

Discretionary Desecration: Dził Nchaa Si An (Mount Graham) and Federal Agency Decisions Affecting American Indian Sacred Sites

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There are, on this earth, some places of inherent sacredness, sites that are holy in and of themselves.

—Vine Deloria Jr.¹

The protection of sacred sites—defined here as areas of religious significance to a group of people—remains a contentious issue in many world regions and a significant dynamic in the uneasy relationship between the US government and many American Indian tribes.² Even the definition of *sacred site* and the establishment of defensible policy principles to be followed when sacred sites are affected or threatened by changing land uses have defied conscientious attempts to clarify terms; provide equal treatments of diverse ethnic, religious, and place-based communities; and apply lessons learned in one setting to other cases.

Why do such problems persist? Sacred-site disputes, including the Arizona case discussed here, are embedded in continental-scale colonialist encounters, legal frameworks, and nationalist hesitancies to recognize and respect minority nations' interests in carrying forward important and distinctive aspects of their heritage. The United Nations and governments at

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other levels have occasionally responded to pleas for the protection of both constructed and unmodified sacred sites.³ But despite sporadic acknowledgments of sacred-site contributions to individual, communal, and ecological vitality, surging tides of demographic, technological, and economic change overwhelm most calls to leave American Indian sacred sites alone. The potential for conflict over sacred sites is particularly high where land developments and resource extractions have already encompassed and excluded indigenous peoples, geographies, and value systems, and where additional impacts to people and places are likely. The United States and Canada often oppose calls for recognizing the rights of Aboriginal peoples, overlook moral and legal mandates for just treatment, and ignore pleas for the protection of sacred sites.⁴

This article examines opportunities and impediments relating to the protection of American Indian sacred sites in the United States. Our data and perspective derive from advocacy on behalf of American Indian sacred sites and from related efforts to guide government decisions toward respect for land-based religious practice and recognition of federal trust responsibility for the well-being of tribes, tribal members, and generations yet to come. A review of federal laws and court decisions relating to sacred sites provides a point of departure for examining ongoing conflicts pertinent to the development of the Mount Graham International Observatory (MGIO) by a consortium led by the University of Arizona.⁵ The observatory is located atop Dził Nchaa Si An (“Big Seated Mountain,” also known as the Pinaleno Mountains), a sacred site in southeastern Arizona considered holy by all of the region’s tribes and to be of particular significance to the Western Apache Nation or Ndee (see fig. 1).⁶ Our examination of efforts to halt desecration and ecosystem destruction by MGIO provides the basis for a critical review of federal agencies’ applications of the National Historic Preservation Act (NHPA), the most common tool used to protect sacred sites on public lands.⁷ Instead of protection *per se*, NHPA requires consultations to identify sites having historical, cultural, and religious importance; determine whether the prospective effects of the proposed federal actions will be adverse; and avoid and reduce any adverse effects. Because of the great latitude available to agency decision makers and the central importance of the consultative process, we conclude with recommendations to improve pivotal aspects of consultations concerning American Indian sacred sites.

At the risk of disappointing some readers, this is not a discussion of Apache religion, the sacredness of Dził Nchaa Si An, or the complex relationships between the mountain and Apaches. Instead, we employ Mount Graham in a case study intended to assess and improve the performance of the US historic preservation program in relation to American Indian sacred-site protection. The study illuminates the Mount Graham case, illustrates issues and dynamics affecting the protection of sacred sites elsewhere, and indicates means for enhancing consultations relating to sacred-site protection and decisions affecting place-based communities more generally. We refer to the religious significance of Dził Nchaa Si An, generally relying on language from Apache individuals and official documents rather than our interpretations. In

Indian sacred sites. Despite a unique history of legislative intervention promoting the observatory's initial construction, efforts by Western Apache tribes and their allies highlight how existing authorities may be applied in order to achieve modest protections for Dził Nchaa Si An. Our review of court decisions and laws that set parameters and create opportunities for sacred-site protection reveals the discretion available to federal agencies in order to protect sacred sites in general and Dził Nchaa Si An in particular. The case study examines machinations underlying federal agency approval of sacred-site desecration, raising broader questions about federal agency trust responsibilities and undue political and special-interest influences in agency decision making.

CONSTITUTIONAL ISSUES

Setting aside differences between Indian and Euro-American land ethics, conflicts over Mount Graham and other sacred sites in the United States may be discussed as products of persistent discontinuities between the legal statuses of American Indians and sacred sites, as well as between these juridical statuses and prevailing federal administrative practice.¹⁰ The legal statuses of American Indians and of sacred sites as places of worship have been determined through hundreds of acts and decisions by legislative, executive, and judicial branches of government reaching back to the ratification of the US Constitution in 1787. The Constitution's First Amendment, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," creates twin mandates to protect religious communities from government and to insulate government from religious communities. Tension between the establishment and free exercise clauses of the Constitution persists despite Supreme Court efforts at reconciliation.

Before turning to specific cases involving American Indians and the First Amendment, we note acknowledgment in Article VI of the US Constitution that treaties with Indian tribes are the "supreme law of the land." This affirmation of tribal sovereignty obliges government-to-government relations and distinguishes "Indian affairs as a unique area of federal concern."¹¹ The net effect of treaties, acts of Congress, court decisions, executive orders, and patterns in US-Indian relations boils down to the recognition that Indians require special consideration because of their imposed dependence upon external government. By taking America from its original Native owners, the government "has charged itself with moral obligations of the highest responsibility and trust."¹² This is a primary basis for the "Trust Doctrine" guiding federal relations with Indians.¹³

Federal fiduciary responsibility for American Indians exists specifically in duties to honor treaty-based rights and privileges and to manage Indian trust lands and their bounties in the best interests of beneficiaries. More generally, trust responsibility extends to an obligation on the part of executive branch agencies to manage their relationships with tribes and Indians in accord with fiduciary principles and mandates to protect "the sovereignty of each tribal government."¹⁴ Most specific US trust responsibilities are delegated to the

Bureau of Indian Affairs and the Indian Health Service. Generic fiduciary duty exists wherever executive branch agencies communicate with or otherwise affect tribes or tribal members.¹⁵ Trust duty thus extends to the departments of Agriculture (home of the US Forest Service [USFS]), Education, Health and Human Services, Homeland Security, Interior, and so forth, as well as to independent agencies, notably the Advisory Council on Historic Preservation (ACHP), the federal executive oversight agency designated to interpret NHPA and related federal authorities pertaining to sacred sites.¹⁶

Because of these deep roots for US commitments to both Indian well-being and separation of church and state, constitutional issues often arise when these parallel interests converge. Initial litigation involving the free exercise clause affirmed constitutional protection of all forms of belief, while limiting the range of protected religious conduct.¹⁷ Later Supreme Court decisions allowed government action to burden religious conduct or practice only when justified by a compelling governmental interest pursued through minimally burdensome means.

Given that many sacred-site conflicts boil down to links between sites and religious practice, it is important to understand legal precedents determining how far the government may (or must) go in either limiting or protecting conduct in relation to sacred sites. In determining the reach of the establishment clause, the Supreme Court has confirmed that the government may not—except under specific circumstances—give a religious organization preferential treatment through either benefits or exemptions. The “Accommodation Doctrine” defines establishment clause exceptions: special government treatment of a religious organization is allowed only when a generally applicable law or regulation would otherwise interfere with free exercise and when the law or regulation: (1) has a secular purpose; (2) has a principal effect that neither advances nor inhibits religion; and (3) does not foster governmental-religious entanglement.¹⁸

The American Indian Religious Freedom Act of 1978 (AIRFA) was Congress’ effort to codify the Accommodation Doctrine and thereby rectify governmental and social abridgement of American Indian religious freedoms.¹⁹ AIRFA states, in part, that “it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites.”

As enacted, AIRFA provided a means for combating desecration to and disturbance of sacred sites. However, a pivotal Supreme Court case, *Lyng v. Northwest Indian Cemetery Protective Association*, brought the Accommodation Doctrine and AIRFA’s effectiveness under intense scrutiny in relation to the establishment and free exercise clauses.²⁰ The *Lyng* case arose in response to USFS plans to permit timber harvesting and road construction in and through a site considered holy by three California tribes. The tribes contended that the sacred-site disturbance would burden the free exercise of their religion. Instead of applying the compelling interest test, however, the Supreme Court’s 1988 decision found that AIRFA was an unenforceable

expression of a congressional policy and that incidental effects of government programs having no tendency to coerce individuals into acting against their religious beliefs do not require government justification, even where they may interfere with religious practice. In its insistence that the government action did not deny access to rights, benefits, or privileges—that is, that the logging did not preclude religious belief even though it would inhibit the practice of that religion—the *Lyng* decision disarmed substantive AIRFA-based rights to protect sacred sites.²¹ By limiting the legal options available for safeguarding sacred sites, the *Lyng* decision ushered in an era of sacred-site advocacy employing less directly relevant authorities.

Another Supreme Court case central to sacred-site protection involved not a specific site, but how far government may intrude into state affairs to protect religious freedom. The court's 1990 decision in *Employment Division, Department of Human Resources of Oregon v. Smith* upheld the dismissal of two state employees who made religious use of peyote as members of the Native American Church.²² Congress' response to this ruling, the Religious Freedom Restoration Act of 1993 (RFRA), reinstated compelling interest as a test for government impositions on religion.²³ RFRA prohibits substantial government burdens on free exercise—including the sort of generally applicable law that impeded religious freedom in the *Smith* case—unless the burden furthers a compelling governmental interest and is the least restrictive means for doing so. The Supreme Court later invalidated RFRA's applications to state laws on the Fourteenth Amendment grounds that RFRA infringed on state's rights and exceeded Congress' remedial powers.²⁴ Congress subsequently amended RFRA in response to that Supreme Court opinion.²⁵ Surviving RFRA mandates prohibiting federal actions that substantially burden religious freedoms have yet to provide protection for American Indian sacred sites, obliging tribes and sacred-site advocates to plead their cases to land managers instead of judges.²⁶

ADMINISTRATIVE REFORM AND AGENCY DISCRETION

Taking into consideration the power that federal land managers have over the fate of sacred sites, this section reviews legislative and executive branch authorities relevant to agency decision making. Most of these authorities were created in the aftermath of the *Lyng* decision in order to counter persistent threats to American Indian cultural heritage.

The 1992 amendments to NHPA boost requirements for agencies to consult with potentially affected tribes on various matters, including areas of the effect of agency undertakings (that is, projects, programs, or permits), the identification of historic properties, whether a proposed undertaking will affect a property, and how to avoid or reduce adverse effects where these occur. The NHPA amendments also recognize the rights of tribes to assume State Historic Preservation Officer (SHPO) functions for Indian lands and, importantly, expand the definition of historic properties to include sites of cultural and religious significance.²⁷ The 1992 amendments to the NHPA also expand the ACHP membership to include a representative of the Native American and Native Hawai'ian communities.

The revised definition obliges federal agency consideration of what are often referred to as traditional cultural properties (TCPs), meaning a place “that is eligible for inclusion on the National Register of Historic Places because of its association with cultural practices and beliefs that are (1) rooted in the history of a community, and (2) are important to maintaining the continuity of that community’s traditional beliefs and practices.”²⁸ Sacred sites are typically viewed as a particularly venerable class of TCPs. The changes prompted by the inclusion of TCPs have transformed NHPA-mandated processes to identify, assess, and resolve adverse effects to historic properties.

The NHPA amendments did not provide protection for sacred sites separate from the considerations given to other historic properties. Clinton’s 1996 Executive Order (EO) No. 13007 on American Indian sacred sites further enshrined AIRFA as federal policy by explicitly directing federal land managers to accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and to “protect the physical integrity” of such sacred sites. EO 13007 defines the term *sacred site* as “any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion.” Signed by President Clinton in 2000, EO 13175 requires federal agencies to (1) be guided “by principles of respect for Indian tribal self-government and sovereignty, for tribal treaty and other rights, and for responsibilities that arise from the unique legal relationship between the Federal government and Indian tribes,” and (2) maintain “an effective process to permit elected officials and other representatives of Indian tribal governments to provide meaningful and timely input.”²⁹

Ostensibly created to address American Indian concerns, EO 13007 and EO 13175 are nonetheless explicit in denying the creation of any additional rights, benefits, or trust responsibilities that would be enforceable by anyone other than federal administrative authorities and the US president. Federal officials must integrate the directives into their management and planning activities and may be held accountable for failing to do so. Questions concerning whether any nonfederal party has standing to hold officials accountable, and whether federal trust responsibility or other authorities would pertain, remain open.

The bottom line is that because sacred sites lack specific and enforceable protections, federal land managers retain great discretion in weighing competing interests for land and resource use and preservation. Noting the political influence reflected in many federal decisions, Hardgrave refers to the “luck of the draw” associated with the “agency approach” of relying on land manager discretion.³⁰ Our review of federal decisions relating to Dził Nchaa Si An suggests the deck is often stacked against sacred-site protection, with wild cards palmed and ready to be played by the government and by applicants for permits to alter sacred sites.

We turn now to a summary of Mount Graham history with reference to instances in which federal officials could have asserted their trust responsibility

and exercised management discretion in order to protect the mountain and its Apache devotees, yet chose not to.

MOUNT GRAHAM I: TIME IMMEMORIAL–2004

Dził Nchaa Si An is unique and worthy of special consideration by most measures. A “management unit” of the Coronado National Forest in southeastern Arizona, the range is the highest of the region’s “sky islands” and Arizona’s third highest, soaring to 3,265 meters (10,720 feet), well more than a mile above the surrounding desert and Gila River Valley.³¹ Dził Nchaa Si An summits are headwaters for at least seven perennial streams that tumble through five major biotic zones. Located between the Southern Rocky Mountains and Mexico’s Sierra Madre, and biologically isolated for millennia, the higher elevations have provided refuge for relic populations of plants and animals with adaptive strategies rooted in Pleistocene environmental conditions. Of particular note are stands of the oldest conifer trees in the US Southwest and associated habitats for threatened and endangered species, especially the Mount Graham red squirrel.³²

Located near the northern limit of the Chiricahua Apache homeland and the southern margins of Western Apache territory, the range is one of the Western Apache’s holy mountains and is considered sacred by all of the region’s Native peoples.³³ Since a determination by the Keeper of the National Register of Historic Places in 2002, Dził Nchaa Si An ranks as the largest (~330,000 acres) property listed on or formally determined eligible for the US National Register of Historic Places.³⁴ The mountain’s notoriety derives from its employment as the host for MGIO, the observatory authorized by a unique peacetime congressional waiver of US environmental protection laws. On Dził Nchaa Si An, the University of Arizona and its partners continue to operate and plan expansions of facilities that desecrate an American Indian sacred site and degrade a rare and fragile ecosystem forming the heart of habitat officially designated as “critical” for the survival of the endangered Mount Graham red squirrel.

Exclusion of Apache control and despoliation of ancient environmental and cultural systems is nothing new in Apache territory. Dził Nchaa Si An has been a locus of conflict through increasingly intrusive iterations of conquest pursued by Spanish, Mexican, and American forays since the 1700s.³⁵ In 1866, General McDowell ordered establishment of a Western Apache military reservation at nearby Fort Goodwin, breaking treaty promises made to Apache leaders.³⁶ In 1869, soldiers of the 1st US Cavalry and 14th US Infantry killed twenty-eight Apaches and captured eight in the adjacent Mount Turnbull range.³⁷

Quickly tightening its grip, the United States established the White Mountain Reservation in 1871, ordering all Western Apaches to remain within reservation boundaries or be attacked. The reservation was enlarged by President Ulysses S. Grant’s EO of 14 December 1872, returning Dził Nchaa Si An to Apache control, but vast tracts containing mineral and water sources, including all of Mount Graham, were subsequently “restored to the

public domain.”³⁸ In the later 1880s, as the United States completed subjugation of the Chiricahua Apaches led by Geronimo, one of the Dził Nchaa Si An summits, Heliograph Peak, was part of a network of Army signaling stations.³⁹ The United States eventually separated the Western Apache Nation into four federally recognized tribes resident on four reservations: the San Carlos Apache tribe of the San Carlos Reservation, the Tonto Apache tribe of the Tonto Reservation, the White Mountain Apache tribe of the Fort Apache Reservation, and the Yavapai-Apache Nation of the Camp Verde Reservation (see table 1).

Table 1
Some Mount Graham Milestones

Date	Description and Implications
1871	Grant executive order (EO) establishes the White Mountain Indian Reservation and compels all Western Apaches to remain within reservation boundaries or suffer pursuit and punishment
1872	Grant EO expands reservation to incorporate terrain south of the Gila River, including much of Mount Graham
1873–77	Four EOs reduce reservation to make minerals and other resources available for non-Indian exploitation
1890s	Timber harvests in full swing; plans unfold for roads, dams, and cabins
1897	Congress divides reservation at Salt-Black River to create Fort Apache Indian Reservation to the north and San Carlos Indian Reservation to the south
1906	Astronomy begins at University of Arizona (UA) when A. E. Douglas arrives from Lowell Observatory, Flagstaff
1930s	Ola Cassadore, San Carlos Apache, visits Mount Graham with her father, who sings, prays, and uses plants from the mountain
1932–2004	More than 50 seasons of UA archaeology field schools on Apache reservations train generations of archaeologists and build world-class collections and status
1950s	UA and Tucson initiate ongoing campaigns to become a global center for research and development in astronomy, optics, and related fields
1978	Congress passes American Indian Religious Freedom Act (AIRFA) to preserve religions of Native Americans and protect sacred sites
Early 1980s	UA unveils plans for a 20-telescope observatory atop Mount Graham
Later 1980s	Apache opposition to UA plans boosted by creation of Apache Survival Coalition
1988	In <i>Lyng v. Northwest Indian Cemetery Protective Association</i> the US Supreme Court invalidates core AIRFA provisions and allows desecration to proceed
1988–89	UA obtains congressional exemption from remaining requirements of National Environmental Policy Act, and Endangered Species Act/US Forest Service (USFS) issues permit to UA for 3 scopes on 8.6 acres
1992	Arizona Regents approve Mount Graham International Observatory (MGIO) (8–2) over objections of Apaches, environmentalists, and ranking professors in Indian studies and anthropology

Table 1 (cont.)

Date	Description and Implications
1996	Clinton EO 13007 directs all federal land managers to: "(1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites"
2002	Keeper of the National Register issues Determination of Eligibility for the Pinaleno unit of the Coronado National Forest (about 330,000 acres)
2003	White Mountain Apache tribal council resolution calls on UA and USFS to: (1) halt plans for additional MGIO telescopes, (2) stipulate date for the removal of all MGIO facilities, (3) plan for post-MGIO site restoration, and (4) prepare National Register nomination for all Apache sacred mountains
2004 Summer	Nuttall Complex fire burns more than 30,000 acres, including areas adjacent to MGIO
2004 Fall	USFS issues no adverse effect determination for UA proposal to install microwave system; Apaches object; USFS issues determination of adverse effect; consultations begin to avoid and reduce adverse effects, pursuant to National Historic Preservation Act Sec. 106
2005	UA President Likins recognizes Apache concerns for the first time and suspends planning for additional MGIO telescopes, but only for the 18-month remainder of his term in office
2006	Wendsler Nosie, who was arrested by UA police in 1997 for praying on the mountain, is elected chairman of the San Carlos Apache tribe
2007	Microwave system, as designed and purchased in 2004, becomes operational
2009	USFS permit for MGIO expires and new management plan is in preparation

Immediately following Apache disenfranchisement, Euro-Americans vigorously exploited Mount Graham and its surrounding areas for minerals, fuel wood, timber, livestock pasture, and domestic and agricultural water.⁴⁰ The 1980 proposal for a twenty-telescope astrophysical research facility on the mountain grew out of regional economic shifts away from resource extraction, as well as university research priority shifts toward optical sciences and astronomy.⁴¹ These trends collided with renewed Western Apache commitments to self-determination and cultural perpetuation, as well as growing environmentalist and land manager recognition of the significance and fragility of high-elevation ecosystems.⁴² Public relations materials sponsored by MGIO proponents and uncritically accepted by the USFS emphasized purported Apache support for MGIO and compatibility between the telescopes and Mount Graham ecosystems.⁴³

Opposition by Western Apaches and their allies refuted proponent claims that the mountain was not sacred in Apache culture or significant in Apache history.⁴⁴ In 1993, former Coronado National Forest Supervisor Robert Tippeconic admitted complicity in university efforts to suppress evidence of

the range's importance to Apaches.⁴⁵ When Tippeconic's successor, James Abbott, delayed approval pending environmental reviews for the new road in the virgin forest to access the observatory site, he was summoned to a meeting and personally threatened with termination by US Senator John McCain.⁴⁶

Meanwhile, controversies over sacredness and the destruction of the endangered red squirrel habitat prompted cooperation among tribal representatives and dozens of nongovernmental organizations (NGOs)—including the Sierra Club, the Center for Biological Diversity, and the Maricopa Audubon Society. The informal partnerships brought eleven lawsuits over the course of fourteen years, limited the project to three telescopes, discouraged partners from buying into MGIO, and thwarted prosecution of Apache religious practitioners for unwillingness to obtain government permits to visit portions of the mountain.⁴⁷ Additionally, due to steady opposition to MGIO and support for the mountain by Apache leaders, several recommendations from ACHP, and a formal USFS submittal that overcame University of Arizona reluctance, the National Park Service determined Mount Graham eligible for listing on the National Register of Historic Places. The formal finding acknowledges the legitimacy of Western Apache oral and religious traditions and recognizes the significance of the mountain as home and source for *gaan* (or mountain spirits), sacred power, prayer places, and plants and other materials used in Apache religion.⁴⁸ Although the determination does not oblige MGIO removal or assure future protection, the ruling ensures that the mountain receives previously denied USFS consideration in NHPA reviews of federal project and program proposals, including any suggested changes to MGIO.

Giving lip service to the mountain's sacred significance, the University of Arizona and its MGIO partners at the Vatican Observatory, Max Planck Institute, Ohio State University, University of Minnesota, and University of Virginia have dedicated millions of taxpayer dollars to lobbying, policing, and legal and public relations campaigns.⁴⁹ The MGIO approach to the conflicts between the proposed telescopes and the sacred and fragile ecosystem was to fabricate Apache support for the project and obtain, without public review or any hearings, two congressional exemptions from authorities protecting land, air, water, and biodiversity.⁵⁰

The first of these exemptions, the Arizona-Idaho Conservation Act of 1988, truncated the environmental and endangered-species review processes, deemed the requirements of the Endangered Species Act and the National Environmental Policy Act satisfied with regard to the construction of the first three telescopes and "necessary support facilities," and directed the issuance of a USFS permit for MGIO use of 8.6 acres.⁵¹ MGIO completed two small "trainer" telescopes: the Vatican Advanced Technology Telescope and the Submillimeter Telescope. In 1997, the "Kolbe rider" invalidated a Ninth Circuit Court injunction prohibiting construction of the large binocular telescope (LBT) because workers felled old-growth forest without authorization and otherwise violated MGIO's USFS special-use permit.⁵² Complications and blunders delayed LBT completion until 2008, and there are indications that it has yet to operate as designed and advertised.⁵³

As the dust settled on the first two decades of conflict over MGIO, Wendsler Nosie, the San Carlos Apache leader who was arrested by University of Arizona police for praying on Dził Nchaa Si An “without a permit,” stated: “It has been a Holy Mountain since the beginning of creation. This has been passed orally through our ancestors. It was taught to us that it was given to the world. Our culture, our language, our religion is being threatened. All of this is our identity. Our identity is the land and where God has placed us in this part of the world. We cannot let it end.”⁵⁴ Applying this perspective to federal land-management concerns, White Mountain Apache Tribal Council Chairman Dallas Massey Sr. wrote to the Coronado National Forest supervisor to reiterate Apache requests “that the Forest Service take affirmative steps to manage Mount Graham primarily as a place of outstanding significance in Western Apache religion, culture, and history—a sacred site.” Massey outlined *respectful avoidance* as an Apache stewardship tenet, recommending “prohibition and avoidance of all activities that (1) interfere with the ‘function’ of the sacred site, (2) interfere with religious practitioners’ use of the sacred site, (3) proceed without full and clear knowledge of the activities’ consequences, or (4) meddle with incompletely understood systems. . . . [W]e urge you to reject . . . proposals to conduct or facilitate . . . unholy activity in this holy place.”⁵⁵ In December 2003 the White Mountain Apache tribal council unanimously endorsed resolution 12-2003-296, resolving, in part, that

Dził Nchaa Si An and other Western Apache Sacred Sites should be managed, in full partnership with the Western Apache tribes, for the protection of the physical integrity of those sacred sites and for the restoration of pre-1870 resource conditions and ecosystem processes. . . . The parties to the telescope operations within the Dził Nchaa Si An sacred site shall work with the Forest Service to specify a date by which the operations shall cease and the “footprint” restored to its pre-development condition, including removal of all roads, power lines, communication facilities, etc.⁵⁶

MOUNT GRAHAM II: 2004–2008

In the wake of the Nuttall Complex fire that burned more than thirty thousand acres adjacent to MGIO in 2004, and as Apache leaders reached out with their concerns and requests, MGIO notified the USFS of plans for installing new microwave communications equipment to replace equipment then in use.⁵⁷ MGIO claimed the system was necessary in order to accommodate increased data flow required by LBT; remote observing, in which astronomers interface with instruments in real time without traveling to observatories; multi-instrument coordination, in which telescopes at various locations focus on a single object; and communications during telephone system outages.

Microwave under a Microscope

Neither the proposal nor the additional damage and desecration it heralded appear momentous at first glance, but several complicating factors recommend the case for close study. First, as the initial MGIO project to require intensive NHPA review since the mountain's 2002 formal determination of National Register eligibility, interested parties saw the microwave case as a likely precedent setter. Second, although proposals for federal land-management actions routinely trigger parallel compliance processes for multiple laws and regulations, the USFS decided that the microwave proposal required only NHPA compliance. The basis for this determination was the Arizona-Idaho Conservation Act, which arguably preauthorized communications as "necessary support facilities," thus immunizing the microwave proposal from review under the National Environmental Policy Act and the Endangered Species Act—but not NHPA. Third, and not surprising given the project's contentious history, disagreements quickly escalated to the point at which intervention by ACHP and other Washington officials was necessary.

The case pushed NHPA review, commonly called the "Section 106 process" after the corresponding number in the statute, to seldom-used margins, where personal participation by senior officials illuminated previously implicit values and alignments. The MGIO microwave case thus offers a unique window into federal decision making in regard to undertakings affecting American Indian sacred sites. It illustrates dynamics that play critical roles in sacred-site protection efforts reliant upon the agency approach and the consultation and federal discretion at the heart of the processes that determine whether desecration will be allowed.

The Microwave Section 106 Process: On the Surface

As noted above, among various other mandates, NHPA's Section 106 requires federal agencies to consult with Indian tribes and other affected parties, to consider the effects of their proposed undertakings on historic properties, and to seek to avoid or reduce adverse effects. The initial parties to the NHPA review for the microwave included the federal action agency (US Department of Agriculture, Coronado National Forest), the undertaking proponent (University of Arizona), ACHP (at the request of the White Mountain Apache tribe), the Arizona SHPO, the four Western Apache tribes, and the Apache Survival Coalition (an NGO founded by Ola Cassadore-Davis to protect Dził Nchaa Si An and Western Apache cultural traditions).

The frustrations that came to characterize the microwave review—anguish would not be too strong a word to describe the experience of the Apache elders who endured the experience—began prior to the formal initiation of the NHPA process. In August 2004, while the USFS was still analyzing the microwave proposal, MGIO began excavations to construct the microwave monopole.⁵⁸ In response to the unauthorized excavations, the USFS sent a "no adverse effect" determination for the entire microwave proposal to the Arizona SHPO.⁵⁹ The White Mountain Apache tribe exercised its prerogative

in the Section 106 regulations and objected, stating that the proposed microwave system⁶⁰

would entail adverse effects to the characteristics, attributes, functions, and values central to Dził Nchaa Si An as a Western Apache Traditional Cultural Property and Sacred Site. . . . [T]he presence of structures and artificial objects—particularly metallic ones—as well as the operation of telescopes and other electronic and communications equipment impinge and infringe upon, interfere with, distort, and detract from these communications [with sacred power]. . . . No additional observatory-related impacts without commensurate restoration of our sacred Southern Mountain.⁶¹

Shortly afterward, the USFS reversed its position and issued a determination that acknowledged the adverse effect for the proposal. In accord with NHPA regulatory protocols, the USFS then organized three consultation meetings. At the December 2004 meeting, MGIO representatives presented a summary of the proposed microwave system. Apache representatives related the long struggle against MGIO, the many previous insults to Apache people and beliefs, and the need for rigorous attention to good-faith consultation and Section 106 processes. USFS representatives reviewed the mountain's significance, as documented in the 2002 determination of eligibility, and went over each relevant step in NHPA, especially the memorandum of agreement (MOA) processes generally required when adverse effects to elements of significance cannot be avoided. Apache representatives requested more information about the following: microwave transmissions on the mountain; alternative means for accommodating MGIO needs; microwave impacts to wildlife and human health; options for reducing MGIO's visual impacts; rights acquired through the permitting process that might allow the microwave-system operator to remain following MGIO removal; and nonmetal alternatives to the monopole.

Apache representatives also suggested participation in the NHPA review and consultation process by the Federal Communications Commission (FCC), the entity responsible for licensing microwave transmission devices and the use of government-regulated airwaves and bandwidths.⁶² USFS and MGIO representatives each pledged to fill in these information gaps. The parties agreed and affirmed that there was no compelling schedule for completing the NHPA process. Among the unresolved issues was whether the MOA anticipated by the USFS would address Mount Graham management as a sacred site in general or limit its purview to the installation of the microwave system alone.⁶³

The next meeting, in February 2005, centered on discussions of microwave-system alternatives and an overture from University of Arizona president, Peter Likins. Likins's representative, Robert Hershey, a professor at the University of Arizona Law School and a principal in the school's Indigenous Peoples Law and Policy Clinic, announced a temporary suspension of planning for additional MGIO telescopes and an intention to participate in

a meeting with Western Apache elected representatives to address issues beyond the microwave.

At the same meeting, Vernelda Grant, director of the San Carlos Apache tribe's Office of Historic Preservation and Archaeology, distributed a statement that noted:

If you put up this microwave . . . it will hurt us by scrambling our prayers. . . . [Y]ou or your family may incur consequences from doing harm to the Mountain. . . . Apache resources can best be protected by managing the land to be as natural as it was in pre-white settlement times. . . . Asking the San Carlos Apache Tribe to participate in mitigating and/or deciding upon the current and future projects on Dził Nchaa si an is like asking us to participate in destroying and/or desecrating a holy place.⁶⁴

Grant and others discussed the moral dilemma of exchanging information with individuals lacking respect for the mountain and otherwise participating in sacred-site desecration. The Apache representatives concluded that the lack of alternate means for protecting the mountain obliged them to continue their reluctant and painful participation in hopes of obtaining the respect and protection required by the mountain. These subtleties were either misunderstood or disregarded by USFS staff, who seized upon Grant's final point—that Apaches incur significant liabilities through participation—paternalistically declaring additional discussions futile and announcing that a decision would be made and a draft MOA circulated shortly.

On 4 March 2005, in anticipation of the "summit" meeting scheduled by the university for 1 April at San Carlos, Likins released a "Declaration for the Western Apache Nation," which states, in part:

My purpose . . . is to begin a process intended to restore harmony between us on the Mountain.

To that end, I make the following declarations on behalf of the University of Arizona: (1) We recognize with respect that Mount Graham is an Apache Sacred Site, and commit to the preservation of an environment that is supportive of the traditional spiritual and religious values of the Apache peoples. (2) We support full access of the Apache peoples to Dził Nchaa Si An and their participation in planning for any future use of land on the Mountain. (3) No plans involving the University of Arizona are now under consideration for increasing the number of telescopes on Mount Graham. We declare an eighteen month hiatus on any such planning commencing April 1, 2005, so that our full energies can be devoted to our mutual efforts in good faith to establish a sound basis for future cooperation. (4) We respectfully recognize contrary views, but we believe that Dził Nchaa Si An can peacefully accommodate for the life of the observatory the coexistence of the Apache and the small numbers of astronomers whose telescopes now occupy a small land area of the Mountain,

recognizing that these scientific personnel require access to their observatories by existing roadways, microwave communications, or their equivalents.

As President of the University of Arizona I deeply regret any words or actions that may have marred our relationship in recent years, and hope earnestly for an era of peaceful coexistence in harmony with the land and the heavens above.

The prospect of a summit to address issues encompassing the microwave consultation put the NHPA review on hold.⁶⁵ The delay brought pressure on the USFS from the university, as well as Graham County officials representing the microwave-system contractors, and the USFS decided to conclude the NHPA process rather than attempt to resolve outstanding fundamental issues.⁶⁶ On 27 April, discounting continued Apache requests for in-person ACHP involvement, the USFS distributed a draft MOA.⁶⁷ Because the MOA ignored most Apache concerns, Apache representatives asked ACHP to require a consultation meeting focused specifically on proposals for the reduction of adverse effects. Until that point, ACHP had not participated in the consultation meetings. On May 10, after a Mount Graham Coalition representative telephoned the ACHP associate general counsel and threatened to sue ACHP for failing to participate—a violation of the NHPA and the ACHP's trust responsibilities to the tribes—another consultation meeting was scheduled around attendance by the ACHP's staff liaison for the Department of Agriculture.

The June consultation meeting, which included the ACHP liaison and a Mount Graham Coalition representative, featured tense discussion but concluded with two key agreements. First, Apache representatives would provide MOA recommendations for reduction of adverse effects from the microwave system. Second, another meeting was scheduled for August to review the revised MOA and initiate discussion of a broader agreement to streamline future NHPA consultations.⁶⁸

On July 7, when the USFS abruptly contravened the process agreed upon in the June meeting and issued a new draft MOA before the stipulated date for receiving the Apache recommendations, cooperation in the Section 106 review fizzled. The White Mountain Apache tribe objected to the MOA, requested its withdrawal, and assembled a list of recommendations to reduce the microwave system's adverse effects.

The Apache suggestions specified construction-focused, mountain-wide, and regional steps to minimize, compensate for, and halt the progression of direct, indirect, and cumulative adverse effects to the Apache sacred site. The suggestions included:

- Administrative and financial penalties for permit violations by MGIO (for example, the preemptive construction of the microwave system);
- Minimization of metal use in the monopole and of subsurface, mineral, plant, and animal disturbances associated with microwave system;
- Use of special paints and other surface treatments to minimize the visual intrusion of the monopole tower and other MGIO facilities;

- Completion of a telecommunications status and needs assessment;
- Elimination of intrusive and disrespectful activities not required for astronomy (for example, commercial tours and lethal police and guard dog patrols);
- Agreement not to expand MGIO beyond the existing boundaries and to specify conditions and time frames (even distant ones) for MGIO removal and site restoration;
- Specification of processes and time frames for the completion of the nomination of Western Apache sacred mountains to the National Register of Historic Places;
- Assessment of accumulating MGIO adverse effects in conjunction with the adverse effects from the proposed ski area expansion on the San Francisco Peaks, near Flagstaff, Arizona, and the proposed extension of copper mining to desecrate and destroy the venerated place known as the Apache Leap, near Superior, Arizona.⁶⁹

Dismissing these suggestions as either beyond the scope of the NHPA review or in conflict with the Arizona-Idaho Conservation Act, the USFS redistributed the MOA—this time already signed by the USFS and the university—and requested signatures from the tribes, SHPO, and ACHP. The request was prefaced by the questionable claims that “no new information or ideas have been offered. . . . [T]he Forest has made a reasonable and good faith effort to involve the tribes and the Apache Survival Coalition and to address their concerns.”⁷⁰

Perhaps needless to say, the other parties refused to sign the MOA. Noting the USFS violation of the June agreements, ACHP recommended use of a laminated wood monopole and development of consultation protocols for future Mount Graham projects.⁷¹ Similarly rejecting these recommendations, the USFS sought to move beyond the microwave and proposed an August meeting, following MOA signature, to discuss general Mount Graham management issues, noting that the MOA “commits to developing a more collaborative and cooperative relationship.”⁷² The San Carlos Apache response represented Apache views on this apparent end-run: “When the Forest Service indicates that it is ready to seriously consider alternatives that do not harm Apache resources or practices, then we will be happy to meet with you.”⁷³

Unwilling to resume microwave discussions, the USFS notified ACHP that it would exercise its NHPA option to terminate consultation formally unless ACHP withdrew the recommended changes to the MOA.⁷⁴ Because MOAs are incomplete without ACHP signature, NHPA’s Section 106 regulations require the agency head to attempt to resolve any conflict with ACHP.⁷⁵ If this fails, ACHP must solicit input from consulting parties and the public before providing final comments to the agency and allowing the project to proceed without a signed MOA.

Cognizant of MGIO opponents’ willingness to file lawsuits, ACHP and the USFS were motivated to resolve their disagreement.⁷⁶ Nonetheless, despite ACHP insistence that the microwave consultation was incomplete, in

November the chief of the USFS terminated the NHPA process, giving ACHP forty-five days to gather views from the consulting parties and respond with final comments.⁷⁷

Answering ACHP's solicitation, San Carlos Apache tribe Chairwoman Kathy Kitcheyan affirmed that the "current proposed microwave communications project is yet another harmful disruption of traditional practices," and requested that "the Forest Service and University fully disclose all proposed future activities and construction in and around the telescope site . . . and consider traditional Apache uses of Mt. Graham's resources against other, multiple uses."⁷⁸ The Yavapai-Apache Nation asserted that "the Forest Service has unrightfully abandoned their trust responsibilities . . . [and] supported similar assaults to the landscape and critical aspects of our traditional culture on Dził Cho (the San Francisco Peaks)."⁷⁹ The university's comments emphasized the length of the decision-making process and the safety risks incurred by what MGIO characterized as an unreliable communications system.⁸⁰

Along with other issues, the White Mountain Apache tribe's comments addressed urgency, noting:

The record unambiguously shows that the sole impasse was and is USFS refusal to acknowledge and reasonably consider effect avoidance and reduction measures. . . . The LBT remains incomplete and the Federal Communications Commission (FCC) has not approved the license. . . . There is ample time to return to the real business of avoiding and reducing effects. . . .

If there is a true urgency in this matter, it is not that of the permittee, but rather in our increasingly desperate quest to avoid yet another federal decision that not only fails to consider Apache values concerning the inestimable importance of our sacred mountains, but flies in the face of good and fair governance in general and federal fiduciary duty. . . . [T]he White Mountain Apache Tribe must insist—out of our deep respect for divine power and for our ancestors, our children, and ourselves—that any and every adverse effect be reduced to the reasonable minimum and that truly irreducible adverse effects be balanced with the respectful protection of a comparable area or value. . . . ACHP action is required not only to preserve Dził Nchaa Si, but the NHPA process that has, sadly, become our only viable means for influencing USFS and UA [University of Arizona] actions.⁸¹

Instead of employing these views as the basis for final comments, however, ACHP engaged in additional discussions with USFS and Department of Agriculture officials. The discussions took ACHP beyond the forty-five days stipulated in the regulations and required the technicality of a formal USFS request for additional time under the strictures of the NHPA: "I am now more optimistic that renewed consultation on these terms can lead to an agreement. . . . I am requesting a two-week extension of the 45-day period within which the Council must transmit its comment to the head of the agency. . . . I look forward to working with the consulting parties to make one final effort

to reach accommodation on this project in order to move forward together in a spirit of cooperation.”⁸²

In early March 2006, ACHP Chairman John Nau responded to the USFS chief, Dale Bosworth. Instead of final comments, the letter conveyed an MOA essentially identical to that distributed by the USFS seven months previously and already signed by ACHP.⁸³ Other than the unexplained withdrawal of ACHP objections to the MOA, the only noteworthy result of the protracted discussions in Washington was the ACHP chairman’s proposal for a “listening session” to “ensure improved relations and a spirit of collaboration in jointly planning for the future of Mount Graham.” The USFS and university then promptly signed the “new” MOA and circulated it to the other consulting parties for their cosignatures.

Despite repeated references to collaboration and consultation in the correspondence, neither the tribes nor the Arizona SHPO were given opportunities to participate in these crucial latter stages of the NHPA process. All of them refused to sign, citing the MOA’s inattention to their significant unresolved concerns, as well as the lack of good faith and integrity in the conduct of the process by the USFS and ACHP. James Garrison, the Arizona SHPO, formally terminated his participation, noting “no ability to further resolve any perceived adverse effects within this document.”⁸⁴ For Garrison, who has served as the Arizona SHPO since 1992, this was the first and only refusal to sign an MOA.⁸⁵ Garrison’s rejection arguably rendered the document invalid and void.⁸⁶ It certainly earned him the respect of the Apache participants and their allies.

Although USFS responsibilities pursuant to NHPA regarding the microwave were thus completed and the USFS was free to amend the MGIO permit to allow microwave-system installation, the system could not be constructed or operated without an FCC license. In a statement signed by representatives of each of the four Western Apache tribes, the Apaches advised the FCC that

the proposed microwave licensure poses both challenges associated with highly irregular handling of the process by USFS and the Advisory Council on Historic Preservation (ACHP) and an opportunity to improve upon and properly conclude the Section 106 process concerning the proposed activities subject to this undertaking.

Despite the unacceptably premature and unwarranted termination of the Section 106 process by the USFS, the Apaches stand willing to work with FCC, the applicant, USFS, ACHP, the Arizona SHPO, and other parties in an effort to avoid and reduce and mitigate the adverse effects associated with the proposed microwave licensure.⁸⁷

Based on an unsubstantiated ACHP claim that the MOA was valid without an SHPO signature, FCC reneged on its oral pledge and refused to conduct an NHPA review and consultation for the undertaking of issuing a license for microwave operations.⁸⁸ Microwave-system installation and monopole construction on Dził Nchaa Si An proceeded in the fall of 2006.

The Microwave Section 106 Process: Behind the Scenes

Based on the approximately 2,600 pages of documents included in responses to the public records requests filed by the White Mountain Apache tribe, we estimate that the NHPA review process for the microwave system involved no fewer than a dozen interparty meetings, one hundred telephone calls, three hundred fifty e-mail messages, and two thousand hours of scheduled work time for personnel employed by ACHP, USFS, FCC, SHPO, and the tribes.

These investments, virtually all of which were made with public resources, did more harm than good. The tribes won no meaningful recognitions of their concerns, much less concessions. The emotional toll, most especially on Apache elders and religious practitioners, is impossible to calculate. MGIO had to operate without the new system for two years. The USFS and ACHP squandered the Apache trust it had worked hard to establish through Mount Graham's 2002 determination of eligibility. ACHP, USFS, MGIO, and the White Mountain Apache tribe each bade farewell to burned-out staff members who served as points of contact for the process. SHPO refusal to sign the MOA invited intense scrutiny and intrusive criticism from some federal and Arizona state elected officials.

What went wrong? The above-described proceedings tell only part of the story, falling short of assigning responsibility for the costly, contentious, and counterproductive process. The university blamed everybody except itself, reserving particular disdain for USFS engagement of the tribes when, from the university perspective, the conclusion was inevitable due to the Arizona-Idaho Conservation Act's allowance for necessary support facilities. The forest supervisor blamed ACHP: "the Council has consulted only with certain representatives of the involved tribes and not with all consulting parties. This pattern of selective and undisclosed consultation and negotiation has . . . contributed to a sense of mistrust concerning the Council's motives and ultimate objectivity in the consultation process."⁸⁹

The supervisor's rebuke can be applied more broadly. Unbeknownst to the other parties and prior to the first consultation meeting, the university engaged lawyers and lobbyists to assure that the microwave system would be installed as planned.⁹⁰ The microwave monopole installed in 2006 was prepurchased and ready to install in August 2004, when the university initiated unauthorized construction.⁹¹ When Department of Agriculture attorneys countered university arguments that no NHPA review was required, the university claimed that the safety of MGIO personnel was at risk due to "unreliable" communications.⁹² Just four days after the initial consultation meeting, a candid e-mail to Buddy Powell, the MGIO director, from a university representative in the NHPA process revealed and sought to remedy the lack of good faith participation by MGIO, imploring,

Do not send the monopole up the mountain. This is a very bad idea.

1. It puts a lie to all John [Ratje] and I said at the meeting on 10 December 2004 that we would not do any additional work . . . until consultation is done. . . . 2. It will be perceived yet again that we are

not serious about consultation—that we are just giving lip service to mollify the Apaches and their concerns. It will be interpreted that we plan to go ahead, perhaps even that we are working other angles to go ahead with this (Congress, Graham County, etc.). 3. **It will undermine any hope/chance of improving the process.** . . . Once again, we say one thing in a meeting then go behind the scenes. . . . I (along with the rest of us) will be labeled a liar or at best an ineffective gofer. . . . **It makes us dishonest.**⁹³

Powell never made good on his threat to continue with the illegal installation, but MGIO operatives proceeded with surreptitious plans to undermine and short circuit the NHPA review and President Likins's attempts to establish a dialogue with the Apaches.⁹⁴

University and federal officials held teleconferences and meetings with various elected and agency representatives during the NHPA review and without informing the other parties or sharing the results.⁹⁵ When ACHP initially refused to sign the MOA, the university postured with indignation: "ACHP comments . . . do not acknowledge the two years of good faith effort undertaken by the USFS, SHPO, and UA to address the concern and arrive at realistic solutions."⁹⁶ When this failed and ACHP remained unconvinced, the university deployed tactics used in 1988 to exempt MGIO from environmental and endangered-species protection laws, and again in 1997 to invalidate the Ninth Circuit injunction against LBT construction.

This time the university and its lobbyists had groomed Congressman Rick Renzi and Senator John Kyl.⁹⁷ University officials set the agenda for an 11 November 2005 meeting among Renzi, Department of Agriculture Undersecretary and former timber industry lobbyist Mark Rey, Graham County Supervisor Mark Herrington, Steward Observatory Director Peter Strittmatter, and Buddy Powell.⁹⁸ The outcome was Rey's suggestion to contact John Nau, the ACHP chairman.⁹⁹ On 1 and 18 December 2005, and again on 11 January 2006, Powell signed letters to Nau and ACHP Executive Director John Fowler. In February, Renzi and Kyl sent a trumped-up congressional inquiry letter to Rey, again claiming that the microwave equipment was essential to MGIO personnel safety.¹⁰⁰

The political barrage is the only explanation available for John Nau's otherwise unjustified and suspicion-inviting decision to abandon previous ACHP commitments and authorize an MOA that excluded Apache and SHPO participation and perspectives.¹⁰¹ Although there was never a documented explanation, there was celebration. The USFS regional archaeologist wrote to Klima, "Amazed that you were able to orchestrate a success out of this. . . . This is a much more positive outcome for everyone."¹⁰²

This foolish statement from a senior USFS representative aptly reflects federal and university officials' view of the NHPA process and the Apaches' consultations as an inconvenience. There is almost no indication of university or federal agency attempts to think or act constructively in response to Apache concerns or of USFS or ACHP intention to discharge Indian and public trust responsibilities by avoiding and reducing harms to Dził Nchaa

Si An and the people who rely upon it. The White Mountain Apache tribe summed up the process as a “definitive example of bad faith consultation,” observing that USFS willingness

to impose consultation terms unfavorable to all except the undertaking proponent, and to then terminate the consultation when the non-proponent signatory and consulting parties object to the imposition sets a dangerous and untenable NHPA procedural precedent. . . . The White Mountain Apache Tribe has been a cooperative and constructive participant in NHPA processes relating to our sacred mountains for more than a decade, patiently awaiting the arrival of the evenhandedness, good faith, and attention to trust responsibility that underlie all good governance. We have collaborated freely . . . working within the imperfect confines of NHPA. . . . Yet the disrespect for our lands, our people, and our culture persists and now dramatically escalates as USFS abandons most of its fiduciary and statutory responsibilities in order to provide expedited and possibly unnecessary special service.¹⁰³

DISCUSSION: CONSULTATION CASE STUDY AS CAUTIONARY TALE

Like any decent case study, the Mount Graham microwave NHPA episode tells a compelling story, sheds clarifying light on similar phenomena, and prompts critical discussion of ways to do things better. Although the microwave case is unique, it is also representative in that the USFS has yet to take Apache concerns to heart, employ its discretionary authority, and inform a proponent of a project on Mount Graham—MGIO, Arizona Department of Transportation, City of Safford, and so forth—that the proposed undertaking is harmful to Dził Nchaa Si An and the Apache people and shall not proceed.

Although Mount Graham’s case history appears to be unique and complex, the unbroken string of decisions favoring MGIO alteration and desecration points to a single rationale for discretionary desecration. Far more than federal law and policy per se, we think the pattern of desecrating decisions stems from habitual federal agency prioritization of multiple-use mandates over American Indian and public trust responsibilities. In this and almost all other cases involving American Indian sacred sites, NHPA implementation has heralded destruction and defilement, not preservation. This case study and the generally dismal treatment of American Indian sacred sites on public lands indicate the need for strategic advocacy to influence the American public, agency officials, proponents of desecrating actions, and courts. The seemingly reasonable presumption that these entities will seek to understand and deal justly with sacred-site issues is, sadly, unjustified, even naïve.

As we await direct legislative protection of sacred sites and “top-down” reform of NHPA implementation, parties to NHPA reviews of actions that adversely affect sacred sites have the opportunity to work together. Our suggestion is that these collaborations work from the “bottom up” to create

better, more rigorous, complete, and accessible Section 106 and National Environmental Policy Act processes that create more balanced and considerate outcomes.¹⁰⁴ Because of the centrality of consultation to the success of Section 106 and other processes relating to sacred-site protection, we call for greater attention to four overlapping consultation standards: respect and balance; timeliness and appropriate breadth; completeness and appropriate depth; and transparency.¹⁰⁵

Grounded in our personal experience in hundreds of multiparty processes, as well as recent work to identify “best consultation practices,” these standards suggest pathways to principled terms of engagement, as well as baselines for assessing performance in consultations pursuant to NHPA and other authorities.¹⁰⁶ Because of the many contentious histories of relationships among proponents, agencies, tribes, and other parties, there is ample potential for improved communications and collaborations based on the specification and alignment of common interests. One good place to start is with a shared definition of consultation. Our suggestion: exchange of information and views as part of a good-faith effort to reach consensus.¹⁰⁷

We proceed by reviewing each of these four consultation standards in terms relevant to *Dził Nchaa Si An*, American Indian sacred-sites protection more generally, and interests expressed by place-based communities concerning participation in government decisions that affect them.

Respect and Balance

There is no substitute for sincere consideration of other participants and their perspectives. Respectful attention to individual and organizational aspirations and limitations are foundations for the thought, communication, and action that engender trust, mutually satisfying relationships, and civil society. Even in the context of strict government-to-government relations, consultation occurs between individuals. A professional atmosphere for consultation, grounded in trust, may be a better long-term strategy than reliance on personal relationships and face-to-face communications.¹⁰⁸

Some proven means for relationship building include the up-front recognition of decision-making authorities and the establishment of clear and open communications with at least one duly designated representative from as many as possible of the potentially affected tribes and interested parties. In the ideal world these delegates, as well as the agency officials charged with consultation management, would be individuals interested in, informed about, and empowered to act upon the issues under discussion.

In the real world there are often legitimate suspicions concerning how consultation participants communicate both up and down the chains of command. It is reasonable for all parties to require documentation of delegations of authority for their counterparts and to encourage other parties either to adopt a single official position on a particular issue or to acknowledge that no position will be available within agreed-upon time frames. The presumed unity of the executive branch of the US government allows a single “lead” federal agency to manage processes in which other agencies have interests

without close involvement by those agencies. Some neighboring or closely related tribes also have formal and informal “division of labor” arrangements for consultations.

Problems in the microwave consultation were probably inevitable due to the long and ongoing history of divergent and conflicting interests. The university rejected calls to abandon plans for additional telescopes or to specify a date for the removal of the facilities and the restoration of the mountain. Specific problems in the microwave review arose because MGIO officials evinced only superficial commitments to the process or the other parties. MGIO challenged the authority of the USFS to mandate NHPA compliance, as well as the authority and integrity of representatives from the White Mountain and San Carlos tribes.¹⁰⁹ Apache representatives raised concerns about allowing astronomers to dominate the terms of tribal engagement concerning broader issues in their relationships with the USFS, state of Arizona, and University of Arizona. The forest supervisor ultimately responsible for deciding whether to authorize the microwave installation and how to reduce and avoid the microwave system’s adverse effects to the mountain did not attend the consultation meetings. Only with the microwave system installed, and the Apache frustration complete, have federal officials made overtures to engage in government-to-government communications.¹¹⁰

Mutual respect may remain elusive in light of the pro-project imbalance that has come to dominate NHPA reviews. This bias was not contemplated or foreseen in the creation of NHPA in 1966. The law’s preamble states, “historic and cultural properties . . . should be preserved as a living part of our community life and development in order to give a sense of orientation.”¹¹¹ But NHPA’s intent is regularly subordinated to changing definitions of progress and responsive government.¹¹²

As noted above, NHPA is too often treated as a procedural hurdle, or part of a compliance checklist, rather than a tool for preserving historic properties, improving federal decision making, or remedying both immediate and transgenerational impacts of damage to and desecration of places and lands having cultural and religious significance. During the microwave-system consultations, federal and university officials structured the NHPA process to create an illusion of procedural compliance rather than to analyze, avoid, and reduce adverse effects. Agencies dedicated vast amounts of staff time to expediting the Section 106 process, justifying inattention to Apache concerns, and creating a legally defensible compliance record. If any serious deliberations focused on NHPA-mandated avoidance and reduction of adverse effects, these were not documented in agency or university records.

Timeliness and Appropriate Breadth

Beginning consultation while projects and programs are in the early planning stages, and before commitments are made, may be the single best means for engaging the broadest range of relevant topics and appropriate solutions to real and perceived concerns. Early consultation may mean discussion about the consultation process, including diligence to ensure that all parties

are aware of each step in the process, of how and why the steps are to be taken, of the junctures at which decisions will be made, and of the ambit of decision-maker discretion. Starting early and involving all parties in subsidiary decisions about consultation processes, formats, agenda, time lines, and contingencies improves prospects for a final, consensus decision.

The USFS failed to include several key issues in the microwave consultation process, including the specific identification of the area of potential effect for the microwave system, the measures to be employed for the identification of prospective historic properties, and the format and time lines for the process.¹¹³ The USFS was clear and consistent in declaring that it lacked the authority to disallow the microwave replacement to proceed but neglected to clarify and focus the consultation upon those issues subject to agency discretion—most notably measures for avoiding and reducing adverse effects. The NHPA review would likely have been facilitated by an early determination of whether the process was going to include efforts to agree on more general management issues or merely serve as a model for future consultations. In the end, it detracted from both.

Completeness and Appropriate Depth

Successful consultation includes opportunities for distinctive and detailed consideration of each consulting party's issues and concerns. Commonalities and divergences among consulting parties may be employed to structure consultations. For example, individual meetings or portions thereof might be allocated for presentations or discussions focused on specific parties, with reports being shared with all. Each party might be given the opportunity to host a consultation or have primary responsibility for all or part of a meeting agenda. It may be advisable for each party or groups of parties to have the exclusive attention of decision makers, and for each to have equal time. Similar considerations indicate that employing information and perspective from one party to assess or address issues of potential interest to a second party should be avoided, as should the pursuit of multiple points of contact in order to identify individuals or organizations more likely to provide sensitive or accommodating information.

Creating opportunities for consulting parties to provide firsthand accounts of the issues they know and care about is invaluable. Visits to project areas and other landscapes are often optimal contexts for consultation. Authoritative publications and experts not recognized by the parties may provide important background information and suggest topics for discussion, but these sources should not be given precedence over first-person knowledge and representation, especially when sacred sites and privileged knowledge are involved. Wherever appropriate, knowledgeable leaders or specialists should be engaged as full partners or hired with mutual consent to assist in meeting proponent or agency responsibilities for large, complicated, or controversial projects or activities.

Although a well-established unity of Western Apache perspectives has prevented such issues from detracting from the microwave consultation, it

might have been useful for the USFS also to engage non–Western Apache tribes with interests in Mount Graham. In this and other ways, the federal parties (USFS, ACHP, and FCC) neglected fiduciary duties obligating trustees to optimize advantages for beneficiaries. Explicit recognition of tribes’ rights, privileges, and opportunities to influence agency decision making might have helped to ease tribal representatives’ legitimate suspicions or promote federal officials’ effective communications.

Transparency

Consistent and unequivocal disclosure of relevant authorities, obligations, and goals by all parties is a sure path to understanding government decisions, even when the parties do not agree with the decision. High-integrity consultation processes are built upon respectful and definitive statements of the purpose and scope of the consultation, including applicable legal and policy mandates and schedule milestones. Ensuring consulting parties’ access to all data used in decision making may demystify the process and facilitate understanding and accounting of the range of issues and values at stake.

Enhancing access to information and process must be clearly distinguished from creating any obligation for parties to assume agency duties or responsibilities without fair compensation or to participate in project planning or consultation processes in which they have no interest. When representatives do contribute beyond the scope of the consultation, their contributions should be fully acknowledged and compensated when appropriate. Recognition of the costs associated with consultation and creative collaboration to reduce and share financial and time commitments can engender trust and foster efficiencies and consensus building. When mistrust persists to the point of impeding communications, as it too often does in consultations relating to federal undertakings affecting sacred sites, it may be useful to shift the consultation focus to procedural matters, such as the use of a professional facilitator or mediator known or acceptable to the parties. It may also be helpful to reduce or relax time pressures that can distort the process and defeat its purpose.

The NHPA review for the Mount Graham microwave system suggests many avenues for increasing transparency. Despite repeated calls from Apache representatives to evaluate critically university claims for the microwave system as a “necessary support facility” and to consider alternatives, the USFS and FCC accepted the MGIO needs assessment and system design without any independent technical review. The Apaches’ federal trustees should have taken to heart the Apache suspicions that the microwave system would be installed in accord with the original plan regardless of the Section 106 outcome. The agencies should have investigated this allegation and, at a minimum, informed the Apaches or other consulting parties of this debilitating encumbrance on the consultation process.

FINAL THOUGHTS

When embarked upon with good faith and open minds, consultations concerning sacred sites may guide agencies and other parties to deeper and broader understanding of lands and peoples, and toward inclusive and balanced cultural and ecological heritage stewardship policy and practice. As is true for any disciplined commitment, the adoption of the foregoing consultation standards and principles entails substantial investments, most especially in communications and learning to listen more fully. As a gateway to understanding others, true listening stimulates questions relevant to all parties. Experience and study of consultation appears to be converging on the general formula that respect and listening lead to trust, trust to collaboration, collaboration to success, and success to subsequent success.

Safeguarding places sacred to communities that lack the political, social, and economic power to do so independently is the sort of atonement and generosity likely to be required in the face of mounting global demographic, resource, and ecological challenges. American Indian sacred sites are among the sources of the wisdom that humanity will likely need to meet such challenges. Lamentably, these continue to be disregarded, desecrated, and destroyed—sacrificed on altars of greed and caprice. Until Congress commits its plenary powers to the protection of sacred sites, and leaving aside options for negotiation and direct action, tribes and other sacred-site protectors must make the best of the limited legal and procedural tools available. By obliging tribes to act as supplicants, prevailing NHPA protocol relegates pleas for basic respect and religious freedom to case-by-case consultations, agency decision making, and the uncertainties of Washington and special-interest power brokering.

Even on federal lands, where the government enjoys wide discretion over development activities and solemn responsibility to discharge their public trust and Indian fiduciary duties, sacred sites seldom benefit from protections on par with those accorded to other kinds of historic properties. Sacred sites deemed holy and worthy of utmost respect too often receive less protection under NHPA than common buildings, bridges, or artifacts. Disparities between the limited protections afforded sacred sites and the widespread consideration given to nonsacred American Indian cultural objects further underscore the institutionalized biases against place-based American Indian religion. Adding insult to injury, the USFS and other federal agencies entrusted with the management of lands recently used and occupied by American Indians are routine in their inattention to trust responsibility. This fiduciary duty could and should be applied to everything from basic consultations, to decisions about sacred-sites protection, to standard agency operating procedures.¹¹⁴ That this is not so flies in the face not only of the Trust Doctrine but also of published agency policies.¹¹⁵ Desecration does not have to happen but is likely to continue until the “culture” of federal land management embraces American Indian trusteeship or Congress provides further, more specific direction.

The case study offered here provides an example of how NHPA can be followed to the letter without a hint of commitment to or achievement of its core purpose of protecting highly significant cultural, religious, and historical sites. The Apache representatives participated continuously and vigorously in consultations with their federal-agency trustees and other parties, providing unambiguous requests from respected elders and elected officials for decisions that would have avoided and reduced the adverse effects of the microwave system on Dził Nchaa Si An. These requests were systematically and deliberately disregarded and had no measurable impact on any USFS decision.

The cautionary tale here is that the public face of consultation is often little more than the tip of an iceberg of federal agency communications with special interests. Tribes and sacred-site protection advocates face great challenges in seeking to influence agency discretion or achieve sacred-site protection.¹¹⁶ Dził Nchaa Si An thus emerges as a “tragic precedent in the protection and perpetuation of Apache culture, in the proper and meaningful conduct of federal agencies’ tribal consultations pursuant to fiduciary and statutory responsibilities, and in the evenhanded and objective management of public lands and resources.”¹¹⁷

Embedded in all great challenges, however, are great opportunities. We close with a final call for some combination of fully defensible sacred-site legislation; respectful, equitable, efficient, and transparent NHPA consultation protocols; and basic human compassion for the plight of dispossessed persons. Our continuing failure to provide equal protection for American Indian religions and religious sites is far more than a blemish on our national honor.¹¹⁸ Gross negligence in our defense of American Indians from the “tyranny of the majority” and in our extension of the full benefits of liberty to the Native Americans we have claimed authority over and upon whose lands we live and prosper constitutes a potentially fatal flaw in our national character and our dedication to the principles underlying our Constitution and shared vision.¹¹⁹ We must, as a nation, either do better or relinquish our claims to greatness.

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We are profoundly grateful for the opportunities given to us to learn and grow in the shade of Apache elders and places. Ola Cassadore-Davis, Jeanette Cassa, Levi Dehose, Ronnie Lupe, Raymond Kane, and Eva Watt deserve special recognition. Mark Altaha, Chip Colwell-Chanthaphonh, Mike Davis, Doreen Gatewood, Vern Grant, Nicholas Laluk, Karl Hoerig, Wendsler Nosie Sr., Alexander Ritchie, Robin Silver, Bob Witzeman, and various reviewers assisted in preparing this article. Most correspondence relating to the MGIO microwave system was obtained through public records requests submitted by the White Mountain Apache tribe to the FCC, USFS, ACHP, Arizona State Historic Preservation Office, and the University of Arizona. Documentary reviews were conducted through the White Mountain Apache tribe legal department in Whiteriver, Arizona, or the tribe’s Historic Preservation Office at Fort Apache, where all unpublished documents referenced in this article are archived, unless otherwise indicated.

NOTES

1. Vine Deloria Jr., "Sacred Lands and Religious Freedom," *American Indian Religions* 1 (1994): 79.

2. See David L. Carmichael, Jane Hubert, Brian Reeves, and Audhild Schanche, eds., *Sacred Sites, Sacred Places* (London and New York: Routledge, 1994); Peter Nabokov, *Where the Lightning Strikes* (New York: Viking, 2006); Steven Newcomb, *Pagans in the Promised Land: Decoding the Doctrine of Christian Discovery* (Golden, CO: Fulcrum Publishing, 2008); Robert Wild and Christopher McLeod, eds., *Sacred Natural Sites: Guidelines for Protected Area Managers*, World Commission on Protected Areas Best Practice Protected Area Guidelines Series No. 16 (Gland, Switzerland: International Union for Conservation of Nature and Natural Resources, 2008). For consistency with federal authorities pertinent to this discussion, we use the word *religious* instead of *spiritual*.

3. See S. James Anaya and Robert A. Williams Jr., "The Protection of Indigenous Peoples' Rights over Lands and Natural Resources under the Inter-American Human Rights System," *Harvard Human Rights Journal* 14, no. 33 (2001), <http://www.law.harvard.edu/students/orgs/hrj/iss14/williams.shtml> (accessed 10 September 2008); *US News and World Report*, "Sacred Places," journal staff cover story and articles with no authors listed (26 November 26–3 December 2007); recent Australian legislation includes the *Queensland Aboriginal Cultural Heritage Act* (2003) and the *Northern Territory Aboriginal Sacred Sites Act* (2004).

4. Charles F. Wilkinson, *American Indians, Time, and the Law* (New Haven, CT: Yale University Press, 1987); David E. Wilkins and K. Tsianina Lomawaima, *Uneven Ground, American Indian Sovereignty and Federal Law* (Norman: University of Oklahoma Press, 2001), 65–97; Ian Lilley, "Professional Attitudes to Indigenous Interests in the Native Title Era," in *Native Title: The Transformation of Archaeology in the Postcolonial World*, ed. Ian Lilley (Walnut Creek, CA: Left Coast Press, 2000), 99–119; Valeria Taliman, "United States Opposes Declaration on Native Rights," *Indian Country Today* (21 November 2006), <http://www.indiancountry.com/content.cfm?id=1096414049> (accessed 7 April 2008); United Nations Non-Governmental Liaison Service, "General Assembly Adopts Declaration on the Rights of Indigenous People," http://www.un-ngls.org/site/article.php?id_article=343 (accessed 30 March 2008). The Declaration was adopted over objections from Canada, New Zealand, and the United States.

5. Mount Graham International Observatory (hereinafter cited as MGIO) is part of Steward Observatory, the research arm for the University of Arizona Department of Astronomy. See University of Arizona, "Mount Graham International Observatory," <http://mgpc3.as.arizona.edu/> (accessed 30 March 2008). See also, Joel Helfrich, Dwight Metzger, and Michael Nixon, "Native Tribes Struggle to Reclaim Sacred Sites," *Pulse of the Twin Cities*, 1 June 2005, <http://pulsetc.com/article.php?sid=1865> (accessed 30 March 2008).

6. See Keith H. Basso, "Western Apache," in *Southwest*, vol. 10 of *Handbook of North American Indians*, ed. Alfonso Ortiz and William C. Sturtevant (Washington, DC: Smithsonian Institution, 1983), 462–88. Hopi, Navajo, Tohono O'odham, and Zuni tribes, as well as the Salt River Pima-Maricopa Indian Community, have identified the mountain as sacred or important in tribal heritage, see Mary M. Farrell, "Proposed MGIO Permit Renewal Determination of Effect," Heritage Resources Report 2008-05-076 (Tucson, AZ: Coronado National Forest, 7 April 2008).

As is true for many prominent landforms in historically and politically contested geographies, the mountain range that is the subject of this article has various names in various languages. Today, in the predominantly English-speaking state of Arizona, the range is most commonly called the “Graham Mountains” or, in reference to one of its highest peaks, simply “Mount Graham.” Another commonly used referent to the range, “Pinalenos,” is the most persistent name inherited from Spanish speakers who sought control over mountains and surrounding territories in the 1700s and 1800s. “Big Seated Mountain” is our translation for Dził Nchaa Si An, the most widely recognized name for the range among speakers of the Western Apache language.

7. The *National Historic Preservation Act* (hereinafter cited as NHPA) mandates federal agency consideration of the effects of projects on “historic properties” (meaning places, structures, and objects with historical significance). The act also establishes the National Register of Historic Places, State and Tribal Historic Preservation Officers (hereinafter cited as SHPOs and THPOs), and a grants program. See 16 U.S.C. § 470 et seq., and 36 *Code of Federal Regulations* (hereinafter cited as *CFR*), pt. 800 et seq. For links to statutes, regulations, and interpretive guidance, see the President’s Advisory Council on Historic Preservation (hereinafter cited as ACHP), <http://www.achp.gov/work106.html>; for a flow chart, see <http://www.achp.gov/regsflow.html> (both accessed 30 January 2008). For discussion of NHPA processes, see Thomas F. King, *Federal Planning and Historic Places: The Section 106 Process* (Walnut Creek, CA: AltaMira Press, 2000). Regarding tribal involvement in the federal historic preservation program, see Alan Downer, “Native Americans and Historic Preservation,” in *A Richer Heritage: Historic Preservation in the Twenty-First Century*, ed. Robert E. Stipe (Chapel Hill: University of North Carolina Press, 2003), 405–21.

8. An anonymous reviewer of our article aptly critiqued the use of Euro-American worldviews and existential categories to understand American Indian spirituality. The critique underscored the relational ways of knowing that bind many Native Americans to other-than-human persons (including some sacred sites) in “webs of interdependent reciprocity.” Per the reviewer’s suggestion, see Kenneth M. Morrison, *The Solidarity of Kin: Ethnohistory, Religious Studies and the Algonkian-French Religious Encounter* (Albany: State University of New York Press, 2002) and Tisa Wenger, *We Have a Religion: The 1920s Pueblo Dance Controversy and American Religious Freedom* (Chapel Hill: University of North Carolina Press, 2009). For Western Apache land linkages, see Keith H. Basso, *Wisdom Sits in Places* (Albuquerque: University of New Mexico Press, 1996).

9. Deloria distinguishes four types of sacred sites: places where people gave their lives for their convictions, places where holy powers altered the course of human history, places where higher powers have revealed themselves, and places made sacred by new revelations. See Deloria Jr., “Sacred Lands and Religious Freedom,” 73–83.

10. For an enlightening presentation of the origins of federal Indian law and policy, especially within the contexts of religion, economy, morality, and cognition, see Newcomb, *Pagans in the Promised Land*. Authoritative reviews of judicial decisions and legislative and executive branch acts and principles of engagement regarding American Indian sacred sites include Sharon L. O’Brien, “Freedom of Religion in Indian Country,” *Montana Law Review* 56 (1995): 451, 478–83; Allison M. Dussias, “Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases,” *Stanford Law Review*

49, no. 773 (1997): 823–33; Brian Edward Brown, *Religion, Law, and the Land: Native Americans and the Judicial Interpretation of Sacred Land* (Westport, CT: Greenwood Press, 1999); George Linge, “Ensuring the Full Freedom of Religion on Public Lands: Devils Tower and the Protection of Indian Sacred Sites,” *Environmental Affairs Law Review* 27 (2000): 307–39; Kristin A. Carpenter, “In the Absence of Title: Responding to Federal Ownership in Sacred Sites Cases,” *New England Law Review* 37, no. 3 (2003): 319–33; Kristin A. Carpenter, “Old Ground and New Directions at Sacred Sites on the Western Landscape,” *Denver University Law Review* 83 (2006): 981–1002; Carla Mattix and Stan N. Harris, “Sacred Sites and Cultural Resource Protection: Implications for Mineral Development on—and off—Indian Lands” (2006), http://www.modrall.com/articles/article_149.html# (accessed 2 February 2007); Joseph E. Hardgrave, “Hell on Earth: The Desecration of Sacred Indian Land Needs a Final Solution,” *Selected Works* (2007), http://works.bepress.com/joe_hardgrave/2/ (accessed 30 January 2008).

11. Janet Reno, “Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes,” memorandum dated 1 June 1995, <http://www.usdoj.gov/ag/readingroom/sovereignty.htm> (accessed 20 October 2007).

12. Justice Frank Murphy, opinion in *Seminole Nation v. U.S.*, 316 U.S. 286, 296–97 (1942).

13. President William J. Clinton, memorandum dated 29 April 1994 to all US federal agency heads regarding “Government-to-Government Relations with Native American Tribal Governments,” <http://www.hanford.gov/?page=588&parent=583> (accessed 20 October 2007); Mary Christina Wood, “Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited,” *Utah Law Review* 108 (1994): 1471–1569; Mary Christina Wood, “Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources,” *Utah Law Review* 1 (1995): 109–238.

14. The *Indian Tribal Justice Act*, 25 U.S.C. § 3601, Cornell Law School, http://www.law.cornell.edu/uscode/html/uscode25/usc_sec_25_00003601---000-.html (accessed 1 October 2007).

15. *Nance v. E.P.A.*, 645 F.2d 701, 711 (9th Cir. 1981); *Pyramid Lake Paiute Tribe v. Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990). Furthermore, “the United States, as a trustee for the Tribes, has a responsibility to protect their rights and resources,” *Klamath Water Users Protective Ass’n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 2000), *cert. denied sub. nom. Klamath Drainage District v. Patterson*, 531 U.S. 812 (U.S. 2000). In the absence of a specific duty, this responsibility is discharged by “the agency’s compliance with general regulations and statutes not specifically aimed at protecting Indian tribes.” *Morongo Band of Mission Indians v. Federal Aviation Administration*, 161 F.3d 569, 574 (9th Cir. 1998). As the Supreme Court has made clear, “Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required. . . . The overriding duty of our Federal Government to deal fairly with Indians wherever located has been recognized by this Court on many occasions.” *Morton v. Ruiz*, 415 U.S. 199, 235–36 (1974) (citing, *Seminole Nation v. U.S.*, n. 11). See also, *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985): “The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians.”

16. The 20-member ACHP consists of representatives from major land-managing agencies and presidential appointees supported by a professional staff. For details on ACHP participation in consultation, see “Policy Statement Regarding the ACHP’s Relationships with Indian Tribes,” adopted 17 November 2000, <http://www.achp.gov/policystatement-tribes.html> (accessed 30 October 2007). For an argument that federal trust responsibility should extend to the protection of American Indian sacred sites, see Jeri Beth K. Ezra, “The Trust Doctrine: A Source of Protection for Native American Sacred Sites,” *Catholic University Law Review* 38 (1989): 705–36.

17. *Reynolds v. United States*, 98 U.S. 145 (1879), see Matix and Harris, “Sacred Sites and Cultural Resource Protection,” n. 193.

18. For the three criteria of the so-called Lemon test, see Carpenter, “Old Ground and New Directions,” n. 56.

19. *American Indian Religious Freedom Act of 1978* (hereinafter cited as AIRFA), P.L. 95-431, 92 Stat. 469, 42 U.S.C. 1996; Robert S. Michaelsen, “The Significance of the American Indian Religious Freedom Act of 1978,” *Journal of the American Academy of Religion* 52, no. 1 (1984): 93–115; Walter Echo-Hawk, Lenny Foster, and Alan Parker, “Issues in the Implementation of the American Indian Religious Freedom Act: Panel Discussion,” *Wicazo Sa Review* 19, no. 2 (2004): 153–67.

20. First Amendment to the Constitution of the United States, Cornell Law School, http://www.law.cornell.edu/supct/html/historics/USSC_CR_0485_0439_ZS.html (accessed 7 November 2007).

21. “Even if we assume that . . . the [logging] road will virtually destroy the . . . Indians’ ability to practice their religion, the Constitution simply does not provide a principle that could justify upholding [the plaintiffs’] legal claims.” Justice Sandra Day O’Conner, majority opinion (451–53), Cornell University Law School, “Supreme Court Collection,” http://www.law.cornell.edu/supct/html/historics/USSC_CR_0485_0439_ZS.html (accessed 30 March 2008). The *Lyng* decision opened the door to establishment clause considerations by specifically noting that the government’s rights to use public lands should not discourage it from accommodating American Indian religious uses.

22. FindLaw, <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=494&invol=872> (accessed 7 November 2007).

23. 107 Stat. 1488, 42 U.S.C. § 2000bb.

24. *City of Boerne v. Flores*, 521 U.S. 507 (1997), <http://www.law.cornell.edu/supct/html/95-2074.ZS.html> (accessed 7 September 2008).

25. *Religious Land Use and Institutionalized Persons Act*, P.L. 106-274, 42 U.S.C. § 2000cc-1 et seq.

26. In *Navajo Nation and others v. U.S. Forest Service and others*, a case decided 8 August 2008, the US Court of Appeals for the Ninth Circuit found that US Forest Service (hereinafter cited as USFS) authorization of ski-area expansion and accompanying daily use of up to 1.5 million gallons of reclaimed wastewater for snowmaking do not substantially burden Hopi, Navajo, Apache, Havasupai, and Hualapai religious use of the San Francisco Peaks, AZ. The majority ruling found that the plaintiffs did not prove that the proposed action would either coerce them to act contrary to their religious beliefs or condition a governmental benefit upon conduct that would violate their religious beliefs. This narrow definition of *substantial burden* now stands as precedent for the *Religious Freedom Restoration Act of 1993* (hereinafter cited as RFRA) claims

brought to protect sacred sites in Arizona. In the dissenting opinion, Judge Fletcher laments that, “RFRA was passed to protect the exercise of all religions, including the religions of American Indians. If Indians’ land-based exercise of religion is not protected by RFRA in this case, I cannot imagine a case in which it will be. I am truly sorry that the majority has effectively read American Indians out of RFRA,” see William A. Fletcher, p. 10137.

The Ninth Circuit’s RFRA rationale was rejected in a subsequent case in the federal Western District of Oklahoma in *Comanche Nation and others v. U.S. and others*, Civ. No. 08-849-D (order granting preliminary injunction, dated 23 September 2008). In that case, too, the court found federal officials had committed bad faith violations of the NHPA: “the evidence in the present case suggests that Defendants merely paused, glanced, and turned a deaf ear to warnings of adverse impact. Thus, Defendants’ efforts fell short of the reasonable and good faith efforts required by the law.”

27. NHPA Amendments of 1992, P.L. No. 102-575, title XL, 106 Stat. 4600, 4753-65 (amending 16 U.S.C. §§ 470-470x-6); NHPA (16 U.S.C. § 470(b)).

28. Patricia L. Parker and Thomas F. King, “Guidelines for Evaluating and Documenting Traditional Cultural Properties,” *National Register Bulletin* 38 (Washington, DC: National Park Service, 1990), 1.

29. Executive Order no. 13007, 61 *Federal Register* 26,771 (1996), see <http://www.nps.gov/history/local-law/eo13007.htm> (accessed 28 March 2008.)

30. Hardgrave, “Hell on Earth,” n. 9.

31. Peter Warshall, “The Biopolitics of the Mt. Graham Red Squirrel (*Tamiasciurus Hudsonicus Grahamensis*),” *Conservation Biology* 8, no. 4 (1994): 977–88; Peter Warshall, “The Heart of Genuine Sadness: Astronomers, Politicians, and Federal Employees Desecrate the Holiest Mountain of the San Carlos Apache—Pinaleño Mountains, Arizona,” *Whole Earth* 91 (Winter 1997), http://findarticles.com/p/articles/mi_m0GER/is_n91/ai_20116005/?tag=content;coll (accessed 14 August 2009); Mark T. Porath and Jennifer L. Nielsen, “Evidence of Sexually Dimorphic Introgression in Pinaleño Mountain Apache Trout,” *North American Journal of Fisheries Management* 23 (2003): 172–80; University of Arizona, “Pinaleño Mountains,” <http://ag.arizona.edu/research/redsquirrel/pinaleno.html> (accessed 16 September 2007).

32. T. W. Swetnam and P. M. Brown, “Oldest Known Conifers in the Southwestern United States: Temporal and Spatial Patterns of Maximum Age,” in *Old-Growth Forests in the Southwest and Rocky Mountain Regions, Proceedings of a Workshop*, ed. M. R. Kaufmann, W. H. Moir, and R. L. Bassett (Fort Collins, CO: USDA Forest Service General Technical Report RM 213, 1992), 24–38; Henry D. Grissino-Mayer and Harold C. Fritts, “Dendroclimatology and Dendroecology in the Pinaleño Mountains,” in *Storm over a Mountain Island: Conservation Biology and the Mt. Graham Affair*, ed. Conrad A. Istock and Robert S. Hoffmann (Tucson: University of Arizona Press, 1995), 100–20.

33. Elizabeth A. Brandt, “The Fight for Dził Nchaa Si’an, Mt. Graham: Apaches and Astrophysical Development in Arizona,” *Cultural Survival Quarterly* (Winter 1996): 50–57; John R. Welch, “White Eyes’ Lies and the Battle for Dził Nchaa Si’an,” *American Indian Quarterly* 21 (1997): 75–109; Patricia M. Spoerl, “Determination of Eligibility for the National Register of Historic Places, Mt. Graham (*Dził nchaa si’an*),” prepared under an agreement with the University of Arizona and submitted to the Keeper of the National Register of Historic Places (Tucson, AZ: Coronado National Forest, 2001); Mary M. Farrell, “Proposed MGIO Permit Renewal Determination of

Effect,” Heritage Resources Report 2008-05-076 (Tucson, AZ: Coronado National Forest, 7 April 2008).

34. After many years of refuting USFS attempts to restrict the size of the land area holy to Western Apaches, the tribes accepted the entire “Pinaleno Management Unit” (all USFS-managed lands in the vicinity) as the boundaries for the Dził Nchaa Si An sacred site and historic property. The holy area actually includes all waters, mineral, plants, and animals derived from the mountain, thus encompassing, at a minimum, thousands of acres of state of Arizona and US Bureau of Land Management lands adjacent to the USFS unit. This issue will be revisited in conjunction with the ongoing preparation of a multiproperty National Register nomination for Western Apache holy mountains.

35. Edward H. Spicer, *Cycles of Conquest* (Tucson: University of Arizona Press, 1962). For an examination of why Apaches are more likely to be targeted for abusive treatment than American Indian village-dwelling farming peoples, see Welch, “White Eyes’ Lies.”

36. Ralph H. Ogle, *Federal Control of the Western Apaches, 1848–1886*, Historical Society of New Mexico, *Publications in History*, vol. 9 (Albuquerque: University of New Mexico, 1940), 64–65.

37. George W. Webb, *Chronological List of Engagements between the Regular Army of the United States and Various Tribes of Hostile Indians which Occurred during the Years 1790 to 1898, Inclusive* (St. Joseph, MO: Wing Printing and Publishing, 1939).

38. See Ulysses S. Grant executive orders of 9 November 1871; 5 August 1873; 21 July 1874; 27 April 1876.

39. Bruno J. Rolak, “General Miles’ Mirrors: The Heliograph in the Geronimo Campaign of 1886,” *Journal of Arizona History* 16, no. 2 (1975): 145–60.

40. Earle R. Forrest, “The Fabulous Sierra Bonita,” *Journal of Arizona History* 6, no. 3 (1965): 132–47; Allen Bertell and Cherrel B. Weech, “A History of Mount Graham,” unpublished manuscript on file, Sky Island Alliance, Tucson, AZ (2003).

41. M. Mitchell Waldrop, “The Long, Sad Saga of Mt. Graham,” in Istock and Hoffmann, *Storm over a Mountain Island*, 9–18; John Dougherty, “Making a Mountain into a Starbase: The Long, Bitter Battle over Mount Graham,” *High Country News* 27, no. 3 (24 July 1995): 1, 8–17.

42. Two Web sites illustrate the depth of conflict: compare “Brief Chronology of VATT Development,” <http://clavius.as.arizona.edu/vo/R1024/Chronology.html> (accessed 30 May 2007) with “Chronology of the University of Arizona, Vatican, German and Italian Campaign against Apache Religious Beliefs 1985–1998,” <http://www.mountgraham.org/whitepapers/chrono85-98.html> (accessed 30 May 2007).

43. Conrad A. Istock, “Telescopes, Red Squirrels, Congress, Courtrooms, and Conservation,” in Istock and Hoffmann, *Storm over a Mountain Island*, 19–36. For discussion of bias in *Storm over a Mountain Island*, see Walt Anderson, review of *Storm over a Mountain Island*, by Istock and Hoffman, eds., *The Journal of Wildlife Management* 61, no. 2 (1997): 577–79 and Kathleen A. Hogan, review of *Storm over a Mountain Island*, by Istock and Hoffman, eds., *Science Education* 84, no. 3 (2000): 420–24.

44. See Resolution #SPO-01-063 of the National Congress of American Indians (Washington, DC, 2001); William B. Gillespie, “Apaches and Mount Graham: A Review of the Historical Record,” manuscript on file (Tucson, AZ: Coronado National Forest, 2001).

45. John Dougherty, “Stargate: The Ruthless Pursuit of Astronomical Sums of Cash and Scientific Excellence,” *Phoenix New Times*, 16–22 June 1993, <http://www.phoenixnewtimes.com/1993-06-16/news/star-gate/> (accessed 14 August 2009).

46. Jeffrey St. Clair, "Star Whores: How John McCain Doomed Mount Graham," *Counterpunch* (16 July 2008), <http://www.counterpunch.org/stclair07162008.html> (accessed 9 September 2008). For a transcript of the relevant portion of the McCain meeting, see Mount Graham Coalition, "Setting the Record Straight," <http://www.mountgraham.org/WhitePapers/MNrebuttal.html> (accessed 9 September 2008).

47. Thomas Stauffer, "University of Arizona, American Indians Remain at Odds About Prayer Permits," *Arizona Daily Wildcat*, 25 August 1998; Winona LaDuke, *Recovering the Sacred: The Power of Naming and Claiming* (Cambridge, MA: South End Press, 2005); see also Waldrop, "The Long, Sad Saga of Mt. Graham."

48. The formal "Notification of Determination of Eligibility" for the Pinaleño Management Unit of the Coronado National Forest was signed by the Keeper of the National Register of Historic Places on 30 April 2002 (National Park Service, Washington, DC).

49. Robert A. Williams Jr., "Large Binocular Telescopes, Red Squirrel Piñatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World," *West Virginia Law Review* 96 (1994): 1133–64; S. J. Wilson, "Nosie Acquitted of Trespassing," *Navajo Hopi Observer* (4 February 1998): 1; Booz-Allen and Hamilton Inc., "Final Report, UA Mt. Graham Observatory Review Issues," 23 October 1991 (the report presents a University of Arizona strategy to make "outliers" of Apache opponents to the telescopes through financial enticements to the San Carlos Apache tribe); Tim Vanderpool, "Scarlet Letters: Public Relations Sleazeballs Go Too Far in Defense of the Latest Mount Graham Telescope Project," *Tucson Weekly*, 22 May 1997, <http://www.tucsonweekly.com/tw/05-22-97/curr4.htm> (accessed 7 November 2007).

50. Dougherty, "Making a Mountain into a Starbase"; "The Dark Side: U of A Uses Police Tactics Against Telescope Opponents, Dirty Tricks 101," *Phoenix New Times*, 20–26 October 1993. For details on this and other apparent abuses of power, see Mount Graham Coalition, "1990 U.S. GAO Investigation Revealed the Mt. Graham Red Squirrel Biological Opinion Was a Fraud," <http://www.mountgraham.org/WhitePapers/1990gaoinvest.html> (accessed 7 November 2007).

51. The *Arizona-Idaho Conservation Act of 1988*, P.L. 100-696, 102 Stat. 4571, 1597; *Endangered Species Act of 1973*, P.L. 93-205, 87 Stat. 884, 16 U.S.C. 1531-1544; *National Environmental Policy Act of 1969*, P.L. 91-190, 83 Stat. 852, 42 U.S.C. 4321.

52. Congressman Kolbe inserted an amendment to the *Omnibus Consolidated Rescissions and Appropriations Act of 1997*, sec. 335, to override the Ninth Circuit injunction. That amendment replaced a provision in the act that would have provided funding to the US Indian Health Service for AIDS education programs on reservations.

53. Anne Ryman, "World's Strongest Telescope at Full Power in Arizona," *The Arizona Republic*, 6 March 2008.

54. University police arrested Nosie for criminal trespass in 1997; the case was dismissed in 1998. Nosie made the comments in August 1999, also stating, "Life is not right when it is too easy. You have to suffer for the things God will bless you with," quoted in "Colorado American Indian Movement News," <http://www.coloradoaim.org/blog/2004/05/san-carlos-wont-accept-bribe.html> (accessed 25 May 2008).

55. Dallas Massey Sr., letter to Acting Forest Supervisor Sue Kozacek, 12 November 2003. The son of a preacher and a practicing Christian, Massey consistently supported protection of the mountain during his eight years as chairman of the tribal council. All referenced correspondence, notes, and other unpublished documentation

are on file at the tribe's Historic Preservation Office, Fort Apache, AZ, as well as with the originating agencies and offices.

56. Tribal Council of the White Mountain Apache Tribe, Resolution 12-2003-296, December 2003. On file, White Mountain Apache Tribe, Whiteriver, AZ.

57. John Ratje, MGIO project manager, letter to USFS District Ranger George Asmus, 3 September 2003.

58. In 1993, ACHP agreed with the Apache Survival Coalition and recommended that the USFS conduct Section 106 reviews for all federal undertakings on Mount Graham, including those within the MGIO compound. In 2004, hoping to avoid NHPA review for the proposed microwave system and future MGIO projects, the USFS received a Department of Agriculture Office of General Counsel confirmation of the ACHP opinion that, due to the 1988 law's silence on the matter, NHPA remained in effect. See Jeanine Derby, letter to university Vice President for Research Richard C. Powell, 13 October 2004.

59. J. Derby, letter to Arizona SHPO James Garrison, enclosing cultural resources report 2004-05-099, 13 September 2004.

60. 36 *CFR*, pt. 800 et seq.

61. D. Massey, letter to J. Garrison, 29 September 2004.

62. The proposed licensee in this case, Valley Telecom, was not a formal participant in the NHPA process.

63. Patricia Spoerl and Mary Farrell, "Coronado National Forest Heritage Report 2005-05-016" (Tucson, AZ: Coronado National Forest, January 2005).

64. V. Grant, letter to J. Derby, 31 January 2005, in which Grant reprises previous statements, notably the letter of 19 January 1999 from Jeanette Cassa, of the San Carlos Apache Elder's Advisory Council, to Coronado National Forest archaeologist James McDonald, stating, in part: "God created everything perfect. . . . We have been taught traditionally that disturbing the natural world brings with it serious consequences. Those that would disturb natural areas must be prepared to incur these consequences."

65. The San Carlos Apache tribal council cancelled the meeting on 31 March 2005.

66. R. C. Powell, letter to J. Derby, 1 November 2004, states, "the forest service, by engaging in further consultation and studies, simply opens itself and the project to further claims of non-compliance . . . jeopardizing both the forest service's well-earned credit for compliance with AICA and NHPA and imposing unnecessary delay on the completion of the first three telescopes and associated necessary support facilities." Graham County Supervisor Mark Herrington, letter to regional forester Harv Forsgren, 3 February 2005, urges expedited issuance of permission for the microwave system.

67. Patricia Spoerl and Mary Farrell, "MGIO Proposed Replacement Microwave Communication System Consultation Record," Coronado National Forest Heritage Report 2005-05-035 (Tucson, AZ: Coronado National Forest, May 2005). Coronado National Forest tribal liaison P. Spoerl, e-mail to ACHP and Arizona SHPO, 8 April 2005, states plans for a May consultation meeting.

68. ACHP, "Case Digest—Protecting Historic Properties: Section 106 in Action," http://www.achp.gov/docs/case_winter06.pdf (accessed 25 May 2007). This version of meeting results is affirmed in independent notes taken by Anna Spitz, Mary Farrell, and John Welch. Don Klima, letter to J. Derby, 14 July 2005, "We [ACHP] are perplexed at your July 1 letter, which seems to present the FS's [Forest Service's] final position. . . . We strongly advise the Forest Service to follow through with its June 13

commitments on consultation regarding the microwave tower MOA [memorandum of agreement] and, later, the programmatic agreement.”

69. White Mountain Apache Tribe Heritage Program advisor J. Welch, e-mail to P. Spoerl, 30 July 2005; D. Massey, letter to J. Derby, 18 November 2005.

70. J. Derby, letter to ACHP Executive Director John Fowler, 8 August 2005.

71. J. Fowler, letter to J. Derby, 26 August 2005.

72. J. Derby, letter to D. Massey, 15 August 2005.

73. San Carlos Apache Tribal Council Chair Kathy W. Kitcheyan, letter to J. Derby, 19 August 2005.

74. J. Derby, letter to J. Fowler, 14 October 2005.

75. See 36 *CFR*, sec. 800.6 and 800.7.

76. See undated briefing prepared by ACHP staff for the council members, “Replacement Microwave Communications System, Mount Graham International Observatory, University of Arizona, Coronado National Forest, Arizona: Comment by the Advisory Council on Historic Preservation Pursuant to Protection of Historic Properties (36 *CFR* Part 800) Section 800.7 (c).”

77. USFS Chief Dale Bosworth, letter to ACHP Chairman John Nau, 17 November 2005, invoking 36 *CFR* sec. 800.7(a)(I).

78. ACHP requested comments from consulting parties through letters from J. Fowler dated 6 January 2006 and from the interested public through a notice in the *Federal Register* 71, no. 5 (9 January 2006): 1406–7. The San Carlos Apache tribe responded in Kathy Kitcheyan, letter to J. Nau, 16 January 2006.

79. Yavapai-Apache Chairman Jamie Fulmer; historian Vincent Randall; and Culture Director Elizabeth Rocha, letter to J. Nau, 9 January 2006.

80. MGIO Director Buddy E. Powell, letter to J. Nau, 11 January 2006.

81. White Mountain Apache tribe Cultural Resources Director Ramon Riley and THPO Mark Altaha, letter to J. Nau, 16 January 2006.

82. J. Derby, letter to J. Fowler, 14 February 2006.

83. John Nau, letter to D. Bosworth, 7 March 2006.

84. J. Garrison, letter to J. Fowler and J. Derby, 27 March 2006.

85. J. Garrison, personal communication to J. R. Welch, 7 August 2008: “We’d never seen the thing. The Council and Forest Service left us out of it and from my perspective there were still recommendations to resolve adverse effects on the table and deserving negotiation. . . . The phone was ringing off the hook from [Senator] Kyl’s office and the Governor. Kyl’s staffer read me the riot act.”

86. See 36 *CFR* sec. 800.6(c)(1)(iii), 800.7(a)(2), and 800.7(b).

87. J. R. Welch on behalf of the White Mountain Apache tribe; Vincent Randall, tribal council member, Yavapai-Apache Nation, and historian, Tonto Apache tribe; Vernelda Grant, tribal archaeologist, San Carlos Apache tribe; and Michael V. Nixon, counsel, Mount Graham Coalition, *ex parte* filing to Federal Communications Commission (hereinafter cited as FCC) Secretary Marlene Dortch, 31 May 2006, in the matter of Valley Telephone Cooperative.

88. ACHP Office of Federal Programs Director D. Klima, letter to FCC Spectrum and Competition Policy Division Deputy Chief Jeffrey S. Steinberg, 28 June 2006. The FCC accepted existing NHPA process as adequate per J. S. Steinberg, letter to the participants in the *ex parte* filing, 10 July 2006. Anne Marie Wypijewski made the FCC pledge to conduct NHPA review of the microwave licensing, e-mail to J. R. Welch, 20 October 2004.

89. J. Derby, letter to J. Fowler, 14 October 2005.

90. Strategic Issues Management Group (hereinafter cited as SIMG) principal Joe Carter, e-mail to B. Powell, 2 December 2004, including a report on contacts with Renzi's office and a plan to use Graham County elected officials and funds to expedite the *National Environmental Policy Act* (environmental impact statement) process for another four telescopes.

91. B. Powell, e-mail to MGIO Project Manager J. Ratje, 9 September 2004: "I spoke to Jeanine Derby and told her we could not wait an additional six weeks. . . . We agreed USFS would continue the permit process, but I politely informed her I would proceed with installation, with or without the USFS permit."

92. B. Powell, e-mail to J. Derby, 29 November 2004; B. Powell, e-mail to R. C. Powell, 30 November 2004.

93. Steward Observatory associate Anna Spitz, e-mail to B. Powell, 14 December 2005 (emphases in original).

94. Steward Observatory Director Peter Strittmatter, e-mail to B. Powell and roster of other university officials, undated but likely February or March 2005. The message calls Likins's declaration "exceedingly dangerous."

95. A. Spitz, e-mail to P. Spoerl, 26 January 2005. See also P. Spoerl, e-mail to USFS and university officials, 22 July 2005, reviewing MOA clauses not shared with SHPO or tribes prior to university and USFS signing.

96. Incoming University of Arizona Vice-president for Research Leslie Tolbert, letter to J. Derby, 14 September 2005.

97. In 1997 reporters exposed MGIO lobbyists at SIMG for preparing fraudulent letters supporting the observatory consortium and denigrating preservation efforts, see J. Erickson, "PR Firm to Stop Signing Letters with Others' Names," *The Arizona Daily Star*, 24 May 1997; and Vanderpool, "Scarlet Letters." The university response to the *Arizona Public Records Act* request of 10 October 2004 from the Independent Media Center includes records of frequent university payments (generally \$2,500 per month plus expenses) to SIMG from Steward Observatory accounts. See Steward Observatory Director P. Strittmatter, e-mail to SIMG principal Matt Smith and others, 2 December 2005, conveying letter prepared by SIMG for Renzi's signature and addressed to the USFS regional forester. The university-SIMG e-mail thread of 25–27 January 2006 discusses plans by B. Powell, Strittmatter, the university Federal Affairs Assistant Director Hassan Hajaji, and Smith to use Renzi to influence ACHP. For involvement in the matter by Senator John Kyl, see the e-mail thread of 19 January–7 February among the Steward Observatory director, SIMG staff, Kyl's legislative counsel Lucy Murfitt, and others. Matt Smith, e-mail to P. Strittmatter, 3 May 2006, discussing Renzi communications with FCC to influence FCC evaluation of the adequacy of the NHPA process. See also letters of 6 April 2006, from university Vice-president for Research Tolbert thanking Renzi and Kyl. Renzi has since been indicted on unrelated federal corruption charges. See John Dougherty, "McCain's Judgment Questioned—GOP Candidate Touched by Congressman's Conflict-of-Interest Problems," *The Washington Independent*, 3 September 2008, <http://www.washingtonindependent.com/4196/renzi-scandal-highlights-mccains-questionable-judgement> (accessed 9 September 2008).

98. University of Arizona Steward Observatory, "Microwave System Replacement Mount Graham International Observatory Summary Statement," November 2005. During his tenure as a Bush appointee, Rey often carried the Department of

Agriculture vote in ACHP meetings. For a review of Rey's career, see Source Watch, "Mark Rey," http://www.sourcewatch.org/index.php?title=Mark_Rey (accessed 17 May 2008).

99. P. Strittmatter and B. Powell, letter to M. Rey, 28 November 2005.

100. John Kyl and Rick Renzi, letter to M. Rey, 16 February 2006, conveying "concerns from constituents in Graham Country, Arizona and the University of Arizona. . . . In light of an anticipated extreme fire season looming, it is particularly important that Mount Graham has the most reliable, direct, and safe communications service available." MGIO, e-mail to "undisclosed," 3 March 2006, providing a SIMG-authored press release requested by Renzi's office: "Renzi Breaks Bureaucratic Logjam on Mt. Graham Antenna Issue Fights to Ensure Critical Communications for Region Are Installed."

101. ACHP staff members Fowler and Klima did not respond to Welch's August 2008 e-mail and voice mail invitations to explain the ACHP reversal.

102. USFS Region 3 archaeologist Judy Propper, e-mail to D. Klima, 9 March 2006.

103. R. Riley and M. Altaha, letter to J. Nau, 16 January 2006.

104. Indigenous leaders and sacred-site advocates continue to call on the US Congress to legislate protection for sacred sites. In 2008, a coalition requested congressional hearings to investigate federal land-management policy and practice relating to sacred-site protection. See http://www.mynewsletterbuilder.com/tools/view_newsletter.php?newsletter_id=1409738047 and www.sacredland.org (both accessed 25 September 2008).

105. In November 2008, as this article was under peer review, ACHP released "Consultation with Indian Tribes in the Section 106 Review Process: A Handbook," <http://www.achp.gov/regs-tribes2008.pdf> (accessed 2 April 2008). This addition to NHPA guidance includes issue-by-issue interpretations as well as four summative recommendations and numerous useful suggestions and caveats. The four major points are "Respect Is Essential; Communication Is Key; Consultation: Early and Often; Effective Meetings Are a Primary Component of Successful Consultation."

106. Sherry Hutt and Jaime Lavalley, "Tribal Consultation: Best Practices in Historic Preservation" (Washington, DC: National Association of Tribal Historic Preservation, 2005), http://www.nathpo.org/PDF/Tribal_Consultation.pdf (accessed 20 May 2007). See Richard W. Stoffle, "A Consultation Model," in *Native American Sacred Sites and the Department of Defense*, ed. Vine Deloria Jr., and Richard W. Stoffle (Washington, DC: Department of Defense, Legacy Resource Management Program, 1998), www.denix.osd.mil/denix/Public/ES-Programs/Conservation/Legacy/Sacred/ch5.html#ch5 (accessed 20 December 2004). See Province of Alberta, Department of Energy, "First Nations Consultation Guidelines," http://209.85.173.104/search?q=cache:quLBIj-ijkJ:www.energy.gov.ab.ca/AbRel/pdfs/Energy_Guidelines_Revised_Version_-_November_14_2007.pdf+consultation+%22early+in+the+planning%22&hl=en&ct=clnk&cd=5&gl=ca (accessed 24 May 2008); for a broader, international approach to engaging stakeholders, see Wild and McLeod, *Sacred Natural Sites*.

107. This comports with the definition in the NHPA regulations, where "consultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the Section 106 process." See 36 *CFR* sec. 800.16(f).

108. Hutt and Lavalley, "Tribal Consultation," 26.

109. Regarding MGIO officials' contempt for tribal sovereignty and violations of government-to-government protocols, see P. Strittmatter, e-mail to R. C. Powell, 24 December 2004, claiming that Welch and Riley, although designated by name in White Mountain Apache tribal council resolution 12-2003-296, do not represent the tribe and deliberately misled tribal elders. In his undated (probably February or March 2005) critique of president Likins's declaration, Strittmatter similarly accuses Welch and Riley of influencing the president's words through a "ruse . . . to get a document for their own purposes . . . totally disconnected from the actual leadership of all three [*sic*] Western Apache Tribes."

110. The "listening session" proposed in Nau's 7 March 2006 letter to the USFS chief was held in July 2007, with ongoing follow-up meetings increasingly focused on the proposed renewal of MGIO's special-use authorization. Although the authorization expired in early 2009, the observatory remains in operation and the Forest Service continues to focus on ways to meet university needs while ignoring most trust responsibilities and duties to environmental and cultural protection statutes.

111. See references in n. 6; also see http://www.peo7.com/UsStateCode/PEOusLabor_Section14620.htm (accessed 20 May 2007).

112. See King, *Federal Planning and Historic Places*, 175–77.

113. 36 *CFR* sec. 800.16(d): "Area of potential effects means the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking."

114. Kari Forbes-Boyte, "Fools Crow Versus Gullett: A Critical Analysis of the American Indian Religious Freedom Act," *Antipode* 31, no. 3 (1999): 304–23.

115. E.g., the US Department of Agriculture, "Friends and Partners," Forest Service Native American Policy (1990), recognizes that lands can "hold a special and unique meaning in the spiritual and everyday lifeways of . . . Native Americans" and affirms trust responsibilities "to protect and maintain Native American lands, self government, resources, and traditional use areas." We hope the fact that this policy is no longer available on the USFS Web site is not part of efforts to limit trust responsibilities and expand discretion. *Author's note*: The document is no longer posted online; I have an unpaginated print out with no URL.

116. For another discussion of the limitations of NHPA in the protection of sacred sites, see Barbara J. Mills and T. J. Ferguson, "Preservation and Research of Sacred Sites by the Zuni Indian Tribe of New Mexico," *Human Organization* 57, no. 1 (1998): 30–42.

117. R. Riley and M. Altaha, letter to J. Nau, 16 January 2006.

118. Susan Staiger Gooding, "At the Boundaries of Religious Identity: Native American Religions and American Legal Culture," *Numen* 43, no. 2 (1996): 157–83.

119. See John S. Mill, *On Liberty* (London: Longman, Roberts and Green, 1869), 3, esp., "the 'self-government' spoken of, is not the government of each by himself, but of each by all the rest. . . . [T]he people, consequently, may desire to oppress a part of their number; and precautions are as much needed against this, as against any other abuse of power. The limitation, therefore, of the power of government over individuals, loses none of its importance when the holders of power are regularly accountable to the community, that is, to the strongest party therein. . . . '[T]he tyranny of the majority' is now generally included among the evils against which society requires to be on its guard."