3d 1078, 1085 (10th Cir. 2004).

destroying eligible sites, but allows judicial enjoinment if agencies do not meet the consultation requirements.[22]

NEPA also requires agencies to consider sacred-site information provided by tribes.[23] Specifically, the statute urges agencies to "preserve important . . . cultural and natural aspects of our national heritage"[24] and imposes procedural requirements to achieve this goal.[25] Most importantly, any agency considering a "major Federal action[] significantly affecting the quality of the human environment" must draft a "detailed statement" that describes, among other things, environmental impacts of the proposal.[26] This detailed statement is known as an Environmental Impact Statement (EIS). Agencies must consider the proposal's cultural and historic effects,[27] and if a proposed action has potential cultural or historic impacts, it is more likely to require an EIS.[28] In fact, potential cultural or historic impacts may trigger an EIS even if they are the only environmental impacts of the project.[29] Like NHPA, NEPA is a procedural statute that requires only consideration, not avoidance, of impacts on cultural resources.[30]

The Native American Graves Protection and Repatriation Act (NAGPRA) is another federal act that mandates tribal consultation and promotes sacred-site protection.[31] NAGPRA prohibits excavation and removal of Native American human remains and cultural items without a permit.[32] Prior to permit issuance, an agency must consult with culturally affiliated tribes.[33]

Like NAGPRA, the Archeological Resource Protection Act (ARPA) protects cultural resources located on federal lands and requires tribal

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22. *See* Pueblo of Sandia v. United States, 50 F.3d at 856, 862–63 (10th Cir. 1995) (enjoining implementation of a Forest Service forest management plan for failure to identify potentially eligible tribal traditional cultural properties within the planning area).

23. *See* 40 C.F.R. § 1502.16 (2008).

24. National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. § 4331(b)(4) (2000).

25. 42 U.S.C. § 4332.

26. 42 U.S.C. § 4332(C).

27. 40 C.F.R. § 1508.8; *see also* 40 C.F.R. § 1508.27 (specifying how impacts on cultural resources may be considered significant). To decide if a federal action significantly affects the environment and whether an EIS is necessary, agencies often prepare Environmental Assessments (EAs). 40 C.F.R. § 1508.9. If, based on an EA, the agency concludes there will be no significant impact, the agency issues a Finding of No Significant Impact (FONSI) and proceeds with its decision. 40 C.F.R. § 1508.13. If the EA reveals significant impacts, the agency must then prepare an EIS that analyzes impacts and alternative actions. 40 C.F.R. § 1508.11. *See generally*, 40 C.F.R. §§ 1502–1503.

28. Any consultation required to identify these impacts is carried out in conjunction with NHPA's consultation requirement if that statute also applies. 40 C.F.R. § 1502.25.

29. *See* Colo. River Indian Tribes v. Marsh, 605 F. Supp. 1425, 1430 (C.D. Cal. 1985).

30. *See, e.g.*, Pit River Tribe v. Bureau of Land Mgmt., 306 F. Supp. 2d 929, 939 (E.D. Cal. 2004).

31. *See* Native American Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013 (2006). *See* COHEN'S HANDBOOK ON FEDERAL INDIAN LAW § 20.02[1][d], at 1241–46 (Nell Jessup Newton, et al., eds., LexisNexis 2005 ed.).

32. 25 U.S.C § 3002 (2006).

33. *Id.*

consultation.[34] This statute applies to any "material remains of past human life or activities" which are found on public lands, are of archeological interest, and are at least one hundred years old.[35] Essentially, non-Indians cannot excavate or remove these resources without a permit obtained from the federal agency with management authority over the land.[36] If the permit issuance can harm a "religious or cultural site," the agency must provide notice to and consult with "any Indian tribe which may consider the site as having religious or cultural importance."[37] Thus, similar to NAGPRA, if physical cultural objects are located on a sacred site, the agency will need to consult with affected tribes before disturbing the objects.

Beyond these statutory requirements, in 1996 President Clinton issued Executive Order 13,007 on Indian Sacred Sites, which encourages agencies to avoid actions that may adversely affect "the physical integrity of such sacred sites."[38] The order provides no enforcement mechanism and creates no private cause of action, but agencies have responded by adopting guidelines and policies aimed at promoting sacred-site protection and consultation with tribes and individual Native practitioners.[39]

II. THE IMPORTANCE OF SECRECY FOR SACRED SITE USERS

Several reasons may explain why tribes and Native practitioners hesitate to share sacred-site information with federal agencies seeking to fulfill the consultation obligations described above.[40] First, the historical relations between tribes and non-Indians have fostered tribal distrust of the federal government and the non-Indian public, especially with regard to respect for Native religion. Second, secrecy is often a basic tenet of Native religions. Third, many Native practitioners fear that sharing information with outsiders will result in the abuse of sacred sites and the disruption of religious ceremonies.

According to at least one anthropologist, some Native secrecy regarding religious beliefs is a function of the historical programs of forced cultural assimilation imposed on Native Americans during various historical periods

34. 16 U.S.C. §§ 470aa–mm (2006).

35. 16 U.S.C. § 470bb(1).

36. *See* 16 U.S.C. § 470ee(a).

37. 43 C.F.R. § 7.7(a) (2008).

38. Exec. Order No. 13,007, § 1(a)(2), 61 Fed. Reg. 26,771 (May 24, 1996). The order defines "sacred site" as "any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion . . . ." *Id.* § 1(b)(iii).

39. *See, e.g.*, IMPLEMENTATION REPORT, *supra* note 8, at 2, 6; DEP'T OF INTERIOR, DEPARTMENT MANUAL § 512 DM3; NATIONAL PARK SERVICE, MANAGEMENT POLICIES § 5.3.5.3.2 (2001).

40. These reasons vary across tribes and individuals. This paper discusses several generalizations for why there is secrecy that apply to most, if not all, tribes.

since colonization.[41] For example, as they did with many tribes, European colonists forced the Pueblos to "Christianize" by punishing traditional religious practitioners and destroying sacred objects.[42] In response, Pueblos continued their ceremonies and beliefs in secret.[43] Thus, Pueblos likely maintain secrecy about their religious practices out of a fear that if they reveal such information to the public, it will again be used against them.[44]

Native Americans may also value secrecy as essential to their practices and beliefs regarding sacred sites. In other words, "[s]acred and secret are often two sides of the same coin."[45] As the Havasupai example demonstrates, some Native "religious matters must remain private and confidential because disclosure would violate the tenets of the religions themselves."[46] According to some Native cultures, sharing religious information with outsiders "will lead to death or severe injury."[47] As a Taos Pueblo noted, this aspect of secrecy's importance is not unique to Indian religions: "in many religions . . . to reveal the holy mysteries to the uninitiated is a blasphemy which destroys their religious power."[48]

Fear of increased site use resulting from sacred-site disclosure also contributes to Native Americans' emphasis on sacred-site secrecy. If more people know that a certain area is sacred, then more people will be interested in visiting it. Such visits are problematic for several reasons. First, some Native practitioners believe that something "consecrated should not be seen by profane eyes or handled by profane hands."[49] That is, it would violate the Native practitioners' religious beliefs for an uninitiated outsider to visit a site that only the practitioners should view. Such a visit may disturb or insult the place, which could have harmful repercussions.[50] Native practitioners may also fear for the welfare of the uninitiated outsider who visits a sacred site without

41. Elizabeth Brandt, *The Role of Secrecy in a Pueblo Society*, *in* FLOWERS OF THE WIND: PAPERS ON RITUAL, MYTH AND SYMBOLISM IN CALIFORNIA AND THE SOUTHWEST 12 (Thomas C. Blackburn ed., 1977).

42. *Id*.

43. *Id*.

44. *Id*.

45. Robert S. Michaelsen, *American Indian Religious Freedom Litigation: Promise and Perils*, 3 J. L. & RELIGION 47, 70 (1985).

46. Suzan Shown Harjo, *Perspectives, Fact Sheet: Protection of Native American Sacred Places*, INDIAN COUNTRY TODAY, June 22, 2002 (noting that "[m]any Native traditional religious matters cannot be discussed or revealed").

47. BULLETIN 38, *supra* note 8, at 19.

48. *Michaelsen*, *supra* note 45, at 70 n.98.

49. *Michaelsen*, *supra* note 45, at 70.

50. For example, Great Basin Indians believe in "power places," which are sites where the world's energy is distributed in especially high concentrations. *See* RICHARD W. STOFFLE, AMERICAN INDIAN RELIGIOUS TRADITIONS, AN ENCYCLOPEDIA 756–57 (Suzanne J. Crawford & Dennis F. Kelley eds., 2005). People with knowledge of these places are extremely secretive about their locations because if an individual is improperly prepared to visit the site, or does not understand how to interact with the site, it will upset the balance of communities and nations. *Id.* at 757.

proper preparation and knowledge.[51] Moreover, the "sacredness" of a site often relates to its pristine characteristics and the privacy it offers.[52] These characteristics may disappear with increased use by non-practitioners who lack religious respect for the site.[53] Non-native "New-Agers"[54] are "notorious among Native American people for disrupting sacred ceremonies"—they interrupt prayers, cross prayer circles in wrong directions, smoke marijuana in sacred pipes, and "New Age women on their period have sneaked into certain ceremonies prohibited to menstruating women."[55] Tourists and collectors may even remove sacred items. As one Native practitioner predicted, "[t]he next thing we know we'll see whatever we have in Museums."[56]

Due to these secrecy concerns, people with information about sacred sites may be reluctant to share this information with land management agencies for fear that the agencies will disclose the information to the public. Tribal leaders warned that "[p]rodding the federal government to protect American Indian sacred sites may place them in greater danger because subsequent publicity typically increases unwanted visitation and vandalism."[57] As in the Havasupai example, these secrecy concerns can cause Native practitioners to withhold the information that agencies need to protect sacred sites.[58]

One potential solution is for an agency to promise Native practitioners that it will consider the sacred-site information in its decisions but not disclose the information to the public. Clearly, confidentiality cannot address all secrecy concerns: if it violates a religious tenet for a Native practitioner to discuss sacred sites with non-practitioners in the first place, the practitioner will violate that tenet by providing an agency with sacred-site information regardless of confidentiality promises. Nevertheless, confidentiality would lessen the degree of this violation, since disclosing religious information to a land manager is not the same as revealing it to any curious person. Moreover, confidentiality would ensure that Native practitioners do not subject themselves to privacy invasions or their sacred sites to overuse. Native practitioners have recognized the potential value of confidentiality: when the DOI solicited tribal opinions about protection of sacred sites, tribal members stressed the need for confidentiality

51. For example, Great Basin Indians also believe that if an unprepared person visits a power place it will harm that individual. *Id.* at 757.

52. IMPLEMENTATION REPORT, *supra* note 8, at 7 ("The physical integrity of Sacred Sites depends upon protection from many environmental factors including light, noise, and other pollutants.").

53. *See* Lyng v. Nw. Cemetery Ass'n, 485 U.S. 439, 442 (1988) (stating that Native American rituals are carried out in a specific manner and depend on privacy, silence, and an undisturbed natural setting).

54. Sources mentioning this issue use the term "New-Ager" without defining it. This Comment uses "New-Ager" to describe a wide variety of non-Native individuals who reject mainstream religions in favor of a personal spirituality tied to nature and outdoor ceremonies.

55. STOFFLE, *supra* note 50, at 626.

56. Michaelsen, *supra* note 45, at 70–71.

57. Ron Selden, *Elders Defend Secrets of Sacred Sites*, INDIAN COUNTRY TODAY, Apr. 7, 2002, *available at* http://www.indiancountrytoday.com/archive/28187054.html.

58. *See supra* note 6.

of sacred site information "to protect against those who would exploit or abuse such knowledge or intrude upon, interrupt, or disrupt religious ceremonial activity."[59]

Agencies have also acknowledged the importance of confidentiality regarding sacred-site information and have adopted policies favoring non-disclosure to the maximum extent "permitted by law."[60] Thus, the key legal question is whether an agency can realistically guarantee Native practitioners that the sacred-site details provided as part of a consultation will be incorporated into the agency's management decisions but not disclosed to the public. In other words, what does it mean to promise confidentiality to the maximum extent "permitted by law"?

III. WHY CONFIDENTIALITY TURNS ON FOIA

Congress passed FOIA in 1966 in order to facilitate public access to information held by federal agencies.[61] In a democratic society, public access to agency information is crucial to holding government accountable to the governed.[62] To achieve its goal, FOIA creates a broad and judicially enforceable public right to obtain "agency records."[63] If a member of the public "reasonably describes" records and files a procedurally proper request, FOIA requires the agency to release the records unless the agency can prove that the requested information fits into one of the FOIA's nine "narrowly construed" exemptions.[64]

FOIA is the exclusive mechanism through which the public can proactively gain access to agency information regarding sacred sites. If a member of the public requests an agency's sacred-site information, FOIA directly controls whether disclosure is mandatory or whether the agency can withhold the information under an exemption. Furthermore, NEPA incorporates

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59. IMPLEMENTATION REPORT, *supra* note 8, at 7.

60. The Fish and Wildlife Service adopted a policy implementing Executive Order 13,007 that acknowledges "confidentiality concerns and [a] commitment to keep information proprietary, *as permitted by law*." *Id.* at 21 (emphasis added). The Department of Interior Manual informs DOI officials that "[*t*]*o the extent permissible under federal law and regulation*, information received during [tribal] consultation shall be managed in a manner which is least likely to be disclosed to third parties. Information so received shall be deemed confidential if disclosure would inappropriately reveal the nature, location or compromise the physical integrity of a sacred site." DEP'T OF INTERIOR, DEPARTMENT MANUAL, § 512 Section 3.7 (1998) (emphasis added).

61. JAMES T. O'REILLY, FEDERAL INFORMATION DISCLOSURE 6 (3d ed. 2000).

62. John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989).

63. *Id.*

64. *Id.*; Freedom of Information Act, 5 U.S.C. § 552(a)(3)(A) (2006). *See generally*, O'REILLY, *supra* note 61. Even if an exemption applies, it is discretionary. Thus, an agency can disclose exempt information unless a separate statute requires non-disclosure. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 292–93 (1979). *See* O'REILLY, *supra* note 61 § 10 (summarizing restrictions on agency discretionary decisions to disclose information). This Comment assumes that if an agency can lawfully withhold sacred site information, it will choose to do so. This assumption is consistent with agencies' current stances that such information should remain confidential to the maximum extent permitted by FOIA. *See supra* note 60.

FOIA in reference to what information must be disclosed in publicly available environmental analysis documents.[65] Therefore, FOIA indirectly controls whether sacred-site information considered as part of an agency's NEPA analysis must be released to the public. Furthermore, the Supreme Court has rejected the possibility that the federal government's unique fiduciary obligations to tribes uniformly exempt tribal information from FOIA coverage.[66] Thus, agencies' ability to keep site information secret turns entirely on FOIA and its exemptions.

FOIA's most obvious effect in this context is allowing members of the public to request the information Native practitioners give agencies regarding sacred sites and cultural practices.[67] For example, a professor writing a book about governmental decision making recently requested notes from National Park Service (NPS) consultation meetings with tribal representatives conducted pursuant to NAGPRA.[68] The professor eventually dropped the request but only after NPS realized that a very limited amount of the requested information qualified for a FOIA exemption.[69] Despite NPS's prior statements to tribal representatives that any information shared with the agency would remain confidential, sacred-site information likely would have been disclosed had the professor not dropped the request.[70] Thus, as this anecdote illustrates, any given agency can promise Native Americans confidentiality only to the extent that the information provided is exempt from mandatory disclosure under FOIA.

FOIA's less obvious application to sacred-site management involves information gleaned in NEPA analyses. NEPA aims to provide for public involvement by informing the public of possible environmental consequences of agency actions.[71] To that end, whenever an agency prepares an environmental-analysis document pursuant to NEPA, the agency must make the analysis publicly available "as provided by [FOIA]."[72] Thus, the "decisionmaking and public disclosure goals of [NEPA] . . . are not necessarily coextensive"—an agency may be able to include certain considerations in its

65. 42 U.S.C. § 4332(C) (2000).

66. Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 11 (2001).

67. Such information requests seem to stem from a variety of motivations; commentators have cited such impulses as the scientific desire to learn about the sites and ceremonies, the "spiritual hunger of the 'New Age' religious groups," and "the natural curiosity of informed people." NATIVE AMERICAN SACRED SITES & THE DEPARTMENT OF DEFENSE (Vine Deloria Jr. & Richard W. Stoffle eds., June 1998), *available at* https://www.denix.osd.mil/portal/page/portal/content/environment/NA/NASSDOD.pdf.

68. Alexa Roberts, *Trust Me, I Work for the Government: Confidentiality and Public Access to Sensitive Information*, 25 AMERICAN INDIAN QUARTERLY 13, 15 (Winter 2001), *available at* http://muse.jhu.edu/journals/american_indian_quarterly/v025/25.1roberts.html.

69. *Id.*

70. *Id.*

71. *See* Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

72. 42 U.S.C. § 4332(C) (2000).

analysis but withhold those same considerations from public NEPA documents under a FOIA exemption.[73] For example, if the Havasupai tribe had provided specific details to the Forest Service about sacred sites affected by the proposed uranium mine, NEPA would have required the agency to consider that information in its decision. But NEPA would not have required the agency to include the information in an EIS if FOIA exempted that information from disclosure. Ultimately, then, FOIA governs whether information is subject to disclosure under NEPA.

Lastly, the federal government's unique fiduciary obligations to tribes do not create an additional legal basis for requiring agency confidentiality. These obligations are rooted in the historical tribal cession of land to the federal government and acknowledgment of superior federal sovereignty; in exchange, the federal government assumed certain responsibilities, including "duties to protect tribal lands and cultural and natural resources for the benefit of tribes and individual tribal members/land owners."[74] The resulting relationship "has been compared to one existing under a common law trust, with the United States as trustee, the Indian tribes or individuals as beneficiaries, and the property and natural resources managed by the United States as the trust corpus."[75] A fundamental trust law principle is that the trustee has a duty to keep information acquired as trustee confidential if disclosure would be detrimental to the beneficiary.[76] The Supreme Court, however, unanimously rejected the possibility of an additional "Indian trust" FOIA exemption based on this relationship.[77] Thus, the statute alone controls an agency's ability to maintain confidentiality of sacred-site information.

IV. WHAT AGENCIES CAN PROMISE UNDER FOIA

As described above, the possible scope of agency-tribal confidentiality depends on the extent to which sacred-site information fits within one of FOIA's nine exemptions. This Part discusses the two strongest candidates for

73. *See* Weinberger v. Catholic Action of Haw./Peace Educ. Project, 454 U.S. 139, 143 (1981).

74. Advisory Council on Historic Preservation, ACHP Policy Statement Regarding the ACHP's Relationships with Indian Tribes (Nov. 17, 2000), *available at* http://www.achp.gov/policystatement-tribes.html.

75. Dep't. of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 11 (2001).

76. *See* RESTATEMENT (SECOND) OF TRUSTS § 176 cmt. a (1957) ("[I]t is the duty of the trustee to exercise such care and skill to preserve the trust property as a man of ordinary prudence would exercise in dealing with his own property . . . .").

77. *Klamath Water Users*, 532 U.S. at 15 (reasoning that such an exemption is not found in the statute, would conflict with FOIA's general presumption that disclosure is required, and would ignore the fact that Congress twice considered adopting such an exception but declined to do so). Justice Scalia later summarized the Court's holding, and his conception of history and Indian law, when he noted that the moral of the case is that "you should never pick a trustee who enacts a Freedom of Information Act." *Justices Will Decide Depth Of Exemption: Feds Argue Tribal Comments Are Confidential Under Act*, THE NEWS MEDIA & THE LAW, Winter 2001, at 39, *available at* http://www.rcfp.org/news/mag/25-1/foi-klamathu.html. I suspect most tribes would disagree that they "picked" the United States as their trustee.

protecting such sacred information—exemption 3, which exempts matters "specifically exempted from disclosure by statute," and exemption 6, which exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[78] With this pair of exemptions at their disposal, agencies can maintain confidentiality of most provided information about sacred sites. Whether *all* such information can remain confidential, however, remains unclear, and agencies may need to obtain the information before they are able to promise confidentiality.

A. FOIA Exemption 3

FOIA permits an agency to withhold information if it can point to a statute that either (1) requires specific information to be withheld on a non-discretionary basis, (2) includes criteria for withholding information, or (3) refers to certain types of matters that should be withheld from disclosure.[79] With regard to sacred-site information, NHPA likely provides the broadest, but also most confusing, exemption to disclosure. This Part first addresses other potentially applicable withholding statutes in brief and then analyzes NHPA in depth.[80]

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78. The remaining exemptions allow agencies to withhold: (1) information that is "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and [is] in fact properly classified pursuant to such Executive order"; (2) information that is "related solely to the internal personnel rules and practices of an agency"; (3) "trade secrets and commercial or financial information obtained from a person and privileged or confidential"; (4) "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency"; (5) "records or information compiled for law enforcement purposes" if the information meets certain qualifications; (6) information that is "contained in or related to . . . the use of an agency responsible for the regulation or supervision of financial institutions"; or (7) "geological or geophysical information and data, including maps, concerning wells." FOIA, 5 U.S.C. § 552(b) (2006). The "trade secrets" exemption has been interpreted to apply only to two classes of information: (a) trade secrets, and (b) commercial or financial information that is *also* privileged or confidential. *See* Brockway v. Dep't of Air Force, 518 F.2d 1184, 1187 (8th Cir. 1975). Thus, it does not apply to information just because it is "privileged or confidential." The exemption for inter-agency memorandums has been extended to cover information provided by consultants an agency uses in securing information, which would suggest that a Native practitioner or tribe might be used as a "consultant" for sacred-site information. The Supreme Court, however, rejected this possibility in *Department of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001). The Court recognized "that the candor of tribal communications with the Bureau [of Reclamation] would be eroded without the protections of the deliberative process privilege recognized under [this exemption]." *Id.* at 11. Nevertheless, the court held that reports made from tribes do not qualify under the exemption due to a tribe's likely self-interest in providing information to an agency. *Id.* at 13.

79. 5 U.S.C. § 552(b)(3) (2006).

80. Some agency-specific legislation may provide withholding authority for certain agencies. For example, the National Parks Omnibus Management Act of 1998 provides additional grounds for withholding information about sites on park service lands. *See* 16 U.S.C. § 5937 (2006). Unless the agency makes specific affirmative findings, it may withhold information about "endangered, threatened, [or] rare" park system resources, "paleontological objects," and "objects of cultural patrimony." *Id.* Other agency-specific statutes, such as the National Forest Management Act and the Federal Lands Policy Management Act might include additional withholding authority, but as discussed *infra* they must be very specific to establish such authority. Moreover, these potential exemptions would not apply to all

1. Non-NHPA Potential Withholding Statutes

Neither Native practitioners nor agencies can rely on Executive Order 13,007 or NAGPRA as withholding statutes. An executive order does not qualify as a "statute" and therefore cannot exempt information from disclosure.[81] NAGPRA includes no express language that identifies it as a withholding statute and courts have been generally unwilling to infer withholding authority without an explicit statutory directive given FOIA's "strong presumption in favor of disclosure."[82] Moreover, in the only decision addressing the issue, a federal district court held that NAGPRA does not qualify as a withholding statute and therefore could not exempt a NAGPRA inventory from public disclosure.[83]

ARPA specifically provides that "[i]nformation concerning the nature and location of any archaeological resource . . . may not be made available to the public under [FOIA] . . . unless the Federal land manager concerned" makes certain affirmative findings.[84] If, however, the governor of the state where "archaeological resources" are found formally requests that information, federal agencies must provide the information as long as the governor promises that she will "adequately protect the confidentiality of such information to protect the resource from commercial exploitation."[85] Because ARPA explicitly authorizes nondisclosure of particular information on a non-discretionary basis, it is clearly a withholding statute under FOIA.[86]

The scope of ARPA's withholding authority has two important limitations, however. First, the statute only authorizes withholding of information about "archaeological resources," which include only "material remains of past human life or activities which are of archeological interest" and are at least one hundred years of age.[87] Consequently, if a Native practitioner informs an agency that a site is sacred because it is a burial ground, the information is exempt from FOIA disclosure and exempt from inclusion in NEPA analysis. If, on the other hand, the Native practitioner says a site is sacred because it is the home of a deity, the information is not about an "archaeological resource," and therefore not exempt from disclosure. Thus, returning to the Havasupai example, the Forest Service could not have promised confidentiality under

agencies and this Comment is limited to discussing only those statutes that would allow any federal land management agency to withhold information.

81. *See, e.g.*, Wash. Post Co. v. U.S. Dep't of Health and Human Servs., 690 F.2d 252, 273 (D.C. Cir. 1982).

82. Na Iwi O Na Kapuna O Mokapu v. Dalton, 894 F. Supp 1397, 1411 (D. Hawai'i 1995).

83. *Id.* at 1411–12. NAGPRA requires federal institutions and museums receiving federal funding to conduct an inventory for remains and cultural items that may be affiliated with particular tribes.

84. NHPA, 16 U.S.C. § 470hh(a) (2006). Upon making these affirmative findings, the federal land manager may disclose the information at his or her discretion. *Id.*

85. 16 U.S.C. § 470hh(b).

86. As of the time this article was written, no federal court has addressed this issue.

87. 16 U.S.C. § 470bb(1).

ARPA—information that a kachina and sacred paths are within a project area does not constitute information about archaeological resources. The second limit on ARPA is that even if information involves an archaeological resource, if the state's governor requests the information, the agency *must* provide it. While the governor cannot allow the information to cause "commercial exploitation," the governor can still make the information available to the public, thereby causing other forms of exploitation.

2. NHPA as a Withholding Statute

NHPA provides that the head of a federal agency conducting NHPA consultation "shall," after consulting with the Secretary of Interior, "withhold from disclosure to the public information about the location, character, or ownership of a historic resource, if the Secretary and the agency" conclude that disclosure would do any of three things: (1) "cause a significant invasion of privacy"; (2) "risk harm to the historic resources"; or (3) "impede the use of a traditional religious site by practitioners."[88] This language makes NHPA the broadest withholding statute that could apply to sacred-site information, but its withholding authority is problematic for several reasons.

The first problem is that no court has held that NHPA is a withholding statute under FOIA. Many withholding statutes, such as ARPA, specifically reference FOIA, thereby clarifying their nondisclosure authority under FOIA. To qualify as a withholding statute, it is not necessary that a statute refer to FOIA, but the statute must conform to one of exemption 3's nondisclosure criteria. Thus, a statute that gives an agency indeterminate discretion to withhold broad categories of information from public disclosure would not qualify. For example, according to the D.C. Circuit Court, a statute giving an agency discretion to withhold certain information if the agency deems nondisclosure to be "in the national interest" is too vague to qualify under exemption 3 because it does not "significantly inform the agency's discretion."[89] Instead, only "explicit nondisclosure statutes that evidence a congressional determination that certain materials ought to be kept in confidence" qualify.[90]

While NHPA does not explicitly reference FOIA, it almost certainly qualifies as a withholding statute under exemption 3. First, NHPA sets forth specific criteria that considerably limit an agency's discretionary authority to withhold certain types of historic-resource information: the agency must withhold such information only if disclosure would risk harm to a historic resource, "impede" the use of a *specific* religious site by Native practitioners, or cause a significant invasion of privacy. Thus, unlike the vague "national

88. 16 U.S.C. § 470w-3.
89. *See* Am. Jewish Cong. v. Kreps, 574 F.2d 624, 629 (D.C. Cir 1978).
90. Irons & Sears v. Dann, 606 F.2d 1215, 1220 (D.C. Cir. 1979).

interest" discretionary limit, NHPA "significantly informs" the agency's discretion. Furthermore, the legislative history strongly suggests that Congress intended NHPA to qualify as a withholding statute. A House Report specifies that NHPA's nondisclosure provision "expands upon" the nondisclosure authority of ARPA.[91] Because ARPA is clearly a withholding statute, NHPA only "expands upon" ARPA's protection if it too qualifies as a withholding statute. Lastly, at least one federal court has noted in dicta that NHPA is a withholding statute.[92]

Assuming NHPA is a withholding statute, it only authorizes an agency to withhold historic-resource information if the agency and the Secretary of Interior find that disclosure would cause one of the three consequences previously discussed. If the sacred site constitutes a "historic resource" within the meaning of NHPA, the agency will be able to find this with ease. Based on the legitimate concerns of Native practitioners described in Part II, the agency could justifiably conclude that disclosure of information about a sacred site would both invade privacy and impede use of the site. Thus, assuming agencies seek to protect information to the extent permitted by law, NHPA's discretionary limits should pose no problem to a promise of confidentiality.

While these discretionary limits are not problematic, NHPA suffers from a fundamental weakness: in order to withhold sacred-site information under NHPA, the agency must first determine that the information pertains to "historic resources." A property only qualifies as a "historic resource" if the property is "included in, or eligible for inclusion on the National Register."[93] This requirement raises two key issues. First, it is not entirely clear when a sacred site qualifies as a "historic resource." This problem is not significant because, as discussed below, most sacred sites will qualify under the established criteria. Second, and most importantly, using NHPA as a withholding statute requires an agency to put the cart before the horse: a Native practitioner must provide the agency with sacred-site information before the agency can determine whether the site qualifies as a historic resource. Accordingly, at the time the practitioner provides the information, the agency cannot make a definite promise of confidentiality.

The first problem is not a significant barrier because most sacred sites would qualify as eligible properties under NHPA. The statute states that the Register must be composed of "districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, engineering, and culture."[94] It specifies, "[p]roperties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization *may be*

91. H.R. REP. NO. 96-1457, at 46 (1980), *reprinted in* U.S.C.C.A.N. 6378, 6409.

92. Hornbostel v. U.S. Dep't of Interior, 305 F. Supp. 2d 21, 32 (D.D.C. 2003) (noting that certain confidential research information could be withheld if covered by NHPA but that the agency did not prove that the materials at issue "are the type described in the Act").

93. 16 U.S.C. § 470w(5).

94. *Id.* § 470a(a)(1)(A).

determined to be eligible for inclusion on the National Register."[95] Traditional religious and cultural properties, such as sacred sites, can therefore be eligible for the Register, but must meet other eligibility requirements. The statute delegates authority to DOI to establish further eligibility criteria.[96]

DOI adopted regulations that establish a four-step test to determine whether traditional cultural properties ("TCPs"), such as sacred sites, are eligible for the Register.[97] Sacred sites should have little trouble passing each step. First, the subject under consideration must be a "property"; the Register does not include intangible resources.[98] Sacred sites should meet this requirement: the regulations do not require physical construction on a site, and DOI guidelines specify that natural landscape can qualify as a "property" if it is somewhere "significant traditional events, activities, or cultural observances have taken place."[99]

Second, the TCP must have "integrity."[100] The NPS has interpreted this to require that the TCP both (1) "have an integral relationship to traditional cultural practices or beliefs," and (2) be in a condition "such that the relevant relationships survive."[101] This integrity requirement should pose no problem for sacred sites' eligibility, for they are by definition integral to Native practitioners' practices and beliefs. Furthermore, Native practitioners would likely only consider sharing information about sites that retain vitality. If, however, development already damaged a site, the site might be ineligible if the damage destroyed the site's relationship to traditional cultural practices.

The third DOI requirement is more complex but should not pose a problem. An agency must evaluate each site under criteria established by the DOI pursuant to NHPA. "If the property meets one or more of the criteria, it may be eligible, if it does not, it is not eligible."[102] Together, these qualifying criteria should cover almost any sacred site. First, a site qualifies if it is "associated with events that have made a significant contribution to the broad patterns of our history."[103] The word "our" refers to the specific group for which the site has significance.[104] Thus, if a site is associated with events that contributed to a tribe's history, it passes step three. Additionally, a site passes step three if it is "associated with lives of persons significant" in the group's past.[105] Gods and demigods can qualify as "persons,"[106] which means a site

95. *Id.* § 470a(d)(6)(A) (emphasis added).
96. *Id.* § 470a(2).
97. 36 C.F.R. §§ 60.3, 60.4; *see* BULLETIN 38, *supra* note 8, at 11–18.
98. BULLETIN 38, *supra* note 8, at 11.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.* at 12.
103. 36 C.F.R. § 60.4(a) (2008).
104. BULLETIN 38, *supra* note 8, at 12.
105. 36 C.F.R. § 60.4(b).
106. BULLETIN 38, *supra* note 8, at 13.

meets the requirement if it is associated with a particular god or demigod. A site also meets the criteria if it represents "a significant and distinguishable entity whose components may lack individual distinction."[107] A tribe's traditional skill, such as the basket-making of the Pomo Indians, can qualify as an "entity."[108] A location thus meets the requirement if it is somewhere a tribe has historically gathered materials used in traditional activities.[109] Together, these qualifying criteria should cover almost any sacred site.

The fourth requirement is murkier but should not pose eligibility problems for most sacred sites. For this step, an agency must determine whether any of certain disqualifying criteria—which would render a property ineligible—apply. Even if a disqualifying criterion applies, however, the agency will re-qualify as eligible properties meeting certain re-qualifying criteria.[110] For example, and most importantly, the regulations disqualify a property "used for religious purposes," but the property re-qualifies if it derives "primary significance from . . . historical importance."[111] The DOI thus recognizes that as long as a sacred site is historical and significant to culture the site does not lose eligibility merely because it is used for a religious purpose.[112] The other relevant disqualifying and re-qualifying criteria are:

- "Cemeteries" (disqualified) unless the cemetery "derives primary significance from graves of persons of transcendent importance, from age . . . or from association with historic events" (re-qualified and eligible).[113]
- "Birthplaces or graves of historical figures" (disqualified) unless they are of "a historical figure of outstanding importance [and] . . . there is no appropriate site or building directly associated with his productive life" (re-qualified and eligible).[114]
- Properties "primarily commemorative in intent"[115] (disqualified) unless "age, tradition, or symbolic value has invested it with its own exceptional significance" (re-qualified and eligible).

107. *Id.* at 14.
108. *Id.*
109. *Id.*
110. *See* 36 C.F.R. § 60.4 (2008).
111. *Id.* § 60.4(a).
112. *See* BULLETIN 38, *supra* note 8, at 15. This restriction is based on the government's fear of Establishment Clause violations. *Id.* The DOI has recognized that "[t]o exclude from the National Register a property of cultural and historical importance to [a tribe], because its significance tends to be expressed in terms that to the Euroamerican observer appear to be 'religious' is ethnocentric in the extreme." *Id.* at 15.
113. *See* 36 C.F.R. § 60.4(b).
114. *Id.*
115. A property is "commemorative in intent" if it is "designed or constructed after the occurrence of an important historic event or after the life of an important person." U.S. NAT'L PARK SERV., NAT'L REGISTER BULL. 15: HOW TO APPLY THE NATIONAL REGISTER CRITERIA FOR EVALUATION 39–40 (1997) [hereinafter BULLETIN 15].

- Properties "achieving significance within the past 50 years" (disqualified) unless the property is of "exceptional importance" (re-qualified and eligible).[116]

It is unclear what happens when more than one disqualifying criterion applies to sites. The regulations provide that "ordinarily cemeteries, birthplaces, or graves of historical figures, properties owned by religious institutions or used for religious purposes, . . . properties primarily commemorative in nature, and properties that have achieved significance within the past 50 years" are not eligible.[117] The regulations then ambiguously provide that these properties

> *will* qualify . . . if they fall within the following categories: (a) [a] religious property deriving primary significance from architectural or artistic distinction or historical importance; *or* . . . (c) [a] birthplace or grave of a historical figure of outstanding importance if there is no appropriate site or building directly associated with his productive life, *or* (d) [a] cemetery which derives its primary significance from graves of persons of transcendent importance, from age, from distinctive design features, or from association with historic events; *or* . . . (f) a property primarily commemorative in intent if design, age, tradition, or symbolic value has invested it with its own exceptional significance; *or* (g) [a] property achieving significance within the past 50 years if it is of exceptional importance.[118]

Arguably, this language means that if a property is disqualified, it re-qualifies so long as it fits *one* of the listed categories. Under this interpretation, then, a site used for a religious purpose that is also a cemetery "will qualify" if the site is "historical and significant to culture," even if the cemetery itself does not "derive[] primary significance from graves of persons of transcendent importance, from age . . . or from association with historic events."[119] As long as they have historical and cultural significance, it appears that nearly all sacred sites are at least eligible for the Register.[120] This interpretation is consistent

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116. 36 C.F.R. § 60.4(g).

117. *Id.* § 60.4.

118. *Id.* (emphasis added).

119. The issue is not clear, however, as the NPS appears to adopt the opposite conclusion. In an interpretive bulletin, the Park Service explains that "if your property *does* fit one of these types, then it must meet the special requirements stipulated for *that* type in the Criteria Considerations." BULLETIN 15, *supra* note 113, at 25 (emphasis added). This seems to indicate that if more than one disqualifying criterion applies, the re-qualifying criteria for each disqualifying criterion must be met. On the other hand, this language only addresses the requirements for properties that fit one—rather than multiple—disqualifying criterion. Most importantly, this issue is largely only academic: if a property meets the specific re-qualifying criterion for one of the disqualifying criterion, it likely meets the re-qualifying criterion for any other disqualifying criterion that may apply. A site used for religious purposes that is also a cemetery, for example, meets both of the pertinent re-qualifying criteria if it is historical; it is "historical and significant to culture" and it derives significance "from association with historic events."

120. *See* COHEN'S HANDBOOK ON FEDERAL INDIAN LAW, *supra* note 31, § 20.02(3)(b), at 1252 ("many places that are not formally listed would likely be found to be eligible if circumstances called for a formal determination").

with the language of NHPA, which states that the Register can include any "sites . . . significant in American . . . culture."[121]

Consider the Havasupai example, where the limited information available to the agency indicated the potential mine site was in the path of a sacred Coconino Kachina. This site likely meets the qualifying criteria because it is "associated with events that have made a significant contribution to the broad patterns of [tribes'] history"[122]—the Coconino Kachina is sacred to the Havasupai and the Hopi believe it protects the Grand Canyon.[123] Alternatively, the site meets the qualifying criteria as a property "associated with lives of persons significant" in the group's past[124]—Gods and demigods can qualify as "persons,"[125] so the Coconino Kachina's importance to the site indicates this criterion is met.

Still, two disqualifying criteria likely apply to the Havasupai site, but re-qualifying criteria apply as well. First, the site is used for "religious purposes," and therefore disqualified from eligibility; however, the site is also "historical and significant to culture" and therefore re-qualified as eligible for the Register. Second, the site may also be "commemorative." In that case, as discussed above, it is unclear whether the site must fit within a second re-qualifying category. If so, the site is nevertheless eligible because it meets the re-qualifying criterion for commemorative properties: it is exceptionally significant to tradition. If the tribe were to provide detailed information about the site and the ceremonies that occur there, the agency could consider this information in its NEPA analysis without disclosing it, as it would fall under FOIA's third exemption.

This raises the greatest problem with using NHPA as a withholding statute: an agency must have documentation that a site qualifies as a "historic resource" *before* it can conclude that the site is a "historic resource."[126] It is therefore impossible for an agency honestly to promise confidentiality before the agency possesses at least some information about the site. Returning to the Havasupai example, the Forest Service could not honestly have promised to withhold all sacred-site information under its NHPA authority. Rather, the agency could only have made the conditional promise that it would withhold the information under NHPA if there were sufficient basis to conclude that the site was an eligible historic resource. That conditional promise, with its

121. 16 U.S.C. § 470a(a)(1)(A) (2006).

122. 36 C.F.R. § 60.4(a) (2008).

123. Havasupai Tribe v. United States, 752 F. Supp. 1471, 1496 (D. Ariz. 1990).

124. 36 C.F.R. § 60.4(b).

125. BULLETIN 38, *supra* note 8, at 13.

126. *See* BULLETIN 15, *supra* note 115, at 27 ("A property or natural feature important to a traditional culture's religion or mythology is eligible if its importance has been ethnohistorically documented and if the site can be clearly defined. It is critical, however, that the activities be documented . . . .").

inherent risk, would likely prevent most Native practitioners from sharing any information at all.

To summarize, FOIA exemption 3 provides an imperfect patchwork of protection: information about "archaeological resources" is protected under ARPA, but not if a state's governor requests it; and information about a "historic resource" can be protected under NHPA, but only after the agency has enough information to determine that the site at issue qualifies as a historic resource.

B. FOIA Exemption 6

FOIA's sixth exemption may provide another basis for sacred-site information confidentiality. Exemption 6 applies to "personnel, medical, and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[127] As it pertains here, sacred-site information is not plainly within the categories of personnel or medical files, and therefore only qualifies under this exemption if it is a "similar file," and its disclosure would constitute a "clearly unwarranted invasion of personal privacy."[128] Because "similar files" include information that is personal, and because this information is deeply religious in nature, there is a strong possibility that a court would find sacred-site information satisfies the above two elements. Nonetheless, the issue is unresolved, and due to the exemption 6 ambiguities discussed below, agencies cannot realistically promise confidentiality based on its withholding authority.

The Supreme Court has interpreted "similar files" broadly to include "[a]ll information which 'applies to a particular individual' . . . regardless of the type of file in which it is contained."[129] Thus, whether a record is a "similar file" depends not on its relation to medical or personnel files, but instead on whether the record is personal in nature.[130] For example, the Ninth Circuit held that tribal enrollment records are "similar files" because they contain sensitive information about individuals.[131] On the other hand, if a record is unrelated to any particular person, it does not qualify.[132]

Although no court or agency has yet considered the issue, records on sacred-site information likely qualify as "similar files." To be sure, files which courts have deemed "similar" generally contain specific information about individuals, such as addresses or names, rather than information about specific

127. FOIA, 5 U.S.C. § 552(b)(6) (2006).

128. *Id*.

129. Wash. Post Co. v. U.S. Dep't of Health & Human Servs., 690 F.2d 252, 260 (D.C. Cir. 1982) (*citing* U.S. Dep't of State v. Wash. Post Co., 456 U.S. 595, 602 (1982)).

130. *See Dep't of State v. Wash. Post Co.*, 456 U.S. at 601–02.

131. Quinault Indian Nation v. Deer, 232 F.3d 896 (9th Cir. 2000).

132. *Id.*

locations and federal land-use.[133] Nevertheless, there are several reasons why this distinction between "personal" and location-based information does not control here. First, sacred-site information not only pertains to a specific site, but also to the individual who provides the information. In providing information on the location and use of a sacred site, Native practitioners would be identifying where they perform religious ceremonies and the nature of those ceremonies. This information is deeply personal, much more so than a name or address. Second, in regard to terminology, it would be arbitrary to interpret "similar file" to exclude "a sacred site is in the Canyon" but to include "I go to a sacred site in the Canyon." Accordingly, agency records with sacred-site information should constitute "similar files"; otherwise, the exemption's applicability becomes purely a matter of a record's form over substance.

This argument gains support from a recent Tenth Circuit decision holding that electronic Geographic Information System (GIS) files are "similar files."[134] The court reasoned that the files "reveal specific geographic point locations" of certain structures, which, "coupled with property records," would allow people to identify names of the structure owners. Thus, the court determined, a "similar file" can consist of indirect reference to personal information.[135] As with GIS files, sacred-site information reveals "specific geographic point locations," information about what occurs there and who uses the site. If someone learned this information, they would be able to identify the people who use the site and the nature of their particular religious beliefs. This information is intimately personal. Thus, it is likely that sacred-site information is a "similar file."

To qualify for exemption 6, disclosure of sacred-site information must also constitute a "clearly unwarranted invasion of personal privacy."[136] As the Supreme Court has established, the inquiry into whether an invasion of privacy is "clearly unwarranted" requires agencies and courts to balance the potential individual harm of disclosure against the public benefit.[137] As such, the requester's individual interests in obtaining the information are not necessarily relevant; the public's interest in general is what controls. Specifically, the public interest analysis turns on whether disclosure would "contribute significantly to public understanding of the operations or activities of government."[138] Furthermore, in keeping with the general policy of full

133. Nat'l Ass'n of Homebuilders v. Norton, 309 F.3d 26, 32 (D.C. Cir. 2002) ("To date, courts interpreting the phrase [similar files] have considered primarily government files that were maintained on a specific individual or group.").

134. *See* Forest Guardians v. FEMA, 410 F.3d 1214 (10th Cir. 2005). GIS is technology that can be used to store and display data identified according to location. *See* U.S. Geological Survey, Geographic Information Systems Poster, http://egsc.usgs.gov/isb/pubs/gis_poster/ (last visited Nov. 23, 2008).

135. *Forest Guardians*, 410 F.3d at 1218.

136. FOIA, 5 U.S.C. § 552(b)(6) (2006).

137. Dep't of the Air Force v. Rose, 425 U.S. 352, 370–76 (1976).

138. Chang v. Dep't of the Navy, 314 F. Supp. 2d 35, 43 (D.D.C. 2004).

disclosure, the agency bears the burden of showing that the invasion of privacy at stake would be "clearly unwarranted."[139] Finally, that an agency may have promised to keep certain information confidential is inconsequential: FOIA supersedes any such agreements.[140]

What will qualify as a "clearly unwarranted" invasion of privacy is difficult to predict.[141] The most analogous case to our analysis is *National Association of Homebuilders v. Norton*.[142] There, the D.C. Circuit held that disclosure of DOI files containing information about owl sightings on private property was not "clearly unwarranted."[143] The court noted that the privacy threat of site-specific information "depends on the individual characteristics that the disclosure reveals and the consequences that are likely to ensue."[144] Assessing the specific circumstances, the court rejected the DOI's argument that the individual property owners had a privacy interest in avoiding potential trespass by birdwatchers hoping to see owls because the DOI had not provided sufficient evidence to demonstrate that disclosure would create a potential trespass problem.[145] Nonetheless, the court concluded that individual landowners did have a privacy interest in not having their addresses disclosed.[146]

The court also concluded that there was a public interest at stake: disclosure would allow the public to examine how the DOI is using the owl sighting information.[147] The court reasoned that this is a "cognizable public interest under FOIA" because it could "contribute to a public understanding of the operations or activities of the government."[148] In balancing these two interests, the court determined that the privacy interest was relatively weak because "to disclose that a pygmy owl has been sighted on an individual's property does not disclose any information about that individual, other than that the individual owns property where an owl has been sighted."[149] The potential privacy invasion was therefore not substantial enough to override the public's interest in disclosure.

Applying the general principles and the analysis of *Homebuilders*, a court will likely consider disclosure of sacred-site information to be a clearly unwarranted invasion of personal privacy. First, a court will likely find that

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139. O'REILLY *supra* note 61, § 16:25, at 31.

140. *See id.* § 16:81, at 74.

141. As the leading FOIA authority states, "[s]ubjectivity in exemption standards leads to diversity of case precedents." *Id.* § 16:21, at 29.

142. 309 F.3d 26 (D.C. Cir. 2002).

143. The court held without deciding that these files were "similar files." *See* Nat'l Ass'n of Homebuilders v. Norton, 309 F.3d at 33.

144. *Id.* at 36.

145. *Id.* at 34–35.

146. *Id.* at 35.

147. *Id.* at 36.

148. Nat'l Ass'n of Homebuilders, 309 F.3d 26, 36 (D.C. Cir. 200).

149. *Id.* at 33.

there is a privacy interest at stake. *Homebuilders* clarifies that the privacy interest "depends on the individual characteristics that the disclosure reveals and the consequences that are likely to ensue."[150] Here, the disclosure of sacred-site information would potentially reveal personal religious data to the public. Unlike information about the home addresses of properties that harbor owls, the information revealed from sacred-site disclosure contains information that is deeply personal as it directly involves individuals' personal religious beliefs and practices. In addition, disclosure could expose Native practitioners to site misuse and harassment from non-practitioners coming to observe the ceremonies. While the *Homebuilders* court found insufficient evidence to consider a privacy interest based on the potential harassment of trespassing birdwatchers, other courts have held that avoiding harassment is a considerable privacy interest.[151] Unlike in *Homebuilder*s, however, sacred-site misuse may be documented by examples of sacred-site disclosure leading to site destruction or harassment.[152] In fact, statutes such as NHPA authorize non-disclosure of information based on this very concern.[153] Thus, the privacy interest at issue is strong, and significantly stronger than the privacy interest in *Homebuilders*.

There is also likely a public-interest justification for disclosure. A developer could argue that the public has an interest in learning about sacred-site information in order to learn about how the agency is using such information in its management decisions. Similar to the interest at stake in *Homebuilders* of enhancing public understanding of how the government is using owl location information, a court would likely find this interest to be a legitimate public interest under FOIA.

How a court would weigh the public and privacy interests at stake in disclosing sacred-site information is difficult to predict. Yet given the highly secretive aspects of Native religion, the importance of privacy in ceremonies, and the importance of maintaining the pristine characteristics of sacred sites, there is a strong argument that weighs in favor of non-disclosure.[154]

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150. *Id.*

151. *See* Church of Scientology of Tex. v. IRS, 816 F. Supp. 1138, 1155 (W.D. Tex. 1993); O'REILLY *supra* note 61, § 16.41, at 43 (noting that in weighing privacy interests courts must look not only at how the particular requestor would use the information, but at "the uses to which [the information] could be put if released to any member of the public").

152. *See supra* Part II. The prime example is looting of sacred sites, especially burial grounds. *See e.g.*, Julie Cart, *Looting Indian Grave Sites is Big Business in Utah*, SAN FRAN. CHRONICLE, Apr. 8, 2001, at A-9.

153. *See* H.R. REP. NO. 96-1457, at 46 (1980), *reprinted in* U.S.C.C.A.N. 6378, 6409 ("The intent [of NHPA's nondisclosure provision] is to assure protection of sites from theft, vandalism, or destruction.").

154. Interestingly, some of the "private land" where the disputed owl sightings occurred in *Homebuilders* was in fact on Tohono O'odham Nation land. After the *Homebuilders* court ordered disclosure, the tribe sent a letter to the Department of Interior, arguing exemption six applies to information about sightings on its land because the owls are spiritual creatures that must be protected according to Tohono O'odham religion. Therefore, by forcing the tribe to disclose information regarding the owls' whereabouts the agency would violate these beliefs by allowing the owls to be disturbed. The

Nevertheless, because the courts and agencies have yet to address the issue, it remains unsettled. Therefore, agencies should not promise confidentiality for any sacred site information based on exemption 6; there is at least some possibility that a court might decide sacred-site information disclosure does not constitute a sufficient invasion of privacy to outweigh the public interest.

CONCLUSION: WHAT SHOULD AGENCIES, TRIBES, AND CONGRESS DO?

As the forgoing analysis illustrates, agencies cannot realistically promise Native practitioners that all information they provide about a sacred site in order to aid in agency planning will remain confidential. Instead, an agency must make a promise that is summarized as follows:

Type of Information	Can Agency Keep it Confidential?	Withholding Authority	Limits on Promise of Confidentiality
Information about "material remains of past human life or activities" at least 100 years old	Yes	ARPA	Agency must disclose if state Governor requests, unless the information is exempt for another reason.
Information about properties of traditional cultural significance that maintain integrity. If the property meets a NHPA disqualifying criterion, it also must meet a re-qualifying criterion.	Yes	NHPA	(a) Which sacred sites qualify is not entirely clear; (b) Property must be deemed eligible before information is protected and eligibility requires documentation: confidentiality promise cannot precede all information disclosure.
Information that qualifies as a "similar file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"	Yes	FOIA Exemption Six	Exemption's applicability to sacred-site information is not certain.
Other Sacred-Site Information	No	None	Not Applicable

Based on this patchwork of potential coverage, agencies have several options, each of which has its limitations. Agencies could simply promise full confidentiality, and then litigate any FOIA request. This strategy would have

agency's response is unknown and this argument was not addressed in court. *See* Letter from Edward D. Manuel, Chairman, Tohono O'odham Nation, to Dale Hall, Regional Director, U.S. Fish and Wildlife Service (April 14, 2003), *in* WILLIAM H. RODGERS JR., ENVIRONMENTAL LAW IN INDIAN COUNTRY 276–78 (2005).

the extra benefit of a judicial decision that clarifies the topic for future communications. This approach is risky, however, as the ambiguous state of the law means that there could be a negative judicial decision; thus, an agency promise of complete confidentiality is misleading. Such an outcome would cause Native practitioners to be increasingly distrustful of agencies and reluctant to work with them to protect sacred sites. It may also expose many sacred sites to misuse and abuse, depending on the particular court's authority and the scope of information requested from agencies after the ruling.

Agencies, then, must be candid when communicating with Native practitioners, being sure to describe the patchwork of protection available for sacred-site information, its ambiguities, and the conditional nature of the confidentiality they can offer. While this approach is honest, it is still problematic. Though it allows Native practitioners to independently assess whether to share particular information based on the likelihood that the agency can keep it confidential, given practitioners' desire for secrecy, *any* risk of disclosure may be enough to prevent them from sharing. Agencies must recognize that Native practitioners will be reluctant to disclose the sacred-site information needed for agency planning decisions. In other words, just because a tribe does not respond to an inquiry does not mean sacred sites are not present.

To address this issue, agencies should adopt a flexible approach to planning decisions when faced with a lack of tribal information. First, agencies should seek out as much non-tribal information as possible from archeologists and anthropologists in order to identify sacred sites so that they may adequately consider the impacts of their decisions. In some cases, the agency will be able to use this non-Indian information to determine that a site is eligible for the Register. If so, the agency can then promise practitioners confidentiality for any further information about the site under NHPA. Agencies can also be flexible in a manner similar to that demonstrated by the Air Force when it selected the location of a missile system in Wyoming. While the Air Force knew some potential missile sites would intrude on Lakota sacred sites, the Lakota would not identify the sites due to secrecy concerns.[155] Therefore, the Air Force met with Lakota representatives, who identified a location that would *not* infringe on any sacred sites.[156] Thus, the Air Force was able to ensure that its construction did not intrude upon the Lakota religion without relying on the Lakota to provide specific sacred-site information. Where an approach like this is legally and politically possible, agencies should use it in order to carry out the objectives of federal laws and policies aimed at sacred-site protection.

Meanwhile, tribes and Native practitioners have several options. Native practitioners should not expect full confidentiality for all sacred-site information as there is a risk that the information they provide to agencies will

155. BULLETIN 38, *supra* note 8, at 19.
156. *Id.*

become publicly available. Accordingly, they should engage in nuanced risk balancing before disclosing information to agencies. Native practitioners and tribes must consider the probability that the revealed information will remain confidential in addition to the magnitude of any problems that may result if the agency makes the information public. They should balance these considerations against the likelihood that disclosing the information will positively affect the land management decision and result in sacred-site protection. This analysis provides one way for tribes and Native practitioners to decide which information to disclose and which information to keep private.

Native practitioners and tribes should also make agencies and Congress aware of their communication dilemma in order to promote reform. Because only Native practitioners possess sensitive religious information, members of the public do not know how frequently confidentiality concerns have prevented agencies from incorporating such information into land management decisions. One method by which Native practitioners can raise awareness is to reveal enough information to agencies to indicate there are sacred site conflicts with proposals, without providing any specific sensitive details. While this limited disclosure may not provide enough information for an agency to actually protect a site, it at least puts the agency on notice. Once the agency is aware of the site, federal law requires it to consider the proposed action's impacts on the site.[157] While the limited disclosure will not provide the agency with enough information to consider the action's impacts in a thorough and meaningful manner, it will at least force the agency to recognize the communication problem, a dilemma that only the holders of the sacred-site information would otherwise comprehend.

Another option for tribes is to focus on getting sacred sites listed or determined eligible for the Register before potential conflicts arise. Once a site is deemed eligible, agencies can keep information about the site confidential under NHPA. Again, the problem with this approach is that Native practitioners face a basic problem when establishing a site's eligibility: there is no assurance of complete confidentiality for the information that they provide. Nonetheless, the benefit of this approach is that it allows tribes, rather than agencies and development project proponents, to determine when to initiate communication. In this sense, Native practitioners can proactively identify eligible sacred sites at times when disclosure risks are minimal.[158] Moreover, if Native practitioners communicate sacred-site information with agencies before any conflicts arise, there will be less publicity and public scrutiny, and therefore less of a chance that someone will make a FOIA request for the information.

157. *See supra* Part I.

158. If an agency is not already planning projects in a certain area, there will likely be no pending NEPA analysis within which the sensitive information can be included.

A more effective and appropriate solution to the communication problem is through legislative reform.[159] The most direct option is for Congress to enact an additional FOIA exemption that would protect from disclosure all sacred-site information provided during a federally mandated tribal consultation process. This exemption would allow tribes to rely on confidentiality promises without risking future disclosure, and without engaging in a complex analysis of whether the information relates to an archaeological resource or a property that is eligible for the Register. Such clarity would likely increase tribal-agency communication and allow for a more flexible discussion as part of the consultation process.

Besides being effective, this exemption would be consistent with existing exemptions to FOIA. FOIA's overall purpose is to allow public scrutiny of the administrative process.[160] FOIA's exemption authority, however, recognizes that the public will not provide agencies with certain types of sensitive information. For example, the statute exempts certain information about "trade secrets and commercial or financial information" in order to "encourage individuals to provide this information to the Government."[161] In other words, a company would rarely provide its sensitive business information to agencies if the company's competitors could then access it through a FOIA request. Yet, because it serves important public interests for the agencies to use such business information in their decision-making process, an exemption is appropriate.[162] This and other exemptions acknowledge that by subjecting certain kinds of information to public disclosure, FOIA would otherwise undermine the very purpose for which agencies acquire such information: to enhance the quality of their decisions for the benefit of the public.[163]

The logic supporting existing FOIA exemptions likewise supports an additional narrow exemption for sacred-site information. Like businesspersons with trade-secret information, Native practitioners are less likely to furnish

159. A legislative solution has been incorporated into at least one bill, The Native American Sacred Lands Act, which was introduced to the House in 2003, and referred to the House Committee on Resources. *See* H.R. 2419, 108th Cong. (2003). This bill would have adopted new protections for sacred sites and a new consultation requirement for federal agencies as part of those protections. *Id.* at § 3. It included a "confidentiality" provision that would have specifically exempted from FOIA any information "obtained as a result of or in connection with" the new protections provided by the bill. *Id.* at § 4. While this bill's new protections would enhance sacred-site protection and enable confidentiality for consultations conducted pursuant to *those* new protections, it may be more politically feasible to remedy the confidentiality problem with existing sacred-site protections, without expanding sacred-site protections at the same time.

160. Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 17 (1974).

161. Soucie v. David, 448 F.2d 1067, 1078 (D.C. Cir. 1971).

162. For example, the public has an interest in government oversight of companies' product development (such as biotechnology) because it allows the government to verify products' safety. That interest would be hindered if trade secrets were subject to FOIA requests because companies would not freely provide the government with necessary information.

163. *Indian Amendment to Freedom of Information Act: Hearing Before the S. Subcomm. on Indian Affairs of the Comm. on Interior and Insular Affairs*, 94th Cong. 11 (1976) (statement of Pete Domenici, Sen. from New Mexico).

sacred-site information if that information is subject to FOIA disclosure. FOIA thereby defeats the very reason that agencies seek to acquire the information in the first place: for consideration in land management decisions.

An additional FOIA exemption for sacred-site information would be appropriate for several other reasons. First, the current tribal-agency communication problem hinders the objectives of existing legislation, such as NHPA, which aims to incorporate sacred-site information into federal land management decisions. A legislative solution is thus appropriate in order to improve federal land management according to the objectives of current legislation. In addition, a legislative solution would be consistent with federal fiduciary obligations to tribes by facilitating confidentiality between government as trustee and the tribes as beneficiaries.

Importantly, a legislative solution would be consistent with existing statutes aimed at promoting religious freedom for Native Americans. The American Indian Religious Freedom Act adopts the policy of protecting and preserving the right of American Indians to exercise traditional religious beliefs, "including but not limited to access to sites."[164] An additional FOIA exemption would further this policy by breaking down the communication barrier between agencies and Native practitioners. Moreover, RFRA prohibits the federal government from imposing substantial burdens on religious exercise absent compelling reasons.[165] By prohibiting Native practitioners from confidentially discussing their sacred sites with the agencies who manage those sites, FOIA may currently "substantially burden" Native religion for no compelling reason.[166] The proposed FOIA exemption would remove this burden.

Alternatively, Congress could amend NHPA to mandate non-disclosure of information about sites eligible for the Register, as well as any information provided about a *potentially* eligible site. This would clarify that NHPA is a withholding statute and would broaden the scope of information that can be withheld under FOIA's third exemption. This legislative fix would be effective because it would allow agencies to guarantee confidentiality before making an eligibility determination under NHPA. Thus, agencies would be able to promise confidentiality about any sacred-site information at the outset of communications because all sites are *potentially* eligible regardless of whether

164. American Indian Religious Freedom Act, 42 U.S.C. § 1996 (2006).

165. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (2006).

166. One federal court held that requiring Native practitioners to obtain permits from agencies for eagle feathers constituted a "substantial burden" on their religion because it forced the practitioners to state on a public record the nature of their ceremonies. United States v. Gonzalez, 957 F. Supp. 1225 (D. N.M. 1997). The court reasoned that "the religious ceremonies . . . are very secretive. Requiring [Native practitioners] to state, on a public record, the name of that secret ceremony substantially burdens the practice of his religion by forcing him to disclose confidential information of a nature sacred to him." *Id.* at 1228. The same reasoning may apply to tribal-consultation without confidentiality.

they are ultimately deemed eligible.[167] Like a FOIA amendment, this legislative reform is appropriate because it removes a basic problem that prevents agencies from fully accomplishing NHPA's objective of protecting historic resources: agencies cannot protect such resources if they do not know about their existence.

Existing federal law evinces a straightforward policy that agencies must, when possible, consider the impacts of their decisions on sacred sites. This same law lacks force, however, because there is no clear ground for communication between agencies and Native practitioners. The information flow involved in federal land management decisions is inherently skewed against sacred-site preservation: the unique combination of private religious information, coupled with the conditional and uncertain nature of available confidentiality, inhibits Native practitioners from disclosing valuable information. When land managers cannot fully consider the costs involved in their decisions, tribes are more likely to lose the sites that tie them to their culture and religion.

This communication barrier need not constitute a Catch-22 for sacred-site protection. Inherent in a Catch-22 are notions of unavoidable problems and inevitable failure. A common definition of the phrase is a "situation in which a desired outcome is impossible to attain because of a set of inherently contradictory rules or conditions."[168] If our ultimate goal is to account for sacred sites in federal land management, the possibility of improvement renders the communication problem ironic, unfortunate, even illogical; but not inescapable. Yet if we define our "desired outcome" to include public awareness of sacred-site protection efforts, we hit a Catch-22: public awareness and accounting for sacred sites may be mutually exclusive. Thus, a Catch-22 is avoidable, but only if Congress embraces that some culturally significant places can be accounted for only if left unknown to the public.

167. The scope of withheld information would be very broad. Therefore, as previously discussed, unless the NHPA amendment explicitly referenced FOIA and identified NHPA as a withholding statute, there would be a risk that a court would deem the non-disclosure authority too vague to qualify under Exemption 3. *See supra* note 90, and accompanying text.

168. THE AMERICAN HERITAGE DICTIONARY 141 (4th ed. 2001).

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