DIGNITY AND RESPECT AT ALL TIMES:[1] HOW FEDERAL AGENCIES CAN MEASURE UP IN COMPLYING WITH NAGPRA AND RELATED STATUTES

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I. INTRODUCTION

Most societies and cultures honor their dead and sacred objects. This need fuels some of classic literature's most memorable dramas: Antigone's desire to bury her brother and the plea to Achilles from King Priam to return the body of his son Hector.[2] Honoring the dead

1. *Facilitating Respectful Return*, NAT'L PARK SERV., https://www.nps.gov/subjects/nagpra/index.htm (last visited Feb. 2, 2022) (noting that Congress recognized that "human remains of any ancestry must at all times be treated with dignity and respect") (internal quotations omitted).

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2. SOPHOCLES, *Antigone* in *Three Theban Plays* 159 (Peter Constantine trans., Barnes and

and associated burial objects is important not only to specific cultures, but also to civilization in general, as it "provide[s] a vehicle in which to examine past civilizations and reconstruct our history."[3] For many Native Americans, death rituals are thought to help the spirit reach its ultimate destination; therefore, if the ritual is not honored, the soul will never be at peace.[4]

However, Native American human remains and sacred objects have historically not received proper treatment.[5] For example, in the Nineteenth Century, grave robbing and desecration were common occurrences, as was displaying Native American remains in museums.[6] These concerns led Congress to enact several laws, including the Native American Graves Protection and Repatriation Act (NAGPRA).[7] Senator Inouye, the act's co-sponsor memorably remarked,

> When human remains are displayed in museums or historical societies, it is never the bones of white soldiers or the first European settlers that came to this continent that are lying in glass cases. It is Indian Remains. The message that this sends to the rest of the world is that Indians are culturally and physically different from and inferior to non-Indians. This is racism.[8]

Unlike contemporary environmental and cultural resource laws, NAGPRA provides substantive safeguards, advances a civil rights standard,[9] and acknowledges a government-to-government

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Noble Books 2007); HOMER, *The Iliad,* 583–87 (Robert Fitzgerald trans., Anchor Books 1974).

3. Gabrielle Paschall, *Protecting Our Past: The Need for Uniform Regulation to Protect Archaeological Resources*, 27 T.M. COOLEY L. REV. 353, 353 (Trinity Term 2010).

4. *See Death Around the World: Native American Beliefs*, FUNERAL GUIDE, https://www.funeralguide.com/blog/death-around-world-native-american-beliefs (Oct. 14, 2016) (stating that many rituals help "guide the spirit to its home in the afterlife").

5. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-110, *Native American Cultural Resources: Improved Information Could Enhance Agencies Efforts to Analyze and Respond to Risks of Theft and Damage* (Apr. 5, 2021), https://www.gao.gov/products/gao-21-110 (noting that "[I]ndividuals have long sought to excavate and steal Native American pottery, tools, and other objects for their own collections or to sell").

6. For example, scientists and museums typically wanted and had unlimited access and control over "found" or "discovered" remains and cultural objects for study and public display, while Native Americans considered this practice cultural conquest that left those remains in spiritual limbo. James A.R. Nafziger, *The Protection and Repatriation of Indigenous Cultural Heritage in the United States*, 14 WILLAMETTE J. INT'L L. & DISP. RESOL. 175, 183 (2006).

7. Native American Graves and Protection and Repatriation Act, Pub. L. 101-601, Stat. 3048–58 (1990) (codified at 25 U.S.C. §§ 3001–13, 104) (NAGPRA's implementing regulations are in 43 C.F.R Part 10. States have also passed similar laws, including "little" NAGPRAs. This article focuses on Federal NAGPRA.).

8. 136 Cong. Rec. 35678, (Oct. 26, 1990) (statement of Sen. Inouye).

9. *See* Lauryne Wright, *Cultural Resource Preservation Law: The Enhanced Focus on American Indians*, 54 A.F. L. REV. 131, 134–-35 (2004) ("Congressman Morris Udall said it was the greatest piece of legislation he had ever been associated with, advancing a civil rights standard

relationship between the United States and Indian tribes.[10]

While NAGPRA has lofty aims and has been effective in returning remains and objects to descendants,[11] it has limitations, both inherent in its language[12] and in how courts have interpreted it, which affect Agency enforcement of the Act. Moreover, NAGPRA has not received the same level of scholarly, judicial, or Congressional attention as other laws that touch on cultural resources, such as the National Environmental Policy Act of 1969 (NEPA)[13] or the National Historic Preservation Act (NHPA).[14] Federal agencies may also struggle to comply with NAGPRA due to limited resources and requirements under several other statutes. For example, in complying with one or more of the other statutes related to cultural resources, agencies may believe that they have met all applicable requirements. NAGPRA's specific requirements and obligations may implicate the Native American Trust Doctrine, which imposes a fiduciary duty on the federal government to protect certain resources. NAGPRA may even provide Native Americans with a means of challenging government action that violates this duty.[15] Further, because NAGPRA's requirements only apply to remains and objects on federal and Tribal land, only a few federal agencies routinely manage or administer lands from which Native American cultural resources may be taken.[16] Thus, many permitting agencies may not be as familiar with NAGPRA if they do not regularly permit or license actions that are on Federal or Tribal lands.[17] While this does not excuse non-compliance, it does help explain why the Government Accountability Office (GAO) reported in 2010, decades after the law passed, that several agencies had not complied with key provisions of

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that hadn't been seen since the mid-1960s.")

10. *Id.* at 135.

11. *See* Nafziger, *supra* note 6, at 175.

12. Jeri Beth K. Ezra, *The Trust Doctrine: A Source of Protection for Native American Sacred Sites*, 38 CATH. UNIV. L. REV. 705 (1989) (noting that NAGPRA's protections do not apply to discoveries or excavations on private or state lands).

13. 42 U.S.C. § 4321 *et seq*.

14. 54 U.S.C. § 300101 *et seq.* (NAGPRA has not been amended since it became law on Nov. 16, 1990. In contrast, NEPA and NHPA have been amended multiple times since enactment.).

15. Ezra, *supra* note 14(internal citations omitted).

16. They are the Bureau of Indian Affairs (BIA), Bureau of Land Management (BLM), Army Corps, Forest Service, Fish and Wildlife Service, the Park Service, and the Tennessee Valley Authority (TVA). *See* U.S. GOV. ACCOUNTABILITY OFF., *supra* note 5, at 7-8.

17. *See, e.g.*, *In re* Hydro Res., Inc., 49 N.R.C. 136, 143 (1999) ("NAGPRA . . . applies only to the disposition of Native American cultural items 'excavated or discovered *on federal or tribal lands.*'"). This article will use the terms licensing and permitting interchangeably.

NAGPRA.[18] GAO has since done several additional reports and made dozens of recommendations.[19] While the GAO reported in February 2022 that agencies have made some progress and implemented some recommendations, not all recommendations are implemented and tribes continue to report challenges related to NAGPRA's implementation.[20]

However, two recent developments make it almost certain that licensing agencies will see a rise in NAGPRA claims and should better understand NAPGRA's requirements. First, there is growing interest in building infrastructure projects on federal land.[21] Second, a recent Supreme Court decision, *McGirt v. Oklahoma*,[22] and several lower court decisions following *McGirt* have significantly expanded what is considered tribal land. Specifically, in *McGirt*, the Court significantly expanded the recognized borders of the Muskogee Creek Nation Reservation in Oklahoma.[23] The Court's holding directly resulted in "one million Oklahomans liv[ing] on an Indian reservation, including 400,000 in the city of Tulsa."[24] And following *McGirt*, lower courts have already recognized numerous other expansions to reservations.[25] These developments could bring NAGPRA issues to the forefront because more remains and objects will be subject to NAGPRA's

18. *See Native American Graves Protection and Repatriation Act: After Almost 20 Years, Key Federal Agencies Still Have Not Fully Complied with the Act*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-768 (2010), https://www.gao.gov/assets/gao-10-768.pdf . *See also Finding Our Way Home: Achieving the Policy Goals of NAGPRA Before the Committee on Indian Affairs*, 112th Cong. (2011), https://www.govinfo.gov/content/pkg/CHRG-112shrg68066/html/CHRG-112shrg68066.htm (hearing covering GAO's report).

19. *See Native American Issues: Federal Agency Efforts and Challenges Repatriating Cultural Items*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-105685 (Feb 2022), https://www.gao.gov/products/gao-22-105685.

20. *Id*. (noting challenges with (1) consulting with tribes and tribal organizations, (2) better protecting Native American cultural items, and (3) addressing challenges in the limited scope of the law and enforcement).

21. *See Advanced Small Modular Reactors*, DEP'T OF ENERGY, OFF. OF NUCLEAR ENERGY, https://www.energy.gov/ne/advanced-small-modular-reactors-smrs (last visited Feb. 2, 2022); *Powering Up Renewable Energy on Public Lands*, DEP'T OF THE INTERIOR (Sept. 12, 2016), https://www.doi.gov/blog/powering-renewable-energy-public-lands.*See also Coordination of Federal Transmission Permitting on Federal Lands (216(h)),* DEP'T OF ENERGY, OFF. OF ELEC., https://www.energy.gov/oe/services/electricity-policy-coordination-and-implementation/transmission-planning/coordination (last visited Feb. 2, 2022).

22. 140 S. Ct. 2452 (2020).

23. *Id*. at 2482 (stating that because Congress had not explicitly disestablished the Creek Nation reservation in Oklahoma that territory remained Tribal land).

24. Robert J. Miller and Torey Dolan, *The Indian Law Bombshell: McGirt v. Oklahoma,* 101 B.U. L. REV. 2049, 2051 (2021).

25. *Id.*

requirements.

Therefore, this article seeks to help federal licensing agencies, that authorize actions possibly impacting remains and objects, comply with NAGPRA and related statutes and authorities. This article will highlight NAGPRA and its significance, describe other key statutes and legal doctrines that also protect Native American cultural resources, explain the differences between these laws, and provide recommendations for federal licensing agencies on how to navigate these requirements most effectively. Specifically, Part II of this article provides an overview of NAGPRA. Part III of this article discusses agencies' responsibilities to protect cultural resources under the NHPA and NEPA. Part IV examines the Trust Doctrine and case law interpreting federal agency compliance with the doctrine. Part V offers recommendations to agencies on how to best comply with NAGPRA in licensing decisions.

II. THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT OVERVIEW

While there are several federal laws that offer some protection to archaeological resources,[26] NAGPRA "vests Indian tribes and Native Hawaiian organizations with ownership and control of Native American remains and cultural objects on federal and tribal lands"[27] and regulates excavation and removal of those remains and objects from those lands, subject to criminal sanctions.[28] NAGPRA is not intended to balance interests; it is intended to protect the rights of "disinterred persons, their lineal descendants, Native American tribes, and Native Hawaiian organizations."[29] One commenter has stated that NAGPRA functions as:

> an instrument of decolonization, self-determination and reparation; as a vindication of Native American religious and other cultural freedoms; as a means of enhancing cultural revival and transmission of cultural knowledge among tribes and Native Hawaiian groups; as a contributor to self-identity and community solidarity; and as a means

26. *See* Nafziger, *supra* note 6, at 180 (discussing the National Environmental Policy Act of 1969 and its requirement for federal agencies to prepare an environmental impact statement).

27. *Id.* at 179. *See also* 25 U.S.C. § 3002 (outlining ownership rights under NAGPRA, with priority given to lineal descendants of the Native American remains excavated or discovered on Federal or Tribal lands).

28. *Id.* at 179 (noting that NAGPRA does not allow such excavation or removal unless the items are removed or excavated pursuant to a permit issued under the ARPA,16 U.S.C. §§ 470aa–470mm); s*ee also* 25 U.S.C. § 3002(c)(1).

29. *See* Nafziger, *supra* note 6, at 188.

for restoring Native American control over pertinent culture.[30]

Consistent with that purpose,, NAGPRA "requires all federal agencies, with the exception of the Smithsonian Institution,[31] to consult with lineal descendants, Indian tribes,[32] and Native Hawaiian[33] organizations prior to intentional excavations and immediately following inadvertent discoveries of cultural items on federal or tribal lands."[34] NAGPRA "also requires federal agencies and museums that receive federal funds to inventory[35] and, if requested, to repatriate[36] Native American cultural items to lineal descendants or culturally affiliated Indian tribes and Native Hawaiian organizations."[37] NAGPRA defines cultural items as "human remains and

30. *Id.*

31. Wright, *supra* note 10, at 135 n. 26 (noting that the Smithsonian Institution was specifically exempted from NAGPRA due to earlier passage of the National Museum of the American Indian Act of 1989); s*ee* Nafziger, *supra* note 6, at 179 (noting that the National Museum of the American Indian Act of 1989 does not provide for repatriation like NAGPRA does); s*ee also* 43 C.F.R. § 10.10 (repatriation regulation).

32. NAGPRA defines Indian Tribe as "any tribe, band, nation or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act [43 U.S.C. § 1601 et seq.]), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their special status as Indians." 25 U.S.C. § 3001(7).

33. NAGPRA defines Native Hawaiian as "any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii." *Id.* at § 3001(10). *See also id*. at § 3001(11) (defining Native Hawaiian organization as "any organization which—(A) serves and represents the interests of Native Hawaiians, (B) has as a primary and stated purpose the provision of services to Native Hawaiians, and (C) has expertise in Native Hawaiian Affairs, and shall include the Office of Hawaiian Affairs and Hui Malama I Na Kupuna O Hawai'i Nei").

34. Wright, *supra* note 10, at 135. *See also* 25 U.S.C. § 3002(c)(2) (intentional excavation and removal); *id.* at § 3002(d) (inadvertent discovery of Native American remains and objects).

35. *See, e.g.*, Notice of Inventory Completion: U.S. Department of Defense, Army Corps of Engineers, Omaha District, Omaha, NE, and State Archaeological Research Center, Rapid City, SD, 81 Fed. Reg. 19619 (Apr. 5, 2016).

36. *See, e.g.*, Notice of Intent to Repatriate Cultural Items: Federal Bureau of Investigation, Art Theft Program, Washington, DC, 85 Fed. Reg. 35430 (June 10, 2020).

37. Wright, *supra* note 10, at 135 (internal citations omitted). *See* 25 U.S.C. § 3003 (requirements for compiling an inventory of Native American human remains and associated funerary objects); *id.* at § 3004 (requirements for providing written summary of unassociated funerary objects, sacred objects, or objects of cultural patrimony); *id.* at § 3005 (requirements for repatriation).

associated funerary objects,[38] unassociated funerary objects,[39] sacred objects,[40] and cultural patrimony."[41] Below is a brief summary of NAGPRA's legislative history, requirements, and relevant case law.

A. Legislative History

NAGPRA's legislative history outlines its unique nature as a human rights statute.[42] The legislative history highlights that NAGPRA was enacted primarily to correct an ongoing injustice that began over 100 years before its passage. Specifically, in the second half of the Nineteenth Century, the Army Surgeon General "ordered the collection of Indian osteological remains," and, over the objection of Native American Tribes who wanted to bury their dead, "his demands were enthusiastically met not only by Army medical personnel, but by collectors who made money from selling Indian skulls to the Army Medical Museum."[43] By 1987, the Smithsonian Institute alone possessed the remains of 14,523 Native American and another 4,061 Eskimo, Aleut, and Koniag remains.[44] Senator Inouye noted that requests by Native Americans "to recover the skeletal remains of their ancestors and to repossess items of sacred value or cultural patrimony" from museums

38. NAGPRA defines associated funerary objects as "objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated funerary objects are presently in the possession or control of a Federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects." 25 U.S.C. § 3001(3)(A).

39. NAGPRA defines unassociated funerary objects as "objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, where the remains are not in the possession or control of the Federal agency or museum and the objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe." *Id.* at § 3001(3)(B).

40. NAGPRA defines sacred objects as "specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents." *Id.* at § 3001(3)(C).

41. Cultural patrimony includes "an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group." *Id.* at § 3001(3)(D).

42. 136 Cong. Rec. 356788 (1990) (statement of Sen. Daniel Inouye, NAGPRA's cosponsor).

43. *Id.*

44. S. REP. NO. 101-473, at 1 (1990).

were often ignored by the scientific community.[45] The Act sought to redress this injustice by providing a process for museums to return human remains and cultural items in their collections to appropriate Tribes.[46]

Additionally, Congress identified a "great need for Federal legislation which could provide additional protection to Native American burial sites."[47] Tribal leaders described "many difficulties in preventing the illegal excavation of graves on tribal and Federal lands" due to a "flourishing trade in funerary and sacred objects that have been obtained from" such graves.[48] Moreover, law enforcement officials had "been unable to prevent the continued looting of Native American graves and the sale of these objects by unscrupulous collectors."[49]

B. NAGPRA Requirements

Given these concerns, NAGPRA provides lineal descendants the right of possession "for any Native American human remains or funerary objects, excavated or discovered on Federal or tribal land after enactment."[50] After NAGPRA's enactment, a party may only intentionally remove cultural items from Federal property or Tribal lands by (1) obtaining a permit under the Archaeological Resources Protection Act (ARPA),[51] (2) consulting with the appropriate Indian Tribes or Native Hawaiian organizations, (3) ensuring that the correct Indian Tribe or Native Hawaiian organization will have ownership and control of the items, and (4) showing proof of the required consultation.[52]

For inadvertent discoveries of Native American cultural items on Federal or Tribal land, the discovering party must (1) provide notice to

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45. 136 Cong. Rec. 35678 (1990).

46. S. REP. NO. 101-473, at 1 (1990); *see also* 25 U.S.C. §§ 3003–5 (requiring Federal agencies and museums to provide a written summary of human remains and sacred objects within their possession and expeditiously return them to culturally affiliated tribes or Native Hawaiian organizations).

47. S. REP. NO. 101-473, at 3 (1990).

48. *Id.*

49. *Id.*

50. *Id.* at 6.

51. 16 U.S.C § 470cc. ARPA is codified at 16 U.S.C. § 470aa–470mm and requires Federal agencies to notify the Secretary of Interior whenever their activities may damage or destroy an archaeological site. It also requires agencies to either take actions necessary to preserve or recover information from such sites, and to assist the Secretary of Interior to report annually to Congress on archaeological protection and data recovery in the Federal government. *Id.* at § 469(3)(a). ARPA and its requirements and protections are primarily outside the scope of this article. For more information about ARPA, see Roberto Iraola, *The Archaeological Resources Protection Act – Twenty Five Years Later*, 42 DUQ. L. REV. 221 (2004).

52. 25 U.S.C. § 3002(c).

the appropriate Federal agency or Tribal entity, (2) suspend any activities on the land for thirty days, and (3) make reasonable efforts to protect the cultural items.[53] The Department of the Interior ("Interior") has promulgated regulations implementing these provisions.[54] Pursuant to NAGPRA, those regulations are developed in consultation with a Review Committee, established by the Secretary of the Interior, to provide advice and assistance in carrying out key provisions of the statute.[55]

While most federal licensing agencies do not possess extensive collections of Native American remains, many operate in areas that frequently involve the inadvertent discovery of or removal of artifacts. Therefore, these agencies are bound by and must understand NAGPRA's requirements related to intentional removal and inadvertent discovery of Native American remains. [56] Consultations are central to these requirements.[57] These consultations "[cast] a broader consultation net than the NHPA"[58] and are critical to addressing

53. *Id.* at § 3002(d)(1).

54. 43 C.F.R. § 10.3 (1995) (establishing procedures for intentional archeological excavations); *Id.* at § 10.4 (1995) (providing procedures for inadvertent discoveries). *See* 25 U.S.C. at § 3011 (requiring the Secretary of the Interior to promulgate regulations to carry out NAGRPA within 12 months of November 16, 1990).

55. *See* Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, § 8, 104 Stat. 3048, 3055 (1990) (codified as amended at 25 U.S.C. § 3006); *id.* § 13, 104 Stat. 3048, 3058 (1990) (codified as amended at 25 U.S.C. § 3011); *see also The Native American Graves Protection and Repatriation Act (NAGPRA)*, NAT'L PARK SERV., https://www.nps.gov/archeology/tools/Laws/nagpra.htm (last visited Feb. 3, 2022).

56. NAGPRA also has several other provisions that are not generally relevant to Federal agencies. *See* Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, § 4, 104 Stat. 3048, 3052 (1990) (codified as amended at 18 U.S.C. § 1170) (stipulating that illegal trafficking in human remains and cultural items may result in criminal penalties); *id.* at § 10, 104 Stat. 3048, 3057 (1990) (codified as amended at 25 U.S.C. § 3008) (authorizing the Secretary of the Interior to administer a grants program to assist museums and Indian Tribes in complying with certain requirements of the statute); *id.* at § 8, 104 Stat. 3048, 3055 (1990) (codified as amended at 25 U.S.C. § 3006) (requiring the Secretary of the Interior to establish a Review Committee to provide advice and assistance in carrying out key provisions of the statute); *id.* at § 9, 104 Stat. 3048, 3057 (1990) (codified as amended at 25 U.S.C. § 3007) (authorizing the Secretary of the Interior to penalize museums that fail to comply with the statute); *id.* at § 13, 104 Stat. 3048, 3058 (1990) (codified as amended at 25 U.S.C. § 3011) (directing the Secretary to develop regulations); *The Native American Graves Protection and Repatriation Act (NAGPRA)*, NAT'L PARK SERV., https://www.nps.gov/archeology/tools/Laws/nagpra.htm (last visited Feb. 3, 2022).

57. *See*, *e.g.*, 43 C.F.R. § 10.5 (2021) (outlining requirements for consultation as part of intentional excavation or inadvertent discovery on Federal lands); *id.* at § 10.9(b) (2021) (consultation relating to inventories); *id.* at § 10.8 (2021) (consultation relating to summaries). Interior put out a draft proposal of revised NAGPRA regulations on July 8, 2021. Comments from Indian Tribes and Native Hawaiian community leaders were requested by September 30, 2021. *See* NAT'L PARK SERV., *supra* note 53 (providing overview of changes in the draft proposal).

58. Bartell Ranch LLC v. McCullough, 558 F. Supp. 3d 974, 987 (D. Nev. 2021) (noting that

identification, treatment, and disposition of Native American cultural items.[59] While NAGPRA's requirements differ depending on where the remains are located and whether there was intentional excavation or inadvertent discovery,[60] the goal of any consultation is to create an atmosphere of trust, engage in good faith, have open and meaningful discussion, and recognize and respect the significance that Native Americans "attach to cultural resources they deem sacred to their traditions."[61] This good faith engagement is particularly important given the unique relationship between the Federal Government and Indian tribes." ."[62] Notably, each of the 574 federally recognized Indian Tribes in the contiguous 48 states and Alaska[63] has its own distinctive cultural identity.[64] And each Tribe may have different "ways of controlling property, harvesting natural resources, revering the environment, and even conducting consultations."[65] Therefore, it is critical for agencies to recognize that a "one-size fits all" approach is not conducive to meaningful NAGPRA consultations.

C. Case Law Interpreting NAGPRA

A person alleging that an agency failed to meet NAGPRA's requirements can bring suit in the U.S. district courts.[66] Cases typically

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NAGPRA focuses on known lineal descendants which spreads out into a much larger area than a tribe's territory, the focus of NHPA).

59. *Native American Graves Protection & Repatriation Act*, BUREAU OF LAND MGMT., https://www.blm.gov/NAGPRA (last visited Feb. 4, 2022).

60. *Native American Graves Protection and Repatriation Act*, NAT'L PARK SERV. (last updated Jan. 21, 2021), https://www.nps.gov/subjects/nagpra/compliance.htm. *See* 43 C.F.R. § 10.3 (2021) (intentional archaeological excavations); *id.* at § 10.4 (2021) (inadvertent discoveries); *id.* at § 10.7 (2021) (disposition of unclaimed human remains, funerary objects, sacred objects, or objects of cultural patrimony); *id.* at § 10.10 (2021) (repatriation); *id.* at § 10.11 (2021) (disposition of culturally unidentifiable human remains).

61. Wright, *supra* note 9, at 154.

62. *See* Yankton Sioux Tribe v. U.S. Army Corps of Eng'rs, 209 F. Supp. 2d 1008, 1023 (D. S.D. 2002) (quoting 25 U.S.C. § 3010).

63. *Federally Recognized Indian Tribes and Resources for Native Americans*, USA.GOV, https://www.usa.gov/tribes (last visited Jan. 2, 2022); s*ee* Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 86 Fed. Reg. 7554 (Jan. 29, 2021) (Bureau of Indian Affairs (BIA) *Federal Register* Notice publishing the current list of 574 Tribal entities recognized and eligible for funding and services from the BIA because of their status as Indian Tribes); s*ee also* Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs; Correction, 86 Fed. Reg. 18552 (Apr. 9, 2021) (BIA *Federal Register* Notice correcting three of the Tribes' names).

64. Wright, *supra* note 10, at 152.

65. *Id.*

66. 25 U.S.C. § 3013 (discussing enforcement of NAGPRA and providing that the U.S. district courts shall have jurisdiction over any action brought by any person alleging a NAGPRA violation); s*ee, e.g.*, Thorpe v. Borough of Thorpe, 770 F.3d 255, 259 (3d Cir. 2014) (noting that

focus on whether or not NAGPRA's requirements are triggered and if so whether those requirements are met.[67] If NAGPRA's requirements are not met, the court may issue an injunction.[68]

Courts consistently dismiss NAGPRA claims when the resources were not discovered on Federal or Tribal land, even when the party raising the claims is of Native American heritage and alleges significant jeopardy to the resources. For example, in *Castro Romero v. Becken*,[69] the Fifth Circuit denied a claim for relief under NAGPRA because the remains at issue were not discovered on Federal or Tribal land.[70] In that case, the plaintiff sought monetary damages for alleged statutory violations from construction of a municipal golf course in Universal City, Texas.[71] The United States Army Corps of Engineers oversaw construction of the golf course, pursuant to the Clean Water Act. To comply with its statutory obligations under the Clean Water Act, the Corps ordered a number of archeological surveys, including one that uncovered human remains on a prehistoric open campsite.[72] After this discovery, the plaintiff demanded the return of the remains to the Lipan Apache Band of Texas, Inc.; however, the Corps instead concurred with the Texas Historical Society's decision to return the remains to Universal City for a reburial ceremony attended by a number of Tribal organizations.[73]

The Fifth Circuit determined that even though NAGPRA grants trial courts an expansive "authority to issue such orders as may be necessary," the district court correctly dismissed the plaintiff's claims.[74] In this case, the surveys uncovered remains on municipal land.[75] However, NAGPRA only protects remains discovered on "federal or tribal land."[76] The court concluded, "[t]he fact that the U.S. Army Corps of Engineers, a federal agency, was involved in a supervisory role with the Texas Antiquities Commission does not convert the land into 'federal

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Section 3013 vests federal courts with jurisdiction over any action alleging a violation of NAGPRA).

67. *See, e.g.*, Yankton Sioux Tribe v. U.S. Army Corps of Eng'rs, 209 F. Supp. 2d 1008 (D. S.D. 2002).

68. *See id.* at 1022 (holding that a preliminary injunction would be granted against construction activities).

69. 256 F.3d 349 (2001).

70. *Id*. at 354.

71. *Id*. at 352.

72. *Id*.

73. 256 F.3d 349 at 353.

74. *Id*. at 354 (quoting 25 U.S.C. § 3013).

75. *Id*.

76. *Id*. at 354 (quoting 25 U.S.C. § 3002(a)).

land' within the meaning of the statute."[77] Additionally, the court noted that plaintiff's request for monetary damage was improper because NAGPRA's purpose is to protect Native American artifacts of Tribal significance – not individual property rights. The court found the "Act does not provide grounds for recovery of monetary damages for individuals who allege Native American ancestry." [78]

This conclusion is consistent with a number of published district court cases across the country that interpreted NAGPRA to not apply to state, local, or private lands in the decade after its passage. For example, the Northern District of New York reached this result in *Western Mohegan Tribe and Nation of New York v. New York*.[79] In that case, the "alleged chief of the Western Mohegan Tribe and Nation, a non-federally recognized Native American tribe," sought to enjoin development of the Schodack Island State Park on the eastern shore of the Hudson River under NAGPRA.[80] The court observed that because the island was not Federal or Tribal land, it did "not fall within the scope of NAGPRA's jurisdiction."[81] The court also concluded that the Army Corps of Engineers permit issued for the park's development "does not transform the [park] into federal property or place it under the United States' 'control.'"[82] Finally, the court noted that because no cultural or funerary objects had yet been discovered on site, "even if NAGPRA were to apply, which it does not, the claim is premature."[83]

The District of Vermont came to a similar result in *Abenaki Nation of Mississquoi v. Hughes*,[84] another case involving the Army Corps of Engineers. The plaintiffs, also a non-federally recognized tribe, moved for a preliminary injunction to stop the Corps from raising the

77. 256 F.3d 349.

78. *Id*. at 355. Additionally, courts have noted that because NAGPRA does not contain a specific waiver of sovereign immunity, the only waiver available is the general one in the Administrative Procedure Act, which means that plaintiffs cannot seek monetary damages. Geronimo v. Obama, 725 F. Supp. 2d 182, 185–87 (D.D.C. 2010).

79. 100 F. Supp. 2d 122 (2000), *rev'd on other grounds,* Western Mohegan Tribe and Nation of N.Y. v. New York, 246 F.3d 230, 232 (2d Cir. 2001) (noting that the tribe abandoned its NAGPRA claim on appeal).

80. *Id*. at 124–25.

81. *Id*. at 125.

82. *Id*.

83. *Id.* at 126; *see also* New Jersey Sand Hill Band of Lenape & Cherokee Indians v. Corine, No. CIV.A.09-683 (KSH), 2010 WL 2674565, at *19 (D.N.J. June 30, 2010) (dismissing a claim under NAGPRA in part because plaintiffs did not sufficiently establish that artifacts were disturbed, confiscated, or retained).

84. 805 F. Supp. 234 (D. Vt. 1992).

spillway elevation of a hydroelectric facility.[85] Plaintiffs claimed a potential violation of NAGPRA "because the mitigation plan leaves the fate of artifacts which may be unearthed in the hands of the Corps . . . . "[86] The court rejected the plaintiffs' argument that NAGPRA should be expansively applied to include not only Federal and Tribal lands but also lands impacted by federal permitting and held that such a broad argument is inconsistent with the statute.[87]

More recently, a number of other courts, in unpublished opinions, have dismissed NAGPRA claims on similar grounds. For example, in *Rocha v. City of San Antonio*,[88] a descendant of the Yanaguana sought to enjoin the City of San Antonio from continuing to destroy alleged archeological sites and Native American burial grounds, including Hemisfair Historical Park, Alamo Plaza, the Alamo, and La Villita.[89] .However, the court dismissed the claims brought under NAGPRA because the plaintiffs did not allege the remains were on Federal or Tribal lands.[90]

Likewise, in *Summers v. Yoshitani*,[91] the District Court for the Western District of Washington considered a challenge from a self-described "seventh generation Duwamish Indian and . . . seventh generation grandnephew of Chief Seattle."[92] Specifically, the complaint sought to enjoin the transfer of certain artifacts in the Burke Museum from the Port of Seattle to the Muckleshoot and Suquamish tribes under NAGPRA.[93] However, because the amended complaint did not allege that the artifacts were uncovered on Federal land or belonged to a lineal ancestor of the plaintiff, the court dismissed this portion of the complaint.[94]

In *New Jersey Sand Hill Band of Lenape & Cherokee Indians v. Corzine*,[95] the plaintiffs brought suit against New Jersey, each county in New Jersey, and their official representatives for allegedly "misappropriat[ing] their land and other property rights for more than 200

85. *Id*. at 236.
86. *Id*. at 251.
87. *Id*. at 251–52.
88. CV No. 514:CV-867-DAE, 2015 WL 4068615 (W.D. Tex. July 2, 2015).
89. *Id*. at *1.
90. *Id*. at *6.
91. No. C14-0482JLR, 2014 WL 2475981 (W.D. Wash. June 2, 2014).
92. *Id*. at *1.
93. *Id*. at *1, *3.
94. *Id*. at *3.
95. No. CIV.A.09-683 (KSH), 2010 WL 2674565 (D.N.J. June 30, 2010).

years."[96] Plaintiffs claimed that the local governments violated NAGPRA "because they are in possession of burial land and artifacts belonging to the plaintiffs."[97] The court dismissed this claim, however, because "the statute's reach is limited to federal or tribal land" and "plaintiffs failed to allege that remains or artifacts were discovered and removed from federal or tribal lands."[98]

The Southern District of California reached a similar result in *Rosales v. United States*.[99] That case arose from a complex dispute over Tribal leadership of the Jamul Indian Village.[100] Plaintiffs asserted they represented the Village and sued the Federal government to enjoin construction on three parcels of land, which they contended would disturb Native American remains and associated items in violation of NAGPRA.[101] The Jamul Indian Village filed an amicus brief indicating that the plaintiffs did not represent the tribe.[102] The court dismissed the claims because none of the burial sites were on Federal land.[103] Further, the court noted that an inadvertent discovery of Native American remains "does not occur when an agency is placed on notice of likely or certain discovery, but that discovery must be 'actual.'"[104] Thus, the court dismissed the claim..

However, where cultural resources have unquestionably been found on Federal or Tribal land, courts have taken strong actions to protect those resources. For example, in *Yankton Sioux Tribe v. U.S.*

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96. *Id*. at *1.

97. *Id*. at *2 (internal quotations omitted).

98. *Id*. at *19 – 20 (internal quotations omitted).

99. Rosales v. United States, No. 07cv0624, 2007 WL 4233060 (S.D. Cal. Nov. 28, 2007).

100. *Id*. at *1.

101. *Id*. at *2.

102. *Id*. at *1.

103. *Id*. at *8–9. While the court stated that Tribal entities "may" take steps to protect resources discovered on Tribal land, Federal agencies "must" take such steps to protect resources on Federal land. *Id*. The court noted that "the only responsibility of a federal agency triggered by an inadvertent discovery on tribal land relates to permits, and plaintiffs do not allege a violation of this duty." *Id*. *See also* Crow Creek Sioux Tribe v. Brownlee, 331 F.3d 912, 916–17 (D.C. Cir. 2003) (dismissing claim that land transfer would diminish NAGPRA protection for artifacts on transferred land because the agency included language in the transfer agreement explicitly providing that NAGPRA would continue to apply).

104. *Id*. at *9 (internal quotations omitted); *see also* Hawk v. Danforth, No. 06-C-223, 2006 WL 6928114, at *2 (E.D. Wis. Aug. 17, 2006) (noting that no provision of NAGPRA "requires a Tribe or anyone else to excavate an area in order to find remains or other artifacts"); San Carlos Apache Tribe v. United States, 272 F. Supp. 2d 860, 892–94 (D. Ariz. 2003) (concluding that the plaintiffs failed to show an inadvertent discovery of human remains when evidence produced by Federal defendants showed that grave sites were largely undisturbed by draining and drawdown of a lake).

Army Corps of Engineers,[105] the District of South Dakota issued a preliminary injunction to stop the Army Corps of Engineers from raising the waters of a reservoir that would cover Native American graves on Federal property.[106] The Corps advanced several arguments that the situation was outside NAGPRA's scope, all of which the court rejected. First, the Corps contended that NAGPRA only applied to prehistoric remains. The court disagreed because if "the Act applied only to prehistoric remains, its priority for lineal descendants in question . . . would be meaningless."[107] Next the Corps claimed that because it knew the remains already existed on the site, there was no "unanticipated" detection of human remains when the reservoir was lowered. However, the court found the Corps' interpretation unavailing because it was the statutory canon that ambiguous statutes should be liberally construed in favor of Native Americans.[108] Last, the Corps argued that "activity" under NAGPRA is restricted to examples of the development activities included in the statute (such as mining) and did not include the Corps raising and lowering the levels of the reservoir. However, the court found that the examples of activities in the statute were not meant to be restrictive, but instead provided instances of actions that might disturb remains. The court concluded that "regulation of the water level at the Lake, through the erosion it produces, has this very effect."[109] Thus, the court concluded that the Corps must comply with NAGPRA in protecting and dispositioning the remains.[110]

These cases illustrate that courts are likely to first determine whether NAGPRA's requirements are triggered, regardless of the nature of the relationship the plaintiff has with the remains or object at issue. The decisions demonstrate that while the courts' rulings are consistent with the statute, they are not necessarily consistent with its intent of providing dignity and respect at all times for human remains - to the extent some remains discovered outside federal or tribal lands may not receive equivalent protection to those discovered on those lands, despite perhaps being no less significant from a cultural

105. 83 F. Supp. 2d 1047 (D. S.D. 2000).

106. *Id*. at 1048. In this case, before constructing the dam, the Corps had relocated bodies in a cemetery that would be flooded. *Id*. at 1049. However, in the following years, the Corps discovered that some bodies, likely of Native Americans, remained. *Id*. at 1051–52.

107. *Id*. at 1056.

108. *Id*. (citing County of Yakima v. Yakima Indian Nation, 502, U.S. 251 (1992) (noting the canon of statutory interpretation that statutes "are to be liberally interpreted in favor of the Indians, with ambiguous provisions interpreted to their benefit").

109. *Yankton Sioux* Tribe, 83 F. Supp. 2d. at 1056–57.

110. *Id*. at 1058–61.

standpoint. However, as discussed above, *McGirt* may significantly expand the ambit of tribal lands, and this expansion may offer courts a greater opportunity to effect the underlying purposes of NAGPRA by protecting more resources.

D. Conclusion

As currently interpreted by the courts, NAGPRA is unlikely to play a significant role in most federal licensing or permitting proceedings unless the proceeding relates to a project on Federal or Tribal land. Courts often decline to invoke NAGPRA's protections, even when a litigant professes a significant connection to a Tribal entity and produces evidence that cultural resources may be harmed, simply because of what side of a property line those resources happen to rest on. However, given the considerable expansion of Tribal land following *McGirt*, future litigants may have more success with NAGPRA.[111] Courts have firmly enforced NAGPRA's substantive requirement to protect cultural resources and ensure they are appropriately repatriated with respect and dignity when the remains are uncovered on Federal or Tribal property.

III. THE NATIONAL HISTORIC PRESERVATION ACT AND THE NATIONAL ENVIRONMENTAL POLICY ACT

This section will briefly discuss two more widely known statutes that relate to the protection of cultural resources and that could intersect with duties under NAGPRA. These laws are the NHPA and NEPA.[112] Like NAGPRA, these laws have lofty aims. NEPA established and set forth a national policy "to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."[113] And the NHPA set a federal policy for preserving our nation's heritage.[114] But unlike NAGPRA, NEPA and NHPA are only procedural and do not prevent

111. McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020).

112. Given the similarities in some of these laws' provisions and protections, plaintiffs often raise claims under one or more of these statutes. *See, e.g.,* Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dep't of the Interior, 927 F. Supp. 2d 921, 925 (S.D. Cal. 2013) (alleging violations of the NHPA, NEPA, ARPA, and NAGPRA, among other statutes).

113. 42 U.S.C. § 4331(a).

114. See 54 U.S.C. § 300101.

agencies from acting once all procedural requirements are met.[115] Further, the NHPA and NEPA may be in tension with the agencies' mission and with each other, including when they are triggered[116] and how to comply with them.[117] For example, licensing agencies with safety missions may be directed to issue licenses notwithstanding significant environmental impacts.[118] Agencies are also given some discretion in how to implement the laws[119] and have limited resources and data when making decisions.[120] Because the NHPA and NEPA are well-known and highly litigated,[121] implementation of these laws may divert agencies' attention from lesser known and understood laws like NAGPRA. Below is a brief summary of these laws, their relevant cultural resource provisions, and how those provisions are similar to and differ from NAGPRA.

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115. *See, e.g.*, United States v. 162.20 Acres of Land, 639 F.2d 299, 302, 304 (5th Cir. 1981) (stating that NHPA does not forbid destruction of historic sites; while assertion of NHPA non-compliance as a defense in a condemnation action may seem to "promote the purposes of the NHPA by creating a means of enforcement to give it 'teeth,' it is manifestly apparent that only Congress can make such a judgment"); Hough v. Marsh, 557 F. Supp. 74, 87 (D. Mass. 1982) (stating that the NHPA provides an opportunity for comment on agency action, but these comments do not constrain agency action); Paulina Lake Historic Cabin Owners Ass'n v. U.S.D.A. Forest Serv., 577 F. Supp. 1188, 1192 & n.1 (D. Ore. 1983) (NEPA and NHPA are not defenses against certain kinds of neutral agency actions); Evans v. Train, 460 F. Supp. 237, 245–46 (S.D. Ohio 1978) (finding federal officials were required to consult with historic preservation officials and providing procedures for so doing); Pennsylvania v. Morton, 381 F. Supp. 293, 299 (D.D.C. 1974) (noting that if the Secretary of the Interior deviated from the recommendation of the Advisory Council on Historic Preservation, "the Secretary was authorized to do so in his discretion by the express terms of the statute").

116. "While no unanimous opinion has developed, the better reasoned view is that different thresholds exist for triggering NHPA and NEPA [Environmental Impact Statement] obligations." Walter E. Stern & Lynn H. Slade, *Effects of Historic and Cultural Resources and Indian Religious Freedom on Public Lands Development: A Practical Primer,* 35 NAT. RES. J. 133, 143 (1995).

117. For example, the NHPA provisions allow agencies to comply through the NEPA process. 36 C.F.R. § 800.8 (2021).

118. *See, e.g.,* https://www.nrc.gov/about-nrc/regulatory/licensing.html (describing licensing by NRC, done following NEPA and NHPA reviews). *See also* the Atomic Energy Action Section 103 (noting that the Commission shall issue licenses once certain finding made).

119. *See, e.g.,* 36 C.F.R. § 800.3(b) (2021) (granting agency flexibility in complying with NHPA by allowing coordination with NEPA, NAGPRA, AIRFA, and agency regulations) (noting that the regulations "may be implemented . . . in a flexible manner reflecting differing program requirements, as long as the purposes of Section 106 of the [NHPA] and these regulations are met").

120. *See supra* U.S. GOV. ACCOUNTABILITY OFF. note 16 at 21 (noting that resource constraints, competing agency priorities, and limitations with data to support decision-making are all constraints on agency prevention and enforcement efforts related to NAGPRA cultural resources).

121. *See* 42 C.F.R. § 137.309 (2021) (outlining how challenges can be brought against the Federal government for failure to meet NEPA or NHPA duties and possible remedies).

A. National Historic Preservation Act

Congress enacted the NHPA[122] in 1966 to "encourage the preservation and protection of America's historic and cultural resources."[123] The law has been amended several times to offer additional protections[124] and is considered "the cornerstone of federal historic and cultural preservation policy."[125]

The NHPA has three purposes:

> (1) strengthen and broaden the process of inventorying historic and cultural sites, and establish a National Register of sites significant in state, local, regional, and national history, culture, architecture, or archaeology; (2) enhance and encourage state, local, national, and tribal interest in historic preservation; and (3) establish the [ACHP] to oversee matters relating to preservation of historic properties, to coordinate preservation efforts, and to promulgate regulations to outline federal, state, and now tribal obligations regarding consideration of sites that may be affected by federal, or federally-controlled, activities.[126]

Prior to taking any action that may affect cultural or historic properties, federal agencies must comply with NHPA Section 110 and Section 106. Federal agencies have the following obligations under Section 110:

> (1) [t]he heads of all Federal agencies shall assume responsibility for the preservation of historic properties which are owned or controlled by such agency.
>
> (2) Each agency shall undertake, consistent with the preservation of such properties and the mission of the agency, any preservation, as may be necessary to carry out this section.
>
> (3) [Each] Federal agency shall establish a program to locate, inventory, and nominate to the Secretary [of the Interior] all properties under the agency's ownership or control . . . , that appear to qualify for inclusion on the National Register.
>
> (4)Consistent with the agency's missions and mandates, all Federal agencies shall carry out agency programs and projects (including those under which any Federal assistance is provided or any Federal

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122. The NHPA was initially codified in Title 16. In 2014, the NHPA was moved from Title 16 to Title 54 and is now codified at 54 U.S.C. §§ 300101 *et seq*. The NHPA's implementing regulations can be found in 36 C.F.R. Part 800.

123. Indiana Coal Council, Inc. v. Lujan, 774 F. Supp. 1385, 1387 (D.D.C. 1991).

124. The NHPA was amended in 1980 to codify protections outlined in Executive Order No. 11593. Protection and Enhancement of the Cultural Environment, 36 Fed. Reg. 8921 (May 15, 1971). It was also amended in 1992 to "provide, among other things, enhanced opportunities for tribes to manage federal cultural resources programs on Indian lands." Stern & Slade, *supra* note 116, at 136.

125. Stern & Slade, *supra* note 116, at 136.

126. *Id*.

> license, permit, or other approval is required) in accordance with the purposes of [the Act].[127]

Section 106 applies to any "proposed Federal or federally assisted undertaking" and its requirements must be completed "prior to the approval of the expenditure of any Federal funds…or prior to the issuance of any license."[128] ACHP regulations encourage the agency to integrate Section 106 compliance with NEPA studies, and to use Section 106 agreements to facilitate compliance with other applicable cultural resources management statutes, such as the Historical and Archeological Data Preservation Act of 1974 and ARPA.[129]

Notably, Section 106 responsibilities "apply to public and private lands,"[130] but there is an exception if Federal or Tribal land is affected. In that case, the NHPA regulations state that "the project sponsor shall adhere to any requirements for cultural resources studies of the applicable federal land-managing agencies on Federal lands and any tribal requirements on Tribal lands. The project sponsor must identify, in [a report] filed with the application, the status of cultural resources studies on Federal or Tribal lands, as applicable."[131]

The NHPA uses the National Park Service's National Register of Historic Places' criteria to define "historic properties." These criteria allow discretion in interpretation but "generally provide a framework for resources that are 50 years old or older and that are related to significant events or people in history, are likely to reveal important information about history or prehistory, or represent the work of a master or unique style."[132] Some of these historic properties hold religious and cultural significance for Native American tribes.[133] Scholars have noted that "the NHPA process for reviewing proposed federal and federally assisted undertakings has become the primary procedural mechanism through which tribes have opportunities to advocate for the

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127. *Id.* at 137 (internal citations omitted).

128. 16 U.S.C. § 470f.

129. Stern & Slade, *supra* note 116, at 154.

130. 18 C.F.R. § 380.14(a)(1) (2021).

131. 18 C.F.R. § 380.14(a)(2) (2021).

132. Anne Senters, *A Common Understanding of "Cultural Resources?"*, 46 No. 5 ABA Trends, 10, 11 (2015). Traditional Cultural Properties are properties that are "eligible for inclusion in the National Register of Historic Places [based on their] associations with the cultural practices, traditions, beliefs, lifeways, arts, crafts, or social institutions of a living community." U.S. DEP'T OF THE INTERIOR, NAT'L PARK SERV., AM. INDIAN LIAISON OFF., National Register of Historic Places – Traditional Cultural Properties (TCPs): A Quick Guide for Preserving Native American Resources (2012).

133. Dean B. Suagee, *NHPA §106 Consultation: A Primer for Tribal Advocates*, 65 A.P.R. FED. LAW. 40, 42 (Apr. 2018).

protection of tribal sacred places."[134] However, it is important to note that "cultural sites and objects protected under NHPA are not synonymous with cultural objects protected under NAGPRA."[135] For example, human remains or other objects protected under NAGPRA may not be considered historic under the NHPA.[136]

As with NAGPRA, consultation is the principal means of protecting historic resources under the NHPA.[137] As outlined in the NHPA's implementing regulations, "[t]he goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties."[138] Consultation must be completed "prior to the approval of the expenditure of any federal funds on the undertaking or prior to the issuance of any license."[139] However, the NHPA, unlike NAGPRA, does not require a federal licensing or permitting agency to take any specific actions; rather, the agency must fully and fairly describe the action's impact on historic properties.[140] Failure to comply with the NHPA can lead to an injunction against the agency, together with the permit applicant.[141]

Typically, the NHPA challenges relate to agency decisions that allow for the repurposing, reconfiguration, or removal of structures with historic significance, such as historic post office buildings or decommissioned military installations.[142] Notably, the Department of Justice has seen an increase in cases in which Native American tribes assert "that

134. *Id*. at 41. Under the NHPA, "Indian tribe" is defined as "an Indian tribe, band, nation, or other organized group or community, including a Native village, Regional Corporation or Village Corporation (as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. § 1602)), that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indian." 54 U.S.C. §300309.

135. San Carlos Apache Tribe v. United States, 272 F. Supp. 2d 860, 891 (D. Ariz. 2003).

136. *Id.*

137. 25 U.S.C. § 3003(b)(1)(A) (requiring inventories and identifications to be completed in consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders). Consultation with the State Historic Preservation Officer is seen as a principal means of protecting historic resources. Attakai v. United States, 746 F. Supp. 1395, 1408 (D. Ariz. 1990) (citing 36 C.F.R. § 800.1(b)).

138. 36 C.F.R. § 800.1 (2021).

139. 36 C.F.R. § 800.1(c) (2021).

140. Ctr. for Biological Diversity v. Mattis, 868 F.3d 803, 816 (9th Cir. 2017) (noting that the NHPA "is a procedural statute requiring government agencies to 'stop, look, and listen' before proceeding" (citing Te-Moak Tribe of W. Shoshone Nev. v. U.S. Dep't of the Interior, 608 F.3d 592, 610 (9th Cir. 2010))).

141. Stern & Slade, *supra* note 116, at 154. *See, e.g.*, Attakai, 746 F. Supp. at 1395 (enjoining a range management project in an area used jointly by the Hopi and Navajo Tribes).

142. *National Historic Preservation Act*, U.S. DEPT. OF JUST. (Dec. 3, 2021), https://www.justice.gov/enrd/national-historic-preservation-act.

renewable energy projects located on desert or coastal lands infringe on place-based cultural or religious practices by restricting their access or simply transforming the landscape."[143] The introduction of Tribal Historic Preservation Officers (THPOs) in the 1992 amendment to the NHPA has strengthened the consultative role of Native Americans in the NHPA consultation process.[144]

As an alternative to the Section 106 consultation process, agencies may develop programmatic agreements:

> Programmatic agreements "govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings." Before implementing a programmatic agreement, the federal agency must consult with the appropriate stake holders, including state historical preservation offices and Indian tribes. Programmatic agreements take effect when executed by the stakeholders. "Compliance with the procedures established by an approved programmatic agreement satisfies the agency's section 106 responsibilities for all individual undertakings . . . covered by the agreement." The regulations state that if the ACHP "determines that the terms of a programmatic agreement are not being carried out, or if such an agreement is terminated, the agency official shall comply with subpart B of this part" with respect to the undertaking covered by the agreement. An approved programmatic agreement satisfies an agency's Section 106 responsibilities "until it expires or is terminated by the agency . . . or the [ACHP]." [145]

Thus, courts can assess programmatic agreements to determine if agencies have fulfilled Section 106 requirements.[146]

Regardless of the approach taken, federal licensing agencies should be aware that while both NAGPRA and the NHPA may protect cultural resources, the statutes also differ in important ways. Most importantly, the NHPA's reach is not limited to Federal or Tribal lands, although it does not impose the type of substantive requirements that NAGPRA does.

B. The National Environmental Policy Act

NEPA is another statute that offers procedural protection to

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143. *Id*. *See, e.g.*, Pub. Emps. for Env'ti Resp.y v. Beaudreau, 25 F. Supp. 3d 67 (D.D.C. 2014).

144. *See* Wright, *supra* note 9, at 154 ("This consultative role is designed to create an atmosphere of trust and has been strengthened with the addition of THPOs pursuant to the NHPA.").

145. Narragansett Indian Tribe By and Through Narragansett Indian Tribal Historic Preservation Office v. Nason, No. 20-576(RC), 2020 WL 4201633, at *1 (D. D.C. 2020).

146. *Id*.; *see also* Colo. River Indian Tribes v. Dep't of Interior, No. ED CV-1402504 JAK (SPx), 2015 WL 12661945, at *13 (C.D. Cal. June 11, 2015) (explaining that obligations under a programmatic agreement serve as a substitute to compliance with Section 106).

certain Tribal resources. Like NAGPRA and the NHPA, NEPA's requirements must be met prior to the agency action. Specifically, NEPA requires federal agencies to assess the environmental effects of their proposed actions prior to making decisions that impact environmental resources,[147] including historic, cultural, and natural resources.[148] Under NEPA, federal agencies must prepare a detailed statement for all "major Federal actions significantly affecting the quality of the human environment" on "the environmental impact of the proposed action."[149] "Meaningful coordination with affected Tribal entities, and analysis of a proposed action's potential effect on Tribal lands, resources, or areas of historic significance is an important part of federal agency decision making [under NEPA]."[150]

Courts have recognized an agency's duty to include a discussion of impacted Tribal cultural resources in NEPA documentation. For example, in *North Idaho Community Action Network v. Department of Transportation*,[151] the Ninth Circuit confirmed that agencies must address "historic and cultural resources" under NEPA.[152] The Ninth Circuit further explored this requirement in *Te-Moak Tribe of Western Shoshone of Nevada v. Department of the Interior*,[153] which considered a NEPA challenge from the tribe to the Bureau of Land Management's (BLM) approval of an amendment to a mineral exploration project in Nevada.[154] The mining company, Cortez Gold Mines, Inc. (Cortez), sited the project on ancestral Tribal lands that included Mount Tenabo, a site of cultural and religious significance; pinyon pine trees, which played an important role in Western Shoshone diet and culture; and potentially a number of Native American burial sites.[155] Plaintiffs argued that the BLM's analyses failed NEPA's requirement to take a "hard look" at the impacts of the mining project on cultural resources because Cortez did not identify the exact location of drilling and other

147. *What is the National Environmental Policy Act?*, U.S. ENV'T. PROT. AGENCY, https://www.epa.gov/nepa/what-national-environmental-policy-act (last updated Nov. 16, 2021).

148. *See* 40 C.F.R. § 1502.16 (2021) (implementing regulation that requires discussion of environmental consequences to include historic and cultural resources).

149. 42 U.S.C. § 4332.

150. *CEQ Guidance and Executive Order Related to Native Americans*, COUNCIL ON ENV'T QUALITY, https://ceq.doe.gov/get-involved/tribes-and-nepa.html (last visited Feb. 8, 2022) (citing CEQ regulations 40 C.F.R. §§ 1501.2 and 1501.7).

151. 545 F.3d 1147 (9th Cir. 2008).

152. *Id*. at 1157.

153. Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of the Interior, 608 F.3d 592 (9th Cir. 2010).

154. *Id*. at 595–96.

155. *Id*. at 597.

activities.[156] While the court concluded that the BLM adequately considered the likely direct impacts to cultural resources based on available information and mitigation measures,[157] the court held that the BLM did not appropriately analyze the cumulative impacts of the project on cultural resources. In particular, the court found that the BLM did not effectively respond to a study from the tribe indicating that the mineral exploration in conjunction with other activities would inhibit the Tribe's access to Mt. Tenabo, decrease the supply of pinyon pine, and disturb burial sites.[158] As a result, one important component of NEPA's hard look requirement is a consideration of historic and cultural resources in the effected environment.

However, while NEPA requires consideration of impacts to cultural resources, "it is now well-settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process."[159] As the Supreme Court has observed, "If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs."[160] Therefore, while some statutes may "impose substantive environmental obligations," "NEPA merely prohibits uninformed – rather than unwise – agency action."[161]

Thus, when agencies undertake NEPA obligations in good faith, the law can be a powerful tool to ensure that tribes' and other minority communities concerns are taken into consideration.[162] However, the value of a NEPA analysis to these communities is limited: "there are too few mechanisms to hold agencies accountable . . . because judicial review is limited to procedural oversight."[163] Scholars have noted that these procedural safeguards are at times "unhelpful" because NEPA "can halt projects procedurally," but does not provide a "substantive" avenue of relief to Native American groups seeking to protect cultural resources.[164] As a result, licensing agencies should recognize that

156. *Id*. at 599.

157. *Id*. at 600–01.

158. *Id*. at 605–06.

159. Robertson v. Methow Valley Citizen's Council, 490 U.S. 332, 350 (1989).

160. *Id.* at 350.

161. *Id*. at 351.

162. Matthew J. Rowe, Judson Byrd Finley & Elizabeth Baldwin, *Accountability or Merely "Good Words"? An Analysis of Tribal Consultation under the National Environmental Policy Act and the National Historic Preservation Act*, 8 ARIZ. J. ENV'T L. & POL'Y 1, 46–47 (2018).

163. *Id*. at 47.

164. Maegan Faitsch, "*Highest Responsibility and Trust": the National Environmental Policy Act & the Dakota Access Pipeline*, 51 CONN. L. REV. 1043, 1052 (2019). This article suggests that

NEPA can impose an expansive obligation to consider and disclose the impacts of a licensing action on cultural resources, but unlike NAGPRA, ultimately does not require any federal action to protect those resources.

IV. TRUST DOCTRINE

In addition to protecting cultural resources under NAGPRA, NHPA, and NEPA, federal licensing agencies must also meet obligations under the Federal Native American Trust Doctrine.[165] The Trust Doctrine arises from the Supreme Court's frequent recognition of "the undisputed existence of a general trust relationship between the United States and the Indian People."[166] Under this relationship, the federal government has "'charged itself with moral obligations of the highest responsibility and trust.'"[167] However, the Court has also cautioned, "[t]he Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute."[168] Thus, the Court found no fiduciary duty under the Trust Doctrine when the underlying statute generally directed the federal government to "hold land . . . in trust."[169] But, the Court did find such a duty when the statute specifically directed that the government manage property in "best interests of the Indian owner."[170] Once federal law imposes such duties, the Court has acknowledged that it may look "to common-law principles to inform our interpretation of statutes and to determine the scope of liability that Congress has imposed."[171]

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one remedy to this problem would be for courts to hold agencies to a "higher standard in NEPA actions when treaty rights [and the corresponding Trust Responsibility] are involved." *Id*. at 1072. However, as noted below, most courts have been reluctant to conclude that the Trust Doctrine mandates enhanced protection under NEPA for Tribal entities. *See, e.g.,* Morongo Band of Mission Indians v. F.A.A., 161 F.3d 569, 575–83 (9th Cir. 1998).

165. For a thorough discussion of the Trust Doctrine in general, *see* Alex Tallchief Skibine, *Integrating the Indian Trust Doctrine into the Constitution*, 39 TULSA L. REV. 247, 250–51 (2003) and Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1499–1501 (1994).

166. *See* United States. v. Jicarilla Apache Nation, 564 U.S. 162, 176 (2011).

167. *Id*. (quoting Seminole Nation v. United States, 316 U.S. 286, 296–97 (1942)).

168. *Id*. at 177.

169. United States v. Mitchell, 445 U.S. 535, 544 (1980) [hereinafter *Mitchell I*] (noting that this language evinced Congressional intent not for "the Government to control use of the land and be subject to money damages for breaches of fiduciary duty, but simply because it wished to prevent alienation of the land").

170. United States. v. Mitchell, 463 U.S. 206, 224 (1983) [hereinafter *Mitchell II*] (quotations omitted) (finding that these words "clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians").

171. *Jicarilla Apache Nation*, 564 U.S. at 177.

A. The Trust Doctrine in Non-Monetary Cases

While cases under the Trust Doctrine normally consider fiscal claims, courts have occasionally considered whether the federal government failed to meet its fiduciary obligations to Tribes in the context of health and safety or environmental statutes, such as NEPA. This line of cases would potentially be the most fruitful avenue for NAGPRA claims. This line of cases is most relevant to federal agencies conducting permitting and licensing activities, as such proceedings rarely relate to funds held in trust for the benefit of Tribal entities. These courts have recognized that the Trust Doctrine may apply in such cases but have concluded that in the absence of a specific statutory obligation, agencies generally meet the Trust Doctrine by complying with the underlying statute.[172] Consequently, in those cases agencies need not "afford Indian tribes greater rights than they would otherwise have."[173]

B. General Duties Are Insufficient to Establish the Trust Doctrine

When considering claims that the Trust Doctrine imposes duties on a Federal agency, courts have scrutinized underlying statutes or treaties for a specific duty. For example, in *Morongo Band of Mission Indians v. F.A.A.*[174] petitioners pointed to the Trust Doctrine to support their challenges under NEPA, NHPA, and the Transportation Act to a proposal to modify an existing flight route at Los Angeles International Airport.[175] However, while the Ninth Circuit acknowledged the existence of the trust responsibility, it concluded that "unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes."[176] Thus, the court declined to impose additional obligations on the government and instead considered the NEPA and NHPA claims under the normal standard of review.[177]

The D.C. Circuit has established similar precedents. In *El Paso*

172. *See* Skokomish Indian Tribe v. F.E.R.C., 121 F.3d 1303, 1308 (9th Cir. 1997) (summarizing how to apply to the Trust Doctrine more generally).

173. *Id*. at 1308–09.

174. 161 F.3d 569 (9th Cir. 1998).

175. *Id*. at 572.

176. *Id*. at 574.

177. *Id*. at 575–83.

Natural Gas Co. v. United States,[178] the court concluded that to state a viable claim based on the Trust Doctrine, a "Tribe must first 'identify a *substantive source of law* that establishes' that specific fiduciary duty."[179] In *El Paso*, the Navajo Nation raised claims related to remediation of three toxic sites near the Tribe's reservation.[180] The Tribe argued that a fiduciary duty existed because the underlying statute provided that the lands in question "'shall be held in trust by the United States exclusively for the Navajo Tribe and as a part of the Navajo Reservation.'"[181] While the D.C. Circuit observed that the argument had a superficial appeal, it found the language insufficient because it "does not afford the government the right to use the land in question."[182] The court explained, "[i]t is natural to infer that Congress intended that a correlative duty to maintain trust property would attach to an expressly provided right of use."[183] In discussing previous Supreme Court and circuit precedents, the D.C Circuit emphasized that a grant of authority to the government to use Tribal property implied a corresponding obligation to ensure that use accrued to the Tribe's benefit.[184] Thus, the court concluded that the Tribe could not rely on the Trust doctrine to support its claims because the language in question did not provide for the level of use that would create a fiduciary duty.

The Ninth Circuit reached a similar result in the context of environmental hazards in *Gros Ventre Tribe v. United States*.[185] In that case, a group of Native American Tribes collectively sued the Bureau of Land Management, the Bureau of Indian Affairs, and the Indian Health Service for licensing two cyanide heap-leach gold mines near the Tribes' reservation.[186] The Tribes based their claims in part on the Trust doctrine and language in the Treaty of Fort Laramie stating that "the United States agreed to 'protect the . . . Indian nations against the commission of all depredations by the people of the said United States."[187] The Ninth Circuit found this language insufficient to invoke the Trust Doctrine because "nowhere do we find the government

178. 750 F.3d 863 (D.C. Cir. 2014).

179. *Id*. at 895 (quoting United States v. Navajo Nation, 537 U.S. 488, 506 (2003) (emphasis in original).

180. *Id*. at 868–69.

181. *Id*. at 896 (quoting 25 U.S.C. § 640d–9(a)) (emphasis removed).

182. *Id*. at 897.

183. *Id*.

184. *See id*. at 892–97.

185. Gros Ventre Tribe v. United States, 469 F.3d, 801 (9th Cir. 2006).

186. *Id*. at 803.

187. *Id*. at 804 (quoting Treaty of Fort Laramie art. 1, Sept. 17, 1851, 11 Stat. 749).

'unambiguously agreeing' to manage off-Reservation resources for the benefit of the Tribes."[188] Instead, the court found that the language in question imposed at most a general trust obligation, "which we have no way of measuring . . . unless we look to other generally applicable statutes or regulations."[189]

Moreover, the Ninth Circuit also found that the Tribes essentially asked the government to regulate other parties' use of resources that did not belong to the Tribes, which occurred off the reservation, for the Tribes' benefit.[190] However, the court concluded that the obligations in the Treaty only extended to protecting the Tribes against actions committed on Tribal land.[191] Thus, the court declined to apply the Trust Doctrine to require the government to regulate and remediate the gold mines in the interests of the Tribes.[192]

C. A Specific Duty Can Establish the Trust Doctrine

However, in the more recent case of *Navajo Nation v. Department of the Interior*,[193] the Ninth Circuit found that the Federal Government had a fiduciary duty to manage the Colorado River for the benefit of a Tribal entity in very similar circumstances. In that proceeding, the Navajo Nation (Nation) sued the Department of the Interior (Interior) and argued, among other claims, that Interior had breached the Federal Trust responsibility because it had "fail[ed] to consider the Nation's as-yet-undetermined water rights in managing the Colorado River."[194] Interior argued that under *Gros Ventre Tribe*, the Nation had not stated a sufficient breach of trust claim because it did not "point to any treaty, statute, or regulation that imposes an affirmative [] duty on the federal government to ensure that the Nation has an adequate water supply."[195] The court rejected these arguments and found that an 1868 Treaty between the United States and the Nation, which established the Reservation as a "permanent home" for the Nation, imposed an affirmative Trust duty on the United States.[196]

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188. *Id*. at 812 (citing *Mitchell I* at 542).

189. *Id*.

190. *Id*. at 813.

191. *Id.*

192. While *Gros Ventre* remains good law in the Ninth Circuit, a stricter construction of the treaty language, following the Court's example in *McGirt*, 140 S. Ct. 2459, may have yielded a different result in *Gros Ventre*.

193. 996 F.3d 623, 641 (9th Cir. 2021).

194. *Id*. at 628.

195. *Id*. at 638.

196. *Id*. at 629, 638–39 (citing Treaty with the Navajo Indians, Navajo-U.S., art. XIII, June 1,

Specifically, the court noted that the 1868 Treaty contained provisions pledging government aid to Tribal members to acquire "'seeds and agricultural implements'" if they "'desire to commence farming.'"[197] The court further observed that under the long-established *Winters* doctrine, treaties between the Federal government and Tribes carry an implied obligation to ensure tribes have sufficient access to water to make specific provisions of treaties meaningful.[198] Therefore, the court concluded that because water rights are an essential element of farming, the Tribe identified a specific, affirmative obligation on the Federal Government "to protect and preserve the Nation's right to water."[199]

In some ways, *Navajo Nation* is a surprising result. The court appeared more willing to look behind the meaning of the words in the treaty or statute than other courts – and relied on the *Winters* doctrine to find a fiduciary duty to protect water rights in a clause related to farming.[200] This appears to expand the treaty language more than readings of similar language to protect tribes from "depredations" or to hold land in trust for the "benefit" of a tribe that courts rejected in *El Paso Natural Gas Co.* and *Gros Ventre Tribe*.[201] Therefore, the holding in *Navajo Nation* could reflect a greater willingness on the part of the Ninth Circuit to invoke the Trust Doctrine to protect Tribal interests. But, the holding might also simply reflect the courts' frequent insistence that language at issue contain "a specific duty that has been placed on the government."[202] The treaty at issue in *Navajo Nation* contained a specific obligation to enable agricultural activities on Tribal lands, while the duties at issue in *El Paso Natural Gas Co.* and *Gros Ventre Tribe* were relatively general. In that sense, *Navajo Nation* may not be an outlier; rather, it could be interpreted to reflect the type of specificity that courts look for when determining whether to invoke the Trust Doctrine.

D. The Trust Doctrine and NAGPRA

Given the specificity needed in an underlying statute to invoke the

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1868, 15 Stat. 667).

197. *Id*. at 639 (quoting Treaty with the Navajo Indians, *supra* note 190, arts. V, VII).

198. *Id*. at 639–40 (citing Winters v. United States, 207 U.S. 564, 576 (1908)).

199. *Id*. at 641.

200. *See id*.

201. *See* El Paso Nat. Gas Co. v. United States, 750 F.3d 863, 897 (D.C. Cir. 2014); Gros Ventre Tribe v. United States, 469 F.3d, 801, 812.

202. Morongo Band of Mission Indians v. F.A.A., 161 F.3d 569, 574 (9th Cir. 1998).

Trust Doctrine, the Trust Doctrine will likely not impose specific, enforceable obligations on most Federal agencies in conducting licensing activities. However, these agencies should maintain an enhanced awareness of statutes or treatise that impose specific duties with respect to Native Americans and Tribes. As discussed above, these laws may require the Federal agency to act as a fiduciary for some or all Native American communities impacted by the action.

To date, only one Federal court appears to have directly considered whether NAGPRA imposes sufficient duties to establish obligations under the Trust Doctrine. In *Na Iwi O Na Kupuna O Mokapu v. Dalton*,[203] the District Court for Hawaii rejected an argument from a Native Hawaiian organization that NAGPRA establishes a trust relationship.[204] Specifically, the group argued that 25 U.S.C. § 3010 created a trust relationship because it states that NAGPRA "reflects the unique relationship between the Federal Government and Indian Tribes and Native Hawaiian organizations and should not be construed to establish a precedent with respect to any other individual, organization or foreign government."[205] The court noted the well-established principle that Congress must explicitly state a specific duty in a statute for the Trust Doctrine to attach. Given this, the court determined that section 3010 should be read as "a disclaimer intended to ward off tangential repatriation claims from other groups "rather than as establishing a fiduciary obligation on the federal government."[206] Some commenters have built on this holding to suggest "that NAGPRA has established a trust or fiduciary relationship between the government and American Indians has been rejected."[207]

However, the court in *Na Iwi O Na Kupuna O Mokapu* only considered the Native Hawaiian organization's arguments that section 3010 of NAGPRA created a fiduciary obligation. As discussed above, NAGPRA imposes several extensive and specific obligations, beyond those contained in section 3010, on Federal agencies to protect Native American burial remains and objects discovered on Federal or Tribal land. And the obvious beneficiaries of NAGPRA are Tribal entities.[208] Moreover, *Navajo Nation* suggests that at least one Circuit Court may be willing to take a more expansive approach to identifying trust

203. 894 F. Supp. 1397 (D. Haw. 1995).
204. *Id*. at 1410 n.12.
205. *Id.*
206. *Id*.
207. Wright, *supra* note 9, at 136.
208. *See supra* Section II.C.

obligations. Therefore, as discussed more fully below, Federal agencies should be aware of the considerations that might support extending the Trust Doctrine to apply to NAGPRA and thereby expanding NAGPRA's reach. And Federal agencies should likewise be aware of NAGPRA's substantive requirements when considering Trust Doctrine claims.

While this approach would represent a departure from the current body of NAGPRA precedent, it could also be seen as a return to first principles with respect to the Trust Doctrine. Generally, scholars trace the Trust Doctrine back to two opinions authored by Chief Justice John Marshall, *Cherokee Nation v. Georgia* and *Worcester v. Georgia*.[209] These cases relied on a rigorous analysis of applicable treaties between Great Britain on behalf of the colonies and Native American Tribes.[210] In analyzing the text of these treaties, Justice Marshall identified a profound moral commitment on the part of the United States to honor the terms of those treaties, which were frequently entered into by beset colonists in desperate need of allies.[211] He memorably asked, "When the United States gave peace, did they not also receive it? . . . [T]he United States were at least as anxious to obtain it as the Cherokees[.]"[212] Consequently, the Trust Doctrine ultimately traces its roots back to a promise of mutual protection between the colonies and Native Americans. In that sense, rather than a duty occasionally assumed by Congress in statutory language, the Trust Doctrine was originally viewed as an ongoing obligation on the part of the government to provide the peace and protection to Tribes that it once hoped to receive.

Therefore, concluding that the Trust Doctrine applies to NAGPRA would be consistent with the original intent behind the Trust Doctrine. However, by its terms NAGPRA only applies to resources found on Federal and Tribal land. Nonetheless, the implications of the Trust Doctrine, and the goals embodied in NAGPRA, might suggest that the Government must use a full selection of powers and authorities to protect Native American cultural resources, beyond those specified in NAGPRA, particularly burial objects and Native American human remains, which are of extreme importance to Tribes,

209. *See* Skibine, *supra* note 165, at 250–51; Worcester, 31 U.S. 515 (1832).

210. *See* Cherokee, 30 U.S. 1 (1831 *S*); Worcester, 31 U.S. at 549–58; *see also* Wood, *supra* note 165, at 1500–01.

211. *See* Worcester, 31 U.S. at 549 (observing that because "the colonists had much cause for the apprehension that the Indian nations would, as the allies of Great Britain, add their arms to hers" during the Revolutionary War, "congress resolved 'that the securing and preserving the friendship of the Indian nations appears to be a subject of the utmost moment'").

212. *Id*. at 551.

even when the objects or remains are not discovered on Federal land. While this approach may expand agency authority under NAGPRA, it would provide cultural resources with a consistent level of protection, regardless of where they happen to be discovered. Therefore, in complying with NAGPRA, and other similar statutes, agencies should be aware that litigants may challenge agency actions that fall short of a fiduciary standard to protect cultural resources, particularly those resources that fall within NAGPRA's ambit. Moreover, as discussed above, such challenges could be significantly increased and bolstered by the Supreme Court's expansion of recognized Tribal land in *McGirt*.[213]

In conclusion, agencies will normally meet their obligations under the Trust Doctrine by complying with the generally applicable laws that govern the review of the application. In some cases, where a statute imposes a specific obligation on an agency with respect to Native American interests, the agency may also have to assume fiduciary obligations with respect to the tribe in executing those obligations. Finally, when considering NAGPRA in the permitting context, agencies should also recognize that the Trust Doctrine may arguably impose a more extensive obligation to protect Tribal resources than the written terms of the statute might imply. In such cases, the agency may be best served by closely examining whether, given the context of the lands they are tasked with administering or regulating, the Trust Doctrine lends support to a broader application of NAGPRA's protections than historically recognized by the courts.

213. *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020). The sponsors of NAGPRA believed that it would not apply to private lands. 136 Cong. Rec. at 35,579 (statement of Sen. McCain, NAGPRA's co-sponsor). But, NAGPRA's implementing regulations indicate that Tribal lands include "all lands" "within the exterior boundaries of any Indian reservation." *See* 43 C.F.R. § 10.2(f)(2)(i). The extent to which *McGirt* would open land held in *fee simple* within a reservation to a NAGPRA claim and whether any agency efforts to repatriate discovered remains or associated objects would violate the Takings Clause could be an important area for future study. NAGPRA's implementing regulations, promulgated prior to *McGirt*, indicate that "[a]ctions authorized or required under these regulations will not apply to tribal lands to the extent that any action would result in a taking of property without compensation within the meaning of the Fifth Amendment of the United States Constitution." *See* 43 C.F.R. § 10.2(f)(2)(iv). However, to the extent a Federal licensing agency used existing authority under the NHPA or NEPA to protect cultural resources, it is unlikely that the agency would violate the takings clause because the constitutionality of those statutes is well established. Although those statutes provide procedural safeguards, a licensing agency could also rely on underlying substantive authority in its organic statute to impose substantive protections as part of the licensing process.

V. RECOMMENDATIONS FOR AGENCIES TO BETTER MEET NAGPRA'S INTENT AND REQUIREMENTS

NAGPRA was enacted to protect human remains and sacred objects at all times. However, the statute has limits inherent in its language, in how courts have interpreted it, and in agency compliance. As one commenter noted:

> The responsibility lies with the multi-branched government and the bureaucracy within it [to carry out NAGPRA's requirements]. Congress is responsible for the actual wording of the law, the courts are responsible for how those words are interpreted, and the agencies must implement the law and make each case's determination. Flaws exist because of problems with each group, and those problems must be collectively addressed to ensure that the implementation of NAGPRA complies with the spirit of the law.[214]

However, while a number of recommendations could improve NAGPRA's efficacy across the board, this article has focused on agencies engaged in licensing and permitting.[215] First and foremost, agencies must recognize and respect the intent of the law.[216] As described above, while similar statutes, such as NEPA and the NHPA, have only procedural requirements, the intent underlying NAGPRA is focused on human rights; as such it provides substantive protections for the deceased and their descendants. In particular, NAGPRA provides substantive protections when parties seek to remove or inadvertently discover resources on Federal or tribal land, through taking reasonable steps to protect inadvertently discovered resources or returning resources to the appropriate Tribe.

Second, agencies must know NAGPRA's requirements and when

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214. Julia A. Cryne, *NAGPRA Revisited: A Twenty-Year Review of Repatriation Efforts,* 34 AM. INDIAN L. REV. 99, 109 (2009).

215. For example, Congress could amend NAGPRA to expand its coverage to private and state lands. Similarly, NAGPRA could be amended to apply to both federally and non-federally recognized tribes. NAGPRA could also be strengthened by offering additional protections to sensitive tribal information. Currently, "legal authority to protect tribal information concerning sacred sites is very limited." Wright, *supra* note 9, at 153. Congress could also provide additional money for tribal grants and access and/or create penalties for agencies that do not comply with NAGPRA's provisions.

216. "NAGPRA represents the culmination of 'decades of struggle by Native American tribal governments and people to protect against grave desecration, to [effect the repatriation of] thousands of dead relatives or ancestors, and to retrieve stolen or improperly acquired cultural property.'" Yankton Sioux Tribe v. U.S. Army Corps of Eng'rs, 209 F. Supp. 2d 1008, 1016 (D. S.D. 2002) (citing Jack F. Trope and Walter R. Echo–Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L. J. 35, 36 (1992)).

they are triggered. As discussed in section II.C., NAGPRA's protections only extend to Federal or tribal lands and to resources that are actually discovered on Federal or tribal land, as opposed to resources that may be impacted. While *McGirt* may extensively expand the ambit of tribal land, many tribal cultural resources may not receive the protection envisioned by Congress simply because of the side of a property line they happen to rest on. In contrast, other statutes, such as the NHPA and NEPA, may cover resources impacted by Federal licenses regardless of the type of land at issue, but may only require the agency to disclose the impact to those resources before proceeding. Therefore, agencies must understand how NAGPRA's requirements, if triggered, differ from other requirements, including those under the NHPA and NEPA. Agencies that comply with NHPA through NEPA could consider whether procedures could be updated to account for NAGPRA compliance. Agencies should consider GAO recommendations and how and whether those recommendations may improve tribal consultations and compliance with NAGPRA.[217]

Moreover, as commenters have noted, the procedural protections of NEPA and the NHPA work best when agencies make a good faith effort to comply with those statutes.[218] Therefore, agencies should act in good faith and with due respect to the unique relationship of the Federal government and Indian tribes. For example, agencies should be clear about what protections they can legally provide to protect Tribal resources.[219] Additionally, agencies should encourage programmatic agreements under the NHPA, especially those that can impose substantive requirements. As one academic noted, while "[t]here is no obligation on the agency actually to preserve or mitigate damage to any historic property arising from the statute or regulations,"[220] a programmatic agreement "may commit agencies to substantive protection measures."[221] Each of these recommendations should help agencies move closer to meeting both the intent of, and the requirements in, NAGPRA.

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217. *See* GAO-22-105685 at 14 (noting that federal agencies will continue to make progress in their efforts to improve tribal consultations and protect Native American cultural items if they implement open GAO recommendations).

218. Rowe, Finley, & Baldwin, *supra* note 162, at 46–47.

219. *See* Wright, *supra* note 9, at 153 (noting that "legal authority to protect Tribal information concerning sacred sites is very limited" (citation omitted) and therefore, DOD's policy warns military installations to not overstate their ability to keep sensitive Tribal information confidential).

220. Stern & Slade, *supra* note 116, at 153.

221. *Id*.

Finally, agencies should continue to monitor legal developments in case law interpreting the Trust Doctrine. When viewed through the prism of the Trust Doctrine, NAGPRA's limited protection of cultural resources may be difficult to reconcile with the government's "moral obligations of the highest responsibility and trust."[222] Litigants may argue that agencies must meet the Trust Doctrine by using their extensive set of authorities and powers to protect Native American cultural resources impacted by Federal licensing actions regardless of whether the impacted resources are on Tribal or Federal land.[223] For example, Federal licensing agencies could use inherent licensing authority, or procedural requirements under the NHPA or NEPA, to require applicants to stop work and notify Tribal organizations upon discovering funerary remains in a Federal project or to seek Tribal approval before moving funerary objects impacted by a Federal project.

VI. CONCLUSION

NAGPRA is a human rights statute aimed at providing dignity and respect at all times for human remains.[224] The law protects human rights by seeking to end the widespread desecration of Native American graves and to return the remains of ancestors to their descendants. The magnitude of the wrongs NAGPRA sought to correct would be just as apparent to Homer or Sophocles as they were to Senator Inouye or any individual who has lost an heirloom, or worse, a loved one. Yet, despite this laudable intent, NAGPRA has not always effectively protected tribal cultural resources. Limitations in the law and by court rulings may leave many cultural resources vulnerable. Federal licensing and permitting agencies do not play a significant role in NAGPRA's statutory language and have a limited ability to carry out its provisions beyond Federal or tribal land. Nonetheless, these agencies may ultimately be in a strong position to help the government, and the nation, realize NAGPRA's lofty goals by using existing authorities to protect cultural resources.

222. United States. v. Jicarilla Apache Nation, 564 U.S. 162, 176 (2011).

223. *See supra* Section III *NHPA and NEPA section.*

224. NAT'L PARK SERV., *supra* note 1.