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THE NEED FOR CONFIDENTIALITY WITHIN TRIBAL CULTURAL RESOURCE PROTECTION

Tribal Legal Development Clinic, UCLA School of Law

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IMMENSE
GRATITUDE

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I THE NEED TO PROTECT SENSITIVE TRIBAL INFORMATION

For Indigenous Peoples,[1] the forced removal from ancestral lands combined with the Western commodification of human remains and ceremonial objects has resulted in a devastating and ongoing loss of cultural resources. This loss includes both tangible resources and landscapes and intangible traditional knowledge. Traditional knowledge is knowledge, know-how, skills, and practices developed, sustained, and passed on from generation to generation within a community, often forming part of its cultural identity.[2] It is the source for the traditional use and management of lands, territories and resources. It is the core of Indigenous Peoples' identities. Recognizing the importance of traditional knowledge, and the right of Indigenous Peoples to promote, maintain and safeguard their traditional knowledge, alongside cultural resources, is enshrined in several international normative and policy instruments.[3]

Among those international instruments is the United Nations Declaration on the Rights of Indigenous Peoples.[4] The Declaration is a standard-setting document supported by 150 nation-states, including the United States, calling for legal reform to ensure protection for Indigenous Peoples' rights. Among its recognitions of Indigenous rights, the Declaration acknowledges the inherent right of Indigenous Peoples to participate, manage, consult, monitor, maintain, promote, access, and repatriate their cultural resources. In addition to recognizing these inherent rights, the Declaration further affirms states' obligations to uphold these rights and provide redress for any violations.

ARTICLE 11 STATES:

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious, and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

ARTICLE 12 STATES:

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effect mechanisms developed in conjunction with indigenous peoples concerned.

The United States has enacted some legislative protections, around which tribes have built extensive cultural resource protection infrastructures. Nevertheless, in going about the work of protecting cultural resources, tribes find themselves in a bind. The protection of one resource almost always requires the exchange of another: sensitive tribal information. From the specific geographical coordinates of a sacred place to the intimate components of a ceremonial practice, to genetic data, tribes are compelled to reveal a staggering amount of detail to trigger protection for their cultural resources. This compulsion to reveal sensitive information fails to respect Indigenous cultural, intellectual, religious, and spiritual assets, as mandated by Article 11; it fails to provide Indigenous access to privacy, as mandated by Article 12; and it ultimately fails to provide meaningful control to Indigenous Peoples to access and re-access their culture.

In line with the framework of self-determination embraced by the Declaration, specifically identified in Article 11 in relation to cultural resource protection, the Declaration calls for Indigenous Peoples to engage in cultural resource protection through free, prior, and informed consent. However, tribes do not currently have access to this meaningful control over their information once shared with federal or state agencies in the course of cultural resource protection. In addition to calling for cultural resource protection, Article 31 of the Declaration requires respect and protection for tribal traditional knowledge.

ARTICLE 31 OF THE DECLARATION STATES:

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions … They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

Indigenous Peoples should have the right to both access culture and determine how cultural information is handled. Should a tribe make a request to protect information shared during the pursuit of protecting cultural resources, particularly those resources that were inappropriately taken from the tribe, Articles 11 and 12 call for such confidentiality protections. The tribe, as a sovereign representative of the Indigenous Peoples affiliated with a cultural resource, requires deference as a matter of self-determination.

However, presently the structure of cultural resource protection laws in the United States is inverted. Rather than require institutions and individuals to bear the burden of proving their possession of a cultural resource is with the free, prior, and informed consent of the tribe,[5] tribes instead bear the burden of proving their cultural resource exists, is theirs, and is of value.[6] U.S. courts have typically provided minimal deference to Indigenous interests. The Federal District Court in *Navajo Nation v. U.S. Forest Service* noted it was "very troubled that the [Indigenous] plaintiffs didn't want to specifically identify those aspects of their religion that they were saying would be harmed."[7] To convince parties to protect their cultural resources, tribes are often forced to disclose traditional knowledge with minimal guarantees that the knowledge will be safeguarded.

In the pursuit of cultural resource protection, the inequities of limited confidentiality protections arise in several ways:

- Confidentiality is rarely built into federal or state cultural resource protection statutes, providing limited statutory confidentiality protections.
- Traditional knowledge is rarely considered as worthy of protection as other typically protected confidential information.
- Traditional knowledge is typically considered less reliable than academic and Western scientific sources in administrative and court hearings, and so its probative value, such as determining cultural affiliation, is diminished. Traditional knowledge must therefore be revealed to a greater extent, and/or be accompanied by a "scientific" source, such as traditional knowledge that has already entered the public sphere via a published citation.
- The entity empowered to decide whether a cultural resource will be protected or returned is frequently the resource possessor, and therefore is incentivized to limit the extent they must offer protection and enhance their access to more traditional knowledge.

This paper will overview the areas in which tribally sensitive information is exposed during cultural resource protection, currently available confidentiality protections that tribes can leverage, and potential legislative fixes that can better minimize that harm.

A. TRIBAL CONSIDERATIONS FOR DESIRING CONFIDENTIALITY

A tribe's sensitive information is not exclusive to traditional knowledge, though it may be included.

Tribes have a multitude of reasons to safeguard their knowledge. Contemporary non-Indian intrigue regarding cultural resources—both professional[8] and amateur—can threaten a resource's existence, necessitating secrecy as to their location and cultural relevance.[9] An Indigenous attorney characterized the existence of a list of sacred places as, "tantamount to placing a neon sign over the sacred site and flashing the words, 'Dig Here!'"[10] Once such information is released, it becomes public and will forever remain so.[11] Some confidentiality breaches are harmful not because the information is accurate, but because the information leaked is inaccurate, such as local or county maps of Indigenous sacred places that inaccurately locate tribally significant areas and thereby deny protection for resources located outside of those areas.

Some tribal information is considered sensitive because of internal tribal considerations. Contemporary tribal religious, cultural, and societal norms can strictly control the flow of traditional knowledge, including both within and outside the tribe, much like other world religions.[12] For example, "[t]he Koontenai have very confidential ceremonies and information. Rather than disclose the information, the Indian tribe would probably choose not to repatriate funerary objects."[13] Particularly regarding a place that is thought to have spiritual power, the community may feel strongly that information about it must be kept confidential.[14]

For some tribes, centuries of forced assimilation and criminalization of their religious practices mandated the adoption of internal confidentiality protocols. As one article describes:

> **For the Pueblos, encounters with the Spanish who attempted to eradicate Pueblos' indigenous religion and way of life in order to convert Pueblo people to Christianity through the Roman Catholic Church were brutal. Secrecy and the safeguarding of knowledge was a life or death matter which in practice, resulted in the maintenance by the Pueblos of many of their traditions, customs and ways of life to this day.[15]**

B. OVERVIEW OF CONFIDENTIALITY PROVISIONS IN CULTURAL RESOURCE PROTECTION STATUTES

Under U.S. law, the cultural resource protection framework is scattered across various and diverse statutes, only some of which have specific confidentiality provisions, including:

- The American Indian Religious Freedom Act (AIRFA);[16]
  - Executive Order No. 13007. Indian Sacred Sites.
    Section 1. (a) … Where appropriate, agencies shall maintain the confidentiality of sacred sites.
- The Archaeological Resources Protection Act (ARPA);[17]
  - 16 U.S.C. § 470hh.
    (a) Information concerning the nature and location of any archaeological resource [pursuant to this Act] … may not be available to the public … unless … such disclosure would …

      (2) not create a risk of harm to such resources or to the site at which such resources are located.

    (b) [Exemption for the Governor of any State to request otherwise protected information so long as they commit to protecting the confidentiality to protect the resource from commercial exploitation.]
- The Cultural and Heritage Cooperation Authority (CHCA);[18]
  - 25 U.S.C. § 3056
    (a) Nondisclosure of information

      (1) In general. The Secretary shall not disclose under section 552 of title 5 (commonly known as the "Freedom of Information Act"), information relating to—

        (A) subject to subsection (b)(l), human remains or cultural items reburied on National Forest System land under section 3053 of this title; or

        (B) subject to subsection (b)(2), resources, cultural items, uses, or activities that—

          (i) have a traditional and cultural purpose; and

          (ii) are provided to the Secretary by an Indian or Indian tribe under an express expectation of confidentiality in the context of forest and rangeland research activities carried out under the authority of the Forest Service.

      (2) Limitations on disclosure. Subject to subsection (b)(2), the Secretary shall not be required to disclose information under section 552 of title 5 (commonly known as the "Freedom of Information Act"), concerning the identity, use, or specific location in the National Forest System of—

        (A) a site or resource used for traditional and cultural purposes by an Indian tribe; or

        (B) any cultural items not covered under section 3053 of this title.

    (b) Limited release of information

      (1) Reburial. The Secretary may disclose information described in subsection (a)(l)(A) if, before the disclosure, the Secretary—

        (A) consults with an affected Indian tribe or lineal descendent;

        (B) determines that disclosure of the information—

          (i) would advance the purposes of this chapter; and

          (ii) is necessary to protect the human remains or cultural items from harm, theft, or destruction; and

        (C) attempts to mitigate any adverse impacts identified by an Indian tribe or lineal descendant that reasonably could be expected to result from disclosure of the information.

(2) Other information. The Secretary, in consultation with appropriate Indian tribes, may disclose information described under paragraph (1)(B) or (2) of subsection (a) if the Secretary determines that disclosure of the information to the public—

(A) would advance the purposes of this chapter;

(B) would not create an unreasonable risk of harm, theft, or destruction of the resource, site, or object, including individual organic or inorganic specimens; and

(C) would be consistent with other applicable laws.

- The National Environmental Policy Act (NEPA);[19]
- The National Historic Preservation Act (NHPA);[20]
  - 54 U.S.C. § 307103
    (a) The head of a Federal agency, or other public official receiving grant assistance pursuant to this division, after consultation with the Secretary, shall withhold from disclosure to the public information about the location, character, or ownership of a historic property if the Secretary and the agency determine that disclosure may—

    (1) cause a significant invasion of privacy;

    (2) risk harm to the historic property; or

    (3) impede the use of traditional religious site by practitioners.

    (b) When the head of a Federal agency or other public official determines that information should be withheld from the public pursuant to subsection (a), the Secretary, in consultation with the Federal agency head or official, shall determine who may have access to the information for the purpose of carrying out this division.

    (c) …[T]he Secretary shall consult with the Council in reaching determinations under subsections (a) and (b).
- The National Museum of the American Indian Act;[21]
- The Native American Graves Protection and Repatriation Act (NAGPRA).[22]
  - 43 CFR 10.9 (e)(5)(ii)
    Documentation supplied under this paragraph by a Federal agency or to a Federal agency is considered a public record except as exempted under relevant laws, such as the Freedom of Information Act (5 U.S.C. 552), Privacy Act (5 U.S.C. 552a), Archaeological Resources Protection Act (16 U.S.C. 470hh), National Historic Preservation Act (16 U.S.C. 470w-3), and any other legal authority exempting the information from public disclosure.
  - H.R. 8298, 116th Cong. § 16 (2020)[23]
    (a) Notwithstanding any other provisions of law, all information related to the fulfillment of obligations imposed by this Act, regardless of form, shall be deemed confidential and not subject to public disclosure by the Secretary, a museum, or a Federal agency, unless such disclosure is required to fulfill an obligation imposed by this Act or regulations promulgated thereto.

    (b) Notwithstanding any other provision of law, all information submitted to the Review Committee by an affected party seeking findings or resolution of disputes pursuant to section 8(c)(3) and (4) shall be deemed confidential and not subject to public disclosure by the Review Committee, if the affected party indicates upon submission that such information shall be kept confidential.
- Indian Self-Determination and Education Assistance Act,[24]
  - 25 C.F.R. § 900.2(d) Access to records maintained by the Secretary is governed by the Freedom of Information Act (5 U.S.C. 552) and other applicable Federal law. Except for previously provided copies of tribal records that the Secretary demonstrates are clearly required to be maintained as part of the record keeping systems of the DHHS or the DOI, or both, records of the contractors (including archived records) shall not be considered Federal records for the purpose of the Freedom of Information Act. The Freedom of Information Act does not apply to records maintained solely by Indian tribes and tribal organizations.

There are also relevant confidentiality protections for particular federal departments, such as:

- Department of Interior and Department of Commerce
  Secretarial Order 3206: American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act (June 5, 1997)
  Sec. 5. Principle 5.
  … In the course of the mutual exchange of information, the Departments shall protect, to the maximum extent practicable, tribal information which has been disclosed to or collected by the Departments. The Departments shall promptly notify and, when appropriate, consult with affected tribes regarding all requests for tribal information relating to the administration of the Act.

C. CONFIDENTIALITY DILEMMAS

Confidentiality Protection Tends to Be Limited in Scope and Only at Agency's Discretion

Even amongst explicit statutory confidentiality protections within cultural resource protection statutes, there is minimal meaningful protection for tribal information.[25] No cultural resource protection statute includes an explicit, mandatory confidentiality protection for tribal information at the tribe's request. Instead, confidentiality protections tend to extend to narrow categories of information, such as the location of a cultural resource. Critically, the agency retains the decision-making authority to determine what a cultural resource ***is***, which can further narrow the scope for tribes that seek to protect cultural resources that may not be considered archaeological or historic property.

The Bureau of Indian Affairs (BIA), under Secretarial Order 3206, has the strongest federal administrative tribal confidentiality protection:

> **[i]n the course of the mutual exchange of information, the Departments shall protect, to the maximum extent practicable, tribal information which has been disclosed to or collected by the Departments.[26]**

However, the BIA is generally not facilitating significant cultural resource protection. AIRFA has a confidentiality provision incorporated through Executive Order 13007:

> **where appropriate, agencies shall maintain the confidentiality of sacred sites.[27]**

However, the qualifier "where appropriate" transfers discretion to the federal agency to determine what tribal information is worthy of protection. And then, only concerning the location of sacred sites.

While ARPA, NHPA, and NAGPRA all have statutory confidentiality provisions,[28] these statutes similarly defer discretion to the agency, and potential protection is only for a narrow scope of eligible information. For example, ARPA extends confidentiality protection only for the nature and location of any ***archaeological*** resource.[29] NHPA extends protection only for the location, character, or ownership of a historic property, and only if the agency finds disclosure would cause a significant invasion of (individual) privacy, risk harm to the historic property; or impede the use of a traditional

religious site by practitioners.[30] Even then, NHPA's confidentiality protections extend only to properties deemed eligible for the National Register.[31] Despite compulsory language that indicates agencies ***shall*** not disclose information,[32] agencies must first determine for themselves whether information unearthed in a Freedom of Information Act (FOIA) or Public Records Act request will risk harm to resources after it is revealed.[33] Essentially, agencies determine whether disclosure of tribal information will cause harm to tribes without a need to consult tribes in this determination. This process cuts against tribal self-determination regarding how tribal religious interests are impacted and what specificity is necessary to ameliorate that impact.

Courts tend to defer to agencies on confidentiality matters. While tribes may challenge abuses of agency discretion in federal court under the provisions of the Administrative Procedures Act,[34] judges have been reluctant to second-guess agency officials' findings regarding what is "practical" or "appropriate." The Supreme Court has meanwhile upheld federal agencies' authority to give their own proprietary interests in federal land a higher priority than Indigenous Peoples' religious interests.[35]

Lack of Notice to Tribes That Information Will Be Disclosed

In the instances federal or state agencies determine to disclose tribal information to third parties, there is no statutory requirement to notify tribes that the disclosure is taking place. AIRFA, via Executive Order 13007, requires that agencies "implement . . . procedures to ensure reasonable notice is provided of proposed actions or land management policies that may restrict future access to or ceremonial use of, or adversely affect the physical integrity of, sacred sites." The release of tribal information shared during a consultation, such as pursuant to an FOIA or Public Records Act request regarding sacred places, likely does not trigger this notice requirement. Further, the determination as to whether such a dissemination would impact future access to a sacred place is at the agency's discretion. The Bureau of Indian Affairs' Secretarial Order 3206 notably does include a notice provision: "[t]he Departments shall promptly notify and, when appropriate, consult with affected tribes regarding all requests for tribal information relating to the administration of the Act."[36] Ultimately, even for the limited scope of cultural resource protection being overseen by the BIA, the agency retains discretion over what information to disclose.[37]

Lack of Tribal Consent

Generally, like notice, most cultural resource protection statutes fail to recognize tribes as the owner of their information, with the accompanying decision-making authority regarding the use of their information. Tribes are simply never asked. The closest federal gesture to consent is found in Secretarial Order 3206, providing that the BIA "when appropriate, consult with affected tribes regarding all requests for tribal information relating to the administration of the Act." Consultation however, even in its most robust and meaningful iteration, is not consent.

Under state law, tribal consent can be found in AB 52 of the California Environmental Quality Act (CEQA), which provides that information submitted by a tribe during the environmental review process may not be included in the publicly available environmental document or told to the public without the prior written permission of the tribe.[38] Additionally, lead agencies must keep all information revealed in tribal consultation confidential unless the tribe agrees in writing to a disclosure.[39] Information that is given by a tribe about their cultural resources will be published in a confidential index that can only be seen by the people involved in consultation, unless the tribe agrees in writing to public disclosure.[40] A tribe's comment letter on an environmental document is also confidential, though a lead agency can summarize a tribal comment letter in a general way.[41] However, even AB 52's confidentiality requirements do not apply to data or information lawfully obtained by a third party,[42] such as a lawful FOIA request or state audit. Further, a lead agency may exchange information confidentially with other public agencies that have jurisdiction over the environmental document without notice to a tribe.[43]

Statutory Third-Party Access to Information

There are significant routine disclosures to third parties built into cultural resource protection statutes, including FOIA. Under NEPA regulations, the lead agency has the discretion to assign one person to consult with a tribe and assign a second, independent party or cooperating agency the responsibility of preparing the Environmental Impact Statement.[44] Under ARPA, a state governor can specifically request tribal information in agency hands.[45] Under state law, University of California (UC) schools are audited every two years regarding their compliance with the federal NAGPRA and state NAGPRA (CalNAGPRA).[46]

Mistrusted, Misinterpreted, or Omitted Traditional Knowledge

Tribal information, including specifically traditional knowledge is particularly vulnerable to limited confidentiality protections because it is devalued compared to other types of information. A case study identified an agency that held traditional knowledge to be:

> **plausible, but not persuasive or even adequate . . . [T]his claim is seriously lacking in credibility. In fairness to other claimants and the general public, the National Park Service cannot simply accept a tribe's unexplained, unelaborated, and unjustified request for repatriation.[47]**

Metaphorically rich commentaries offered by tribal elders on why a place or object is sacred have been omitted from agency deliberations because decision-makers do not understand the information.[48] In other instances, information is misinterpreted and used to reach false conclusions.[49] Courts have discredited tribal oral testimony on many grounds, including: (1) that the evidence is unreliable on account of the witnesses' age;[50] (2) the evidence is unreliable because it does not fit within western legal norms;[51] (3) natives are more biased;[52] and (4) agencies are less biased.[53] In instances where courts have credited oral tradition, they have done so subject to three conditions: (1) no other evidence was offered to discredit the oral testimony; (2) the oral testimony is corroborated, and; (3) cross-examination of oral testimony reveals that it is "not inherently improbable or uncandid."[54]

Statutes that offer confidentiality protections, like NHPA, offer only limited protection when it concerns traditional knowledge. NHPA recognizes that tribes may be "reluctant to divulge specific information on the location, nature and activities regarding sacred sites."[55] However, NHPA's confidentiality protections are limited to the "location, ownership or character" of a historic property, providing limited protections for traditional knowledge beyond the Western property framework.[56]

D. FOIA EXEMPTIONS

Generally, information exchanged in the course of a cultural resource protection becomes part of the government "record," which, under varying statutory frameworks, the governmental agency is mandated to keep and turn over pursuant to a valid legal request, such as FOIA or an audit. The Freedom of Information Act (FOIA) is intended to make federal agencies more transparent.[57] While FOIA does not apply to state and local governments, most states have implemented state public records acts that mirror FOIA to varying degrees, leaving tribal information exchanged in either a federal or state consultations susceptible to a public records request.

Virtually anyone can make an FOIA request for materials within the federal government's possession unless the information fits into one of nine exemption categories.[58] FOIA Exemptions 3, 4, 5, 6, and 9 may be particularly useful to tribes. Exemption 3 covers information that is prohibited from disclosure by another federal law; Exemption 4 covers trade secrets or commercial or financial information that is confidential or privileged; Exemption 5 covers privileged communications within

or between agencies; Exemption 6 covers information that, if disclosed, would invade another individual's privacy; and Exemption 9 covers geological information on wells.

Notably, Congress has at least twice considered specific proposals to protect Indian trust information. *See* Indian Amendment to Free of Information Act: Hearings on S. 2652 before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 94th Cong., 2d Sess. (1976); Indian Trust Information Protection Act of 1978, S. 2773, 95th Cong., 2d Sess. (1978).

FOIA Exemption 3: Disclosure Prohibited by Another Federal Law

FOIA Exemption 3 concerns information that is prohibited from disclosure by another federal law.[59] Typically, tribes are not able to utilize this exemption because the relevant cultural resource protection federal statute fails to specifically provide for confidentiality or to cross-reference FOIA. Thus, most cultural resource protection statutes do not qualify as a "withholding statute" for FOIA purposes.[60] Therefore, under Exemption 3, tribes generally receive only partial protection,[61] or no protection at all.[62] For example, in Earth Power Resources, Inc., 181 I.B.L.A. 94, 105 (2011), the Interior Board of Land Appeals found that 36 C.F.R. 800.11(c), the federal regulations informing the Section 106 consultation process of the National Historic Preservation Act (NHPA), does not rise to the level of "procedural steps mandated by Congress as necessary to show certain information is prohibited from disclosure under the NHPA," indicating the NHPA is not a withholding statute.

FOIA Exemption 4: Trade Secrets, Commercial or Financial Information

FOIA Exemption 4 concerns trade secrets and commercial or financial information obtained from a person.[63] Exemption 4 requires showing that the information is "commercial" in nature of function.[64] Proving a commercial link to ecology and land rights will be easier than knowledge related to spiritual elements. A court held that the tribe's collected data, including information on the resources surrounding annual water well yields, "would give competitors unfair advantage," thereby meeting the "competitive harm" prong.[65] Though, at least one author sees a link between commercial value and traditional knowledge's integral and immense value to tribes.[66]

Under Exemption 4, information is confidential if it is "of a kind that would customarily not be released to the public by the person from whom it was obtained."[67] Agencies applying this test must reach an initial judgment about the specific submitter's customary treatment of the information—a shift from examining the customs of the industry as a whole. The new test allows for the submitter to have made previous disclosures, so long as those disclosures were not "public."[68]

However, Exemption 4 protection is also limited by 30 U.S.C. § 1733(C), which states that "Indian tribe[s] shall be subject to the same provisions of law with respect to the disclosure of such information as would apply to the United States or any department or agency thereof."[69] Essentially, tribes are barred from enjoying "trade secret" type confidentiality protection under Exemption 4 when engaging in "cooperative agreements" with other governmental agencies.[70]

FOIA Exemption 5: Inter- and Intra-Agency Communications

Exemption 5, also known as the deliberative process exemption, protects privileged communications within or between agencies.[71] Typically, courts take the view that exemption extends to communications between government agencies and outside consultants hired by them. However, in ***DOI v. Klamath Water Users Protective Association,***[72] the U.S. Supreme Court unanimously held that Exemption 5 protection did not extend to the Tribe's communication to the Bureau of Indian Affairs in its capacity as fiduciary for the Tribe because tribes are distinct "self-advocates" with their own "interest in mind" apart from the U.S. government.[73] Notably, the Court declined to extend an "Indian trust" exemption into Exemption 5 because "even communications made in support of the [federal-tribal] trust relationship fail to fit comfortably within the statutory text."[74] Judge Hawkins of the 9th Circuit offered an alternative, albeit minority interpretation of FOIA Exemption 5 in a dissent, "I believe that the majority misreads and misapplies FOIA case law […] Fundamentally, the majority fails to recognize that the appropriate inquiry is an inquiry into the role a document plays in agency decision making, not into the identity of its producer."[75] Note that even in instances where the FOIA Exemption 5 is applied, it only applies to records less than 25 years old.[76]

FOIA Exemption 6: Personnel, Medical, or Similar Records

FOIA Exemption 6 protects personnel and medical files, and similar files that, if disclosed, would invade another individual's privacy.[77] Native Hawaiian claimants attempted to protect a relative's body from being photographed and put on public display, but a federal district court declined to extend Exemption 6, finding "that although the ancestral remains were 'living' entities within the indigenous belief system, they were merely de-identified human skeletal remains for purposes of the privacy exemption within FOIA."[78] The Native Hawaiian claimants were structurally excluded from creating a shared meaning for the doctrine of privacy, which would operate to protect a living person's body from being photographed and put on public display without the individual's consent.[79]

FOIA Exemption 9: Geological and Geophysical Information and Data

FOIA Exemption 9 protects geological and geophysical information and data, including maps and concerning wells.[80] There is minimal case law or regulatory guidance concerning Exemption 9. [81] Of the limited case law, courts tend to view Exemption 9 narrowly, with one court noting the release of well data would, "place one party at a disadvantage in negotiations over its use."[82]

II CONFIDENTIALITY PROTECTION STRATEGIES

This section will outline practical measures that tribes have used on the ground to help mitigate or prevent confidentiality breaches. In light of statutory limitations, the most effective solutions are the ones that involve tribal retention of their own knowledge. This section will overview Memorandums of Understanding ("MOU") and other solutions that involve tribes maintaining ownership of their information, solutions that involve agency retention of tribal information, and finally, other miscellaneous solutions.

A. RETAIN OWNERSHIP AND/OR CONTROL OF TRIBAL KNOWLEDGE

The most effective strategy for preventing the disclosure of sensitive tribal knowledge is to retain tribal ownership and control of that information. In his book ***Places That Count***,[83] Thomas King advises revealing as little information as possible. For example, he recommends that tribes not follow the preferences of the National Register for "lots and lots" of documentation and suggests that agencies ought to collect only what is absolutely necessary for the cultural resource protection decision to be made.[84] Where possible, tribes should disallow an agency's creation of written records regarding tribal knowledge. Allowing agencies to retain written records potentially exposes those written records to third parties via FOIA and PRA requests, audits, or other statutory provisions.

Consultation

Consultation is the nation-to-nation acknowledgement and engagement required between sovereigns. Consultation requires recognition on a meaningful governmental level. Critically, consultation can and frequently should go beyond holding individual meetings. Consultation can include the nurturing of trust and reliance over time. Consultation can include the building of relationships. With trust between sovereigns, the probative value of traditional knowledge can elevate, the reasons for confidentiality can appear more reasonable and justified, and willingness to partner for the mutual benefits in protecting current and future cultural resources may increase. By requiring meaningful consultation in regard to confidentiality concerns, tribes can better protect their tribal knowledge and more effectively participate in future decisions that impact them.

Rely on Public Information

To the extent feasible, historical and anthropological data already in the public sphere can help minimize the amount of sensitive information a tribe will need to disclose and will allow "oral information provided by tribal elders and spiritual leaders [to] supplement, correct, and explain the existing data."[85]

Exchange Information Informally and Return Original Notes

Where the collection of detailed information is unavoidable, the information should be returned to the community, including copies and original notes.[86] For example, University of California schools were recently audited regarding their compliance with NAGPRA. The report found that while "Los Angeles corresponded informally—and did not maintain documentation of that correspondence … Berkeley… required [tribes] … to respond in writing before it would proceed with returning the remains."[87] The resulting written records, and lack thereof, were subject to inspection for that state audit report. This is problematic because on the one hand, auditors had difficulty identifying what work had taken place at UCLA. On the other hand, Berkeley used written information as a bargaining chip. There should be a balance between an accountable written record and a record that unnecessarily includes sensitive information. The U.S. Forest Service, in its *Tribal Cultural and Heritage Cooperation Authority Technical Guide*, attempts to strike this balance in recommending that in some situations, "the original holders of sensitive information may be the best holder of that information, sharing only with the Forest Service on an as-needed basis."[88]

Label Information Confidential

For tribes willing and able, sensitive cultural information can be protected through storage and labeling within an internal and confidential database.[89] Different types of information can be given different levels of confidentiality, quickly signaling to outside agencies the extent of care that is expected for the information based on its tier. For example, the Tulalip Tribes developed a computer software program to provide confidentiality protections for "storytelling traditions, knowledge about native plants, and traditional salmon fishery management."[90] At least one tribe has a summarized written document of the aspects of their tribal culture that they are willing to share with agencies. This document can also have a disclosure at the beginning and end, such as:

[Agency name] is authorized to access [tribe's name]'s history and sacred knowledge for [insert statute name] consultation purposes and [insert statute name] purposes only.

Codify Confidentiality Protections Under Tribal Law

Tribal law can be used to establish tribal expectations and set the parameters for what information is expected to be confidential. A tribal code can articulate that traditional knowledge is valued and held in high regard to the tribe. It can be referenced in future memoranda of understanding, letters, and negotiations. A code can be as simple as stating that value and as complex as establishing a framework of liability. Several tribes have codified consultation procedures, which cover tribal expectations for the entire government-to-government consultation process and can include confidentiality expectations. Consider, for example, the Yurok Tribe's cultural resource protection confidentiality provision:

The Tribe shall withhold from the public information about the location, character, or ownership of cultural resources if the Tribe determines that disclosure may cause a significant invasion of privacy; risk harm to cultural resources; or impede the use of a traditional or ceremonial site by practitioners.[91]

B. MEMORANDA OF UNDERSTANDING

A memorandum of understanding (MOU) is a formal agreement between two or more parties that reflects mutual respect and a serious, though not legally binding, intent on fulfilling the terms of the agreement. MOUs can be an effective mechanism for tribes to retain ownership of tribal knowledge. They can be used to establish and ensure tribes have a government-to-government relationship, tribes are consulted regarding matters that impact them, that tribal knowledge and expertise regarding their own culture and people should have deference, and importantly, to ensure that tribal privacy should be respected.[92] An MOU can outline the parameters for agency access to tribal knowledge.

In their MOUs with agencies, tribes should consider including: (a) confidentiality clauses; (b) prior informed consent clauses; (c) alternative dispute resolution clauses incorporating tribal code; (d) information outlining relevant federal law and relevant FOIA exemptions; and (e) remedies for breach.

Minimize the Written Record

An MOU can state a preference for communication to occur in-person or over the phone, or it may articulate a preference for an agency to review original eligibility documentation, but without retaining copies of tribal knowledge for its own records.[93] If written records are unavoidable, sensitive tribal information should be labeled as such and treated with particular care. Tribes can inform the agency that a summary document prepared by the tribe and agency staff should contain a minimum amount of information necessary to justify its determination regarding eligibility.[94] An MOU can identify sensitive areas without disclosing the nature or use of sacred places.[95]

Free, Prior, and Informed Consent

An MOU should include provisions for tribal review and approval of: (1) written characterization of their information, (2) any analysis and conclusions that will go into the agency determination documents about their tribal cultural resources, or (3) any tribal cultural resource-related information. Tribes should also negotiate how confidential tribal information will be utilized and where it will be stored.

Consent and notice should be given by the tribe prior to any disclosure of their obtained information. Some tribes have accomplished this through codifying permit requirements that include mandatory confidentiality protections.[96] An FPIC MOU clause might include:

_____ agrees it will not disclose a record to any individual or entity other than to the Tribe _____ to whom the record pertains without receiving the prior written consent of the Tribe to whom the record pertains.[97] Only the designated tribal representative(s) may develop, print, or duplicate hard copy or electronic documents or disks of information, such as reports, lists, maps, etc. Confidential information includes, but is not limited to, the locations of sensitive archaeological sites. Any confidential information provided by shall not be disclosed to the general public. Consent regarding agency possession and retention of tribal information may be revoked at any time.[98]

Outline Relevant Federal Law and FOIA exemptions

Language in an MOU or programmatic agreement can help remind the agency of the relevant law, including relevant FOIA or State Public Records Act exemptions. Such language can put the agency on notice and shift the burden from the tribe to the federal agency to defend why confidential protection should not be provided.

For instance, under NAGPRA, agencies are required to include in inventory documentation "[a] summary of the evidence, *including the results of consultation*, used to determine the cultural affiliation."[99] An MOU can emphasize that, while the results of consultation need to be documented, they need not be documented in detail because the agency has a duty to "ensure that information of a particularly sensitive nature is not made available to the general public."[100] Because detailed documentation of the results of consultation would risk exposing sensitive tribal information, the agency has an affirmative obligation to document the consultation results in general terms, leaving tribal knowledge in possession of tribes.

Under NHPA, 36 CFR 801.7 requires agencies to include photos, maps, or other specifications regarding their determinations "as appropriate."[101] An MOU can point out that, while these results need to be documented, it would be ***inappropriate*** to include maps or other specifications regarding sacred tribal places because this information is sacred and would thereafter be subject to public scrutiny. Further, the accompanying summary of consultation with a tribe is only required to be a "brief statement,"[102] and anything more than a concise summary of the results of consultation is in violation of federal regulations.

One practitioner advises use of the following language at the end of an MOU:

DO NOT DISCLOSE--CONFIDENTIAL CULTURAL RESOURCE AND ARCHAEOLOGICAL INFORMATION, subject to the protection of all federal and State law, including, without limitation: National Historic Preservation Act of 1966, as amended (NHPA), 16 USC 470, et seq.; See Section 9 (16 USC 470hh) (limitations on access to information); Archaeological Resources Protection Act of 1979, as amended (ARPA), 16 USC 470aa-mm; See Section 9 (16 USC 470hh) (confidentiality of information containing nature and location of archaeological resources); Federal Cave Resources Protection Act of 1988 (FCRPA), 16 USC 4301-4310; See Section 4304 (confidentiality of information containing nature and location of significant caves); and Freedom of Information Act (FOIA), 5 USC 552 exceptions 3-6 (3. Information exempted from disclosure by another statute); (4. Trade secrets and commercial or financial information that is privileged or confidential), (5. Documents that are normally privileged in the civil discovery context, including agency predecisional deliberative records), (6. Records containing information about individuals when disclosure would constitute a clearly unwarranted invasion of personal privacy).[103]

Specifically pertaining to FOIA Exemption 5 regarding deliberative process documents, tribes can clearly delineate that, in the event of an FOIA request, tribally sensitive knowledge will be explicitly exempt from an FOIA request as deliberative process documents. MOU language could outline that the deliberative process exemption applies to pre-decisional, intra-agency documents, and drafts exchanged between the agency and the tribe are considered intra-agency documents.[104] Tribes could thereafter specifically include a clause stating that "the federal agency agree[s] to accept a document marked 'DRAFT" which would be returned to the Tribe or placed in the federal archive with a 'DO NOT DISTRIBUTE' notice."[105] Thus, an MOU with the agency outlining the deliberative process exemption of FOIA, coupled with markings on documents that the documents are "drafts" and not to be distributed could potentially guard the tribal information from a FOIA release.[106] Note that FOIA Exemption 5 only applies to records less than 25 years old.[107]

Alternative Dispute Resolution Clauses and Tribal Code Applicability

Alternative dispute resolution ("ADR") clauses and agreements are often used as a means to settle disputes cost efficiently amongst two or more parties without having to submit to the jurisdiction and formalities of the courts. ADR is a legal process that "includes such processes as mediation, negotiation, and arbitration"[108] and, to an extent, allows the involved parties to design the framework by which the dispute will be judged. ADR can help preserve the ongoing consultative relationship between tribes and federal/state agencies.[109] Importantly, an ADR clause can include choices of law, such as tribal customary law, as well as provide for questions to be certified to a tribal court or to a special master appointed by the tribal judiciary.[110] Because many tribes have enacted tribal legislation dealing with such things as historic places, archaeology, graves protection, and sacred places, tribal law can be incorporated in an agreement,[111] both for the execution of the MOU and the resolution of any disputes that arise as a result of confidentiality breaches.[112]

III | POTENTIAL LEGISLATIVE AND ADMINISTRATIVE FIXES

Notably, Congress has at least twice considered specific proposals to protect Indian trust information. *See* Indian Amendment to Free of Information Act: Hearings on S. 2652 before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 94th Cong., 2d Sess. (1976); Indian Trust Information Protection Act of 1978, S. 2773, 95th Cong., 2d Sess. (1978).

In 1976, a bill was introduced to amend FOIA with the so-called "Indian Amendment," noting that FOIA places the federal government "in the anomalous position by the Freedom of Information Act of being forced to violate its fiduciary relationships to tribes."[113] S. 2652 would have added a tenth FOIA exemption:

> **(10) information held by a Federal agency as trustee, regarding the natural resources or other assets of Indian tribes or band or groups or individual members thereof."[114]**

In September 2020, Rep. Deb Haaland introduced, H.R. 8298, 116th Cong. § 16 (2020)[115] to provide confidentiality protections as the information pertains to NAGPRA:

> **(a) Notwithstanding any other provisions of law, all information related to the fulfillment of obligations imposed by this Act, regardless of form, shall be deemed confidential and not subject to public disclosure by the Secretary, a museum, or a Federal agency, unless such disclosure is required to fulfill an obligation imposed by this Act or regulations promulgated thereto.**
>
> **(b) Notwithstanding any other provision of law, all information submitted to the Review Committee by an affected party seeking findings or resolution of disputes pursuant to section 8(c)(3) and (4) shall be deemed confidential and not subject to public disclosure by the Review Committee, if the affected party indicates upon submission that such information shall be kept confidential.**

Presently, the bill is in committee.

Nevertheless, there are various legislative options at the local, state and federal levels that can ensure tribes are better positioned to protect and assert themselves. For example, in line with S. 2652, "cultural items" could be added to the definition of "trust resources" in 25 § 1000.352 (b)(1)[116] to extend protection for information related to cultural items pursuant to the trust responsibility.

This section will explore other legislative options.

A. FREE, PRIOR, AND INFORMED CONSENT

Free, prior, and informed consent ("FPIC") should be built into cultural resource protection statutes to mitigate against the disclosure of tribal information without the tribe's knowledge and consent. FPIC is called for by the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") and is rooted in Indigenous Peoples' right to self-determination and sovereignty.[117]

> **ARTICLE 19 SPECIFICALLY MANDATES NATION STATES TO**
>
> consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.
>
> **MEANWHILE, ARTICLE 11 MANDATES NATIONS STATES TO**
>
> provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.[118]

There is precedent for an FPIC-like notice to individuals before information pertaining to them is disclosed in NEPA.[119] Note that the requirement for tribal consent is comparable to a non-disclosure agreement framework.[120] Potential FPIC language might include:

> **The [agency] will not disclose a record to any individual other than to the tribe or tribal representative to whom the record pertains without receiving the prior written consent of the tribe or tribal representative to whom the record pertains.[121]**
>
> **Or**
>
> **Information submitted by a tribe before, during, or after consultation may not be included in publicly available documents or told to the public without the prior written permission of the tribe.[122]**
>
> **Or**
>
> **It is the purpose of this section to exclude tribal knowledge and information from FOIA or Public Records Act Requests. It is also the purpose of this section to exclude tribal knowledge from other agencies, third party auditors, or external parties--including but not limited to the governor of the state.**
>
> **Or**
>
> **Tribal consent is always required before disclosing information derived from a tribe and may be withdrawn at any time.**

B. ACCESS TO REVIEW INFORMATION FOR ACCURACY

Information exchanged during routine communications and consultation can be recorded inaccurately or with inappropriate detail. Tribes should have access to agency-held information regarding the tribe. For example, NEPA provides an individual access to information contained in the record which pertains to that individual.[123] Tribes should have comparable access across cultural resource protection statutes. For example:

Upon verification of identity, the [agency] shall disclose to the tribe or tribal representative the information contained in the record which pertains to that tribe. Upon request of the tribe to whom the record pertains, all information in the accounting of disclosure will be made available. This section seeks to establish a procedure by which a tribe or tribal representative can gain access to a record pertaining to them for the purpose of review, amendment and/or correction.[124]

C. LIMIT THE SCOPE OF FOIA

Beyond the addition of a tenth FOIA exemption, the existing exemptions could be leveraged.

Make Cultural Resource Protection Statutes FOIA Exemption 3 "Withholding Statutes"

Legislation could modify each cultural resource protection statute making the statute exempt from FOIA and state public records act requests, such as is provided for the Cultural and Heritage Cooperation Authority.[125]

FOR EXAMPLE: [redacted]

(a) In general – The [agency] shall not disclose under section 552 of title 5 (commonly known as the "Freedom of Information Act"), information provided to the [agency] by an Indian or Indian tribe under an express expectation of confidentiality in the context of cultural resource protection carried out pursuant to this statute.

(b) Limited release of information. The [agency] may disclose information described in subsection (a) if, before the disclosure, the [agency] notifies and receives prior and informed consent from the affected Indian tribe[s];

Increase FOIA Fees

Agencies are vital in the process of preventing unsolicited access to sensitive tribal knowledge. Increasing fees and minimizing fee waivers for access to tribal knowledge could minimize amateur curiosity and other extraneous exposure of tribal knowledge. It would weed out people attempting to gain access to the information. NEPA's CFR provisions give information on how the Council of Environmental Quality is to waive FOIA fees.[126] A provision could be included in the NEPA fee waiver that specifically states that waivers do not and cannot apply to tribal knowledge, at least without their prior and informed consent.

IV | CONCLUSION

Sensitive tribal information, including traditional knowledge, are resources that tribes value and seek to protect much like other cultural resources. Indigenous Peoples have a sovereign right to promote, maintain and safeguard their traditional knowledge alongside other cultural resources.[127] The cultural resource protection field is expanding, providing more, though still insufficient, opportunities for acknowledging and protecting tribal cultural resources. There is now a need to reciprocate that acknowledgment and protection for the protection of sensitive tribal information exchanged in the course of protecting cultural resources. Ultimately, tribes must be afforded the autonomy to maintain and control their information. Which means that before any information obtained from a tribe is shared or used, the tribe should have an opportunity to provide their free, prior, and informed consent. Current confidentiality protection statutes, confidentiality protection tools like memorandum of understanding provisions, and potential legislative fixes that reinforce statutes as well as other tools are all aimed at empowering this tribal self-determination. Tribes can and should have meaningful control to access, re-access, and protect their culture. Protecting their confidentiality is an integral component to this work.

V | ENDNOTES

1 This article uses "Indigenous Peoples," "American Indian" "Indian," "Native American," and "Indigenous" interchangeably to refer to the Indigenous Peoples located within the United States. The terms "tribes" and "tribal nations" are used to refer to sovereign tribal governments.

2 World Intellectual Property Organization (WIPO), at https://www.wipo.int/tk/en/tk/ (last accessed Dec. 11, 2020).

3 G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) (Article 31); the United Nations Convention on Biological Diversity (CBD) (1992) (Article 8(j)); and United Nations Educational, Scientific and Cultural Organization, *Traditional Knowledge – Definition* (2019).

4 G.A. Res. 61/295, annex, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007). The United States did not endorse the Declaration until 2010. However, even with this endorsement, the Declaration must be adopted into domestic U.S. law to be enforceable under U.S. law. Nevertheless, the Declaration reflects international legal norms.

5 "Free, prior, and informed consent" is an information-gathering and decision-making framework found in the United Nations Declaration on the Rights of Indigenous Peoples. G.A. Res. 61/295, (Sept. 13, 2007) (Articles 10, 11, 19, 28, 29, and 32). *See specifically*, Declaration at Article 11(2): "States shall provide redress through effective mechanisms … with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior, and informed consent or in violation of their laws, traditions and customs."

6 *See e.g. Bonnichsen v. United States*, 367 F.3d 864, 875-876 (9th Cir. 2004) (holding that NAGPRA requires that human remains must relate to a presently existing tribe indigenous to the United States, that the burden of proof was on the tribes, and that the tribes could not meet that burden in their attempts to repatriate the 9,000-year-old human remains known as "Kennewick man".).

7 Rebecca Tsosie, *Challenges to Sacred Site Protection*, 83 Den. U. L. R. 963, 971 (2006) discussing *Navajo Nation v. U.S. Forest Service*, 408 F.Supp. 2d 866 (D. Ariz. 2006).

8 Some bioarchaeologists are staunchly opposed to returning bones to the ground. Duncan Sayer, an archaeologist at the University of Central Lancashire, writes, "The destruction of human remains prevents future study; it is the forensic equivalent of book burning, the willful ruin of knowledge." Mark Strauss, "When Is It Okay To Dig Up The Dead?" National Geographic (April 7, 2016). As one scholar put it, "The confidentiality provision of the ARPA, and the limitations on the right of possession in the NAGPRA, are official censorship and suppression of information. Many archaeological finds are never written about, and even fewer are published. When not published, the information is useless. If geographic information (site location) is not allowed to be published with those reports that find their way into print, even that information will be useless." David G. Bercaw, *Requiem for Indiana Jones: Federal Law, Native Americans, and the Treasure Hunters*, 30 Tulsa L. J. 213, 239-40 (1994).

9 "Fear of increased site use resulting from sacred-site disclosure also contributes to Native Americans' emphasis on sacred-site secrecy." Ethan Plaut, *Tribal-Agency Confidentiality: A Catch-22 for Sacred Site Management?*, 36 Ecology L.Q. 137, 144 (2009).

10 Anonymous Attendee, Meeting of California Indian Law Association (2002), as cited in Angela P. Riley, S*traight Stealing: Towards an Indigenous System of Cultural Property Protection*, 80 Wash. L. Rev. 69, 89 n. 118 (2005) (citations omitted).

11 Jeanette Wolfley, 56 Nat. Resources J. 55, 79 (2016).

12 Ethan Plaut, *Tribal-Agency Confidentiality: A Catch-22 for Sacred Site Management?*, 36 Ecology L.Q. 137, 144 (2009) ("[S]ecrecy'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." (internal citation omitted)).

13 Meeting 16 Minutes, supra note 251, at 38, as cited in Ryan Seidmann, *Altered Meanings: The Department of Interior's Rewriting of the Native American Graves Protection and Repatriation Act to Regulate Culturally Unidentifiable Human Remains*, 28 Temp. J. Sci. Tech. & Envtl. L. 1, 44 n. 253 (2009).

14 Thomas F. King, Place The Count: Traditional Cultural Properties in Cultural Resource Management, 250 (Alta Mira Press, 2003).

15 Ann Berkeley Rodgers, Aaron Sims and Gregory Smith, *Defending the National Historic Preservation Act: Part 1*, Law 360 3 (2017).

16 Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified in part at 42 U.S.C. § 1996).

17 16 U.S.C. § 470aa, et. seq.

18 25 U.S.C. § 3051, et. seq. ***Note***, the Cultural and Heritage Cooperation Authority only applies to National Forest System lands, whereas ARPA, NHPA, NEPA apply to all federal lands.

19 42 U.S.C. § 4321, et. seq.

20 16 U.S.C. § 470, et, seq.

21 20 U.S.C. § 80q et. seq.

22 18 U.S.C. § 1170, 25 U.S.C. §§ 3001-3013.

23 H.R. 8298, 116th Cong. § 16 (Sept. 17, 2020) is a bill proposed in Congress to amend the Native American Grave Protection Act to move the enforcement office to the Bureau of Indian Affairs, to increase the civil monetary penalties for failure to follow the processes established by that Act, to protect confidential information, and for other purposes. As of Oct. 26, 2020, the bill has been referred to the House Committee on Natural Resources, with no further movement.

24 25 U.S.C. § 5301, et. seq.

25 Lauryne Wright, *Cultural Resource Preservation Law: The Enhanced Focus on American Indians*, 54 A.F. L. Rev. 131, 153 (2004) (Noting that military instillation policy warned agencies to be "careful not to overstate their ability to keep sensitive tribal information confidential.").

26 Department of Interior Secretarial Order 3206, Principle 5.

27 AIRFA does not have a confidentiality provision. *See* 42 U.S.C. 1996. However Executive Order 13007 applies to AIRFA and states that "where appropriate, agencies shall maintain the confidentiality of sacred sites."

28 For ARPA's confidentiality provision, see 16 U.S.C. 1B §470hh; for NHPA's confidentiality provision, see 54 USCA §307103 (a); NAGPRA does not specifically have a confidentiality provision in its text, but incorporates ARPA and NHPA confidentiality provisions via 43 CFR 10.9 (e)(5)(ii).

29 16 U.S.C. § 470hh(a).

30 54 U.S.C. § 307103(a).

31 36 C.F.R. § 800.16 (defining "historic property" as those "included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior").

32 *See* 16 U.S.C. 1B §470hh (stating "Information concerning the nature and location of any archeological resource . . . ***may not*** be made available to the public …) (emphasis added); ***see also*** 54 USCA §307103 (a) (stating "The head of a Federal agency, or other public official receiving grant assistance pursuant to this division . . . ***shall withhold from disclosure*** to the public …) (emphasis added).

33 *See* 16 U.S.C. 1B §470hh [ARPA] (stating information may not be made available "***unless*** the Federal land manager concerned ***determines*** the disclosure would . . . "not create a risk of harm to such resources or to the site at which such resources are located.") (emphasis added); ***see also*** 54 USCA §307103 (a) [NHPA] (stating information shall not be made available if the Secretary and the agency ***determine*** that the disclosure may . . . risk harm to the historic property . . . or impede the use of a traditional religious site") (emphasis added). For regulatory language that reiterates an agency's role in the NHPA determination process, see 36 C.F.R. § 800.11(c) (stating in relevant part "[w]hen the head of the federal agency or other public official has determined that information should be withheld from the public . . . shall determine who may have access to the information for purposes of carrying out the act.").

34 5 U.S.C. § 500, et. seq.

35 *See e.g. Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988) (noting that construction of a timber road, while certainly causing damage to the Six Rivers/Chumney Rock area, did not substantially burden the tribal religions because it did not compel behavior that was contrary to their beliefs).

36 Department of Interior Secretarial Order 3206, Principle 5.

37 Russel L. Barsh, *Grounded Visions: Native American Conceptions of Landscapes and*

Ceremonies, 13 St. Thomas L. Rev. 127, 138 (2000).

38 Cal. Pub. Res. Code §21080.3(c)(1). (AB 52 OPR Technical Advisory (Revised) June 2017, pg. 7)

39 Cal. Pub. Res. Code § 21082.3 (c)(1), (c)(2)(A).

40 Cal. Pub. Res. Code §21080.3(c)(1)

41 Consistent with the holding in ***Clover Valley Foundation v. City of Rocklin*** (2011) 197 Cal.App.4th 200; ***See also*** AB 52 OPR Technical Advisory (Revised) June 2017, Pg. 7.

42 Cal. Pub. Res. Code §21080.3(c)(2)(B).

43 Cal. Pub. Res. Code §21080.3(c)(1)

44 40 CFR 1506.5(c) "Environmental Impact Statements. . . any environmental impact statement prepared pursuant to the requirements of NEPA shall be prepared directly by or by a contractor selected by the lead agency or where appropriate under 1501.6 a cooperating agency."

45 16 U.S.C. Ch. 1B, §470aa; ***see*** 16 U.S.C. Ch. 1B, §470hh(b)

46 Calif. Health & Safety Code, Sec. 8028 (2018).

47 ***See*** Deborah L. Theedy, ***Claiming the Shields: Law, Anthropology, and the Role of Storytelling in a NAGPRA Repatriation Case Study***, J. Land Resources & Envtl. L. 91, 117 (2009); ***see also*** Dean B. Suagee, ***Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground***, 21 Vt. L. Rev. 145, 166-67 (1996) ("Indians barely got to the table at all, and when they did, the University scientists scarcely took them seriously. This last factor was a failing on the part of the University rather than on the part of the Indians . . .").

48 Kurt F. Anschuetz & Kurt E. Dongoske, Hadiya:Wa: Hearing What Traditional Pueblo Cultural Advisors Talk About, Symposium: Collaborative and Community Archeology 1, 7 (2017).

49 ***See*** Deborah L. Theedy, ***Claiming the Shields: Law, Anthropology, and the Role of Storytelling in a NAGPRA Repatriation Case Study***, J. Land Resources & Envtl. L. 91, 117 (2009).

50 ***Pueblo of Jemez v. United States***, 430 F.Supp. 3d 943, 1175 (D.N.M. 2019), ***citing Assiniboine Indian Tribe v. United States***, 77 Ct. Cl. 347, 366 (1933) ("'[M]uch of the evidence … is from a source that lessens its weight[,]' and emphasizing that the witnesses 'were either . . . children at the time of the signing of the treaty or very old men at the time when they gave their testimony, and on account of age having at best a very incomplete recollection of matters that occurred fifty years prior thereto.").

51 ***Pueblo of Jemez v. United States***, 430 F.Supp. 3d 943, 1175 (D.N.M. 2019), ***citing Coos Bay, Lower Umpqua & Siuslaw Indian Tribes v. United States***, 87 Ct. Cl. 143, 152 (1938) (stating oral testimony was "insufficient on its own to carry the Tribal claimants' burden of proof."); ***see also Bonnichsen v. United States***, 367 F.3d 864, 875 (9th Cir. 2004) ("The record as a whole does not show where historical fact ends and mythic tale begins, we do not think that the oral traditions . . . were adequate . . . .").

52 ***Pueblo of Jemez v. United States***, 430 F.Supp. 3d 943, 1176 (D.N.M. 2019), ***citing Coos Bay, Lower Umpqua & Siuslaw Indian Tribes v. United States***, 87 Ct. Cl. 143, 152 (1938) ("at least seventeen of the twenty-one witnesses…had a direct interest in the outcome of the case.").

53 ***Pueblo of Jemez v. United States***, 430 F.Supp. 3d 943, 1175 (D.N.M. 2019), ***citing Assiniboine Indian Tribe v. United States***, 77 Ct. Cl. 347, 369 (1933).

54 ***Pueblo of Jemez v. United States***, 430 F.Supp. 3d 943, 1179 (D.N.M. 2019), ***citing Gibbs v. Central Surety and Insurance Corporation***, 163 Kan. 252, 181 P.2d 498, 499 (1947).

55 36 C.F.R. § 800.4(a)(4).

56 ***See*** Emily Choi, ***Safeguarding Native American Traditional Knowledge Under Existing Legal Frameworks: Why and How Federal Agencies Must Re-Interpret FOIA's "Trade-Secret Exemption"***, Advisory Council on Historic Preservation (2019).

57 5 U.S.C. § 552.

58 Dep't of Justice, ***What is FOIA***? At www.foia.gov/about.html. ***Also see*** Emily Choi, ***Safeguarding Native American Traditional Knowledge Under Existing Legal Frameworks: Why and How Federal Agencies Must Re-Interpret FOIA's "Trade-Secret Exemption"***, Advisory Council on Historic Preservation (2019).

59 5 U.S.C. § 552(b)(3) (FOIA "does not apply to matters that are specifically exempted from disclosure by statute … if that statute—(A) (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009 …").

60 ***See*** ***Na Iwi O Na Kupuna O Mokapu v. Dalton***, 894 F. Supp. 1397 (D. Haw. 1995) stating "Courts have consistently held that a statute is a withholding statute for FOIA purposes only when it explicitly states in unambiguous terms that information gathered under the statute is not to be released to the public or is to be kept confidential"; ***see also Baldrige v. Shapiro***, 455 U.S. 345, 359, 102 S.Ct. 1103, 1111, 71 L.Ed.2d 199 (1982) (holding Census Act is a withholding statute as it explicitly provides for nondisclosure); ***Association of Retired R.R. Workers v. Railroad Retirement*** Bd., 830 F.2d 331, 334 (D.C.Cir.1987) (finding Railroad Unemployment Insurance Act, which requires specific types of information to be kept confidential, to be a withholding statute).

61 ***Center for Biological Diversity v. US Army Corps of Engineers***, 2015 WL 3606419 at *9 (West 2015) (stating "[t]he agency can only redact character information in a FOIA request if such information would somehow convey the location of the resource.").

62 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 such information, but may not be enough to guarantee confidentiality in the face of a . . . (FOIA) . . . request for disclosure--especially under NHPA, which does not cross-reference FOIA.").

63 5 U.S.C. § 552(b)(4).

64 ***See Flathead Joint Bd. of Control v. U.S. Dep't of Interior,*** 309 F.Supp.2d 1217 (D.Mont. 2004) ("There is no doubt that water rights themselves are an object of commerce.") and ***Starkey v. U.S. Dep't of Interior***, 238 F.Supp. 2d 1188 (S.D. Cal. 2002) (recognizing a competitive harm claim for "well and water related information" on an Indian reservation because release "would adversely affect the [Tribe's] ability to negotiate its water rights").

65 ***Starkey***, 238 F.Supp. 2d at 1195.

66 Emily Choi, ***Safeguarding Native American Traditional Knowledge Under Existing Legal Frameworks: Why and How Federal Agencies Must Re-Interpret FOIA's "Trade-Secret Exemption"***, Advisory Council on Historic Preservation, 22 (2019).

67 ***Critical Mass Energy Project v. NRC***, 975 F.2d 871 (D.C. Cir. 1992) (en banc), cert. denied, 113 S.Ct. 1569 (1993).

68 In ***Critical Mass***, the information in question was provided to third parties—but only under a nondisclosure agreement. The D.C. Circuit held that the information was still "confidential" as it was "not customarily [made] available to the public."

69 30 USCS § 1733(C)

70 ***Merit Energy Co. v. United States DOI***, 180 F. Supp. 2d 1184 (D. Colo. 2001) (rejecting the Jicarilla Apache Tribe's claim of confidentiality for information accumulated by the Tribe pursuant to a cooperative agreement).

71 5 U.S.C. § 552(b)(5) ("inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation within the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested").

72 532 U.S. 1 (2001).

73 ***Id*** at 13.

74 ***Id***. at 15.

75 Klamath Water Users Protective Ass'n v. DOI, 189 F.3d 1034, 1039 (9th Cir. 1999) (Hawkins, J. Dissenting).

76 ***See*** https://www.foia.gov/faq.html.

77 5 U.S.C. § 552(b)(6).

78 Rebecca Tsosie, ***Indigenous Peoples and Epistemic Injustice, Science, Ethics, and Human Rights***, 87 Wash L. Rev. 1133, 1160-61 (2012) (discussing ***Na Iwi O Na Kupuna O Mokapu v. Dalton***, 894 F. Supp. 1397 (D. Haw. 1995)).

79 Id.

80 5 U.S.C. § 552(b)(9).

81 ***See***; Superior Oil Co., 563 F.2d at 197 (natural gas exploration expenditure data); Pennzoil Co., 534 F.2d at 629 (natural gas reserve estimate data); Starkey, 238 F. Supp. 2d at 1195 (water table levels

and well-yield data); Black Hills Alliance, 603 F. Supp. at 122 (narrowly construed Exemption and determined that it applies only to "well information of a technical or scientific nature").

82 *Starkey v. United States DOI*, 238 F. Supp. 2d 1188 (S.D. Cal. 2002)

83 Thomas F. King, Place The Count: Traditional Cultural Properties in Cultural Resource Management, 250-51 (Alta Mira Press, 2003).

84 Lynne Sebastian, "Protecting Traditional Cultural Properties through the Section 106 Process," in Patricia L. Parker (ed.), ***Traditional Cultural Properties: What You Do and How We think, CRM*** Special Issue (National Park Service, 1993), ***cited in*** Thomas F. King, Place The Count: Traditional Cultural Properties in Cultural Resource Management, 43 (Alta Mira Press, 2003).

85 Jeanette Wolfley, 56 Nat. Resources J. 55, 79 (2016).

86 King at 251.

87 California State Auditor, *Native American Graves Protection and Repatriation Act: The University of California Is Not Adequately Overseeing Its Return of Native American Remains and Artifacts*, Report 2019-047, 17 (June 2020).

88 Tribal Cultural and Heritage Cooperation Authority Technical Guide: A Companion to the Forest Service Directives, U.S. Forest Service, FS-1137, 23 (October 2019).

89 If the task of creating a cultural resource database seems too resource intensive for your particular tribe, it might be worth considering pooling resources with other tribes to create the database.

90 Nancy Kremers, ***Speaking with A Forked Tongue in the Global Debate on Traditional Knowledge and Genetic Resources: Are U.S. Intellectual Property Law and Policy Really Aimed at Meaningful Protection for Native American Cultures?***, 15 Fordham Intell. Prop. Media & Ent. L.J. 1, 42 (2004).

91 Yurok Tribal Code, 14.10.140.

92 ***See e.g.*** Cherokee Nation Letter sent to the Internal Revenue Service, Notice 2011-94 Baker, 2012 WL 8685330 (West 2012).

93 Jeanette Wolfley, 56 Nat. Resources J. 55, 79-80 (2016).

94 Id.; ***see also*** Kristen A. Carpenter, ***A Property Rights Approach to Sacred Site Cases: Asserting a Place for Indians as Nonowners***, 52 UCLA L. Rev. 1061, 1113 n. 323 (describing the decision of Northwest tribes to survey national forest lands, and identify sacred areas for a confidential report accessible only by permission of the tribes).

95 Russel L. Barsh, ***Grounded Visions: Native American Conceptions of Landscapes and Ceremony***, 13 St. Thomas L. Rev. 127, 145-46.

96 Joseph P. Brewer II & Elizabeth Ann Kronk Warner, Protecting Indigenous Knowledge in the Age of Climate Change, 27 Geo. Int'l Envt'l L. Rev. 585, 626 (2015) ("Like the CRIT code and Ho-Chunk tribal laws, the CRPA prohibits research conducted within its territory without a permit. Researchers' permit applications must include mechanisms for obtaining informed consent from research participants and state in detail how they will protect participants' confidentiality.").

97 Modeled after language taken from NEPA Regulations, 40 CFR 1516.9.

98 Memorandum of Agreement Pertaining to Access to Historical Resources Records by and between the Santa Ynez Band of Chumash Indians and the Central Coast Information Center California Historical Resources Information System, on file with author.

99 43 CFR 10.9(c)(4), ***emphasis added***.

100 43 CFR 10.10(f)(2).

101 36 CFR 801.7(a)(1)(ii); 36 CFR 801.7(b)(1)(ii); 36 CFR 801.7(b)(2)(iv).

102 36 CFR 801.7(b)(1)(iv); 36 CFR 801.7(b)(2)(vi); ***see also Colorado Off-highway Vehicle Coalition***, 194 IBLA 382, 401 (2019) citing ***Dine Citizens Against Ruining Our Env't v. Jewell***, 312 F. Supp. 3d 1031, 1101 (D.N.M. 2018)(quoting 36 C.F.R. § 800.11(a)) ("[The Bureau of Land Management (BLM) is required to explain the basis for determining that no historic properties [under NHPA] are present or affected, but does not require production of all underlying data supporting the no-effects conclusion. A recent judicial case recognized that under these documentation standards 'a piercing level of detail is unnecessary' and that 'all the agency needs to provide is sufficient documentation such that the Court or any other reviewing party can understand the findings' basis.").

103 Sam Cohen Email, on file with author.

104 ***See Hornbostel v. U.S. Dept. of Interior***, 305 F.Supp. 2d 21, 31 (D.C. Cir. 2003) ("Similar to defendant's previous two categories, defendant's third category—drafts—consists of earlier versions of final agency documents or versions of documents which were not ultimately adopted. 4 Many of these documents contain the opinions and suggested changes of federal officials as well. As these documents also fall within the pre-decisional and deliberative category, defendant's invocation of Exemption 5 was proper").

105 Jeanette Wolfley, 56 Nat. Resources J. 55, 80 (2016).

106 ***See Southern Natural Gas Company,*** 76 FERC P 611122, 61630 n.8 (1993) (stating that the agency routinely placed applicants' cultural resource information in a non-public file, and when public officials wanted access to the information, they had to sign a certificate of non-disclosure to be given access to the information).

107 see https://www.foia.gov/faq.html.

108 Dean B. Suagee, Tribal Voices in Historic Preservation at 218.

109 Dean B. Suagee, Tribal Voices in Historic Preservation at 218.

110 Dean B. Suagee, ***Tribal Voices in Historic Preservation*** at 218.

111 Dean B. Suagee, Tribal Voices in Historic Preservation at 210.

112 ***See generally*** Donna S. Salcedo, ***Hawaiian Land Disputes: How the Uncertainty of the Native Hawaiian Indigenous Tribal Status Exacerbates the Need for Mediation***, 14 Cardozo J. Conflict Resol. 557 (2013)

113 Indian Amendment to Freedom of Information Act, Hearing on S. 2652 Before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, 94th Cong. 2d , 2 (May 17, 1976).

114 S. 2652, 94th Cong. 2d (Nov. 11, 1975).

115 H.R. 8298, 116th Cong. § 16 (Sept. 17, 2020) is a bill proposed in Congress to amend the Native American Grave Protection Act to move the enforcement office to the Bureau of Indian Affairs, to increase the civil monetary penalties for failure to follow the processes established by that Act, to protect confidential information, and for other purposes. As of Oct. 26, 2020, the bill has been referred to the House Committee on Natural Resources, with no further movement.

116 25 § 1000.352 (b)(1) - What are "trust resources" for the purposes of the trust evaluation process?

117 G.A. Res. 61/295, ¶ 12, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

118 Id.

119 40 CFR § 1516.5.

120 ***See*** Gregory A. Smith, ***The Role of Indian Tribes in the Section 106 National Historic Preservation Act Review Process***, 53 Am. L. Inst. 649, 669 (2004) (discussing proposed confidentiality provisions and their placement within a statute, particularly because placement in a specific part of NHPA would presumably limit the application of the confidentiality provisions "to all parties who have access to tribal materials or information.").

121 Modeled after 40 CFR § 1516.9.

122 Modeled after Cal. Pub. Res. Code §21080.3(c)(1).

123 40 CFR § 1516.5.

124 Modeled after 40 CFR 1516.5 and 1516.1.

125 25 U.S.C. § 3056.

126 40 CFR 1515.15.

127 G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) (Article 31); the United Nations Convention on Biological Diversity (CBD) (1992) (Article 8(j)); and United Nations Educational, Scientific and Cultural Organization, ***Traditional Knowledge – Definition*** (2019).