

Safeguarding Native American¹ Traditional Knowledge
Under Existing Legal Frameworks: Why and How Federal Agencies
Must Re-Interpret FOIA’s “Trade Secret Exemption”²

By Emily Choi

- I. Introduction
- II. What Is Traditional Knowledge and Why Does It Necessitate Confidentiality?
- III. The Federal Role in Preserving and Protecting Native American Sacred Sites
 - A. The History and Evolution of the Tribal-Federal Relationship
 - B. Government-to-Government Consultation Under the National Historic Preservation Act
- IV. Why Disclosure During Consultation Is a Precarious Strategy for Tribes: Gaps Between Pre-Existing Provisions and Actual Confidentiality
- V. A Call to Agency Action: New Interpretive Guidance to Harmonize FOIA Compliance with Federal Indian Law
- VI. Conclusion

¹ Is *Native American* a respectful, appropriate term? Answers vary, but the consensus is that Native peoples prefer to be identified with their specific tribe. This paper uses the terms *Native* and *Native American* in collective reference to tribes whose borders fall within the contiguous U.S. It should be noted that domestic policy and legal instruments most often employ the terms *Indian* or *American Indian*, while international organizations use the broader term *Indigenous*. Native Hawaiians and Alaska Natives are also indigenous communities, and this paper’s thesis could be applied to protection of their traditional knowledge as well. However: the principles outlined in Part III do not apply in full to such communities, due to the history-dependent application of federal Indian law.

² I would like to thank and credit Mr. David Tarler (National NAGPRA Program Officer at the National Park Service) for posing the initial question: could disclosed traditional knowledge be protected from the public as a “trade secret” under FOIA?

I. Introduction

What image does your mind conjure when I ask you to picture the classic American landscape? Perhaps the rolling hills of battlefields past, or a great scene of wilderness “where man himself is a visitor who does not remain.”³ Or: the silhouette of some city’s sunset skyline? An iconic landmark such as the Statute of Liberty or the Golden Gate Bridge?

Rewind time: before the cities and the battles, predating industrialization and the arrival of Europeans—what do you see? What may appear as empty land is actually filled with places and events memorialized by Native American oral traditions and rituals.⁴ These lands embody a living connection between a current community and the past: a connection comprising both carefully-preserved and presently-expanding knowledge. This knowledge forms a tribe’s unique “traditional knowledge,” integral to the community’s well-being and cultural identity.

Fast forward, and adverse counter-narratives begin to emerge: Manifest Destiny, land ownership and competitive privatized enterprise. Extractive industries are far from the sole exploiters of Earth’s surface; development is a self-amplifying cycle of construction and infrastructure, with need for housing, employment and communications soon to follow. As a result, Native Americans are in perpetual contest to protect present lands, ceded territories and ancestral homelands.

Within this contrapuntal context, the U.S. government is tasked by the National Historic Preservation Act (NHPA) to balance conflicting interests. When a proposed project with federal involvement has the potential to affect significant⁵ historic resources, the relevant agency must

³ Wilderness Act of 1964, 16 U.S.C. § 1131(c) (2012).

⁴ Dean B. Suagee & Peter Bungart, *Taking Care of Native American Landscapes*, 27 NAT. RESOURCES & ENV’T 23, 23 (2013).

⁵ According to the National Park Service (the agency administering the National Register of Historic Places), such significance derives from criteria ranging from archaeological and architectural value, to association with important events and persons. While National Register eligibility is not the focus of this paper, it is relevant to the extent that federal agencies employ the same criteria under Section 106 review.

initiate an information-gathering process known as Section 106 review. When Native places of “traditional religious and cultural importance”⁶ are affected, the NHPA expressly requires agencies to consult with tribes; such consultation must occur on a nation-to-nation basis.⁷ The accompanying regulations require agencies to invite the project’s proponent (whose interests often represent the concerned industry as a whole), the general public and all other interested parties to the same consulting table. In other words, agencies must bring together and consider the full spectrum of relevant perspectives.

A major concern for tribes who wish to participate in consultation is ensuring confidentiality of sensitive information. For Native Americans, “sensitive information” refers to a range of place-based knowledge known as “traditional knowledge.”⁸ As its name suggests, such knowledge is *traditional* in that it encompasses a venerable range of generational experience and observation. Simultaneously, it is a constantly growing network of *local* knowledge: it is anything but stagnant, so long as the community continues to live and adapt.

Tribes sharing their traditional knowledge must do so consciously: federal processes such as Section 106 review oblige agencies to create and compile a decision-making record. Once information is part of an agency’s record, it may be disclosed to any requesting member of the public under the Freedom of Information Act (FOIA). If tribes choose not to participate or are unable to do so, the agency may proceed with findings of eligibility and mitigation for adverse effects without taking tribal traditional knowledge into account.

⁶ The NHPA explicitly provides that properties or districts of “traditional religious and cultural importance” to Native tribes are eligible for inclusion on the National Register.

⁷ As will be expanded in Part III, the nation-to-nation (or “government-to-government”) relationship derives from the U.S. government’s recognition of tribal sovereignty.

⁸ Scholars and other writers employ terms such as *tribal intangible cultural property* or *Native oral tradition*. This paper utilizes *traditional knowledge*, as it is the term with broadest current usage. However, readers should note that *indigenous knowledge* is emerging as a more appropriate term, due to the false connotation of “traditional” as anachronistic.

In light of this problematic state of affairs, federal agencies must do more to reconcile their FOIA compliance with existing laws and executive directives which promote and protect the confidentiality of Native American “sacred sites” (a commonly-used term by the U.S. government in reference to places, land features and associated natural resources memorialized by Native oral histories).⁹ This paper proposes that agencies reinterpret FOIA’s “trade secret exemption”¹⁰ to cover traditional knowledge. To accomplish this, agencies should issue interpretive guidance on their FOIA regulations to define traditional knowledge shared in the course of consultation as valuable, confidential information.

Part II describes traditional knowledge and explains why maintenance of confidentiality is vital for tribal culture and health of the community. Part III summarizes the development of the U.S. tribal-federal relationship. This background—particularly the contentious portion of federal Indian law known as “recognition”—is necessary to understand the full extent of federal responsibility to tribes under existing legal frameworks. Part IV overviews current provisions on confidentiality and points to why they are insufficient in safeguarding the full spectrum of traditional knowledge tribes might otherwise share for sacred site protection. Part V shows that the proposed agency re-interpretation of FOIA’s “trade secret exemption” is a reasonable result of applicable law and policy. The paper concludes by discussing the preference of agency action to legislative amendment as an expedient, effective solution.

This proposal improves Section 106 review for all parties involved. The benefit for tribes is twofold: the assurance of confidentiality not only enables fuller participation, but functions more largely as a rightful step by the U.S. government toward nation-to-nation respect. Private

⁹ Federal agencies use the term “sacred sites” specifically in reference to Executive Order 13007 Indian Sacred Sites (1996).

¹⁰ FOIA’s “trade secret exemption,” or Exemption 4, applies to: “trade secrets” and “commercial or financial information obtained from a person that is also privileged or confidential.” 5 U.S.C. § 552(b)(4) (2012).

applicants and industry, as longstanding advocates of streamlined, predictable review, benefit as well: a hard rule on confidentiality is useful, particularly when lack of such basic protections is bound to cause volatile and highly-publicized situations.¹¹ Moreover, an established federal presence in historic preservation review indicates a high likelihood that this paper's thesis could be implemented meaningfully and efficiently.¹²

II. What Is Traditional Knowledge and Why Does It Necessitate Confidentiality?

To understand why federal agencies should exempt certain material from public disclosure, it is imperative first to understand the material itself. This section attempts to explain why traditional knowledge (TK) is so fundamental to Native cultures, and why safeguarding it is an outstanding concern for all tribes.

The most intrinsic aspect of TK is its all-encompassing nature. The following disciplines are all within the realm of possibility for a specific tribe's TK: botanical and medicinal; wildlife migration patterns or hunting techniques; long-term weather patterns; areas of ancestral presence; and parenting tools.¹³ It is critical to understand that Native peoples do not distinguish or categorize ecological knowledge¹⁴ from the social, cultural and spiritual. Manifestations of TK

¹¹ In the aftermath of international debacles such as the Dakota Access or Keystone XL Pipelines, corporations are voluntarily seeking and creating mechanisms for respectful cooperation with tribes. As a recent example: Wells Fargo committed to requiring future industry borrowers to demonstrate compliance with international standards for projects "affecting sacred lands and natural resources—traditionally owned or otherwise occupied and used." See <https://www.wellsfargo.com/about/corporate-responsibility/indigenous-peoples-statement/>

¹² Agencies could apply this paper's thesis to other contexts where tribal input enters the decision-making record, such as the repatriation process under the Native American Graves Protection and Repatriation Act (NAGPRA).

¹³ For an illuminating anthropological study on the lattermost category, see Michaeleen Doucleff & Jane Greenhalgh, *The Other Side of Anger: How Inuit Parents Teach Kids to Control Their Anger*, NPR (Mar. 13, 2019), available at https://www.npr.org/sections/goatsandsoda/2019/03/13/685533353/a-playful-way-to-teach-kids-to-control-their-anger?fbclid=IwAR3cI7MuBwL4TcaMfOotdX7tT2_B-HDX00SoGtPcl02n01ZaNmEYsE0oDWs.

¹⁴ TK can complement scientific hypotheses as a valid line of evidence. TK in this context is commonly called *traditional ecological knowledge* (TEK) or *Native science*. As a recent example, the Navajo Nation formed an educational partnership with the National Aeronautics and Space Administration (NASA) to create an astrobiology program for Native youths. The program strives to create "a dual-learning environment [of] scientific and cultural

are likewise broad, ranging from physical, observable locations and practices to intangible cultural elements such as linguistics, philosophy, moral values and social structure.

The United Nations Educational, Scientific and Cultural Organization (UNESCO) enumerates the following as common elements of TK across the globe:

- 1) Consists of knowledge, innovations, and practices;
- 2) Developed from experience gained over time, adapted to the local culture and environment;
- 3) Transmitted orally from generation to generation;
- 4) With a tendency to be communally- or collectively-owned; and
- 5) May take the form of stories, folklore, proverbs, cultural values, beliefs, rituals, community laws, local language¹⁵ and agricultural practices.¹⁶

The World Intellectual Property Organization (WIPO) notes: TK consists of “know-how, skills and practices... developed, sustained and passed on from generation to generation within a community,” adding that TK forms “part of [a tribe’s] cultural or spiritual identity.”¹⁷

Together, the UNESCO and WIPO definitions emphasize three important facts. First, TK is passed down primarily through oral, rather than written, means. Some community members may possess more knowledge than others, but TK is generally not shared with non-members in

knowledge... in which *both ways of knowing are held equal*.” See NASA and the Navajo Nation (2019), available at <https://astrobiology.nasa.gov/education/nasa-and-the-navajo-nation/>.

¹⁵ Generally, language develops in tandem with “cultural substance,” reflecting not only shared observations of the immediate environment but societal values and priorities. TK pervades the substantive and semantic structure of Native languages. Conversely, a perfect translation of TK into any other language is impossible.

¹⁶ United Nations Educational, Scientific and Cultural Organization, *Traditional Knowledge – Definition* (2019), available at <http://uis.unesco.org/node/335063>.

¹⁷ World Intellectual Property Organization, *List and Brief Technical Explanation of Various Forms in which Traditional Knowledge May be Found* (2010), available at <https://www.wipo.int/tk/en/tk/>.

the absence of exigence.¹⁸ For some tribes, the chance to participate in federal processes affecting their at-risk resources may qualify as exigent. Second, what constitutes TK is specific to each tribe, since TK is the culmination of unique, local experiences. This trove of collective knowledge is not an idle archive: generational transmission means that new knowledge is constantly added to enhance existing links between TK and the environment. Third, TK is foundational to what WIPO calls “cultural or spiritual identity.”

In reality, TK’s importance to a Native community transcends the domain of “cultural or spiritual.” Theresa Pasqual, former Tribal Historic Preservation Officer for Acoma Pueblo, maintains that knowledge of the past has continuing influence on Native communities’ present well-being:

Oftentimes, people think that we protect archaeological resources because of their sheer historical or cultural significance. For tribes, it is about much more than that.

[Preservation] ties into *resilience, what can keep a community healthy...* When we lose [land or natural] features to development, we are actually *losing pages of that history book.*¹⁹

Pasqual’s metaphor that land features function as “pages of a history book” is apt because it characterizes TK as inherently place-based knowledge.²⁰ Since TK is obtained from the

¹⁸ For rules regarding TK disclosure for specific tribes, one should refer to that tribe’s tradition and laws on TK.

¹⁹ Jennifer Levin, *Someone Else’s Manifest Destiny: Theresa Pasqual on Protecting Sacred Places*, PASATIEMPO, Apr. 28, 2017 (emphasis added), available at https://www.santafenewmexican.com/pasatiempo/art/someone-else-s-manifest-destiny-theresa-pasqual-on-protecting-sacred/article_4bcf474a-4a6e-5ecd-a817-c799139e53ec.html.

²⁰ In a personal interview, Pasqual made explicit the connection between TK and present community health. “Protection and continued access to sites impact individual health in the sense of mental well-being. The sense of identity is weakened when children and adults lose security and protection through destruction or threatened loss of places. Members of tribal communities already face increasing burdens of alcoholism, drugs and other social ills; the

observable environment, it is often anchored to local landforms or recurring natural phenomena. Correspondingly, studies evidence that Native oral traditions benefit from the method of *loci* (“location”), where memory is enhanced through heightened spatial awareness.²¹ Protecting the landscape is indispensable to the preservation of Native life and heritage. There remains a synergistic connection between place and TK for all tribes, whether that connection is current (the tribe resides on or is granted access to ancestral lands) or historical (oral tradition references places prior to forcible removal²²).

Establishing TK as confidential material is crucial to Native Americans. Ecological or medicinal knowledge can be appropriated by individuals and corporations. Burial grounds and other cultural sites are in immediate danger of increased foot traffic, desecration and looting.²³ Illegal trafficking in Native American funerary objects and human remains is an abhorrent and grossly underemphasized crimes.²⁴ To prolong the status quo through inaction is unethical,

loss of significant places can impact a community’s ability to maintain the strength of its members’ physical and mental well-being.”

²¹ Duane W. Hamacher, *The Memory Code: How Oral Cultures Memorise So Much Information*, THE CONVERSATION, Sep. 26, 2016, available at <https://theconversation.com/the-memory-code-how-oral-cultures-memorise-so-much-information-65649>.

²² Forcible removal of Native peoples by the U.S. government is shameful history which resulted in cultural (and, as many point out, actual) genocide. Afterwards, the U.S. government coerced assimilation initiatives such as U.S. Boarding Schools, which removed Native children from their homes to “educate” them under federally-determined standards.

²³ For more information on the prevalence of desecration and looting, see Derek V. Goodwin, *Raiders of the Sacred Sites*, NEW YORK TIMES MAGAZINE, Dec. 7, 1986, available at <https://www.nytimes.com/1986/12/07/magazine/raiders-of-the-sacred-sites.html> (“Sacred Native American burial chambers had been gutted and trashed. Some mummified bodies had been carted away; others mutilated and strewn about. Items such as priceless baskets, jewelry, feather capes, bowls, sandals and fur robes had been ripped from the ground to be packaged for sale. Although the cave had probably been idly looted in the past by souvenir-searching amateurs, this time it had been struck by an organized raiding party of professional archaeological looters.”).

²⁴ For more information, see Sherry Hutt, *Illegal Trafficking in Native American Human Remains and Cultural Items: A New Protection Tool*, 24 ARIZ. ST. L.J. 135 (1992), available at <https://heinonline.org/HOL/LandingPage?handle=hein.journals/arzl24&div=15&id=&page=> (discussing a NAGPRA provision which amended the U.S. Criminal Code to render illegal trafficking in Native American human remains a felony offense).

particularly in light of the debilitating, enduring injustices suffered by Native Americans at the hands of the conquerors.²⁵

III. The Federal Role in Preserving and Protecting Native American Sacred Sites

The NHPA delineates a federal review process commonly known as “Section 106 review.”²⁶ Once such review is initiated, federal agencies must consult with Native tribes and incorporate their input into each of the following steps: identification of historic properties; assessment of potential adverse effects to those properties; and resolution of such effects, should any be present.

Part A summarizes the relevant developments in federal Indian law necessary to understand the purpose and function of consultation. Most importantly, Part A explains “tribal sovereignty” (a tribe’s collective right to govern its people and property), which is prerequisite to the “government-to-government relationship” (a result of the federal government’s “recognition” of a particular tribe’s sovereignty). These three concepts—tribal sovereignty, the government-to-government relationship and recognition—touch every legal responsibility federal agencies owe to tribes. Part B looks closer to Section 106 review, detailing when and how TK may be disclosed by tracing the statutory and regulatory language around tribal participation.

²⁵ For an extensive discussion on the “conqueror-conquered” narrative in the development of federal Indian law, see Walter Echo-Hawk, *In the Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided* (2010).

²⁶ Another relevant federal review process arises under the National Environmental Policy Act (NEPA) when a “major federal action” is determined to significantly affect the “quality of the human environment.” 42 U.S.C. § 4332(C). Compliance with NEPA may be combined with Section 106 review under an official regulatory process known as “substitution.” Tribes may consult under NEPA directly (for “significantly affected” ecological resources) or jointly with the NHPA through “substitution.”

A. The History and Evolution of the Tribal-Federal Relationship

The federal role and responsibilities in Native American affairs derive from a vast array of sources, spanning the Constitution and historic treaties, federal statutes, agency regulations, executive orders, and judicial opinions. Today, federal Indian law continues to evolve in tandem with societal values which shift with time (and elections).²⁷ This section covers core principles derived from the aforementioned sources.

Two constitutional provisions serve as the bedrock of federal Indian law. First, the Commerce Clause (enabling Congress to regulate commerce “with foreign Nations, and among several States, and *with the Indian Tribes*”²⁸) is understood to affirm tribal sovereignty as predating the formation of the U.S. In fact, tribes were independent, self-governing societies long before the European settlers’ arrival.²⁹

Second, the Constitution states that treaties, unless abrogated or superseded, are the “supreme Law of the Land,” on equal legal footing with the Constitution itself.³⁰ In the early days of the U.S., treaties were forged with Native tribes on a nation-to-nation basis.³¹ The Treaty Clause provides for a powerful, deep-rooted inference: treaties between Native American tribes and the federal government are organic, quasi-constitutional documents creating “supreme”

²⁷ For an analysis on federal Indian law’s penchant for evolving in tandem with cultural and societal norms, see Kevin K. Washburn, *What the Future Holds: The Changing Landscape of Federal Indian Policy*, 130 HARV. L. REV. F. 200 (2019), available at <https://harvardlawreview.org/2017/04/what-the-future-holds-the-changing-landscape-of-federal-indian-policy/>. As a recent example of a meaningful interpretive evolution, see also Nina Totenberg, *Gorsuch Provides Decisive 5th Vote In Case Interpreting Treaty With Indian Tribe*, NPR, Mar. 20, 2019, available at <https://www.npr.org/2019/03/20/704926048/gorsuch-provides-decisive-5th-vote-in-case-interpreting-treaty-with-indian-tribe>.

²⁸ U.S. Const. art. I, § 8 (emphasis added).

²⁹ Felix S. Cohen, *Cohen’s Handbook of Federal Indian Law*, at § 4.01[1][a] (Neil Jessup Newton ed., 5th ed. 2005).

³⁰ U.S. Const. art. VI, § 2.

³¹ Cohen, at Scope. Some treaties were formed with more respect than others, but Cohen notes that treaty-making as a general practice devolved into an appearances-only exercise by the federal government. In addition: treaties are powerful legal instruments, but the language within is rarely crystal clear. Federal courts are granted the final word on treaty interpretation. It is a well-established (but questionably applied) judicial canon that treaties be liberally construed in favor of Native American tribes, due to the inequitable circumstances surrounding the original negotiations.

federal obligations to tribes.³² While the substance of individual treaties varies on a case-by-case basis, it suffices for this paper to understand that treaties promise certain land-based rights³³ to tribes in *quid pro quo* for their ceded lands.

Together, the Commerce and Treaty Clauses create a “government-to-government relationship” between the federal government and Native American tribes. This relationship is founded on the federal government’s official acknowledgment of tribal sovereignty. Once formed, the government-to-government relationship commits affairs regarding that specific tribe exclusively to the federal government.³⁴

A logical inconsistency between principle and practice must be noted here: even though the Constitution affirms tribal sovereignty as altogether predating European settlement, this fact does not automatically establish the “government-to-government relationship” for each tribe whose borders lie within the U.S. Instead, establishing such a relationship requires an additional step: “recognition,” an official process resulting in a fiduciary trust relationship by the federal government to the “recognized” tribe.³⁵ “Recognition” is a legal term of art, and it effectively serves as an on-off switch for the applicability of nearly all legislation in federal Indian law. Such status may be conferred through: (1) treaties (although mere existence of a treaty is insufficient to automatically confer recognition); (2) an Act of Congress; (3) administrative procedures under 25 C.F.R. Part 83; or (4) a federal court decision.³⁶

“Recognition” is problematic because it brings about an untenable result from unalterable premises: tribal sovereignty predates treaty-making and European settlement—yet, the

³² Id.

³³ Some treaty rights are expressly stated (such as creating a land reservation or retaining hunting or grazing rights) while others are implied (such as the control of water necessary to allow meaningful exercise of a reserved right).

³⁴ Id. Note that the tribal-state relationship comprises its own subject of study, not covered by this paper.

³⁵ Id. at § 3.02[3].

³⁶ Id. at § 3.02[4].

government-to-government relationship applies under unilaterally-determined standards by Congress. In this sense, “recognition” is an invalid exercise of U.S. authority over tribes—an exercise paradoxically cutting against international customary principles such as respect for sovereignty and redress for historical inequity.

Recognized status grants certain benefits under federal law. Most relevant to this discussion: the NHPA’s statutory scheme explicitly grants procedural rights to federally-recognized tribes only. This means that non-recognized tribes have no legal right to participate in processes which affect their current and ancestral lands. Significantly, recognized status also confers an official “trust responsibility” by the federal government. While trust responsibility does not provide an enforceable right on its own, it creates a powerful moral obligation which overlays existing statutory obligations.

The beginnings of federal trust responsibility can be traced to an 1831 case in the Supreme Court, where the Cherokee Nation argued that its constitutional “foreign nation” status precluded it from Georgia’s jurisdictional control.³⁷ Justice Marshall held in favor of the tribe, but his infamous reasoning would deter tribal sovereignty for decades to come: because the term “foreign nation” is properly applied only when it is mutually applicable “by either to the other,” tribes are appropriately distinguished as “domestic dependent nation[s].”³⁸ Accordingly, Justice Marshall patronizingly qualified the tribal-federal relationship as one of “ward to his guardian,”³⁹ leaving ample room for future rationalizations by all three branches of government when undercutting tribal sovereignty without the tribe’s input or consent.⁴⁰

³⁷ Cherokee Nation v. Georgia, 30 U.S. 1, 2 (1831).

³⁸ Id.

³⁹ Id.

⁴⁰ For example: the “ward/guardian” language would be quoted to uphold legislation with devastating consequences, such as the Dawes Act (forcing individual land ownership upon a fundamentally communal society).

One year later, Justice Marshall cast the tribal-federal relationship in more positive terms: notably, that the tribes' cession of land created a corresponding "duty of protection" by the federal government.⁴¹ In 1942, the Supreme Court would clarify that this duty gives rise to "moral obligations [by the federal government] of the highest responsibility and trust."⁴²

According to the U.S. Department of Justice, the settled law is: trust responsibility is a moral obligation, enforceable only to the extent that it is embodied in a specific legal requirement.⁴³ In other words, trust responsibility does not create additional obligations to an agency's compliance with general laws.

Still, trust responsibility has consistently been held as a valid "independent basis for federal action benefitting tribes."⁴⁴ It is also possible for agency action to violate the trust doctrine whilst otherwise in compliance with general laws. In general, agencies enjoy broad discretion under broad congressional delegations, subject to repeal only by a generous "arbitrary or capricious" standard.⁴⁵ However, agency action that is otherwise reasonable could be held "arbitrary or capricious" due to breach of the trust responsibility alone.⁴⁶

Trust responsibility extends to all federal agencies in their official interactions with recognized tribes.⁴⁷ The Supreme Court has noted that "standard principles of statutory interpretation do not have their usual force in cases involving Indian law," since "canons of

⁴¹ Worcester v. Georgia, 31 U.S. 515, 519 (1832) (clarifying that the duty of protection arises from "the universal conviction that the Indian nations possessed a full right to the lands they occupied until that right should be extinguished by the United States with their consent").

⁴² Seminole Nation v. U.S., 316 U.S. 286, 297 (1942) (emphasis added).

⁴³ Cohen, *supra* at § 5.05[3][c]; see also Dep't of Justice, Sacred Sites training video (result of the 2017 Sacred Sites MOU in Part IV), available at <https://www.youtube.com/watch?v=Fx0A7iA128U&feature=youtu.be>.

⁴⁴ Dep't of Justice, Sacred Sites training video. The DOJ offers the following example: an agency validly denied a dam construction permit because issuance would have interfered with tribal treaty fishing rights.

⁴⁵ Id.

⁴⁶ Cohen, at § 5.05[3][c]. Cohen cites a 1972 case where the Interior Department's decision regarding allocation of water was "arbitrary and capricious" because it breached the federal trust responsibility.

⁴⁷ Id.

construction... in Indian law are rooted in the unique [tribal-federal] trust relationship.”⁴⁸ Such a holding could be read as encouraging agencies to interpret all statutory mandates related to Native peoples with trust responsibility in mind. The precise extent to which such responsibility limits agency discretion is an undecided issue which elicits competing viewpoints, but agencies are free to go beyond specific statutory requirements in fulfilling their trust responsibility.⁴⁹

B. Government-to-Government Consultation Under the National Historic Preservation Act

Section 106 of the NHPA and its regulations create a review process triggered by an agency’s determination that a “federal undertaking”⁵⁰ has potential to affect “historic properties.”⁵¹ Section 106 review functions as a “stop, look and listen” requirement: agencies must “stop” to consider the effects of their undertakings, but the NHPA imposes no substantive requirements on any portion or aspect of an agency’s discretion.⁵²

The first step of Section 106 review is the identification of historic properties within the area of potential effects (APE).⁵³ The Section 106 regulations clarify: at this stage, the agency is obligated to “gather information”⁵⁴ by inviting affected tribes⁵⁵ as consulting parties. Agencies

⁴⁸ Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985).

⁴⁹ Cohen, at § 5.05[3][c].

⁵⁰ 36 C.F.R. § 800.16(y). A federal undertaking largely falls under one of two categories, depending on the type (or degree) of agency involvement: (1) land managing activities and (2) permitting, licensing, funding and approving activities.

⁵¹ National Historic Preservation Act of 1966, 54 U.S.C. § 306108 (2012).

⁵² Id.

⁵³ 36 C.F.R. § 800.16(d) (“The APE 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 APE is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking”).

⁵⁴ § 800.4(a)(4).

⁵⁵ Note that this provision only applies to federally-recognized tribes.

must make a “reasonable and good faith effort” to identify affected tribes and collect their input for decision-making.⁵⁶

What are the standards which determine whether “historic properties” are present? In other words: what are the metrics of finding historic significance? The Section 106 regulations promulgated by the Advisory Council on Historic Preservation (ACHP)⁵⁷ echoes the NHPA by defining a “historic property” as one which is eligible for the National Register of Historic Places (NRHP).⁵⁸

NRHP eligibility does not require nationally-applicable significance; it suffices for a place to demonstrate its importance to the local community.⁵⁹ Under the Section 106 regulations, “historic significance” explicitly includes properties of “traditional religious and cultural importance” to Native American tribes.⁶⁰ There are no limitations as to how tribes could prove significance for NRHP purposes, but some written, publicly-accessible documentation must be prepared in order to receive a final determination.⁶¹ For this reason, tribes are generally hesitant to affirmatively list a sacred site on the NRHP; it is more likely that tribes are consulted for their input when a particular project triggers Section 106 review.

In sum: U.S. law does not protect tribal land features or sites, just because they are sacred.⁶² Instead, properties or landscapes (as “districts”) of “traditional religious and cultural importance” may qualify as NRHP-eligible, hence historically-significant under the NHPA.

Consideration of TK under Section 106 review is necessitated by a regulatory requirement: agencies must “acknowledge that Indian tribes possess *special expertise* in

⁵⁶ § 800.3(f)(2).

⁵⁷ The ACHP is an independent federal agency which advises the President and Congress on national historic preservation policy.

⁵⁸ National Historic Preservation Act § 30031; *see also* C.F.R. § 800.16(l)(1) (2004).

⁵⁹ Suagee & Bungart, *supra* at 24.

⁶⁰ 36 C.F.R. § 800.16(l)(1).

⁶¹ Suagee & Bungart, *supra* at 24.

⁶² Id.

assessing the eligibility of historic properties that may possess *religious and cultural significance* to them.”⁶³ Land-based “religious and cultural significance” for Native tribes inherently derives from TK. Therefore, the identification of historic properties and all subsequent steps to Section 106 review become, to some degree, dependent on TK. In particular, tribal input is crucial in the resolution of adverse effects, so that such effects could be minimized or avoided altogether.

IV. Why Disclosure During Consultation Is a Precarious Strategy for Tribes: Gaps Between Pre-Existing Provisions and Actual Confidentiality

Disclosure of TK beyond the smallest number of necessary parties is dangerous for reasons ranging from invasion of privacy to looting and desecration. On the other hand, disclosure during federal consultation may prove paramount for tribes whose places are at immediate risk from development or other disturbance. This section overviews how existing legal instruments address confidentiality or recognize it as a significant concern—and why these provisions fall short of achieving actual confidentiality.

The NHPA includes a confidentiality provision known as Section 304.⁶⁴ Under Section 304, information about the location, character or ownership of a historic resource may be withheld by the agency from the public under three circumstances: when disclosure would (1) create threat of harm to a historic property; (2) cause significant invasion of privacy; or (3) impede the use of a traditional religious site by Native practitioners.⁶⁵ Once information is

⁶³ § 800.4(c)(1) (emphasis added). In a 2019 draft of an information paper on TK, the ACHP’s Office of Native American Affairs makes explicit the link between “special expertise” and TK.

⁶⁴ National Historic Preservation Act § 307103(a).

⁶⁵ Id.

withheld, the agency must then determine which entities may access such information for the purposes of Section 106 review.⁶⁶

The Section 106 regulations recognize that tribes may be “reluctant to divulge specific information on the location, nature and activities regarding sacred sites.”⁶⁷ Referring to Section 304, the regulations require agencies to consult with the ACHP, the expert agency on these matters, as they consider the withholding or release of sensitive information.⁶⁸

While Section 304 is helpful, its applicability depends on translating TK into information about a specific site which is eligible for or listed on the NRHP. Otherwise put, Section 304’s scope is limited to information about historic properties and is thus limited in regards to the full scope of TK. In short, TK which does not concern “location, ownership or character” of a historic property receives no assurance of protection. Without such assurance, tribes are understandably hesitant to share their TK.

Section 304 is also limited in that it only binds federal agencies and public officials receiving NHPA grant assistance.⁶⁹ Private applicants’ ability to share or withhold sensitive information would only be subject to the terms of the federal permit, license or funding—not Section 304. Although the whole of existing law strongly suggests that agencies address tribal confidentiality in these cases, there is no legal provision mandating agencies to incorporate such concerns before issuing permits or approving funds. The Section 106 regulations require agencies to “take into account confidentiality concerns raised by tribes,”⁷⁰ but it is ultimately up to individual agencies to execute a uniform approach to TK.

⁶⁶ § 304(b).

⁶⁷ 36 C.F.R. § 800.4(a)(4).

⁶⁸ § 800.11(c)(2).

⁶⁹ National Historic Preservation Act § 307103(a).

⁷⁰ § 800.4(b)(1).

Other statutes⁷¹ and executive documents acknowledge confidentiality as a major concern for tribes. Two executive documents most relevant to sacred site protection are covered here, although neither is legally enforceable.

First, Executive Order 13007 (EO 13007) directs agencies to “accommodate access to and ceremonial use of Indian sacred sites” to the fullest practicable extent.⁷² EO 13007 unambiguously states: “where appropriate, [the agency] shall maintain confidentiality of sacred sites.”⁷³ Second, an inter-agency memorandum of understanding (MOU) amongst the ACHP and four cabinet-level departments (“Sacred Sites MOU”) declares a unified intent to accomplish the following: identify existing confidentiality standards for maintaining sensitive information about sacred sites; analyze the effectiveness of these mechanisms; and develop recommendations for addressing challenges to confidentiality.⁷⁴

Despite these documents, gaps remain. EO 13007 tightly circumscribes the borders of a sacred site: “any *specific, discrete, narrowly delineated location on federal land* that is identified by an Indian tribe as sacred by virtue of its established *religious significance to, or ceremonial use by, an Indian religion*... provided that the tribe or appropriately authoritative representative of an Indian religion *has informed the agency* of the existence of such a site.”⁷⁵ Although the

⁷¹ Other applicable statutes include the Archaeological Resources Protection Act of 1979 (§ 470hh, a blanket confidentiality provision on “information concerning the nature and location of archaeological resources”) and the 2008 Farm Bill (§ 8106 on information related to sacred sites, resources, cultural items or uses, applicable only to the Forest Service in its role as the Cultural and Heritage Cooperation Authority).

⁷² Exec. Order No. 13007, 61 Fed. Reg. 104 (May 24, 1996).

⁷³ *Id.*

⁷⁴ Memorandum of Understanding Among the Department of Defense, Department of the Interior, Department of Agriculture, Department of Energy, and the Advisory Council on Historic Preservation Regarding Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites (Nov. 30, 2012) (“Sacred Sites MOU”), available at https://www.energy.gov/sites/prod/files/2018/01/f47/interagency_sacred_sites_MOU.pdf.

⁷⁵ Exec. Order No. 13007, *supra* (emphasis added).

Sacred Sites MOU recognizes that a “narrowly delineated location” may “interact” with its surroundings, the MOU stops short of expanding EO 13007.⁷⁶

In addition to the inadequacy of existing provisions, FOIA presents a unique threat to tribes and TK. FOIA provides the public with a means to access all federal records, including an agency’s record of decision-making under statutory authority such as the NHPA.⁷⁷ Federal agencies must disclose all pertinent information unless it falls under one of nine exemptions—each representing a compelling interest against disclosure, such as personal privacy, national security or law enforcement.⁷⁸ Under FOIA, agencies may withhold information under two circumstances only: (1) it is reasonably foreseeable that disclosure would harm an interest protected by an exemption or (2) disclosure is prohibited by other law, such as Section 304.⁷⁹ Whenever full disclosure is not possible, FOIA requires agencies to consider the appropriateness of a partial disclosure. In sum, FOIA signifies a powerful public interest in transparency that may only be overcome by the interests listed as exemptions.

Exemption 4, the focus of this paper, states: FOIA does not apply to “trade secrets” or “commercial or financial information obtained from a person [that is] privileged or confidential.”⁸⁰ Tribes seeking to strengthen confidentiality measures have sought to answer whether Exemption 4 could cover TK. They assert that disclosure of TK results in cultural harms, which could be framed as “commercial or financial” interests. This is the inquiry which prompted this paper.

⁷⁶ Sacred Sites MOU, *supra*.

⁷⁷ Dep’t of Justice, *What is FOIA?*, available at <https://www.foia.gov/about.html>.

⁷⁸ *Id.*

⁷⁹ Freedom of Information Act, 5 U.S.C. § 552(a)(8) (2012).

⁸⁰ § 552(b).

V. **A Call to Agency Action: New Interpretive Guidance to Harmonize FOIA Compliance with Federal Indian Law**

Part V delves into the legal inquiry which concluded the previous section: could FOIA’s “trade secret exemption” protect TK? To reframe the question: would an agency’s exercise of discretion to that effect be reasonable?

In reliance of existing laws and policies, federal agencies can and should protect TK to the greatest practicable extent. The federal government must align its trust responsibility with germane international norms⁸¹ by addressing a great need—namely, the assurance of confidentiality. To do so, agencies should include TK in their interpretation of FOIA Exemption 4, otherwise known as the “trade secret exemption.” This section relays relevant FOIA jurisprudence to show that such an interpretation would be held reasonable. [BETTER

Exemption 4 under FOIA delineates two separate categories of exempted information: (1) a trade secret, or (2) commercial or financial information obtained from a person that is privileged or confidential.⁸²

For FOIA purposes, the scope of a trade secret is considered “at least co-extensive” with the definition by the Uniform Trade Secrets Act (UTSA).⁸³ In other words, trade secrets which fall under the scope of Exemption 4 necessarily fall under UTSA, but UTSA covers a much larger breadth of information. Under UTSA, a trade secret is any information with actual or potential “economic value,” which (1) derives that value from not being generally known or

⁸¹ Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) asserts indigenous peoples’ “right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions,” while States, “in conjunction with indigenous peoples, shall take effective measures to recognize and protect the exercise of these rights.” See also Dep’t of State, *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*, Jan. 12, 2011, available at <https://2009-2017.state.gov/s/srgia/154553.htm>.

⁸² § 552(b)(4).

⁸³ Dep’t of Justice, *Freedom of Information Act Guide* (May 2004), available at <https://www.justice.gov/oip/foia-guide-2004-edition-exemption-4>.

ascertainable and (2) is subject to reasonable efforts to maintain secrecy.⁸⁴ The D.C. Circuit⁸⁵ has clarified that a trade secret is a “commercially-valuable plan, formula, process or device... used for making, preparing, compounding or processing of commodities [as] the end product of either innovation or substantial effort.”⁸⁶ In essence, trade secret status requires a direct relationship between the “secret” and final product.

Outside the context of FOIA, trade secrets are considered the fourth type of intellectual property, in addition to patents, trademarks and copyrights.⁸⁷ Due to the incompatibility of the American intellectual property regime and Native American TK⁸⁸, only the second category under Exemption 4 will be discussed further. Moreover, the overwhelming majority of Exemption 4 case law turns on the second category.⁸⁹

The federal government may invoke Exemption 4 when information meets each of the following three prongs: (1) it is commercial or financial, in nature or in function; (2) it is obtained from a person; and (3) it is confidential or privileged. All three prongs are required. There are two recent federal district court opinions which have examined tribal knowledge under Exemption 4: *Flathead* and *Starkey*.⁹⁰ These cases, which both involve water rights, point out some important factors in an analysis specific to tribes. The following discussion covers each

⁸⁴ Uniform Trade Secrets Act, § 1(4) (1986) (written by the National Conference of Commissioners on Uniform State Laws), available at <https://www.wipo.int/edocs/lexdocs/laws/en/us/us034en.pdf>.

⁸⁵ The D.C. Circuit has the highest level of experience with FOIA and administrative law generally. Approximately two-thirds of D.C. Circuit cases involve the federal government in some civil capacity, compared with less than 25 percent in other circuits. See John G. Roberts Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 377 (2006).

⁸⁶ *Public Citizen Health Research Group*, 704 F.2d 1280, 1288 (D.C. Cir. 1983).

⁸⁷ U.S. Patent and Trademark Office, Trade Secret Policy (Dec. 2017), available at <https://www.uspto.gov/patents-getting-started/international-protection/trade-secrets-policy>.

⁸⁸ U.S. intellectual property law functions as an incentive for inventors. In return for promoting “the progress of science and the useful arts,” inventors receive federal protection for the exclusive right to profit from their inventions. U.S. Const. art. I, § 8, cl. 8.

⁸⁹ Dep’t of Justice, Freedom of Information Act Guide, *supra*.

⁹⁰ *Flathead Joint Board of Control v. Dep’t of Interior*, 309 F. Supp. 2d 1217 (D. Mont. 2004); *Starkey v. Dep’t of Interior*, 238 F. Supp. 2d 1188 (S.D. Cal. 2002).

prong under the two cases, as well as clarifying pronouncements by the D.C. Circuit under non-tribal suits.

Meeting the “commercial or financial” prong is not difficult, since a potential loss of commercial or financial nature would qualify for protection.⁹¹ A successful showing of TK as “commercial” requires multiple steps in logic—particularly for a sacred site, where the ensuing TK is largely spiritual. Disclosure leads to harm in the context of sacred site protection; this resulting harm could be framed as “commercial or financial,” as required under Exemption 4. Release of TK directly affects a tribe’s ability to protect its ancestral lands and resources from encroachment and desecration—even when projects do not occur directly on lands under federal or tribal jurisdiction.

“Commercial” harm would be easier to prove for ecological or social damage, than loss of spiritual elements. This difficulty is compounded in the shadow of *Lyng*, a case in which the Supreme Court refused to enjoin the construction of a road, despite general acknowledgment that constructing the road would virtually destroy tribes’ and Native individuals’ ability to practice “religious” traditions.⁹² In its holding, the Court confirmed that the Free Exercise Clause only protects individuals from government compulsion; it does not follow that the government must protect or otherwise comport with individual citizens’ religious beliefs.⁹³ It is this author’s opinion that this is where trust responsibility is needed the most: there is clear harm—and while it is difficult to square that harm as “commercial,” it is harm to something integral and immensely valuable to tribes. While a straightforward interpretation of *Lyng* might bar federal

⁹¹ Dep’t of Justice, Freedom of Information Act Guide, *supra* (The D.C. Circuit “has firmly held that these terms should be given their ‘ordinary meanings’ and has specifically rejected the argument that the term ‘commercial’ be confined to records that ‘reveal basic commercial operations,’ holding instead that records are commercial so long as the submitter has a ‘commercial interest’ in them.).

⁹² See *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 445 (1988).

⁹³ *Id.* at 448.

protection for “spiritual” TK, this would be a surface determination in light of the fact that TK encompasses far more than “religious” practice; TK is the manifestation of the intrinsic and unique identity of each tribe, and it is absolutely crucial to sustaining a tribe’s well-being and culture for posterity.

The second prong (“obtained from a person”) is easily met. As *Flathead* notes: a tribe, “as a corporation that is not part of the federal government, is plainly a person within the meaning of [FOIA Exemption 4].”⁹⁴

Case law on the third prong revolves around the term “confidential,” rather than “privileged.”⁹⁵ A D.C. Circuit case⁹⁶ significantly expanded an existing test⁹⁷ by distinguishing “voluntary” from “required” submissions to the government. This distinction would be determinative of whether a submission had been kept sufficiently “confidential.” As will be discussed, the new test can be leveraged favorably for tribes.

Previously, submissions were confidential under Exemption 4 when disclosure was likely to have either of the following effects: (1) to impair the government’s ability to obtain similar necessary information in the future; or (2) to cause substantial harm to the competitive position of the submitter.⁹⁸ These became known as the “impairment” and “competitive harm” prongs.

In *Starkey*, the court clarified that the tribe’s collected data (such as information on the resources surrounding the water, or annual well yields) “would give competitors unfair advantage,” thereby meeting the “competitive harm” prong.⁹⁹ Thus, the withheld information

⁹⁴ *Flathead*, 309 F. Supp. 2d at 1221 (citing *Indian Law Resource Center v. Dep’t of Interior*, 477 F. Supp. 144, 146 (D.D.C. 1979)).

⁹⁵ Dep’t of Justice, Freedom of Information Act Guide, *supra*.

⁹⁶ *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992) (en banc), *cert. denied*, 113 S.Ct. 1569 (1993).

⁹⁷ *National Parks and Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

⁹⁸ *Id.* at 770.

⁹⁹ *Starkey*, 238 F. Supp. 2d at 1195.

was held “unquestionably [as] information which [the tribe] guards as proprietary and *confidential* information.”¹⁰⁰

Under the new test, information that is submitted voluntarily (as under the NHPA) is subject to a lower bar for exemption. Rather than meeting the “impairment” or “competitive harm” prongs, information is confidential if it is “of a kind that would customarily not be released to the public by the person from whom it was obtained.”¹⁰¹ Agencies applying this test must reach an initial judgment about the specific submitter’s customary treatment of the information—a shift from examining the customs of the industry as a whole.¹⁰² The new test allows for the submitter to have made previous disclosures, so long as those disclosures were not “public.”¹⁰³

Finally, there is a policy argument to be made in favor of tribes. There is a very powerful interest in enforcing FOIA to the fullest extent. FOIA is intended to promote transparency—as the Supreme Court phrased it, to “pierce the veil of administrative secrecy and open agency action to the light of public scrutiny.”¹⁰⁴ On the other hand, the existence of exemptions evidence that effective governance requires a balance of many compelling, competing interests. In this sense, Exemption 4 may be viewed as recognition that a person or company would not want to provide sensitive business information, due to the competitive disadvantage of potential disclosure. The underlying rationale is to prompt disclosures which enhance the overall quality of the government’s decision-making—which, in turn, benefits the public.

¹⁰⁰ *Id.* at 1196 (emphasis added).

¹⁰¹ *Critical Mass*, 975 F.2d at 879.

¹⁰² *Id.* The DOJ cites *Critical Mass*, 975 F.2d at 872, 878-80.

¹⁰³ In *Critical Mass*, the information in question was provided to nearly everyone who may be interested—but only under a nondisclosure agreement. The D.C. Circuit held that the information was still “confidential” as it was “not customarily [made] available to the public.”

¹⁰⁴ *Dep’t of the Air Force v. Rose*, 245 U.S. 352, 361 (1976).

A similar logic extends to TK. Native Americans are hesitant to provide sensitive information in fear of harm to their sacred places and way of life. While the harm is so much greater than “economic,” it would be reasonable for agencies to frame the spectrum of harms in such language to justify the exemption. An alternative interpretation would defeat the very purpose of FOIA, since lack of tribal input could not result in the full consideration of the nation’s significant historic heritage. Without an exemption, these benefits would be substantially hindered.

To address the gaps of the status quo, agencies should issue new interpretive guidance. Agencies typically issue such documents to clarify or explain existing laws and regulations. Depending on specific agency protocol, interpretive guidance distributed in the form of manuals, guidelines and memoranda.

Interpretive guidance documents receive a high level of deference from courts. Since each agency already has regulations on FOIA, *Auer* deference (rather than *Chevron*¹⁰⁵) would apply: in short, an agency’s interpretation of its own regulations receives “controlling weight unless plainly erroneous or inconsistent” with the regulation.¹⁰⁶

Issuance of agency guidance has decisive advantages to legislative enactment or amendment. In fact, several legislations which could have covered TK were proposed but vanished in committee.¹⁰⁷ Interpretive guidance by the agency is far more efficient and reliable

¹⁰⁵ *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) (holding that judicial deference to an agency’s interpretation of a statute turns on whether the statute was ambiguous to begin with and, if so, whether the agency’s interpretation was a “reasonable” and “permissible” construction of that statute).

¹⁰⁶ *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

¹⁰⁷ For instance: (1) a 1976 Senate bill (“Indian Amendment to FOIA”) would have protected information “held by a federal agency as trustee, regarding the natural resources or other assets of Indian tribes” and (2) a 2003 House bill (“Native American Sacred Lands Act”) would have exempted from FOIA information “obtained as a result of or in connection with” sacred site consultation. Neither bill passed initial committee review.

as an alternative to the legislative process, which is notorious for moving slowly.¹⁰⁸ It is also possible that a federal court could rule for TK's confidentiality; however, this route is not covered by this paper because the individualized nature of adjudication is not appropriate for widespread, immediate implementation.

A critical shortfall to this paper's proposal is that an agency's discretion, exercised to the fullest possible extent, would still apply to federally-recognized tribes only. It is quite unrealistic to expect agency discretion to overturn a longstanding governmental tradition such as the practice of recognition; this would require an enormous systematic overhaul of many laws and policies. Ultimately, doing away with recognition is only possible through an Act of Congress—and one can only wonder how likely that might be, and how soon.

VI. Conclusion

By providing a deeper understanding of TK, this paper hopes to have persuaded the reader that confidentiality for tribal input during historic preservation processes is crucial. Confidentiality is a necessary prerequisite for full participation by tribes in federal decision-making mechanisms, and it also enhances tribal confidence in the nation-to-nation relationship long-promised by the U.S. government.

To take a few steps away from preservation law, the chief focus of this paper: an alternative cast to this paper's argument is intellectual property reform—not in the theoretical or academically-abstract sense, but as a practical and meaningful implementation manifesting in

¹⁰⁸ No major privacy law has passed since 1974—even then, applying only to federal records and not to information maintained by private firms (which range from insurance providers to social media companies). No major law on beauty products have passed since 1938. See *Congress Is Trying to Create a Federal Privacy Law*, THE ECONOMIST, Feb. 28, 2019, available at <https://www.economist.com/united-states/2019/02/28/congress-is-trying-to-create-a-federal-privacy-law>; U.S. Food & Drug Administration, *Cosmetic Laws & Regulations* (2018), available at <https://www.fda.gov/Cosmetics/GuidanceRegulation/LawsRegulations/default.htm>.

actual redress. Whereas intellectual property is founded on principles of ownership, control and enforceability over infringement, Native tribes ask for something quite different: they request that TK be meaningfully incorporated into federal decision-making and that the government, under the whole umbrella of legal and moral obligations by which it is bound, protects this valuable information. This paper's proposal is a decisive step in recognizing Native peoples as partners, rather than observers. To accomplish this, it is paramount that federal agencies first and foremost approach Native knowledge with requisite care and respect.