The National Historic Preservation Act as a Model for the Protection of Indigenous Sacred Places in Other Nations

December 2021

EXECUTIVE SUMMARY

The Advisory Council on Historic Preservation (ACHP) is an independent agency of the U.S. government with the primary mission to encourage historic preservation in the government and across the nation. The National Historic Preservation Act (NHPA), which established the ACHP in 1966, directs federal agencies to act as responsible stewards when their actions affect historic properties. The ACHP assists federal agencies in their efforts to help ensure they consider preservation during project planning.

The ACHP serves as the federal policy advisor to the President and Congress; recommends administrative and legislative improvements for protecting the nation's diverse heritage; and reviews federal programs and policies to promote effectiveness, coordination, and consistency with national preservation policies. A key ACHP function is overseeing the federal historic preservation review process established by Section 106 of the NHPA. Section 106 requires federal agencies to consider the effects of projects, carried out by them or subject to their assistance or approval, on historic properties and to provide the ACHP an opportunity to comment on these projects prior to a final decision on them.

This report by the ACHP is in response to recommendations offered by Indian tribes during State Department consultations leading to the 2014 World Conference on Indigenous Peoples. It addresses questions raised by the Hualapai Tribe and Oglala Sioux Tribe regarding the suitability of the NHPA — a law that is often used by Indian tribes to preserve sacred places — as a model for the protection of sacred places in other nations. The report is submitted to the Department of State for potential submission to a United Nations or other international body.

In addition to considering the potential of the NHPA as a model for other countries, this report also reviews other U.S. laws, executive directives, and policies related to the protection of sacred places.

While the NHPA does not mandate preservation, Section 106 of the NHPA (54 U.S.C. § 306108) requires federal agencies to consider the effects of undertakings they propose to carry out, license, permit, or fund on historic properties[1] — which can include properties of religious and cultural significance to Indian tribes and Native Hawaiian organizations (NHOs) — and to consult with Indian tribes and NHOs and other consulting parties. Such historic properties are often considered or called "sacred places" by Indian tribes and NHOs, as well. While other federal laws require consultation with Indian tribes about various issues, Section 106 is the only federal environmental review process which requires consultation on effects to historic properties and affords Indian tribes and NHOs the opportunity to inform and influence federal decisions that may affect historic properties significant to them.

Other provisions in the NHPA provide for federal grants to Indian tribes and NHOs for preservation purposes and for the substitution of a tribe's historic preservation rules for the ACHP's regulations on its tribal lands, thus providing the opportunity for further control and management of historic properties on tribal lands to Indian tribes. Additional provisions in the NHPA provide for consultation in the development of agency-wide preservation programs, furthering tribal influence on sacred places. The NHPA may be found at **https://www.achp.gov/sites/default/files/2018-06/nhpa.pdf**.

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INTRODUCTION

In preparation for the World Conference on Indigenous Peoples in September 2014, the U.S. State Department held a series of consultations with federally recognized Indian tribes (Indian tribes), non-governmental organizations (NGOs), and other indigenous peoples via teleconferences and in-person meetings. On May 9, 2014, the State Department held an in-person consultation meeting in Washington, D.C. in which a spokesperson for both the Hualapai Tribe of Arizona and the Oglala Sioux Tribe of South Dakota gave verbal testimony and submitted written comments suggesting that "working with indigenous Indian tribes on the preservation of places that hold religious and cultural significance" to them be added to the discussion at the World Conference. Both Indian tribes also suggested that the National Historic Preservation Act (NHPA), which, among other things, requires federal agencies to work with Indian tribes to consider effects to historic properties, might serve as a model for other countries. The written comments from the tribes asked the following questions:

1) Is the NHPA model something that has potential for adaptation in other countries?
2) What can be done to ameliorate the shortcomings of the NHPA model?
3) Recognizing that there are shortcomings in the model, in addition to making improvements in the way the process works in the U.S., are there features of the U.S. model that should not be adopted in other nations?
4) Are there different models in use in other countries that adequately protect tribal sacred places?

In July 2014, the ACHP members unanimously voted to support the proposal of the tribes to consider if the NHPA might serve as a model for adaptation in other countries and to submit its report to the State Department.

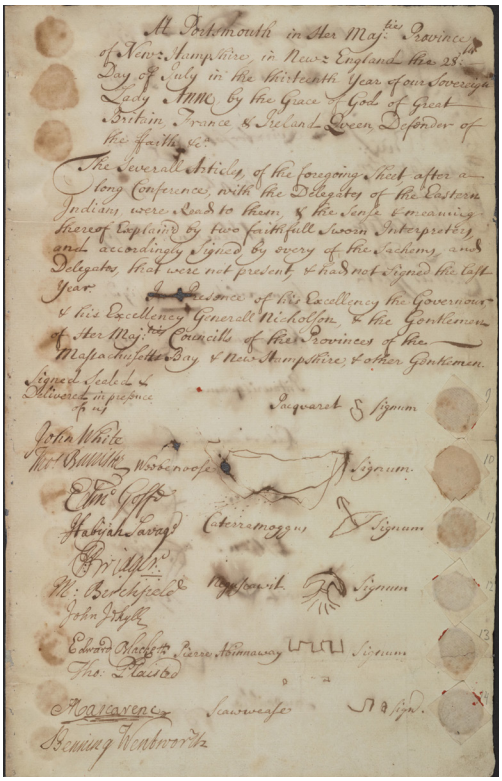
This report was developed as a collaborative effort among the ACHP's Office of Native American Affairs, the Office of Federal Agency Programs, and the Office of General Counsel. Several ACHP members reviewed draft versions of this report and provided input, specifically the Honorable Leonard Forsman, Chairman, Suquamish Tribe and former Native American member and Vice Chairman of the ACHP and Dr. Dorothy Lippert, National Museum of Natural History and former expert member of the ACHP. Any questions or comments on this report should be directed to **achp@achp.gov**.

PURPOSE OF THIS REPORT

The ACHP offers this report in response to some of the questions discussed above. However, the ACHP recognizes that the full intent and scope of the questions presented are beyond the reach of this report. The ACHP intends this report to start a conversation about the protection of indigenous sacred places around the world including an examination of the NHPA model and how it may or may not protect indigenous sacred places in the U.S.; how its provisions may be adapted by other nations to assist in protecting indigenous sacred places; and, what legal protections may exist in other nations to protect such places. The ACHP believes it is important to bring awareness to the protection of indigenous places worldwide because, for many indigenous peoples, their very survival as distinct peoples depends on the existence of their sacred or culturally

Each culture has its unique way of knowing things, of viewing the world, of expressing their views and ideas. Different cultures can look at the same object, place, or living thing but may have very different knowledge about it or even have similar knowledge but express that knowledge differently."

John Brown
Narragansett Indian Tribe



Treaty signed at Portsmouth, New Hampshire, July 13, 1713 (Library of Congress)

important places. The destruction of such places and the separation of indigenous peoples from these places have dire cultural consequences. The ACHP acknowledges the ongoing struggles of indigenous peoples to protect their cultural heritage as well as the strides that have been made to protect sacred places. The ACHP views this report as a first step toward a broader discussion about the protection of indigenous sacred places.

THE ACHP

The ACHP is an independent agency of the United States government and has a unique mission to encourage historic preservation across the U.S. The ACHP serves as the federal historic preservation policy advisor to the President and Congress; recommends administrative and legislative improvements for protecting U.S. heritage; oversees a federal regulation requiring federal agencies[2] to "stop, look, and listen" before taking actions that might affect historic properties; and reviews U.S. government historic preservation programs and policies. The regulations promulgated by the ACHP require U.S. government agencies to consider historic preservation during project planning. The ACHP has 24 statutorily designated members, 21 of whom are appointed by the President. One of these members must be a member of an Indian tribe or Native Hawaiian organization (NHO) and another is the Board Chair of the National Association of Tribal Historic Preservation Officers. A professional staff supports the ACHP's operations and carries out the daily work of the agency.

SCOPE OF THE REPORT

In developing this report, the ACHP conducted documentary research into the legal protections offered to indigenous sacred places in the U.S. and around the world. The report primarily addresses the first question posed by the Hualapai Tribe and the Oglala Sioux Tribe regarding the suitability of the NHPA as a model for the protection of indigenous sacred places in other nations. Initial research on the laws of other nations was also undertaken to provide context for further study on the question regarding models in other nations that might provide adequate protection for indigenous sacred places. The remaining questions, which relate to domestic U.S. issues, are not addressed here.

METHODOLOGY

While the comments of the Hualapai Tribe and the Oglala Sioux Tribe only addressed the potential of the NHPA to serve as a model, the ACHP also reviewed other broadly applicable U.S. laws, executive orders, and policies related to the protection of sacred places. Additionally, the ACHP reviewed the laws of several other nations to identify provisions that appear to offer protections for indigenous sacred places, recognizing that the U.S. is not the only nation to offer some level of protection for indigenous sacred places.

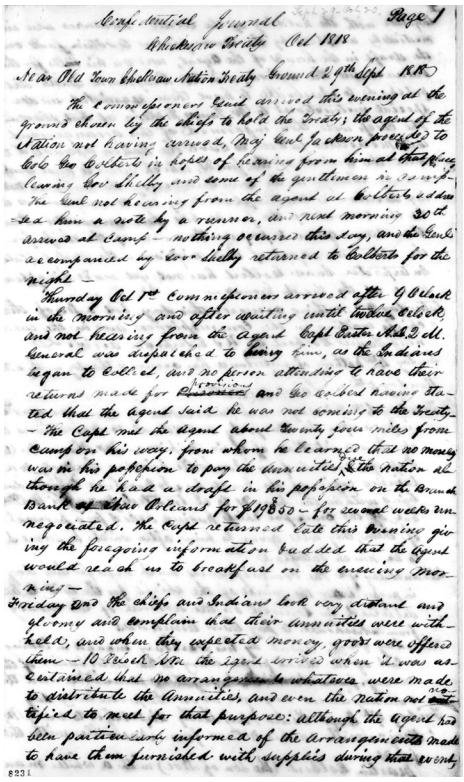
The information in this report is based solely on documentary research in which the laws of nations with indigenous populations, including New Zealand, Australia, Canada, and certain Scandinavian countries were collected. It is important to note that

the ACHP reviewed only the readily available texts of such laws available online and in English. See the Appendix for this information, which includes a legal sheet for each country or region. The legal sheets contain information about and links to pertinent laws. There is also a list of the sources consulted for this section.

In presenting information about other nations' laws, the ACHP acknowledges that:

- Provisions for the protection of sacred places may exist within other general laws or in laws covering such topics as land use not reviewed by the ACHP, and that require review by practitioners familiar with those legal systems.
- Significant gaps may exist between the intent of national legislation as written and its effective implementation. However, an evaluation of how laws are implemented and an assessment of their effectiveness is a task that would be appropriate for the next stage of research. Similarly, broader historical and legal contexts and other factors affecting the implementation and effectiveness of the laws were not assessed for this report.
- The perspectives of national governments or states and indigenous peoples may be vastly different. What a nation may celebrate as a success may not necessarily be viewed as such by the indigenous peoples in that nation.

A note on terminology: the term "sacred places" is used throughout this report as much as possible, rather than "sacred sites." "Sacred places" is a broader term often preferred by many indigenous peoples in the United States and abroad; "sacred sites" is used, however, when it is the official or legal term used in a law or by a nation.



Chickasaw Indian Treaty signed by Robert Butler, Isaac Shelby and Andrew Jackson, October 20, 1818 (Library of Congress)

INDIAN TRIBES, NHOS, AND OTHER INDIGENOUS PEOPLES OF THE UNITED STATES

To determine if the NHPA might serve as a model for the protection of sacred places in other nations, it is necessary to understand the legal and political status of certain indigenous peoples in the U.S. This has direct bearing on their interactions with the U.S. government and on their ability to protect sacred places under federal law.

The NHPA includes provisions specific to Indian tribes and Native Hawaiian organizations (NHOs). However, there are other indigenous peoples in the U.S. and in the territories held by the U.S., but because they are not mentioned in the NHPA, they are not the focus of this report.

> A note on U.S. federal laws and executive orders: the U.S. Congress, in the legislative branch, is the entity with authority to pass national laws. Agencies of the U.S. government (such as the ACHP), under the executive branch, are authorized via statute to issue regulations implementing laws passed by the U.S. Congress. Executive orders are directives from the President regarding federal government operations and have the force of law but only in the executive branch of government.

> My name is Kaleo Paik and I identify myself as an indigenous first nation people. We managed our lands with wisdom that is lost today. The focus was to protect and provide for the future and the present were but a caretaker of the resources to ensure the longevity of those resources. Our sacred places were chosen and structures erected for specific purposes. The purpose and what it served was carried down through traditional knowledge via oral history or practices that have continued over time."
>
> **Kaleo Paik**

Indian Tribes

Historically, federally recognized tribes in the U.S. received federal recognition status through treaties, acts of Congress, presidential executive orders or other federal administrative actions, or federal court decisions. Today, Indian tribes may be recognized by the federal government in several ways. The Federally Recognized Indian Tribe List Act of 1994 (P.L. 103-454, 108 Stat. 4791, 4792) recognized three ways in which an Indian group may become federally recognized:

- By Act of Congress,
- By the administrative procedures under 25 C.F.R. Part 83, *or*
- By decision of a United States court.

The following information about Indian tribes is extracted from information available on the website of the U.S. Department of the Interior, Bureau of Indian Affairs at **www.bia.gov/FAQs**.

As of September 2021, there are 574 federally recognized Indian tribes in the U.S. A federally recognized tribe is an American Indian or Alaska Native tribal entity[3] that is recognized as having a government-to-government relationship with the United States, with the responsibilities, powers, limitations, and obligations attached to that designation, and are eligible for funding and services from the Bureau of Indian Affairs.

Furthermore, federally recognized tribes are recognized as possessing certain inherent rights of self-government (i.e., tribal sovereignty) and are entitled to receive certain federal benefits, services, and protections because of their special relationship with the United States.

Indian tribes possess all powers of self-government except those relinquished under treaty with the United States, those that Congress has expressly extinguished, and those that federal courts have ruled are subject to existing federal law or are inconsistent with overriding national policies. Indian tribes, therefore, possess the right to form their own governments; to make and enforce laws, both civil and criminal; to tax; to establish and determine membership (i.e., tribal citizenship); to license and regulate activities within their jurisdiction; to zone; and to exclude persons from tribal lands.

Limitations on inherent tribal powers of self-government are few but do include some of the same limitations applicable to states, e.g., neither Indian tribes nor states have the power to make war, engage in foreign relations, or print and issue currency.

In the U.S., there are three types of reserved federal lands: military, public, and Indian. A federal Indian reservation is an area of land reserved for an Indian tribe or tribes under treaty or other agreement with the U.S., executive order, or federal statute or administrative action as permanent tribal homelands, and where the federal government holds title to the land in trust on behalf of the Indian tribe.

There are different legal terms for reserved Indian lands. One is "tribal lands" which is defined in 54 U.S.C. § 303319 as all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.

Another term, "Indian Country" is defined in 18 U.S.C. § 1151 and 40 C.F.R. § 171.3 as:

a. all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;

b. all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and

c. all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Approximately 56.2 million acres are held in trust by the U.S. for various Indian tribes and individuals. There are approximately 326 Indian land areas in the U.S. administered as federal Indian reservations (i.e., reservations, pueblos, Rancherias, missions, villages, communities, etc.). The largest is the 16 million-acre Navajo Nation Reservation located in Arizona, New Mexico, and Utah. The smallest is a 1.32-acre parcel in California where the Pit River Tribe's cemetery is located. Many of the smaller reservations are less than 1,000 acres.

Some reservations are the remnants of an Indian tribe's original land base. Others were created by the federal government for the resettling of Indian people forcibly relocated from their homelands. Not every federally recognized Indian tribe has a reservation. Federal Indian reservations are generally exempt from state jurisdiction, including taxation, except when Congress specifically authorizes such jurisdiction.

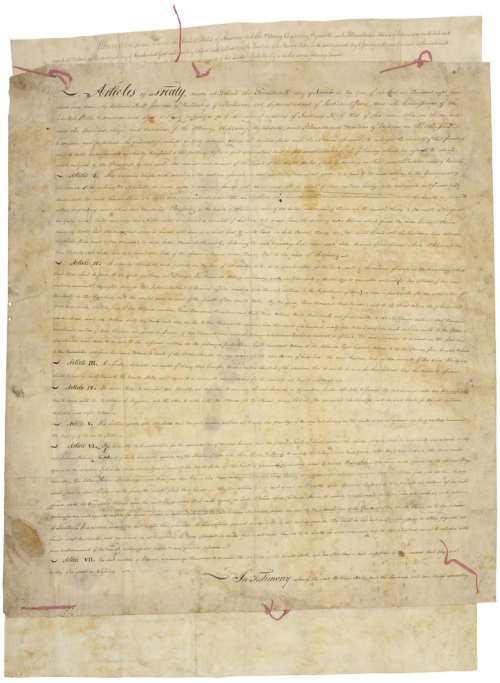
It is also important to note that the U.S. government has a trust responsibility to Indian tribes. The federal Indian trust responsibility is a legal obligation under which the United States "has charged itself with moral obligations of the highest responsibility and trust" toward Indian tribes.[4] This obligation was first discussed by Chief Justice John Marshall in *Cherokee Nation v. Georgia*.[5] Over the years, the trust doctrine has been at the center of numerous other Supreme Court cases, thus making it one of the most important principles in federal Indian law.

The federal Indian trust responsibility is also a legally enforceable fiduciary obligation on the part of the United States to protect tribal treaty rights, lands, assets, and resources, as well as a duty to carry out the mandates of federal law with respect to American Indian and Alaska Native tribes and villages. In several cases discussing the trust responsibility, the Supreme Court has used language suggesting that it entails legal duties, moral obligations, and the fulfillment of understandings and expectations that have arisen over the entire course of the relationship between the United States and federally recognized tribes.

The NHPA defines an Indian tribe as "an Indian tribe, band, nation, or other organized group or community, including a Native village, Regional Corporation or Village Corporation (as those terms are defined in Section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602)), that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians."[6]

Formal recognition of Indian tribes in the United States provides them with more authority under some federal laws, and the ACHP acknowledges that the legal status of indigenous peoples may have significant bearing on whether they have the authority to protect their sacred places. For instance, the Native American Graves Protection

> "The best available data includes traditional knowledge, includes indigenous science."
>
> **Kelsey Leonard**
> *Shinnecock Nation*



Treaty between the Ottawa, Chippewa, Wyandot and Potawatomi Indians (Library of Congress)

and Repatriation Act (NAGPRA) specifically address the rights of Indian tribes (and NHOs) and gives deference to tribal decisions on tribal lands. The processes by which indigenous peoples may be recognized, if such exist, in other nations is a topic that would need further research.

Native Hawaiian organizations

NHO is defined in the NHPA as any organization that:

- Serves and represents the interests of Native Hawaiians;
- Has as a primary and stated purpose the provision of services to Native Hawaiians; and,
- Has demonstrated expertise in aspects of historic preservation that are culturally significant to Native Hawaiians.[7]

"Native Hawaiian" in turn, is defined in the NHPA as: Any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.[8]

NHOs have some of the same rights as federally recognized tribes under certain laws (such as the NHPA and NAGPRA), but they do not have the same government-to-government relationship with the U.S. government as federally recognized Indian tribes. Further, NHOs do not have the same political and legal status as federally-recognized Indian tribes. However, many U.S. federal laws include provisions for services to NHOs, such as funding for education or housing, or accord them specific rights, such as consultation with federal agencies. Additionally, certain state-level agencies — such as the Office of Hawaiian Affairs[9] and the Hawaiian Homes Commission[10] — carry out some functions similar to that of tribal governments. Of significance to this discussion, NHOs are accorded rights under most of the federal laws and other executive directives that address the protection of sacred places on a national level.

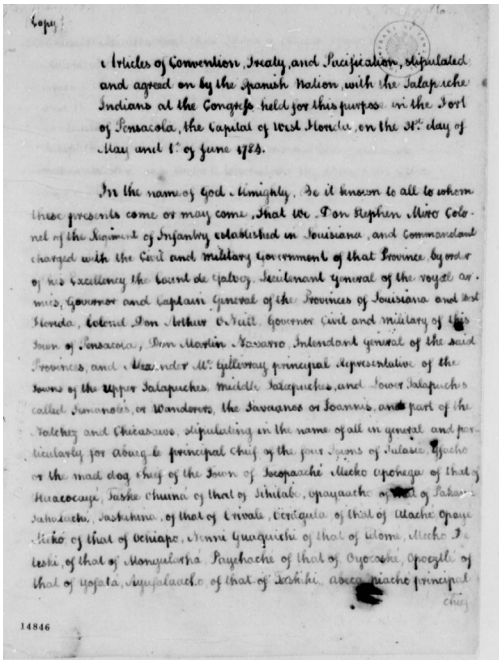
Other Indigenous Peoples in the US

In addition to Indian tribes and NHOs, there are other indigenous peoples in the U.S. and its territories. In at least 14 U.S. states, tribal entities are recognized at the state level as having self-government authority outside of federal processes. The U.S. Government Accountability Office has identified around 400 non-federally recognized tribal entities in the nation,[11] many of which are state-recognized tribes. Many federally and non-federally recognized tribes still have ancestral ties to an area or still occupy their aboriginal territory, and have knowledge of sacred places in their homelands. However, U.S. federal laws do not include provisions specifically for the protection of places sacred to these indigenous peoples. Instead, they could use the general provisions for the protection of historic properties and other cultural resources.

THE NHPA AND OTHER U.S. FEDERAL LAWS AND AUTHORITIES

The National Historic Preservation Act (NHPA)

The NHPA,[12] which became law in 1966, expresses a general policy of support for and encouragement of the preservation of historic properties for present and future generations. While the NHPA does not mandate preservation, it does require federal agencies to consider the impacts of undertakings they propose to carry out, license, permit, or fund on historic properties.[13] Among places considered to be "historic" in the U.S. are places of religious and cultural significance to Indian tribes (including Alaska Native Villages and Regional and Village Corporations as those terms are defined in section 3 of the Alaska Native Claims Settlement Act[14]) and NHOs. Section 106[15] of the NHPA requires federal agencies to consult with Indian tribes and NHOs when places of religious and cultural significance to them might be affected by a proposed undertaking. While the statute explicitly references "historic property of religious and cultural significance to an Indian tribe or Native Hawaiian organization," these places are often called sacred places or sites by indigenous peoples and constitute historic properties under the NHPA when they meet certain criteria discussed below.



Spanish Treaty with Talapuche Indians, May, 31 1784 (Library of Congress)

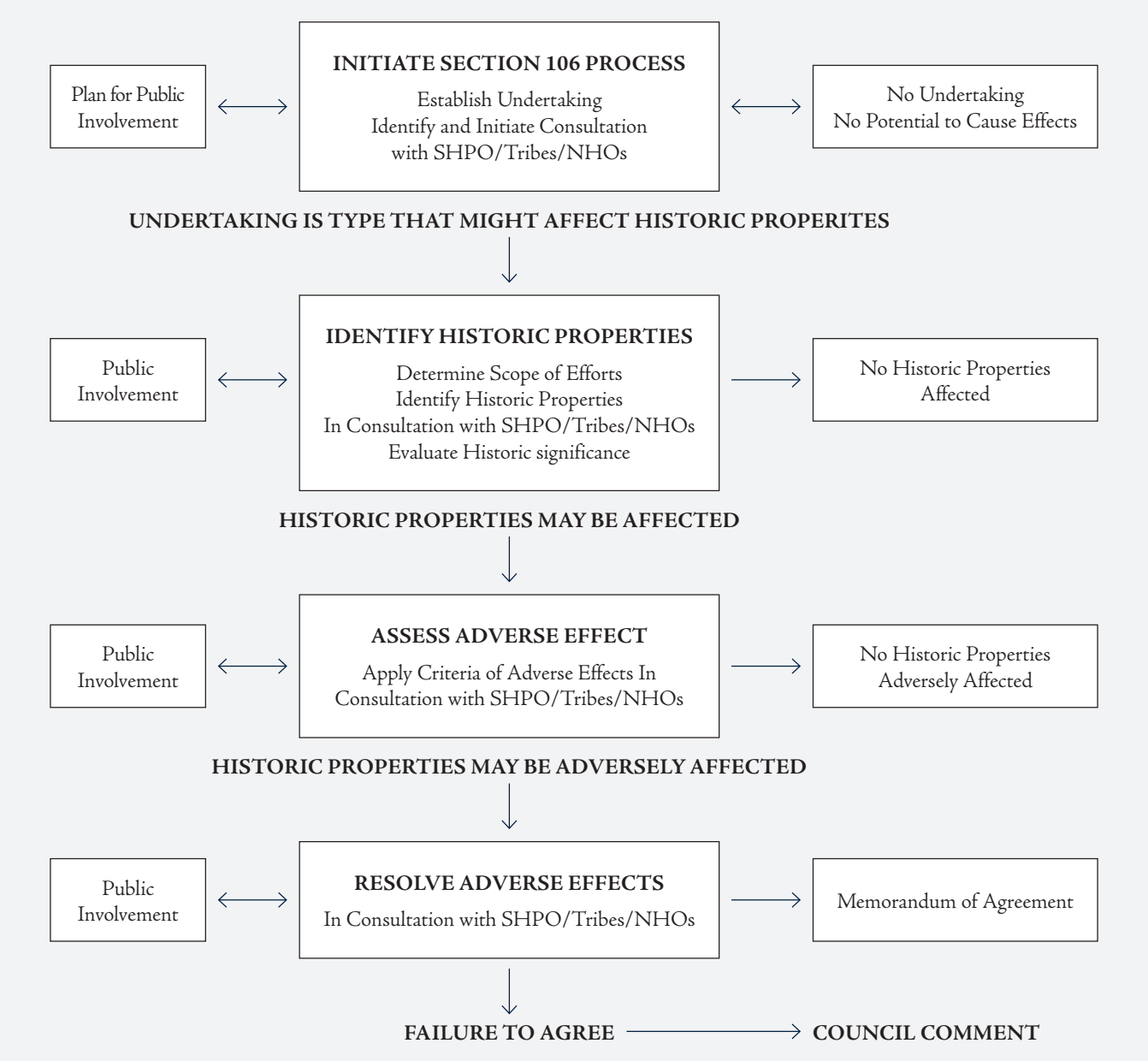
Section 106

Section 106 of the NHPA requires federal agencies to do two things: take into account the effects of undertakings they carry out, license, permit, or fund on historic properties and provide the ACHP an opportunity to comment on the undertaking. Federal agencies meet these requirements by following regulations promulgated by the ACHP that govern the implementation of Section 106. The Section 106 regulations outline the decision-making process by which federal agencies must consider effects to historic properties and consult with others in doing so. The requirements include consultation with Indian tribes and NHOs throughout the process. The regulations may be found at **https://www.achp.gov/sites/default/files/regulations/2017-02/regs-rev04.pdf**.

All federal agencies under the executive branch of the U.S. government are required to comply with Section 106, including independent regulatory agencies.[16] Consultation is the cornerstone of the Section 106 process and should be initiated in the early stages of project planning.

At the very outset, the regulations require federal agencies to respect their government-to-government relationships with Indian tribes and clarify that the federal agency is responsible for making a reasonable and good faith effort to identify those Indian tribes and NHOs that shall be consulted. The regulations also require that federal agencies ensure consultation in the Section 106 process provides a reasonable opportunity for Indian tribes and NHOs to identify their concerns about historic properties; advise on the identification and evaluation of them; articulate views on the undertaking's effects, and, participate in the resolution of adverse effects. The regulations remind federal agencies of their unique legal relationship with Indian tribes and suggest that consultation be respectful of tribal sovereignty. In fact, there is a difference in the Section 106 process for undertakings that would occur on or affect historic properties on tribal lands, notably, that the federal agency must attempt to seek agreement with the Indian tribe on its Section 106 determinations and findings.

The Section 106 process involves four basic steps, as illustrated in the graphic below:



As the graphic above illustrates, the federal agency is required to consult throughout the process with Indian tribes and NHOs who attach religious and cultural significance to historic properties that may be affected by the proposed undertaking.

Initiate the Section 106 Process

In the first step, the federal agency decides if the undertaking is the kind of activity that would affect historic properties, assuming historic properties are present. After determining if Section 106 applies to its undertaking, the federal agency is then required to initiate consultation with the State Historic Preservation Officer (SHPO) and/or the Tribal Historic Preservation Officer (THPO), if the project

would occur on or affect historic properties on tribal lands. SHPOs are responsible for administering the state historic preservation program and advising and assisting federal agencies in carrying out their Section 106 responsibilities. A THPO can assume all or part of the SHPO's responsibilities on tribal lands, including Section 106 responsibilities. If an Indian tribe does not have a THPO, a designated tribal representative participates in the consultation process along with the SHPO regarding undertakings located on or affecting historic properties on tribal lands.

At this early stage, the federal agency must also determine if there are Indian tribes or NHOs that should be invited to participate in the process because they attach religious and cultural significance to historic properties that may be affected by the undertaking, regardless of its location. The federal agency must also invite local government(s) and applicants for federal licenses, permits, or assistance to consult. Further, additional consulting parties, such as preservation groups or individual citizens, or non-federally recognized Indian tribes, should be invited by the agency to participate in the consultation as well if they have an interest in the undertaking or its effects on historic properties. In this first step, the agency gathers information about potential historic properties. All these actions are part of a comprehensive planning exercise and establish the scope of the review process and and with whom the federal agency must work throughout the process.

Treaty between William Penn and the Indians (Library of Congress)

Identify Historic Properties

If the undertaking has the potential to affect historic properties, the federal agency determines the area of potential effects and the scope of appropriate identification efforts within the area of potential effects. To do this, the agency reviews background information and seeks information from knowledgeable parties, and conducts additional studies as necessary, all in consultation with the SHPO/THPO and Indian tribes or NHOs. Districts, sites, buildings, structures, and objects listed in the National Register are considered; unlisted properties are evaluated under the National Park Service's criteria for the National Register of Historic Places, in consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that may attach religious and cultural importance to them. The regulations include a requirement that federal agencies acknowledge the special expertise of Indian tribes and NHOs in evaluating historic properties of religious and cultural significance to them. The passage of time, changing perceptions of what is significant, or incomplete prior evaluations may require a federal agency to reevaluate previous determinations of eligibility.

Places of sacred or spiritual importance to an Indian tribe or NHO may be eligible for the National Register if they meet one or more of the criteria for listing.[17] If a sacred site is determined eligible for the National Register, effects to it must be considered in the Section 106 review process. It should also be noted that such places are sometimes referred to as "traditional cultural properties" or "TCPs." National Register Bulletin 38[18] defines traditional cultural property as "a property that is eligible for inclusion in the National Register of Historic Places (NRHP) based on its associations with the cultural practices, traditions, beliefs, lifeways, arts, crafts, or social institutions of a living community. TCPs are rooted in a traditional community's history and are important in maintaining the continuing cultural identity of the community."

If the agency finds that no historic properties are present within the area of potential effects or would be affected by the undertaking, it provides documentation to the SHPO/THPO and, barring any objection in 30 days, may conclude its Section 106 review.

If the agency finds that historic properties are present and may be affected by the undertaking, it proceeds to assess possible adverse effects.

Assess adverse effects

The agency, in consultation with the SHPO/THPO, and Indian tribes or NHOs, assesses the undertaking's potential adverse effects to the identified historic properties based on criteria found in Section 106 regulations. Consultation is very important at this stage because the federal agency may not fully understand both the importance of the historic properties to an Indian tribe or NHO and how the undertaking would affect those properties without input from the tribe or NHO for whom the place is culturally significant.

After that consultation, if the agency determines that there would be no adverse effect from the undertaking, and the SHPO/THPO, Indian tribes, and other consulting parties do not object, the agency may conclude its Section 106 review. If any of these parties object to the finding, the federal agency must either consult with the objecting party to resolve the disagreement or forward the finding to the ACHP for an advisory opinion. The federal agency must take the ACHP's opinion into consideration in making its final decision about the effects of the proposed undertaking on historic properties.

If the agency determines there would be an adverse effect from the undertaking, the agency continues consultation to seek ways to avoid, minimize, or mitigate the adverse effects.

> Traditional Knowledge (TK) to the Winnebago Tribe of Nebraska is a connection to all things. We are connected from the air we breathe, the ground we walk on, to the foods we grow, the animals and plants we share our earth with, the connectedness with all things our creator put on this earth. We grow and respect all of these things in our lifetime, knowing that one day we will return to the earth and the cycle of life will continue."
>
> **Sunshine Thomas-Bear**
> *Winnebago Tribe of Nebraska*

Resolve adverse effects

The agency consults to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate the adverse effects with the SHPO/THPO and Indian tribes or NHOs, local governments, permit or license applicants, and any other consulting parties, and notifies the ACHP. The ACHP may elect to participate in consultation when there may be substantial impacts to important historic properties, when a case presents important questions of policy or interpretation, when there is a potential for procedural problems, or when there are issues of concern to Indian tribes or NHOs.

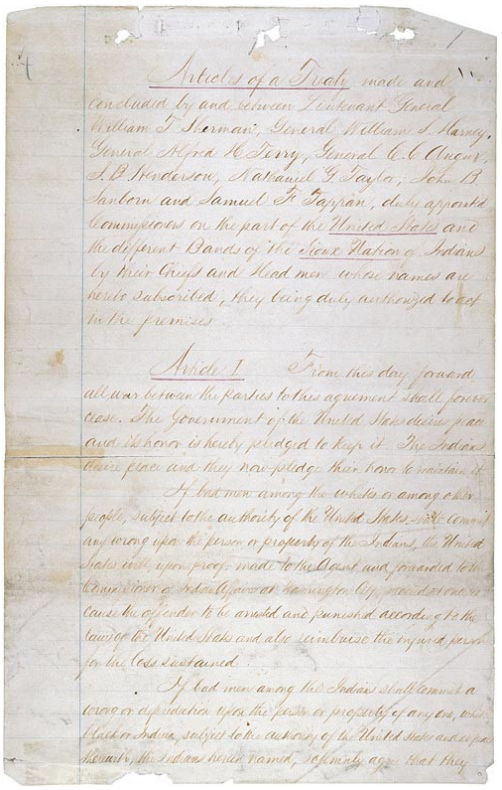
The voice of Indian tribes or NHOs in the resolution of adverse effects is critical to ensure consideration of the values that make the property significant and to understand what measures, if any, would avoid or minimize adverse impacts to historic properties of religious and cultural significance to them.

Consultation usually results in a Memorandum of Agreement (MOA), which outlines agreed-upon measures that the agency would ensure are carried out to avoid, minimize, or mitigate the adverse effects. In some cases, the consulting parties may agree that no measures would be able to fully mitigate the harm or loss of a historic property, but that the adverse effects would be accepted as the undertaking serves other important public interests.

In the rare instance an agreement is not reached among the agency and consulting parties to resolve adverse effects from the undertaking, the consultation process may be terminated. If the SHPO terminates consultation, the agency may still seek to execute

an agreement with the ACHP. However, if the THPO or an Indian tribe terminates the consultation regarding an undertaking on or affecting historic properties on tribal land, the agency must seek and consider the ACHP's comments to conclude the Section 106 process. While the ACHP's comments are not binding, they can be very persuasive since they are issued to the agency head by the leadership of the ACHP.

While consultation is required throughout the Section 106 process, it does not guarantee the preservation of historic properties or that the input of Indian tribes and NHOs will be followed. Final decisions about the undertaking are made by a federal agency who must balance agency mission and other directives. However, the process is very important to Indian tribes and NHOs because it affords them the opportunity to directly influence federal decisions that may affect their sacred places, on or off tribal or federal lands. And, as illustrated above, this influence may be exercised throughout the decision-making process. Indian tribes and NHOs have important opportunities to protect places that are sacred to them because federal agencies are required to consult with them about how to identify and evaluate historic properties of significance to them; to determine if the proposed undertaking might affect such places and, if so, whether the effects would be adverse; and, finally, to seek ways to avoid, minimize, or mitigate adverse effects to historic properties. Since the process is intended to result in agreement between the federal agency and consulting parties, the Section 106 process overall can be a powerful tool for protecting tribal and Native Hawaiian sacred places.



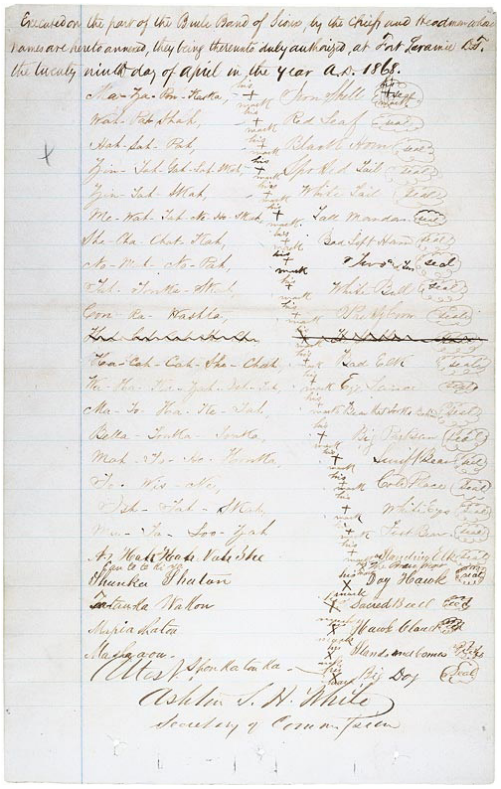
Fort Laramie Treaty, 1868 (National Archives)

Other Provisions in the NHPA

There are a number of other sections in the NHPA that apply specifically to Indian tribes and NHOs. Some of the provisions call for the development of programs that directly or indirectly support their efforts to preserve places of importance to them. Other sections provide for grants to be made available to support tribal and NHO preservation efforts. The following text examines those sections and discusses how they can be used by indigenous peoples to protect sacred places:[19]

Section 302701.
The Secretary of the Interior is required to establish a program that takes into account tribal values and promulgate regulations to assist Indian tribes in preserving their historic properties. The Secretary is also required to foster communication and cooperation between Indian tribes and SHPOs to ensure that all types of historic properties are considered and to encourage cooperation among Indian tribes, NHOs, SHPOs and federal agencies to identify, evaluate, protect and interpret historic properties. While this section does not directly result in the protection of indigenous sacred places, it does require the Secretary of the Interior to develop a program to assist Indian tribes.

Section 302702.
This section provides an opportunity for an Indian tribe to assume all or any part of the functions of a State Historic Preservation Officer on its tribal land. Therefore, the role of the state in Section 106 reviews for undertakings on tribal lands or affecting historic properties on tribal lands is either reduced or eliminated, giving the Indian tribe a greater voice in the process on tribal lands and, thus, more opportunity to protect its sacred sites. While the federal agency still makes the final decision about the undertaking, the tribe and the federal agency work in partnership in the Section 106 process. As of October 2021, there were 207 THPOs in the U.S.



Fort Laramie Treaty, 1868 (National Archives)

When a tribal program is approved to assume the role of the SHPO on tribal lands, the tribe enters into an agreement with the Department of the Interior (Interior) and receives an annual funding award. The source for this funding is the Historic Preservation Fund (HPF).[20] Congress annually appropriates funds from the HPF to Interior which, in turn, awards funding to THPOs, SHPOs, and other preservation programs. Approximately 80% of the total funding set aside for THPOs is divided equally among all THPOs and the remaining 20% is apportioned based on the size of tribal lands. Therefore, tribes that manage large land areas receive additional funding.[21]

While this source of funding is an important form of assistance to those Indian tribes that have a THPO and historic preservation program, the funding often does not cover the basic operational costs of a THPO.[22] In 2019, the average award to THPOs was $62,700, an almost $20,000 decrease from the average award of $80,000 in 1996, the first year of the program. Therefore, the intention of the program, to bring Indian tribes into the national preservation program as full partners, can be hindered by inadequate funding. When THPOs do not have sufficient financial resources, they struggle to participate in the Section 106 process.

Section 302705.
This section of the NHPA allows the ACHP to enter into an agreement with an Indian tribe for undertakings on tribal land to be reviewed under tribal historic preservation regulations in place of review under the ACHP's Section 106 regulations. These agreements can afford Indian tribes even more authority with which to manage and protect historic properties on tribal lands through the Section 106 review process by developing their own historic preservation regulations. When such an agreement is in place, federal agencies proposing undertakings on tribal lands would follow the tribe's regulations rather than the ACHP's. When such an agreement is proposed by a tribe that also has a THPO, the process to develop the agreement does not need to involve any SHPO because the tribe has already assumed the responsibilities of the SHPO on its tribal lands. As of 2021, only two Indian tribes have entered into such an agreement with the ACHP. There are likely several reasons why only two tribes have availed themselves of this opportunity: many Indian tribes prefer to have the ACHP participate in preservation reviews on their lands; there is no additional federal funding for assuming this responsibility; and, many Indian tribes struggle to maintain historic preservation programs, including THPOs, because of inadequate financial resources.

Section 302706.
In 1992, the NHPA was amended to include three very important provisions regarding Indian tribes and NHOs. The first clarified that properties of traditional religious and cultural importance to an Indian tribe or NHO may be determined to be eligible for inclusion on the National Register of Historic Places.[23] Thus, the NHPA clearly states that properties of importance to Indian tribes and NHOs are also important to the nation. This recognition means that federal agencies must consider the impacts of undertakings they propose to carry out, license, permit, or fund on such properties. The second provision clarified that federal agencies must consult with any Indian tribe or NHO that attaches religious and cultural significance to historic properties that may be affected by an undertaking in carrying out the Section 106 process. Thus, Indian tribes and NHOs have a voice in the process and an opportunity to influence federal decision making. The third provision requires the Hawaii SHPO to consult with and enter into MOUs or agreements with NHOs to assess the cultural significance of properties to determine National Register eligibility and develop cultural components of preservation programs or plans for properties. This is a proactive program to recognize and protect Native Hawaiian heritage and sacred places.

Section 307103.
This section addresses the protection of sensitive information. Federal agencies or other public officials receiving grant assistance under the NHPA, must withhold from public disclosure information about the location, character, or ownership of a historic resource if, after consultation with Secretary of the Interior, the official determines that such disclosure may cause a significant invasion of privacy, risk harm to the historic property, or impede the use of a traditional religious site by practitioners. Withholding information about sacred places is not only respectful to traditional practitioners but can add another layer of protection by keeping locational information protected from public disclosure.

In addition to the programs discussed above, the NHPA includes programs that offer financial assistance and training to Indian tribes and NHOs.

Section 302906.
This section allows Interior to make grants, loans or both to Indian tribes and nonprofit organizations representing ethnic or minority groups for the preservation of their cultural heritage.

Section 302907.
This section allows Interior to award direct grants to Indian tribes and NHOs for the purpose of carrying out preservation work. In 2016, Indian tribes and NHOs received more than $530,000 for 16 projects and in 2017, more than $510,000 was awarded. More than 600 such grants have been awarded since 1991 when the Tribal Heritage Grants Program was created.

Section 303903.
This section of the NHPA requires Interior, in consultation with the ACHP and others, to develop and implement a comprehensive preservation education and training program to include, among other things, technical or financial assistance to tribal colleges or colleges with a high enrollment of Native Americans or Native Hawaiians to establish preservation training and degree programs.

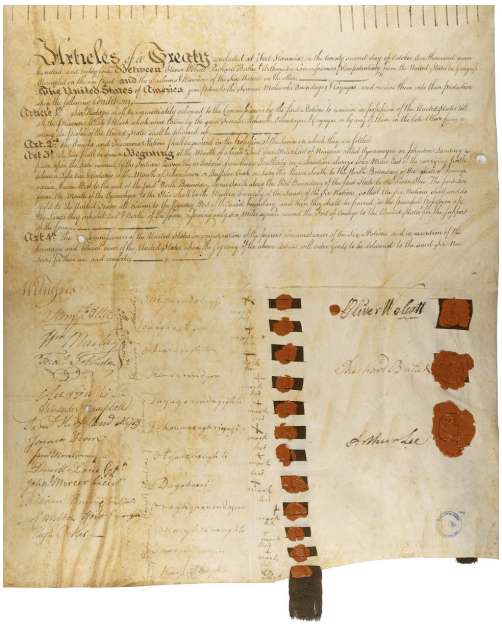
Section 306102.
Each federal agency must establish preservation programs for the identification, evaluation, and nomination to the National Register, and protection, of historic properties. The agency's preservation-related activities must be carried out in consultation with Indian tribes and NHOs, among others, thereby giving Indian tribes and NHOs another opportunity to influence federal actions and decisions that may affect sacred places.

Section 306131.
This section requires Interior to issue guidelines to ensure that federal state, and tribal historic preservation programs (that are subject to the NHPA), include plans to encourage the protection of Native American cultural items and properties of religious or cultural importance to Indian tribes, NHOs, or other Native American groups. This provision in the NHPA is a clear policy statement by Congress that Interior must encourage its preservation partners to protect such places.

Section 307101.
This section provides for the participation of the United States in the World Heritage Convention and the nomination of property to the World Heritage Committee. Prior to approving any undertaking outside the U.S. that may directly and adversely affect a property that is on the World Heritage List or on the applicable country's

Protecting land-based cultural resources is essential if the Tribes are to sustain Tribal cultures. This is one of the most important goals of Tribal natural resource management on the Reservation. It is also a goal that the Tribes have for Tribal aboriginal territories managed by other entities."

Confederated Salish and Kootenai Tribes



Treaty of Fort Stanwix, 1784
(National Archives)

equivalent of the National Register, subsection (e) requires each federal agency to take into account the effect of such undertaking on the property for purposes of avoiding or mitigating any adverse effect. Where a sacred property outside the U.S. is either listed on the foreign equivalent to the National Register or on the World Heritage List, U.S. government agencies would need to take into account the potential effects of undertakings under their direct or indirect jurisdiction and seek to avoid or mitigate any adverse effects to them.

Throughout the NHPA, there exist opportunities for Indian tribes and NHOs to protect places of significance to them. Therefore, in addition to the ability to influence federal decisions that might affect sacred places through participation in the Section 106 process, Indian tribes and Native Hawaiian organizations have access to limited funding to assist them in their efforts, as well as the ability to modify the review process for potential actions that may affect sacred places on tribal lands.

Other U.S. Federal Laws and Executive Orders Regarding Indigenous Sacred Places

While this report focuses on the NHPA, a body of U.S. federal laws and executive orders also provide a measure of protection for sacred places. Taken together, these authorities constitute a set of tools that both Indian tribes and NHOs can and have used to protect their sacred places in the U.S.

The information below was largely derived from a report issued by the United States Departments of Defense, the Interior, Agriculture, and Energy, and the ACHP.[24] In 2012, the agencies entered into the Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites (MOU) to improve the protection of and tribal access to Indian sacred sites. Under the terms of the MOU, an evaluation of the following federal authorities was included in a progress report issued in May 2014:

- Executive Order 13007: Indian Sacred Sites
- National Historic Preservation Act
- National Environmental Policy Act (NEPA)
- Native American Graves Protection and Repatriation Act (NAGPRA)
- American Indian Religious Freedom Act (AIRFA)
- Archaeological Resources Protection Act (ARPA)
- Religious Freedom Restoration Act
- Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

In the United States, federal agencies have broad discretion to work cooperatively on issues of mutual interest or where responsibilities overlap. In this case, these agencies sought to find efficiencies by leveraging their resources with the goal of improving their efforts to protect Indian sacred places under their control.

The evaluation carried out by these agencies revealed that in the United States, no single national level law addresses or requires the protection and preservation of indigenous sacred places. Instead, multiple laws and executive orders, taken together, create a national policy of "stop, look, and listen" before the U.S. government can make a decision

that might affect tribal or Native Hawaiian sacred places. It was found that, when combined, Section 106 and the NEPA provide perhaps the greatest protection for sacred places under current U.S. federal law through their procedural review requirements.[25]

Only two federal authorities *specifically* identify indigenous sacred places by name in the United States: AIRFA and Executive Order (E.O.) 13007: Indian Sacred Sites. AIRFA states that it is the policy of the U.S. to protect and preserve for American Indians their religious freedoms including access to sacred sites. While it clearly states federal policy, the effectiveness of AIRFA as a protective mechanism was significantly limited by a landmark Supreme Court case.[26] In *Lyng v. Northwest Indian Cemetery Protective Association*, the Supreme Court found that the law does not establish any legal rights or cause of action beyond those recognized under the First Amendment of the Constitution; that it is simply a statement of policy.

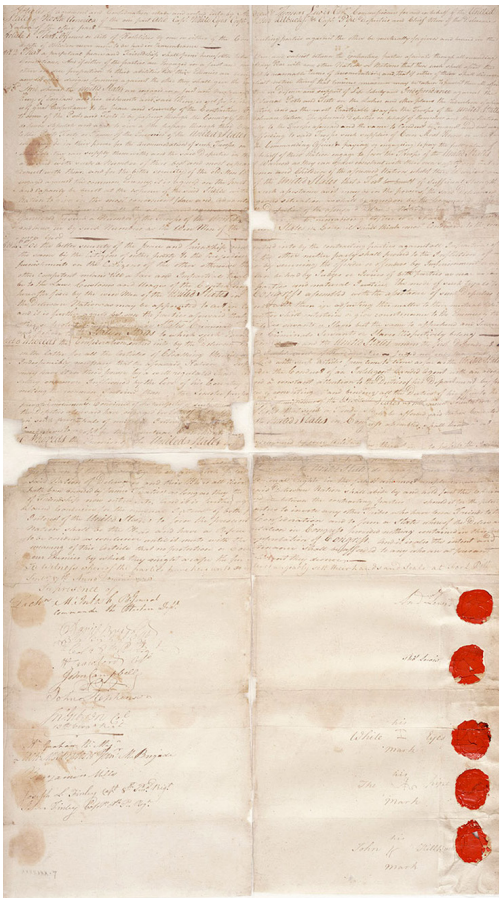
E.O. 13007 established policy, directing federal land managing agencies to: 1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and 2) avoid adversely affecting the physical integrity of such sacred sites. In doing so, federal agencies must maintain the confidentiality of sacred sites. However, E.O. 13007 applies only to sacred sites on federal and tribal land.

Section 3 of NAGPRA requires a permit to be issued for the excavation or removal of Native American human remains and funerary objects from federal or tribal lands. Unlike other federal cultural resource statutes, tribal lands, under NAGPRA, include any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920.[27] Section 3 also requires tribal consent for the removal of human remains and cultural items on tribal lands and for tribal or NHO consultation on federal lands. While consultation does not necessarily lead to protection, it does afford Indian tribes and NHOs the opportunity to influence federal decision-making regarding burials on federal lands.

While sacred sites are not specifically mentioned in NEPA, a stated policy of the law is to "preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice."[28] If a proposed major federal action threatens a sacred site, that action is likely subject to NEPA review. NEPA also provides for consideration of environmental justice with respect to impacts on community health. The protection and preservation of sacred places is recognized as an important factor in community health in the U.N. Declaration on the Rights of Indigenous Peoples (Declaration).

While the term "sacred site" is not used in ARPA, it explicitly mentions sites that have religious or cultural importance to Indian tribes. In fact, many archaeological sites are considered sacred by Indian tribes. Archaeological resources protected by ARPA are broadly defined, but specifically can include graves and human remains. ARPA's implementing regulations further define and treat such sites in a manner that acknowledges their potentially sacred nature. Although ARPA only applies on federal and tribal lands, its criminal and civil penalties can serve as a deterrent to looting or vandalism of sacred sites on these lands.

To the extent that various U.S. laws and executive orders require federal agencies to request information from and consult with Indian tribes and NHOs, these indigenous peoples are afforded the opportunity to influence federal government decision making. Laws at the state or local level may also help indigenous peoples protect sacred places or burial sites. For example, many states have laws that protect unmarked burials and



Treaty with the Delawares, 1778
(National Archives)

> Elders are keepers of cultural traditional knowledge and are responsible for tribal social well-being. Elders and knowledgeable tribal members have experienced teachings that are imbued with spirit, have earned respect and honor because the reality of oral histories, songs, ceremonies, and other ethereal elements residing within tribal elders of a community, are manifested upon cultural landscapes that are seen as significant and or religious places. These places are permeated with layers of meaning both tangible and intangible."
>
> **Linda Otero**
> *Director, AhaMakav Cultural Society, Fort Mojave Indian Tribe*

archeological sites. Further research could be done to assess the ability of state, local, and tribal laws to protect indigenous sacred places.

CONSULTATION WITH INDIAN TRIBES AND NHOs

There are many statutes, regulations, and executive orders in the U.S. that require federal agencies to consult with Indian tribes and NHOs. While consultation requirements may vary by directive, the overall intent to provide Indian tribes and NHOs a voice is the same.

In regard to historic properties of religious and cultural significance to Indian tribes and NHOs, the Section 106 process has particularly robust consultation requirements. As noted above, federal agencies are required to consult with Indian tribes or NHOs at each step of the review process and attempt to seek agreement on alternatives or modifications to a proposed undertaking to avoid, minimize, or mitigate adverse effects to historic properties, thus providing Indian tribes and NHOs the opportunity to influence federal decision making.

Consultation can be a powerful tool for the protection of sacred places. While consultation is mandated under the NHPA and other laws between the U.S. government and Indian tribes or NHOs, the dialogue and interaction between the parties often achieves more than just compliance with a legal requirement. For example, it is common for consultation to include traditional openings, sharing of stories and histories, and remarks by indigenous representatives that can help educate U.S. government officials and other consulting parties about the tribe's past and present culture. Sometimes, elders and other indigenous representatives participate in a consultation process in addition to tribal government or NHO officials. When these kinds of interactions happen on a regular basis, they can lead to more positive working relationships between U.S. government and indigenous officials. Future interactions can become partnerships that lead to better preservation outcomes.

THE ACHP'S RESPONSE TO THE QUESTIONS RAISED BY THE TRIBES

This report provides the ACHP's response to questions posed by the Hualapai Tribe and the Oglala Sioux Tribe during the State Department consultation meeting in May 2014 in preparation for the U.N. World Conference on Indigenous Peoples. Based on an examination of the NHPA and a body of other U.S. cultural heritage laws, the ACHP concludes that the NHPA and other U.S. laws may serve as useful models or provide helpful principles that could assist indigenous peoples achieve preservation outcomes.

Question 1: Is the NHPA model something that has the potential for adaptation in other nations?

Based on the information presented above and more than fifty years of experience in overseeing the Section 106 process and participation in the national historic

preservation program, the ACHP believes the answer is, yes, the NHPA has the potential for adaptation in other nations. However, the ACHP believes there are other legal, historical, and political contributing factors within the U.S. in addition to the NHPA that lend support to the protection of indigenous sacred places in this country.

The acknowledgement of Indian tribes as sovereign governments by the federal government and their concomitant legal rights add to the ability of Indian tribes to protect their sacred places. This is certainly true for sacred places on tribal lands. Off tribal lands, Indian tribes have opportunities to influence federal decisions through the NHPA and other federal laws. Importantly, federal agencies must consult with them on a government-to-government basis and respect their sovereignty regarding the consideration of effects to historic properties of religious and cultural significance to them. Therefore, the political and legal status of indigenous peoples is an important factor in their ability to protect sacred places.

The opportunities for Indian tribes and NHOs to carry out preservation themselves through federal grants may also serve as an example for other nations.

Question 2: What can be done to ameliorate the shortcomings of the NHPA model?

The ACHP did not address potential shortcomings to the NHPA in this report. Rather, the ACHP focused on the legal requirements and opportunities for indigenous peoples to utilize the NHPA and other federal laws to protect sacred places in the U.S. To identify potential shortcomings in the NHPA, the ACHP would need input and information from Indian tribes and NHOs on the law's implementation. That level of investigation was beyond the scope of this project.

While the NHPA includes an important right of consultation for Indian tribes and NHOs, it does not (nor do other federal cultural resource laws) require tribal or Native Hawaiian consent for proposed federal projects. Free, prior and informed consent is a cornerstone of the Declaration and is an important principle for indigenous peoples around the world.

Question 3: Recognizing that there are shortcomings in the model, in addition to making improvements in the way the process works in the U.S., are there features of the U.S. model that should be adopted in other nations?

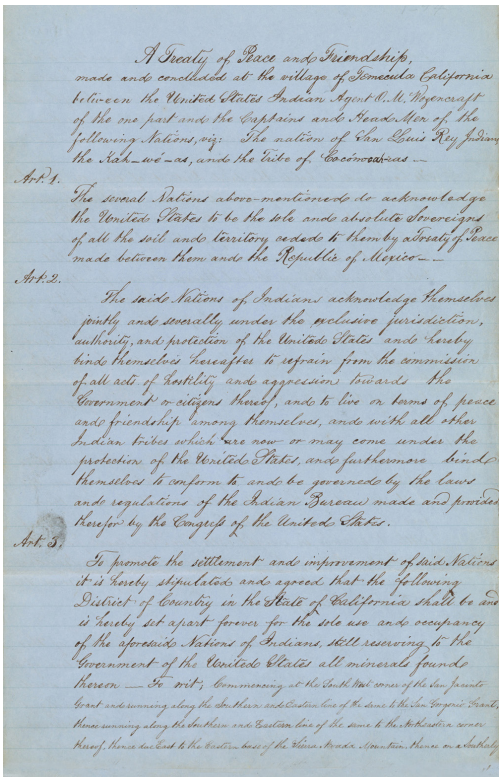
The ACHP believes that all of the above-mentioned sections in the NHPA could provide useful principles for adoption by other nations. The ACHP acknowledges that indigenous peoples may believe additional provisions could be added to the NHPA to strengthen both their role in the federal review process and the protection of sacred places but such an analysis was beyond the scope of this report.

Question 4: Are there different models in use in other nations that adequately protect tribal sacred places?

Many nations across the world are working to consider and protect tribal sacred places. The ACHP recognizes that there may be models from other nations with principles and procedures that could strengthen the protection of sacred places in the U.S. While the ACHP examined the laws of several nations and included select examples in the

Traditional Ecological Knowledge, TEK, when I first heard of this term I didn't know what it was and thought to myself I need to ponder this. TEK refers to the aboriginal, indigenous, Native form of knowledge, practice, and belief. It is passed down from generation to generation, culturally. It's the relationship of us, as living human beings and our environment; which is also living."

Melany Johnson
Susanville Rancheria



A Treaty of Peace and Friendship,
made and concluded at the village of Temecula California
between the United States Indian Agent R. S. Rogencraft
of the one part and the Cappains and Head Men of the
following Nations, viz: The nation of San Luis Rey Indians
the Nah-we-as, and the Tribe of Cocomaricas —

Art 1.

The several Nations above-mentioned do acknowledge
the United States to be the sole and absolute Sovereigns
of all the soil and territory ceded to them by a Treaty of Peace
made between them and the Republic of Mexico —

Art 2.

The said Nations of Indians acknowledge themselves
jointly and severally under the exclusive jurisdiction,
authority, and protection of the United States and hereby
bind themselves hereafter to refrain from the commission
of all acts of hostility and aggression towards the
Government or citizens thereof, and to live on terms of peace
and friendship among themselves, and with all other
Indian tribes which are now or may come under the
protection of the United States, and furthermore bind
themselves to conform to and be governed by the laws
and regulations of the Indian Bureau made and provided
therefor by the Congress of the United States.

Art 3.

To promote the settlement and improvement of said Nations
it is hereby stipulated and agreed that the following
District of Country in the State of California shall be and
is hereby set apart forever for the sole use and occupancy
of the aforesaid Nations of Indians, still reserving to the
Government of the United States all minerals found
thereon — To wit; Commencing at the South West corner of the San Jacinto
Grant and running along the South West and Eastern line of the same to the North Eastern corner
thereof, thence due East to the Eastern base of the Vallecito Mountain, thence on a Southerly

Unratified California Treay, 1852
(National Archives)

Appendix, the analysis necessary to determine which nation's specific laws might be models for the U.S. was beyond the scope of this report.

The ACHP also notes that the qualifier, "adequately," is a value-laden concept. To fully answer this question, it would be necessary to review case law and overall legal and political context and consult with indigenous peoples as well as government officials to understand what constitutes "adequate" protection in other nations.

RECOMMENDATIONS FOR FUTURE RESEARCH

Any consideration of the protection and preservation of indigenous cultures and traditions, including those places indigenous peoples hold sacred, should include the Declaration. It is perhaps the most significant, unified statement by indigenous peoples throughout the world and, while it addresses a multitude of important and pressing issues, it speaks to the rights of indigenous peoples to their cultures and traditions. Although the Declaration is not binding, it does serve as a policy guide that highlights issues of concern to indigenous peoples and can provide direction when a nation is considering legislative or policy changes.

In the United States, federal government support for the Declaration has focused on improving the lives of indigenous peoples.[29] The U.S. has noted that the Declaration has both "moral and political force" to protect and promote the rights of indigenous peoples. The U.S. also recognizes "that some of the most grievous acts committed by the United States and many other States against indigenous peoples were with regard to their lands, territories, and natural resources."[30]

Specific articles in the Declaration related to the protection of sacred places include Articles 8, 11, 12, 24, 25 and 26. Consideration of these articles could guide the direction of future research on this topic as well as international consideration of indigenous sacred places.

Briefly summarized, Article 8 notes that States shall prevent and redress actions toward dispossession of lands, territories, or resources. Article 11 outlines, among other things, the obligation of States to provide redress (developed in conjunction with indigenous peoples) for "spiritual property" taken without consent. Article 12 focuses on indigenous rights to spiritual and religious practices, including access to sites and repatriation of human remains, which States should facilitate. Article 24 states that indigenous peoples have the right to their traditional medicines and to conservation of plants, animals, and minerals (which requires protection of the places where they exist). Articles 25 and 26 are perhaps the most relevant to the protection of sacred places. Article 25 emphasizes indigenous rights to maintain and strengthen spiritual relationships with land, territories, waters, and other resources and maintain for future generations. Article 26 focuses on ownership, use, development, and control rights to the lands, territories, and resources traditionally owned, occupied, used, or acquired; it also outlines the obligation of States to provide legal recognition and protection to these lands, territories, and resources.[31]

The ACHP notes that challenges around the world regarding the protection of indigenous sacred sites and heritage have been mentioned in several reports by the U.N. Special Rapporteur on the Rights of Indigenous Peoples.

From this international context, an assessment of the effectiveness of the laws of other nations incorporating the views of indigenous peoples would provide a more comprehensive basis to determine which laws might provide models to adequately protect tribal sacred places. In addition to sharing this report with other nations, the following components could be included in a more comprehensive study of this topic:

- An evaluation of the on-the-ground effectiveness of relevant laws by both indigenous and non-indigenous people;
- A discussion of how different nations recognize indigenous peoples, including in the laws and judicial decisions of each nation;
- An analysis of the U.S. federal recognition process and a comparison of U.S. Indian tribes' sovereignty and authority with that of indigenous populations in other nations;
- An analysis of the interconnection between preservation of sacred places and burial places, including applicable laws and policies;
- A discussion of broader historical and legal contexts of the nations with indigenous populations;
- A discussion of economic developments influencing indigenous populations;
- A discussion of how economic development influences the development and/or enforcement of historic or cultural resource preservation laws;
- Consideration of how national laws contradict (or help to strengthen) the protections each indigenous community self-determines for its sacred places, including a more thorough analysis of national cultural protection laws;
- An evaluation of all national laws applicable to indigenous peoples including but not limited to those addressing land reparations, language preservation, and conservation of natural resources.

While the ACHP undertook this report in response to recommendations from the Hualapai Tribe and the Oglala Sioux Tribe, it is important to acknowledge on both domestic and international levels that indigenous sacred places are under constant threat of damage and destruction. The development of additional legal tools to protect them is equally important and timely. Since many indigenous peoples in the U.S. and other nations face similar challenges, there is value in comparing the approaches taken by different nations to recognize and protect indigenous sacred places.

We have been called on to defend traditional information, knowledge, and places frequently in the last few years in relation to state, local, federal and international undertakings here in the Columbia Plateau. Our comments regarding TEK, Sacred Sites, places of religious and cultural significance, Indian trust assets, traditional foods' role in maintaining healthy minds and bodies, and the association between historic properties and ceremonial and ritual use is voluminous and compound."

Confederated Tribes of the Colville Reservation Tribal Historic Preservation Office

ENDNOTES

1. Historic property is defined in the NHPA as "any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register, including artifacts, records, and material remains relating to the district, site, building, structure, or object." (54 U.S.C. § 300308)
2. For purposes of this report, "federal agencies" means U.S. government agencies.
3. For more information on the status of Alaskan Native Corporations, see Yellen v. Confederated Tribes of the Chehalis Reservation et al., 594 U.S. __ (2021) at **https://www.supremecourt.gov/opinions/20pdf/20-543_3e04.pdf**
4. Seminole Nation v. United States, 316 U.S. 286 (1942).
5. 30 U.S. § 1 (1831).
6. 54 U.S.C. § 300309.
7. 54 U.S.C. § 300314(a).
8. 54 U.S.C. § 300313.
9. The Office of Hawaiian Affairs was established under the 1978 state constitution as a public trust charged with improving conditions for Native Hawaiians and the Hawaiian community. It is funded from revenues from state lands once belonging to the Kingdom of Hawaii and the Hawaiian monarchy.
10. In 1921, the U.S. Congress enacted the Hawaiian Homes Commission Act, 1920 (HHCA), 42 Stat. 108, to provide a homesteading program for native Hawaiians by placing approximately 200,000 acres of land (known as Hawaiian home lands) into the Hawaiian Home Lands Trust.
11. **http://www.gao.gov/assets/600/590102.pdf**
12. **http://www.achp.gov/nhpa.pdf**.
13. Historic properties are defined as either listed in or eligible for the National Register of Historic Places according to criteria established by the National Park Service.
14. 43 U.S.C. § 1602.
15. 54 U.S.C. § 306108.
16. Note that the NHPA does not apply to the White House, the Supreme Court building, or the U.S. Capitol. 54 U.S.C. § 307104.
17. See 36 CFR 60.4.
18. **https://www.nps.gov/subjects/nationalregister/upload/NRB38-Completeweb.pdf** (last visited 2-7-20).
19. Citations refer to the sections of the law in title 54 of the U.S. Code.
20. The Historic Preservation Fund (HPF) was created in 1976 and is the source of preservation grants and financial assistance to states, Indian tribes, local governments, and non-profit entities. The source of funding for the HPF is offshore oil and gas lease revenues, not federal taxes. See 54 U.S.C. Chapter 3031.
21. **https://www.nps.gov/thpo/grants/**
22. Tribal Preservation Program Annual Report for 2016, National Park Service.
23. The National Register of Historic Places is the federal government's official list of historic places worthy of preservation. It is maintained by the National Park Service, a federal agency in the Department of the Interior.
24. The report is available at **http://www.achp.gov/docs/SacredSitesWorkingGroup-2013ProgressReport.pdf**.
25. A handbook on the integration of the Section 106 and NEPA review processes is available at **http://www.achp.gov/docs/NEPA_NHPA_Section_106_Handbook_Mar2013.pdf**.
26. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).
27. 25 U.S.C. § 3001(15)(C).
28. 42 U.S.C. § 4331(b)(4).
29. See, e.g., **https://www.achp.gov/news/achp-endorses-united-nations-declaration-rights-indigenous-peoples**.
30. **http://www.state.gov/documents/organization/184099.pdf**
31. The exact language of these articles can be found in the Declaration at **http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf**.

APPENDIX — OTHER NATIONS' LEGISLATION

Introduction

This appendix comprises two parts:

- **Part A** compiles the legislation of nations that share important similarities to the US: (1) a substantial population of Indigenous peoples; (2) a legal system which addresses Indigenous heritage; and (3) a federal-state system with colonial origins. Countries chosen are Canada, Australia, and New Zealand.
- **Part B** compiles legislation creating/ensuring a self-government or political participation mechanism for Indigenous peoples — specifically, the Sami people. Countries chosen are Finland, Norway, and Sweden. The ACHP has italicized or bolded certain text in the Appendix for emphasis.

This introduction discusses points of consideration that the ACHP believes are relevant to the protection of indigenous sacred places. Legal landscapes are constantly evolving via repeal or amendment of laws and regulations, and political or social changes. This is a compilation of current laws, separate from the issues that may surround implementation or enforcement, which often depend on funding as well as judicial interpretation. In essence, this compilation of laws is a "snapshot in time."

This compilation does not address the Tribes' request to determine if there are laws in other countries that might serve as models for addressing perceived gaps in U.S. laws regarding the protection of sacred places. Instead, information is presented here for future researchers to analyze and continue the conversation about how indigenous sacred places may be protected.

I. Format

Part A.

The relevant laws of each country are presented in a chart format. Each chart contains laws passed by legislative bodies in current effect. The charts are introduced by a contextual background section that provides an overview of general relevant concepts, including:

- government-provided census data of the Indigenous population;
- legal terms-of-art used by the government;
- government processes for Indigenous self-determination (i.e., how Indigenous peoples may assert legal status under national laws);
- government announcements or specific implementations of UNDRIP;
- certain bills-in-progress, if particularly relevant; and
- research methodology for each specific legal sheet.

Part B.

Unlike Part A, there are no contextual notes in this section. This part only includes links to the laws themselves, as well as relevant government resources.

II. Categories of Legislation

In compiling legislation addressing sacred site protection, the range of legal areas included in the appendix is broader than simply those that mention "cultural heritage." However, this research is limited to those laws relating to "sacred sites"- that is, land-based protections (i.e., concerning physical space or natural resources), and do not include intangible heritage such as language or movable cultural objects, although the latter category may also be protected as part of a sacred site.

Throughout this research, the ACHP considered what might constitute "meaningful protection" for sacred sites. In an attempt to address this difficult question, the ACHP identified the points listed below; the differences between these subjects could be a subject for further exploration and discussion.

- Rights-based protection vs land-based protection.
- Rights to land (such as ownership or access) vs rights to other resources (such as the right to consult, when a specific resource is affected; or rights to specific resources, such as the right to hunt or fish).
- Different levels of laws (statutes vs regulations; guidance vs hard law)- in essence, distinguishing between what

creates legally enforceable rights vs what constitutes recommended policy or best practices.

- The following legal sources and areas were considered:
  - Constitutional references[1]
  - Laws that address:
  - Explicit reference of UNDRIP implementation
  - Cultural heritage
  - Environmental protection (i.e., protection of land with designated boundaries, natural resources, etc.)
  - Legal status of indigenous peoples (e.g., "federal recognition" in the U.S.)[2]
  - Land rights[3]
  - Consultation rights[4]

1. Both Parts denote where Indigenous peoples are mentioned in the nation's Constitution.
2. Denotation of legal status may also derive from treaties. While treaties may also constitute national law, they have not been included in this Appendix because fully understanding treaty rights/status often requires additional contextual and historical information, including judicial interpretation.
3. Sources of land rights range widely. They may derive from treaty; policy/guidance (e.g. co-management protocols); and case law.
4. Rights to consultation, for the purposes of this Appendix, are connected to land use and natural resources.

CONTEXTUAL BACKGROUND

Census Data

- As of 2016, indigenous peoples in **Canada** totaled 1,673,785 people, or 4.9% of the national population.[1]

Terminology as legal entity

- There are over 600 recognized First Nations[2] governments/bands. The term "Aboriginal" is used as a legal term of art in the Constitution Act and other legislations, but it is gradually falling into disuse.

Self-determination

- Indigenous peoples' inherent right to self-government is affirmed by the Constitution[3] and implemented via a guide titled "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self Government."[4]
- In the absence of a negotiated self-government status with the federal government, the Indian Act (1876) applies; the Indian Act establishes a limited form of local administration.[5]
- "Aboriginal identity" may be derived or estimated; in either case, three components (Aboriginal group; registered or treaty Indian status; and membership in a First Nation or Indian band) are considered.[6]

Public Announcement and Legislative Implementation re UNDRIP

- In 2016, the Government of Canada endorsed the Declaration without qualification and committed to its full and effective implementation.[7]
- In December 2020, the Government of Canada introduced legislation to implement UNDRIP. If passed by Parliament, the legislation will provide a roadmap for the Government and Indigenous peoples to work together to fully implement UNDRIP.[8] Bill C-15 (An Act respecting UNDRIP)[9] purports an Action Plan to be formed "in consultation and cooperation with Indigenous peoples."

Research methodology

- Approach:
  - The Canadian jurisprudence — as it concerns Indigenous peoples, places, and rights — is multifaceted. There is a large variety of substantive laws, ranging from: "heritage" legislation to environmental; protection of "intangible" culture, to implementation of UNDRIP.
- Important concepts and keywords:
  - Duty to consult - *see* Constitution Act, 1982 (federal)
  - Traditional knowledge - recognized as a valid form of information (in some instances, explicitly on par with "science") and referred to as: "Traditional aboriginal knowledge," "spiritual and cultural relationship with land and water," "traditional, scientific, and local knowledge," etc.

1. *Statistics on Indigenous Peoples*, Statistics Canada, **https://www.statcan.gc.ca/en/subjects-start/indigenous_peoples** (last visited Nov 2, 2021); *Annual Report to Parliament 2020*, **https://www.sac-isc.gc.ca/eng/1602010609492/1602010631711** (last visited Nov 2, 2021).
2. First Nations is a general term denoting status or treaty Indians registered with their home reserve, band, or community. While there is no official, uniform legal definition, certain provincial legislations define First Nations as: "an aboriginal people sharing a common traditional territory and having a common traditional language, culture, and lands." New Brunswick, *Heritage Conservation Act* (2010). The Constitution Act of 1982 declares that Aboriginal peoples in Canada include Indian (First Nations), Inuit, and Métis peoples. Crown-Indigenous Relations and Northern Affairs Canada, **https://www.canada.ca/en/crown-indigenous-relations-northern-affairs.html** (last visited Nov 2, 2021).
3. Constitution Act, Section 35.
4. *Self-government*, Crown-Indigenous Relations and Northern Affairs Canada, **https://www.rcaanc-cirnac.gc.ca/eng/1100100032275/1529354547314** (last visited Nov 2, 2021).
5. *Id.*
6. *Aboriginal identity of person*, Statistics Canada, **https://www23.statcan.gc.ca/imdb/p3Var.pl?Function=DECI&Id=59224** (last visited Nov 2, 2021).
7. *Implementing the United Nations Declaration on the Rights of Indigenous Peoples in Canada*, Department of Justice, **https://www.justice.gc.ca/eng/declaration/index.html** (last visited Nov 2, 2021).
8. *Id.*
9. *C-15 (43-2) An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, LEGISinfo, **https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=11007812** (last visited Nov 2, 2021).

FEDERAL LEGAL SOURCES

Constitution Act, 1982 (duty to consult and accommodate)	Part II: Rights of the Aboriginal Peoples of Canada - Section 35: ▸ (1) Existing aboriginal and treaty rights of aboriginal peoples of Canada hereby recognized and confirmed ▸ (2) "Aboriginal peoples of Canada" includes the Indian, Inuit, and Metis peoples of Canada ▸ (3) "Treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired ▸ (4) Aboriginal and treaty rights of (1) guaranteed equally to male and female persons The "**duty to consult, and where appropriate accommodate**"[10] derives from 2 sources: ▸ Section 35 ▸ "Honor of the Crown"[11] (a general legal principle) ▸ Note: First Nations typically bring suits under the duty to consult, most often in resource extraction contexts. Courts emphasize the necessity of balancing interests.[12]
Canadian Environmental Protection Act, 1999	*This Act aims to protect the environment and human health by preventing pollution and managing risks. It addresses: biotechnology; marine pollution; vehicle, engine, and equipment emissions; fuels; hazardous wastes; and environmental emergencies.* Preamble ▸ Whereas the Government of Canada recognizes the importance of endeavoring, in cooperation with provinces, territories, and **aboriginal peoples**, to achieve the highest level of environmental quality... and ultimately contribute to sustainable development ▸ Whereas the Government of Canada recognizes the integral role of science, as well as **the role of traditional aboriginal knowledge, in the process of making decisions** relating to the protection of the environment and human health Duties of the Government of Canada ▸ 2(1)(i): to apply knowledge, including **traditional aboriginal knowledge**, science, and technology, to identify and resolve environmental problems

10. For more information, see *Government of Canada and the duty to consult*, Crown-Indigenous Relations and Northern Affairs Canada, **https://www.rcaanc-cirnac.gc.ca/eng/1331832510888/1609421255810#** (last visited Nov 2, 2021).
11. The Crown refers here to both federal and provincial governments. The level of government contemplating an action or decision has the responsibility to consult and accommodate. Procedural aspects are delegated to other levels of government or to industry proponents (the latter particularly common in provinces), the honor of the Crown itself can never be delegated, thus the ultimate duty to ensure proper consultation and accommodation lies with the Crown. Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73, 3 SCR 511 at para 53.
12. "The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary." Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73, 3 SCR 511 at para 45.

Species at Risk Act, 2002	*This Act provides for recovery of threatened or endangered wildlife species, and manages species of special concern to prevent them from becoming threatened or endangered. The Act also provides for the issuance of related permits.* Preamble, recognizing that ▸ The **traditional knowledge of the aboriginal peoples** of Canada should be considered in the assessment of which species may be at risk and in developing and implementing recovery measures

PROVINCE LEGAL SOURCES

ALBERTA	(no relevant legislation found)
BRITISH COLUMBIA	On November 26, 2019, **Bill 41 (Declaration on the Rights of Indigenous Peoples Act)** was passed unanimously by the B.C. legislature. B.C. is the first province in Canada to legislate on the implementation of the UNDRIP. Important sections: ▸ (3) Measures to align laws with [UNDRIP]: "In consultation and cooperation with the Indigenous peoples of B.C., the government must take all measures necessary to ensure the laws of B.C. are consistent with the [UNDRIP]." ▸ (7) Decision-making agreements: An appointed government official may negotiate and enter into agreements with Indigenous governing bodies, for "the exercise of a statutory power jointly" and "the consent of the Indigenous governing body before the exercise of a statutory power of decision." Heritage Conservation Act, 1996 ▸ Definitions » **Heritage object or site:** "heritage value to British Columbia, a community, or **an aboriginal people**" ▸ 4: on **agreements with First Nations** » (1) British Columbia may enter into **formal agreement with first nation with respect to conservation and protection** of heritage sites and objects **that represent heritage of aboriginal people who are represented by that First Nation** » (4) Agreement may include… (a) schedule of sites and objects of particular **spiritual, ceremonial, or other cultural value** • Note: under 13(2), agreement MUST identify specific actions which would desecrate or detract value — different sets of actions required for distinct schedules of sites and objects ▸ 8: on application of this Act to **treaty lands** » If a **treaty first nation, in accordance with its final agreement, makes laws for conservation and protection of, and access to, heritage sites and objects on its treaty lands**, the following provisions do NOT apply: • Heritage designation by government authority • Permits for excavation, alteration, or other damage to heritage sites or objects • Heritage inspection or investigation under permit • Temporary protection orders (stop work order) by government authority • Promotion of heritage value by government • Right by Minister to acquire, manage, and conserve property, or otherwise acquire interest in property
MANITOBA	(no relevant legislation found)

NEW BRUNSWICK	Heritage Conservation Act, 2010 ▸ Property in archaeological, paleontological, or burial objects (i.e. "heritage objects") » 5(1): An archaeological, paleontological, or burial object discovered in New Brunswick — MUST deliver the object to the Minister[13] » 5(3): An archaeological object or burial object where property has vested in the Crown under 5(1) **shall be held in trust by the Crown for the aboriginal peoples of the Province IF** • (a) **it is in possession of the Minister, AND** • (b) **it is identified by the Minister as being of aboriginal origin** » 6: Subject to 5(3), **Minister may transfer the ownership of an archaeological, paleontological, or burial object** ▸ Agreements respecting heritage objects » 7(1): Minister may enter into agreement with a person to authorize the person to retain custody of an archaeological, paleontological, or burial object for which property has vested in the Crown » 7(2): **Minister may enter into agreements with a duly mandated governing body of one or more First Nations with respect to identification, conservation, and protection of places and objects that represent the cultural heritage of the aboriginal peoples of the Province, including agreements respecting:** • **Communication of any discovery of those places and objects** • **Transfer of ownership of those objects** • Designation of those places as provincial heritage places or local historic places ▸ 45(1) Designation of a local historic place (as opposed to provincial heritage) in an unincorporated area[14] requires » Property owner's agreement, **AND** » Designation receives support from • Local society or organization concerned with heritage conservation, • Relevant local service district advisory committee, • **Duly mandated governing body of one or more First Nations**, OR • District planning commission
NEWFOUNDLAND AND LABRADOR	(no relevant legislation found)

13. "Minister" refers to the Minister of Wellness, Culture and Sport.
14. An "unincorporated area" may be understood as non-public lands.

NORTHWEST TERRITORIES	Wildlife Act, 2014, amended in 2017 ▸ Preamble » …whereas the Governemtn of the Northwest Territories **recognizes and respects the Aboriginal and treaty rights of Aboriginal peoples, including harvesting rights** ▸ Part 1 (Interpretation and Application) » 2 (Principles): The Government of Northwest Territories and all persons and bodies exercising powers and performing duties and other functions under this Act shall do so with the following principles: (e) the best available info, **including traditional, scientific, and local knowledge** (i.e., person's knowledge about wildlife or habitat acquired through experience or observation) ▸ Part 3 (Rights and Authorizations) » Definitions: "Local harvesting committee" (LHC) means one of the following bodies or organizations that represents **persons with Aboriginal or treaty rights to harvest wildlife**… » Part 2, 10 (Role of LHCs): LHCs established **by or under land claims agreements have roles and responsibilities** in respect of **the conservation and management of wildlife** » 14 (Agreements with LHCs and Recognition of LHCs) • (1) The Minister[15] may enter into agreements with LHCs with respect to **their involvement in the conservation and management of wildlife** • (2) For the purposes of this Act, the **Minister may enter into agreement with band council, Métis council, or other body or organization located in the Northwest Territories to designate the body or organization as a LHC in respect to Aboriginal harvesters not otherwise represented in the definition**
NOVA SCOTIA	(no relevant legislation found)
NUNAVUT	(no relevant legislation found)

15. The Northwest Territories' cabinet comprises a Premier and six Ministers. Relevant to this agreement are the Minister of the Executive and Indigenous Affairs, and the Minister of Environmental and Natural Resources.

ONTARIO	**Indigenous Institutes Act**, 2017 ▸ Preamble: ▸ Government of Ontario "affirms… reconciliation with indigenous peoples… and acknowledges that the UNDRIP recognizes the right of indigenous peoples to **establish and control their educational systems and institutions providing education in their own languages**, in a **manner appropriate to their cultural methods of teaching and learning**" ▸ Government of Ontario and Indigenous Institutes "have come together, in the spirit of reconciliation, mutual respect, and mutual accountability, to enhance educational opportunities for indigenous students, and to **promote the revitalization of indigenous knowledge, culture, and languages**" ▸ (2) Creates **indigenous controlled and governed entity as Council**, which provides recommendations to the Minister of Advanced Education and Skills Development + provides approval for Indigenous Institutes to grant degrees ▸ (3) Council and Minister to enter into MOU governing their relationship Several **environmental conservation statutes** acknowledge the traditional relationship between First Nations and their lands, even granting rights based on that historic relationship. ▸ Great Lakes Protection Act, 2015: Preamble notes that "**First Nations maintain a spiritual and cultural relationship with water** and the Basin is a historic location where Metis identity emerged in Ontario" ▸ Lake Simcoe Protection Act, 2008: when appointing members of the Lake Simcoe Coordinating Committee (whose important functions include advising higher authorities and monitoring conservation progress), "Ministers shall recommend persons who represent the following interests [including] interests of **aboriginal communities that have a historic relationship** with Lake Simcoe ▸ Provincial Parks and Conservation Reserves Act, 2006: when regulating mechanized travel through designated wilderness, government may only allow 6 exceptions (Exception 5: "**First Nations to address their needs**")
PRINCE EDWARD ISLAND	Wildlife Conservation Act, 2015 ▸ Permits and Licenses » 12(1): No person shall, unless authorized by license or permit under this Act • Take trout or salmon by angling or other means • Hunt game, game bird, or migratory game bird • Trap any fur-bearing animal » 12(2): **12(1) does not apply to** • **Aboriginal persons**[16], or • Persons under 16 years while angling for trout

16. The Act defines "aboriginal person" as someone who: (i) is registered as an Indian pursuant to the Indian Act, or (ii) is a registered member of an aboriginal organization that requires as a condition of membership proof of aboriginal ancestry.

QUEBEC	Cultural Heritage Act, 2011 ▸ Allows Native communities to **act as municipalities on reserve lands,** thus providing the ability to directly influence identification, inventorying, protecting and restricting access to places of importance to the communities. ▸ The law also recognizes **"heritage cultural landscapes"** ("recognized by a community for… landscape features… [that are] the result of interaction of natural and human factors and their value as a source of identity) and **"intangible heritage"** Act Respecting the Conservation and Development of Wildlife, 2002 ▸ *Chapter II.1: Provisions specific to Native communities* ▸ **24.1:** Government is authorized, to better reconcile wildlife conservation and management requirements with the **activities pursued by Native people for food, ritual or social purposes**, or to further **facilitate wildlife resource development and management by Native people, to enter into agreements with any Native community** represented by its band council… ▸ **24.2:** Government is also authorized, to better reconcile wildlife conservation and management requirements with the activities pursued by Native people for food, ritual or social purposes, **to provide, by regulation, adaptations to [existing provisions of regulations]**
SASKATCHEWAN	(no relevant legislation found)
YUKON TERRITORY	Historic Resources Act, 2002 ▸ Designation of historic sites on aboriginal lands — only with **written consent of the Yukon First Nation** governing that land ▸ Indian objects and human remains off settlement lands — to become the possession of the Yukon First Nation on whose traditional territory they are found on ▸ Indian sites on public lands — to be **managed jointly** by the Yukon government and Yukon First Nation tied to that traditional territory

CONTEXTUAL BACKGROUND

Census Data

- As of 2016, indigenous peoples in **Australia** totaled 798,400 people, or 3.3% of the national population.[1]

Terminology as legal entity

- The Indigenous peoples of Australia are referred to as Aborigines; Torres Strait Islanders; and First Australians. Before the arrival of British colonizers in 1788, Aboriginal people inhabited the whole of Australia and Torres Strait Islanders lived on the islands between Australia and Papua New Guinea. There were over 500 different clan groups or "nations" around the continent.[2]

Self-determination

- The need to provide proof or confirmation of Aboriginal and/or Torres Strait Islander heritage arises when applying for Indigenous-specific public services or programs. Government agencies accept three "working criteria" as confirmation: (1) being of Aboriginal or Torres Strait Islander descent; (2) identifying as an Aboriginal or Torres Strait Islander person; and (3) being accepted as such by the community in which you live, or formerly lived.[3]

Public Announcement and Legislative Implementation re UNDRIP

- The Australian Government announced its support for UNDRIP in 2009.[4]
- New South Wales[5]: The Draft Aboriginal Cultural Heritage Bill (2018), was released on February 23, 2018 for public consultation. The public consultation culminated in a Summary of Submissions Report (2018)[6]. Further consultation is currently underway on the proposed reforms.
- Western Australia[7]: New legislation, the Aboriginal Cultural Heritage Bill (2020), is planned to replace the outdated Aboriginal Heritage Act (1972), concluding more than 2 years of consultation with Aboriginal people, industry representatives, heritage professionals, and the Western Australian community. At present, submissions have closed for phase three (out of total 4 phases) final consultation. The new bill encourages early engagement and meaningful consultation with Aboriginal people, and creates a new Aboriginal Cultural Heritage Council to facilitate agreements between Aboriginal people and proponents.

Research methodology

- Approach:
  - The Australian jurisprudence — as it concerns Indigenous peoples, places, and rights — is complex. The general pattern is: the Commonwealth (Cth) legislature has responded to cultural and judicial changes via legislation. This results in legislation that creates complex systems — lots of issues addressed by large documents (to be implemented by guidelines or state legislation).
  - State and territories have jurisdiction over "cultural heritage."
- Important concepts and keywords:
  - Aboriginal Land Council - *see* Aboriginal Land Rights (Northern Territory) Act, 1976 (Cth)
  - Native Title - *see* Native Title Act, 1993 (Cth)
  - "Heritage" is generally recognized as sites and objects; in some legislation, there is also recognition of "tradition" (e.g., "customs, rituals, institutions, beliefs or general way of life")

1. *Estimates of Aboriginal and Torres Strait Islander Australians*, Australian Bureau of Statistics, **https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/estimates-aboriginal-and-torres-strait-islander-australians/latest-release** (last visited Nov 2, 2021).
2. *Our people*, Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), **https://info.australia.gov.au/about-australia/our-country/our-people** (last visited Nov 2, 2021); also see *Indigenous Australians: Aboriginal and Torres Strait Islander people*, AIATSIS, **https://aiatsis.gov.au/explore/indigenous-australians-aboriginal-and-torres-strait-islander-people** (last visited Nov 2, 2021).
3. *Proof of Aboriginality*, AIATSIS, **https://aiatsis.gov.au/family-history/you-start/proof-aboriginality** (last visited Nov 2, 2021).
4. *2009 Media Release: United we stand – Support for United Nations Indigenous Rights Declaration a watershed moment for Australia*, Australian Human Rights Commission (AHRC), **https://humanrights.gov.au/about/news/media-releases/2009-media-release-united-we-stand-support-united-nations-indigenous** (last visited Nov 2, 2021).
5. *Draft Aboriginal Cultural Heritage Bill 2018*, New South Wales, **https://www.environment.nsw.gov.au/research-and-publications/publications-search/draft-aboriginal-cultural-heritage-bill-2018** (last visited Nov 2, 2021).
6. *Aboriginal cultural heritage publications*, New South Wales, **https://www.heritage.nsw.gov.au/search-for-heritage/publications-and-resources/aboriginal-cultural-heritage-publications/** (last visited Nov 2, 2021).
7. *Review of the Aboriginal Heritage Act 1972*, Western Australia, **https://www.wa.gov.au/organisation/department-of-planning-lands-and-heritage/review-of-the-aboriginal-heritage-act-1972** (last visited Nov 2, 2021).

COMMONWEALTH LEGAL SOURCES

The Aboriginal and Torres Strait Islander Heritage Protection Act, 1984

Part II: Protection of significant Aboriginal areas and objects

- Division 1 — Declaration by Minister
  - 9 Emergency declarations in relation to areas {*Delineates process, where Minister receives an application, orally or in writing, by or on behalf of an Aboriginal (or group of Aboriginals),* seeking the preservation or protection of a specified area *from injury or desecration — Minister may, by* legislative instrument*, make a declaration in relation to the area — to remain in effect for a* **maximum of 60 days**}
    - (1)(b) [Minister] is satisfied: (i) that the area is a significant Aboriginal area; and (ii) that it is **under serious and immediate threat of injury or desecration**
  - 10 Other declaration in relation to areas
    - (1)(b) [Minister] is satisfied: (i) that the area is a significant Aboriginal area; and (ii) that it is **under threat of injury or desecration**
    - (1)(c) has received a report…
    - (4) the report… shall deal with the following matters:
      - (a) the particular significance of the area to Aboriginals…
      - (e) the effects the making of a declaration may have on the proprietary or pecuniary interests of persons other than the Aboriginal or Aboriginals…
  - 11 Contents of declarations under section 9 or 10
    - (a) describe the area with sufficient particulars to enable the area to be identified; and
    - (b) contain provisions for and in relation to the **protection and preservation of the area** from injury or desecration
- Division 2 — Declarations by authorized officers
  - 17 Authorized officers {designation by Minister}
  - 18 Emergency declarations in relation to areas or objects
    - (1) {similar process to above, but differences are emphasized here}
      - (ii) area… is under **serious and immediate threat of injury or desecration**;
      - (iii) in the case of an area — the circumstances of the case would justify making a declaration under section 9, but the injury or desecration is likely to occur before such a declaration can be made
    - (2) A declaration under (1)
      - (b) shall specify the period, **not exceeding 48 hours,** for which it is to remain in effect

Aboriginal Land Rights (Northern Territory) Act, 1976

This Act is the first legislation in Australia that enables Indigenous people to claim land rights for where traditional ownership can be proven. Four land councils were established under the Act; currently, about 50% of the Northern Territory and 85% of its coastline is recognized as being owned by Aboriginal groups.[8]

This Act establishes Aboriginal Land Councils and Land Trusts. Land Councils give Aboriginal peoples a voice on issues affecting their lands, seas, and communities.[9] *The grant of Aboriginal freehold is made to an Aboriginal land trust to be held for the benefit of traditional owners who are entitled by Aboriginal traditional use or occupation; the Land Trust is a non-profit corporate entity.*[10]

Laws at the State and Territory levels implement the Commonwealth Act.

- *New South Wales - Aboriginal Land Rights Act, 1983*
- *Queensland - Aboriginal Land Act, 1991 and Torres Strait Islander Land Act, 1991*
- *South Australia - Aboriginal Lands Trust Act, 2013*
- *Victoria - Aboriginal Lands Act, 1970*[11]
- *West Australia - Aboriginal Affairs Planning Authority Act, 1972*

Part I — Preliminary

- 3 Interpretation
  - **Aboriginal:** member of the Aboriginal race of Australia
  - **Aboriginal land:** (a) land held by a Land Trust… or (b) land the subject of a deed of grant held in escrow by a Land Council
  - **Aboriginal tradition:** the **body of traditions, observances, customs and beliefs** of Aboriginals or of a community or group of Aboriginals, and includes those traditions, observances, customs and beliefs as applied in relation to particular persons, sites, areas of land, things or relationships
  - **Traditional Aboriginal owners:** in relation to land… a local descent group of Aboriginals who
    - (a) have **common spiritual affiliations** to a site on the land, being affiliations that place the group under a **primary spiritual responsibility** for that site and for the land; and
    - (b) are entitled by **Aboriginal tradition to forage** as of right over that land
  - **Traditional land claim:** a claim by or on behalf of the traditional Aboriginal owners of the land arising out of their traditional ownership

Part IV — Mining {*Delineates "exploration licenses," requiring consent from the Land Council on Aboriginal land*}

8. *Aboriginal Land Rights Act*, National Museum Australia, Defining Moments, **https://www.nma.gov.au/defining-moments/resources/aboriginal-land-rights-act** (last visited Nov 2, 2021).
9. *Land Councils*, Indigenous policy and programs, **https://info.australia.gov.au/about-government/government-and-parliament/indigenous-policy-and-programs/land-councils** (last visited Nov 2, 2021).
10. *Aboriginal and Torres Strait Islander land*, Australian Trade and Investment Commission, **https://www.austrade.gov.au/land-tenure/land-tenure/aboriginal-and-torres-strait-islander-land** (last visited Nov 2, 2021).
11. Consultation ongoing for amendment (prompted because the Act "has not kept pace with current laws, changes in attitudes and policy governing affairs in Victoria," and "won't meet the communities' future needs"). Victoria, *Review of the Aboriginal Lands Act 1970*, **https://www.firstpeoplesrelations.vic.gov.au/review-aboriginal-lands-act-1970** (last visited Nov 2, 2021).

Native Title[12] Act, 1993[13]

Preamble {*sets out considerations taken into account by the Parliament of Australia in enacting the law*}

- The people whose descendants are now known as Aboriginal peoples and Torres Strait Islanders were the **inhabitants of Australia before European settlement**.
- They have been **progressively dispossessed of their lands**. This dispossession occurred largely without compensation, and successive governments have failed to reach a lasting and equitable agreement with Aboriginal peoples and Torres Strait Islanders concerning the use of their lands.
- As a consequence, Aboriginal peoples and Torres Strait Islanders have become, as a group, the most disadvantaged in Australian society.
- The High Court[14] has:
  - (a) **rejected the doctrine that Australia was terra nullius** (land belonging to no-one) at the time of European settlement; and
  - (b) held that the common law of Australia recognises a form of native title that reflects the entitlement of the indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands; and
  - (c) held that native title is extinguished by valid government acts that are inconsistent with the continued existence of native title rights and interests, such as the grant of freehold or leasehold estates.
- The needs of the broader Australian community require certainty and the enforceability of acts potentially made invalid because of the existence of native title. It is important to provide for the validation of those acts.
- Justice requires that, if acts that extinguish native title are to be validated or to be allowed, compensation on just terms, and with a special right to negotiate its form, must be provided to the holders of the native title. However, where appropriate, the native title should not be extinguished but revive after a validated act ceases to have effect.
- A special procedure needs to be available for the just and proper ascertainment of native title rights and interests which will ensure that, if possible, this is done by conciliation and, if not, in a manner that has **due regard to their unique character**.
- It is important that appropriate bodies be **recognised and funded** to represent Aboriginal peoples and Torres Strait Islanders and to assist them to pursue their claims to native title or compensation.
- It is also important to recognise that many Aboriginal peoples and Torres Strait Islanders, because they have been dispossessed of their traditional lands, will be unable to assert native title rights and interests and that a **special fund** needs to be established to assist them to acquire land.

12. "Native title" rights are different to and separate from the statutory right to land, to be asserted by Aboriginal Land Councils. Native title may be understood as a "bundle of rights" in land, which may include performing ceremonies and subsistence gathering. When Native title is established, the specific rights are decided on a case-by-case basis. The Native Title Act derives from Mabo v. Queensland (No 2) (1992); one year after, the Commonwealth legislature formalized that case via legislation. *Native title*, Attorney-General's Dept, **https://www.ag.gov.au/legal-system/native-title** (last visited Nov 2, 2021). Note: Land Councils are not the same as **Registered Native Title Body Corporates (RNTBCs)**, the latter of which are funded by the federal government. *Native title*, Australian Trade and Investment Commission, **https://www.austrade.gov.au/land-tenure/native-title/native-title** (last visited Nov 2, 2021).
13. Key changes to the Act are underway (i.e. the Native Title Legislation Amendment Act 2021). The amendment: changes how native title applicants can act and make decisions; allows historical extinguishment of native title in areas of national and state parks to be disregarded where the relevant parties agree; and improves the accountability, transparency and governance of RNTBCs (commonly known as Prescribed Bodies Corporate or PBCs). *Key changes in the Native Title Act*, Attorney-General's Dept, **https://www.ag.gov.au/legal-system/native-title/key-changes-native**-title-act (last visited Nov 2, 2021).
14. Mabo v. Queensland (No 2) (1992).

Native Title Act, 1993 (continued)	Part 1 — Preliminary ▸ 3 Objects — main objects of this Act are: » (a) to provide for the recognition and protection of native title; » (b) to establish ways in which future dealings affecting native title ay proceed and to set standards for those dealings; » (c) to establish a mechanism for determining claims to native title… Part 2 — Native Title {*includes rights and interests that relate to land and waters held by Indigenous people under traditional laws and customs* — traditional use/activities *include: hunting, fishing, gathering or camping; performing rites or other ceremonies; and visiting sites of significance*} Part 3 through 7 {*Delineates provisions specific to: Queensland; Western Australia; South Australia; Tasmania; and Northern Territory*}

Environmental Protection and Biodiversity Conservation Act, 1999	Chapter 1 — Preliminary ▸ 3 Objects of Act » (1) The objects of this Act are: • (d) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and **indigenous peoples**; • (f) **to recognize the role of indigenous peoples** in the conservation and ecologically sustainable use of Australia's biodiversity; and • (g) **to promote the use of indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge** » (2) In order to achieve its objects, the Act: • (g) promotes a partnership approach to environmental protection and biodiversity conservation through: (iii) **recognizing and promoting indigenous peoples' role in, and knowledge of, the conservation and ecologically sustainable use of biodiversity** Chapter 3 — Bilateral agreements,[15] Subdivision B — Prerequisites for making bilateral agreements ▸ 49A The Minister may enter into a bilateral agreement only if he or she: (c) has **considered the role and interests of indigenous peoples in promoting the conservation and ecologically sustainable use of natural resources** in the context of the proposed agreement, taking into account Australia's relevant obligations under the Biodiversity Convention. Chapter 5 — Conservation of biodiversity and heritage, Part 13 — Species and communities ▸ Division 1 — Listed threatened species and ecological communities » Subdivision B, Section 201: • (3) The Minister must not issue the permit unless satisfied that: › (c) the specified action is of particular significance to **indigenous tradition** and will not adversely affect the survival or recovery in nature of the listed threatened species or listed threatened ecological community concerned › (4) In this Act: **indigenous tradition** means the body of traditions, observances, customs and beliefs of indigneous persons generally or of a particular group of indigenous persons » {*Parallel provisions apply to:* • *Division 2 — Migratory species; and* • *Division 4 — Listed marine species*}

15. Under Chapter 3, Section 45(2) of the Act: a bilateral agreement is a written agreement between the Commonwealth and a State or a self-governing Territory that:
    (a) Provides for one or more of the following:
        (i) Protecting the environment;
        (ii) Promoting the conservation and ecologically sustainable use of natural resources;
        (iii) Ensuring an efficient, timely and effective process for environmental assessment and approval of actions;
        (iv) Minimising duplication in the environmental assessment and approval process through Commonwealth accreditation of the processes of the State or Territory (or vice versa); and
    (b) Is expressed to be a bilateral agreement.

Indigenous Protected Areas (IPAs)[16]	*{IPAs, a program (not legislation) has been included because: "IPAs combine traditional and contemporary knowledge into a framework to leverage partnerships with conservation and commercial organizations and provide employment, education and training opportunities for Indigenous people."}*

STATE and TERRITORY[17] LEGAL SOURCES

NEW SOUTH WALES	Heritage Act, 1977 ▸ Part II - The Heritage Council of NSW {8 members appointed by the Minister + Secretary of Dept of Planning and Environment} ⬩ Requires: "One of the other appointed members is to be a person who, in the opinion of the Minister, possesses qualifications, knowledge and skills relating to **Aboriginal heritage**" National Parks and Wildlife Act, 1974 » *{A "nature protection" law, protecting a range of sites that conserve Aboriginal culture in NSW}*[18] Native Title (NSW) Act, 1994 {*Implements the Commonwealth Native Title Act*}

16. *Indigenous Protected Areas*, Dept of Agriculture, Water and the Environment, **https://www.awe.gov.au/agriculture-land/land/indigenous-protected-areas** (last visited Nov 2, 2021); *see also Indigenous Protected Areas*, National Indigenous Australians Agency (NIAA), **https://www.niaa.gov.au/indigenous-affairs/environment/indigenous-protected-areas-ipas** (last visited Nov 2, 2021).
17. There are 6 states, and 12 territories in Australia. Of the 12 territories: 2 are mainland; 10 lie outside the mainland. The 2 mainland territories included (Australian Capital Territory and Northern Territory) have limited unitary governments (i.e., in the ACT and Northern Territory, the Commonwealth legislates on some aspects; the territories themselves legislate on others).
18. *The National Parks and Wildlife Act*, New South Wales, National Parks and Wildlife Service, **https://blog.nationalparks.nsw.gov.au/the-national-parks-and-wildlife-act/** (last visited Nov 2, 2021).

QUEENSLAND

{*Under these Acts: anyone who carries out a land-use activity, is required to exercise a* duty of care *(land users must take* all reasonable and practicable measures *to ensure their activity does not harm Aboriginal or Torres Strait Islander cultural heritage)*}[19]

Aboriginal Cultural Heritage Act, 2003

- Part 1, Div 2 — Purpose of Act
  - 4 The main purpose of this Act is to provide effective **recognition, protection and conservation of Aboriginal cultural heritage**.
  - 5 Principles underlying Act's main purpose
    - (a) the recognition, protection and conservation of Aboriginal cultural heritage should be based on respect for Aboriginal knowledge, culture and traditional practices;
    - (b) Aboriginal people should be recognised as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage;
    - (c) it is important to respect, preserve and maintain knowledge, innovations and practices of Aboriginal communities and to promote understanding of Aboriginal cultural heritage…
  - 6 How main purpose of Act is to be achieved
    - (d) establishing a duty of care for activities that may harm Aboriginal cultural heritage;
    - (e) establishing powers of protection, investigation and enforcement;
    - (f) establishing a database and a register for recording Aboriginal cultural heritage;
    - (g) ensuring Aboriginal people are involved in processes for managing the recognition, protection and conservation of Aboriginal cultural heritage…
- Part 1, Div 3 — Interpretation
  - 8 Meaning of **Aboriginal cultural heritage:** anything that is (a) a **significant Aboriginal area** in Queensland… or (c) evidence, of archaeological or historical significance, of Aboriginal occupation of an area of Queensland
  - 9 Meaning of **significant Aboriginal area**: an area of particular significance to Aboriginal people because of either or both (a) Aboriginal tradition; (b) the history, including contemporary history, of any Aboriginal party for the raea
  - 12 **Identifying significant Aboriginal areas**
- Part 3, Div 1 — Key cultural heritage provisions
  - 23 Cultural heritage duty of care
    - (1) A **person who carries out an activity must take all reasonable and practicable measures to ensure** the activity **does not harm Aboriginal cultural heritage** {*Includes penalty provisions*}
  - 24 Unlawful harm to Aboriginal cultural heritage
    - (1) A person must **not harm Aboriginal cultural heritage if the person knows or ought reasonably to know** that it is Aboriginal cultural heritage
- Part 5 Collection and management of Aboriginal cultural heritage information {*Purpose: to assemble, in a central and accessible location, information about Aboriginal cultural heritage*}

Torres Strait Islander Cultural Heritage Act, 2003

- {*Parallel to Aboriginal Cultural Heritage Act*}

19. *Cultural heritage duty of care*, Queensland, **https://www.qld.gov.au/firstnations/environment-land-use-native-title/cultural-heritage/cultural-heritage-duty-of-care** (last visited Nov 2, 2021).

SOUTH AUSTRALIA

Aboriginal Heritage Act, 1988

- Part 1 — Preliminary
  - 3 — Interpretation
    - **Aboriginal site** means an area of land — (a) that is of significance according to Aboriginal tradition; or (b) that is of significance to Aboriginal archaeology, anthropology or history
    - **Aboriginal tradition** means traditions, observances, customs or beliefs of the people who inhabited Australia before European colonisation and includes traditions, observances, customs and beliefs that have evolved or developed from that tradition since European colonisation
- Part 2 — Administration
  - 7 — Aboriginal Heritage Committee {*Consisting of Aboriginal persons appointed, represents the interests of Aboriginal people in advising the Minister*}
  - 12 — Determination of whether site or object is an Aboriginal site or object
  - 13 — Consultation on determinations… {*Requires "reasonable steps to consult with the Committee; any Aboriginal organization with particular interest in the matter; and any traditional owners and other Aboriginal persons who have a particular interest in the matter*}
    - (2) When determining whether an area of land is an Aboriginal site… the Minister must accept the views of the traditional owners of the land… on the question of whether the land or object is of significance according to Aboriginal tradition.
- Part 2B — Recognised Aboriginal Representative Bodies (RARBs) {*RARBs for a specified area are appointed from* native title *claimants*}
- Part 3 — Protection and preservation of Aboriginal heritage
  - Div A1 — Agreement making with RARBs
  - Div A3 — Register {*Maintaining local heritage agreements*}
  - Div 1 — Discovery of, and search for, Aboriginal sites… {*Discovery; excavation; access*}
  - Div 2 — **Protection of Aboriginal sites**… {*Damage to Aboriginal sites; restricting access necessary for protection or preservation*}
  - Div 4 — Acquisition and custody of Aboriginal sites…
    - 30 — Acquisition of land: The Minister may… acquire land for the purposes of protecting or preserving an Aboriginal site…
  - Div 5 — **Protection of traditions**
    - 35 — Divulging information contrary to Aboriginal tradition {*Prohibited from divulging info relating to an Aboriginal site or tradition; penalty provisions*}
    - 36 — Access to land by Aboriginal people
  - Div 6 — **Aboriginal heritage agreements** {*Binding agreement that "attaches to the land," containing provisions for the protection or preservation of Aboriginal sites*}

TASMANIA	Aboriginal Heritage Act, 1975, amended in 2017[20] ▸ Part I - Preliminary, 2. Interpretation » (8) **Aboriginal tradition** means (a) the body of traditions, knowledge, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people; and (b) any such tradition, knowledge, observance, custom or belief relating to particular persons, areas, objects or relationships » **Significance**, of a relic, means significance in accordance with (a) the **archaeological or scientific history** of Aboriginal people; (b) the **anthropological history** of Aboriginal people; (c) the **contemporary history** of Aboriginal people; or (d) **Aboriginal tradition**. ▸ Part II - The Aboriginal Heritage Council » 3 Establishment {*Advises and makes recommendations to the Minister; "where it is appropriate and practicable to do so, [the Council] is to* consult *with the Aboriginal people of Tasmania"*} » 4 Membership {*All members are to be Aboriginal persons*} ▸ Part III - Declaration and Management of Protected Sites » 7 Declaration of protected areas • (1) Where the Minister is satisfied that there is on or in any land a relic and that steps should be taken to protect or preserve that relic, he may… by order declare an area of land within which it is situated to be a **protected site** {*requires consent from owner/ occupier of the land*} » 8 Management of protected sites • (1) The Director [of National Parks and Wildlife] is charged with the **management and maintenance** of every protected site… • {*Also covers: human remains; traditional objects*}

20. Key changes include: (1) revising the name of the Act (Aboriginal Relics Act, to Aboriginal Heritage Act); (2) removing references to 1876 being a "cut-off" point for what is considered as Aboriginal heritage; (3) increasing penalties for damage to Aboriginal heritage; (4) introducing scaled offences, in association with the removal of the ignorance defence; (5) establishing a statutory Aboriginal Heritage Council of Aboriginal people to advise the Minister. *Statutory Review of the Aboriginal Heritage Act 1975,* Tasmania, Aboriginal Heritage Tasmania, **https://www.aboriginalheritage.tas.gov.au/legislation** (last visited Nov 2, 2021).

VICTORIA	Aboriginal Heritage Act, 2006 ▸ {*This Act allows different organizations to connect by establishing:* » *the* Victorian Aboriginal Heritage Council *(providing a state-wide voice for Aboriginal people and advising the Minister for Aboriginal Affairs on cultural heritage management;* » *the* Registered Aboriginal Parties *(allows Aboriginal groups with connections to the land to be involved in cultural heritage decision-making);* » *the* Victorian Aboriginal Heritage Register *(records details about Aboriginal places and knowledge);* » Cultural Heritage Management Plans *(CHMPs) and* Cultural Heritage Permit processes, *to manage activities that may impact Aboriginal cultural heritage;* » *providing enforcement provisions, e.g. sanctions; penalties.*}[21] ▸ Part 2 — Ownership and custody of Aboriginal cultural heritage ▸ Part 3 — Protection of Aboriginal cultural heritage ▸ Part 4 — Cultural heritage management plans ▸ Part 5 — Cultural heritage agreements ▸ Part 7 — Protection declarations ▸ Part 8 — Disputes regarding cultural heritage management plants ▸ Part 10 — Registered Aboriginal parties ▸ Part 11 — Enforcement

21. *Aboriginal heritage legislation,* Victoria, First Peoples-State Relations, **https://www.firstpeoplesrelations.vic.gov.au/aboriginal-heritage-legislation** (last visited Nov 2, 2021).

WESTERN AUSTRALIA

Aboriginal Heritage Act, 1972 {*Under this Act, the Western Australian government "works with Aboriginal people to protect and manage places of significance, provides advice to the public and private sectors about Aboriginal heritage management and maintains the Register of Places and Objects… [and] also administers a grant program that provides funding for Aboriginal communities to protect and promote their heritage sites*}[22]

- Part I — Preliminary
  - 4. Terms: **Aboriginal** means pertaining to the original inhabitants of Australia and to their descendants
- Part II — Application and traditional use
  - 5. Application to places: This Act applies to
    - (a) **any place of importance and significance** where persons of Aboriginal descent have, or appear to have, left any object, natural or artificial, used for, or made or adapted for use for, any purpose connected with the traditional cultural life of the Aboriginal people, past or present;
    - (b) **any sacred, ritual or ceremonial site,** which is of importance and special significance to persons of Aboriginal descent;
    - (c) any place which, in the opinion of the Committee, **is or was associated with the Aboriginal people and which is of historical, anthropological, archaeological or ethnographical interest** and should be preserved because of its importance and significance to the cultural heritage of the State;
    - (d) any place **where objects to which this Act applies are traditionally stored,** or to which, under the provisions of this Act, such objects have been taken or removed.
- Part IV — Protection of Aboriginal sites
  - 15: Report of findings — Any person who has knowledge of the existence of any thing in the nature of Aboriginal burial grounds, symbols or objects of sacred, ritual or ceremonial significance, cave or rock paintings or engravings, stone structures or arranged stones, carved trees, or of any other place or thing to which this Act applies or to which this Act might reasonably be suspected to apply **shall report** its existence to the Registrar, or to a police officer, unless he has reasonable cause to believe the existence of the thing or place in question to be already known to the Registrar.
  - 19: Protected areas — (1) Where the Committee recommends to the Minister that an Aboriginal site is of outstanding importance and that it appears to the Committee that the Aboriginal site should be **declared a protected area** the Minister shall give notice in writing of the recommendation
    - (6) An Aboriginal site may be declared to be a protected area whether or not it is on land that is in the ownership or possession of any person or is reserved for any public purpose.

22. *Aboriginal heritage*, Western Australia, Dept of Planning, Lands and Heritage, **https://www.wa.gov.au/organisation/department-of-planning-lands-and-heritage/aboriginal-heritage** (last visited Nov 2, 2021).

AUSTRALIAN CAPITAL TERRITORY

Heritage Act, 2004

- Part I Preliminary
  - 3 Objects of act
    - (a) to establish a system for the recognition, registration and conservation of the following:
      - (i) places and objects [of] natural heritage significance;
      - (ii) places and objects [of] cultural heritage significance;
      - (iii) **Aboriginal places and objects**
    - (b), (c), (d) {*establish heritage council; provide for heritage agreements to encourage conservation; to establish enforcement and offence provisions to provide greater protection for heritage*}
    - (e) to provide a system **integrated with land planning and development** to consider development applications having regard to the heritage significance of places and heritage guidelines
  - 3A Exercise of functions under Act: (1) A function under this Act must be exercised in a way that, as far as practicable, achieves the following:
    - (a) the conservation of —
      - (i) places and objects with heritage significance; and
      - (ii) **Aboriginal places and objects**
  - 3A (2) However, if the exercise of a function would result in harm to a place or object with heritage significance, or an Aboriginal place or object, the function may be exercised only if the entity or person exercising the function
    - (a) is satisfied that it is not reasonably practicable to exercise the function in a way that avoids the harm; and
    - (b) identifies all reasonable steps that must be taken to minimise the extent of the harm.
- Part 2 Important concepts
  - 9 Meaning of **Aboriginal object** and **Aboriginal place**
    - (1) **Aboriginal object:** an object associated with Aboriginal people because of Aboriginal tradition; **Aboriginal place:** a place associated with Aboriginal people because of Aboriginal tradition
    - (2) **Aboriginal tradition:** customs, rituals, institutions, beliefs or general way of life of Aboriginal people
- Part 3 Heritage council
  - 18 {*Functions: identify, assess, conserve and promote places and objects of natural and cultural heritage; encourage registration of such places; and to work within the land planning and development system to achieve appropriate conservation of such places and objects*}

AUSTRALIAN CAPITAL TERRITORY (continued)	▸ Part 4 Heritage register ▸ Part 5 Heritage guidelines ▸ Part 6 Registration of places and objects » 28 {*Requires an individual to submit an application to the heritage council*} ▸ Part 8 Management of Aboriginal places and Aboriginal objects ▸ Part 9 Restricted information » 51 A person commits an offence if the person — • (a) discovers an Aboriginal place or object; and • (b) has reasonable grounds to believe it is an Aboriginal place or object; and • (c) fails to take reasonable steps to report the discovery to the council ▸ Part 15 Heritage agreements » 99 {*To be made with the Minister, with a person in relation to the conservation of the heritage significance of a place or object — requires council's advice and participation of the owner*}

NORTHERN TERRITORY

Aboriginal Sacred Sites Act, 1989

- Part II Administration {*Establishes an Aboriginal Areas Protection Authority — a corporate body, capable of acquiring, holding and disposing of real and personal property — main function is, to facilitate discussions between custodians of sacred sites*[23] *and persons performing or proposing to perform work on or use land comprised in or in the vicinity of a sacred site, with a view to their agreeing on an appropriate means of sites avoidance and protection*}
- Part III Sites protection procedure
  - » Div 1A Application for Authority Certificate {*Applicant may consult with custodians; request conference with custodians; or refer matter to the Minister*}
  - » Div 1 Avoidance of sacred sites {*Authority Certificate requires: Authority is satisfied that (a) the work or use of the land could proceed or be made without substantive risk of damage to or interference with a sacred site, or (b) an agreement has been reached between the custodians and applicant*}
- Part IV Offences, penalties and procedures

Heritage Act, 2011

- Part 1.1 Preliminary matters, 3 Object of Act {*Providing for conservation of cultural and natural heritage, via declaring places and objects to be significant heritage places/objects; establishing the Heritage Council; providing for heritage agreements; regulating work on heritage places/objects; and establishing enforcement and offense provisions*}
- Part 1.2 Interpretation,
  - » Division 1 — Defined terms
    - **Major work** {*requiring approval by Minister or Council*} means work that is likely to: (a) cause significant damage to a heritage place or object; or (b) to significantly alter the heritage significance of a heritage place or object.
  - » Division 2 — Important concepts
    - 6 Meaning of **Aboriginal or Macassan**[24] **archaeological place:** (a) relates to the past human occupation of the Territory by Aboriginal or Macassan people; and (b) has been modified by the activity of those people.
- Part 2.1 Declaration of Aboriginal and Macassan heritage places and objects
  - » 17 An aboriginal or Macassan archaeological place is a heritage place.

23. "Sacred site" is defined under the Land Rights Act (1976).
24. The Macassan people are fishermen from the Sulawesi region of Indonesia, who visited parts of northern Australia.

CONTEXTUAL BACKGROUND

Census Data

- As of 2018, indigenous peoples in **New Zealand** totaled **1,157,478 people**, or **24.6%** of the national population **(775,836 Māori; 381,642 Pacific peoples)**.[1]

Terminology as legal entity

- The indigenous peoples of New Zealand are referred to as the Māori. There are many "iwi"[2] (set of people bound together by descent from a common ancestor or ancestors; literally: bone; modern meaning: tribe)[3].

Self-determination

- New Zealand legislation defines a Māori as "a person of the Māori race of New Zealand; and includes any descendant of such a person."[4]

Public Announcement and Legislative Implementation re UNDRIP

- On April 20, 2010, the New Zealand government formalized its support for UNDRIP. The announcement stated: "(5) The Declaration contains principles that are consistent with the duties and principles inherent in the Treaty, such as operating in the spirit of partnership and mutual respect. We affirm this objective, and affirm the Government's commitment to build and maintain constructive relationships with Māori to achieve better results for Māori, which will benefit New Zealand as a whole." Also, "(9) In particular, where the Declaration sets out aspirations for rights to and restitution of traditionally held land and resources, New Zealand has, through its well-established processes for resolving Treaty claims, developed its own distinct approach." Maori Affairs Minister Dr Pita Sharples emphasized: "Today's announcement restores our mana and our moral authority to speak in international fora on issues of justice, rights and peace."[5]
- According to Ministry of Māori Development: "New Zealand is committed to improving outcomes for Māori in areas such as health and housing as part of our Declaration obligations. Developing a Declaration plan will measure our progress in addressing indigenous rights and interests." On July 1, 2021: the Minister for Māori Development Willie Jackson announced next steps in developing a national plan to implement the Declaration. On October 14, 2021: Minister Jackson met with more than 30 national Māori organisations in an online hui, kicking off the process to develop a plan for New Zealand to implement the Declaration.[6]

Research methodology

- Approach:
  - In New Zealand, the Treaty of Waitangi is acknowledged as a "founding document" of the Constitution.[7] It may be helpful to read through the Treaty[8] (link includes the Treaty in English and Māori; a discussion of the differences between those texts; and further information, such as a timeline[9] on the interpretation and implementation of the Treaty.
  - Since it is a complex political and historical document, even though it has legal effect, the Treaty will not be covered in this legal sheet. Related notes:
    - Treaty of Waitangi Act of 1975, amended 1985 and 1988, established the Waitangi Tribunal[10] to investigate Treaty breaches

1. *2018 census ethnic group summaries: Māori ethnic group*, Stats NZ (Tatauranga Aotearoa), **https://www.stats.govt.nz/tools/2018-census-ethnic-group-summaries/m%C4%81ori** (last visited Nov 2, 2021).
2. *Map of New Zealand with iwi*, Te Ara, **https://teara.govt.nz/en/map/45555/map-of-new-zealand-with-iwi** (last visited Nov 2, 2021).
3. *Glossary ("iwi")*, Te Ara, **https://teara.govt.nz/en/glossary#iwi** (last visited Nov 2, 2021).
4. Maori Purposes Act, 1974, **https://www.legislation.govt.nz/act/public/1974/0144/4.0/whole.html** (last visited Nov 2, 2021).
5. *Supporting UN Declaration restores NZ's mana*, Beehive.govt.nz, **https://www.beehive.govt.nz/release/supporting-un-declaration-restores-nzs-mana** (last visited Dec 6, 2021).
6. *UN Declaration on the Rights of Indigenous Peoples*, Ministry of Māori Development, **https://www.tpk.govt.nz/en/whakamahia/un-declaration-on-the-rights-of-indigenous-peoples** (last visited Dec 6, 2021).
7. *The Treaty in brief*, New Zealand History (Nga korero a ipurangi o Aotearoa), **https://nzhistory.govt.nz/politics/treaty/the-treaty-in-brief** (last visited Nov 2, 2021).
8. *Read the Treaty*, New Zealand History (Nga korero a ipurangi o Aotearoa), **https://nzhistory.govt.nz/politics/treaty/read-the-treaty/english-text** (last visited Nov 2, 2021).
9. *Treaty timeline*, New Zealand History (Nga korero a ipurangi o Aotearoa), **https://nzhistory.govt.nz/politics/treaty/treaty-timeline/treaty-events-1800-1849** (last visited Nov 2, 2021).
10. *Waitangi Tribunal*, **https://waitangitribunal.govt.nz/** (last visited Nov 2, 2021).

- Other land/resource-affecting legislations state: "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi."

- Important concepts and keywords:
  - New Zealand legislation, particularly those featured here, have Māori language organically woven into the main text. Definitions included come from either (1) the New Zealand federal government, or (2) where the former is unavailable, the Māori Dictionary Project[11].
    - A limitation that should be acknowledged — dictionaries such as this are only an entry into understanding the full, rich meaning of a given word or phrase.
    - Māori terms have been bolded and footnoted.
  - New Zealand is divided into six provinces. Each province has the power to pass **subordinate legislation (Ordinances).**

11. **https://maoridictionary.co.nz/** (last visited Nov 2, 2021).

FEDERAL LEGAL SOURCES

Heritage New Zealand Pouhere Taonga Act, 2014

Part I, Preliminary Provisions

- 3 Purpose: "to promote the identification, protection, preservation, and conservation of the historical and cultural heritage of New Zealand."
- 4 Principles: All persons performing functions and exercising powers under this Act must recognise —
  - (a) the principle that historic places have lasting value in their own right and provide evidence of the origins of New Zealand's distinct society; and
  - (b) the principle that the identification, protection, preservation, and conservation of New Zealand's historical and cultural heritage should —
    - (i) **take account of all relevant cultural values, knowledge, and disciplines**; and
    - (ii) take account of material of cultural heritage value and involve the least possible alteration or loss of it; and
    - (iii) safeguard the options of present and future generations; and
    - (iv) be fully researched, documented, and recorded, where culturally appropriate; and
  - (c) the principle that there is value in central government agencies, local authorities, corporations, societies, **tangata whenua**, and individuals working collaboratively in respect of New Zealand's historical and cultural heritage; and
  - (d) the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, **wāhi tūpuna**, **wāhi tapu**, and other **taonga**[12].
- 6 Interpretation:
  - Historic area means an area of land that —
    - (a) contains an inter-related group of historic places; and
    - (b) forms part of the historical and cultural heritage of New Zealand; and
    - (c) lies within the territorial limits of New Zealand.
  - Historic place —
    - (a) means any of the following that forms a part of the historical and cultural heritage of New Zealand and that lies within the territorial limits of New Zealand:
      - (i) land, including an archaeological site or part of an archaeological site;
      - (ii) a building or structure (or part of a building or structure);
      - (iii) any combination of land, buildings, structures, or associated buildings or structures (or parts of buildings, structures, or associated buildings or structures); and
    - (b) includes any thing that is in or fixed to land described in paragraph (a)
  - **Land** includes —
    - (a) Land covered by water; and
    - (b) The airspace above land
  - **Tangata whenua** means, in relation to a particular place or area, the iwi or hapū that holds, or at any time has held, mana whenua in relation to that place or area
  - **Wāhi tapu** means a place sacred to Māori in the traditional, spiritual, religious, ritual, or mythological sense
  - **Wāhi tapu area** means land that contains 1 or more wāhi tapu

12. *Māori Dictionary ("taonga")*, **https://maoridictionary.co.nz/search?idiom=&phrase=&proverb=&loan=&histLoanWords=&keywords=taonga** (last visited Nov 2, 2021).

Heritage New Zealand Pouhere Taonga Act, 2014 (continued)	Part II, Heritage New Zealand Pouhere Taonga and Māori Heritage Council ▸ Sets out functions and powers of the HNZPT, which is principally "to identify, record, investigate, assess, list, protect, and conserve historic places, historic areas, wāhi tūpuna, wāhi tapu, and wāhi tapu areas or enter such places and areas on the **New Zealand Heritage List/ Rārangi Kōrero**"[13] ▸ Distinguishes role of HNZPT to that of the Māori Heritage Council[14] (HNZPT may delegate certain roles to MHC) » MHC, among other responsibilities, must "ensure that, in the protection of wāhi tūpuna, wāhi tapu, wāhi tapu areas, and other historic places and historic areas of interest to Māori, Heritage New Zealand Pouhere Taonga meets the needs of Māori in a **culturally sensitive manner**" ▸ Requires the appointment of at least 3 members "who are qualified for appointment having regard to their knowledge of te ao Māori and tikanga Māori" ▸ HNZPT must implement "measures that are appropriate to support processes and decisions relating to sites that are of interest to Māori or to places on Māori land" Part III, Protection of places and areas of historical and cultural value ▸ **39 Heritage covenants** » (1) HNZPT may enter into a **heritage covenant with the owner** of a historic place, historic area, wāhi tūpuna, wāhi tapu, or wāhi tapu area to provide for the **protection, conservation, and maintenance** of the place, area, wāhi tūpuna, wāhi tapu, or wāhi tapu area » (2) A heritage covenant may — • (a) include the terms and conditions that the parties think fit, including provision for public access • (b) state that it has effect in perpetuity or for any specified term, or may be expressed to terminate on the happening of a specific event or events • (c) be varied or cancelled by agreement between the parties » *NOTE: requires consent of the land-owner, or persons with interests in the land* Part IV, Recognition of places of historical, cultural, and ancestral significance {*Includes criteria for inclusion, and applications to* **wāhi tūpuna**, **wāhi tapu**, or **wāhi tapu** areas*; SEE Footnote 11 for more information*}

13. *About the List (Rārangi Kōrero)*, Heritage New Zealand (Pouhere Taonga), **https://www.heritage.org.nz/the-list/about-the-list** (last visited Nov 2, 2021).
14. *Māori Heritage Council*, Heritage New Zealand (Pouhere Taonga), **https://www.heritage.org.nz/about-us/maori-heritage-council** (last visited Nov 2, 2021).

Marine and Coastal Area (Takutai Moana) Act, 2011	4 Purpose ▸ (1) The purpose of this Act is to — (b) recognise the **mana tuku iho**[15] exercised in the marine and coastal area by iwi, hapū, and whānau as tangata whenua; and (d) acknowledge the Treaty of Waitangi (te Tiriti o Waitangi). ▸ (2) To that end, this Act — (b) contributes to the continuing exercise of mana tuku iho in the marine and coastal area NOTE: in summary, the Act includes provisions related to recognizing **wāhi tapu or a wāhi tapu ar**ea[16], in an agreement or customary marine title order.

15. According to Ministry of Justice guidance on recognizing Indigenous customary rights to marine title (**https://www.justice.govt.nz/assets/Documents/Publications/Blue-Book.pdf**, last visited Nov 2, 2021): the "inherited right or authority derived in accordance with tikanga," where **tikanga** are the "appropriate customary practices or 'layers of the culture' developed by Māori communities and individuals, and informed by common cultural values and concepts." **https://www.data.govt.nz/toolkit/data-ethics/nga-tikanga-paihere/what-are-tikanga/** (last visited Nov 2, 2021).
16. Definition references Section 6 of the Heritage New Zealand Pouhere Taonga Act 2014.

Te Ture Whenua Maori Act (Maori Land Act), 1993	NOTE: this Act "provides the rules around land dealings that change the ownership status of Māori land."[17] Preamble: Whereas the Treaty of Waitangi established the special relationship between the Maori people and the Crown: And whereas it is desirable that the spirit of the exchange of kawanatanga for the protection of **rangatiratanga**[18] embodied in the Treaty of Waitangi be reaffirmed: And whereas it is desirable to recognise that land is a **taonga tuku iho**[19] of special significance to Maori people and, for that reason, to promote the retention of that land in the hands of its owners, their **whanau**,[20] and their **hapu**[21], and to protect **wahi tapu**[22]**:** and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their **whanau**, and their **hapu**: And whereas it is desirable to maintain a court and to establish mechanisms to assist the Maori people to achieve the implementation of these principles. 2 Interpretation of the Act: ▸ (1) It is the intention of Parliament that the provisions of this Act shall be interpreted in a manner that best furthers the principles set out in the Preamble. ▸ (2) Without limiting the generality of subsection (1), it is the intention of Parliament that powers, duties, and discretions conferred by this Act shall be exercised, as far as possible, in a manner that facilitates and promotes the retention, use, development, and control of Maori land as taonga tuku iho by Maori owners, their whanau, their hapu, and their descendants, and that protects wahi tapu. ▸ (3) In the event of any conflict in meaning between the Maori and the English versions of the Preamble, the Maori version shall prevail. 4 Interpretation: ▸ (4) Māori land means Maori customary land and Maori freehold land

17. *Māori land FAQs*, Toitū Te Whenua (Land Information New Zealand), **https://www.linz.govt.nz/kb/849** (last visited Nov 2, 2021).
18. *Māori Dictionary ("rangatiratanga")*, **https://maoridictionary.co.nz/search?idiom=&phrase=&proverb=&loan=&histLoanWords=&keywords=rangatiratanga** (last visited Nov 2, 2021).
19. *Māori Dictionary ("taonga tuku iho")*, **https://maoridictionary.co.nz/search?idiom=&phrase=&proverb=&loan=&histLoanWords=&keywords=taonga+tuku+iho** (last visited Nov 2, 2021).
20. *Māori Dictionary ("whānau")*, **https://maoridictionary.co.nz/search?idiom=&phrase=&proverb=&loan=&histLoanWords=&keywords=whanau** (last visited Nov 2, 2021).
21. *Māori Dictionary ("hapū")*, **https://maoridictionary.co.nz/search?idiom=&phrase=&proverb=&loan=&histLoanWords=&keywords=hapu** (last visited Nov 2, 2021).
22. Definition references Section 6 of the Heritage New Zealand Pouhere Taonga Act 2014.

Resource Management Act, 1991	5 Purpose ▸ (1) The purpose of this Act is to promote the sustainable management of natural and physical resources. ▸ (2) In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while » (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and » (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and » (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment. 6 Matters of National Importance ▸ In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance: » (c) the protection of areas of **significant indigenous vegetation and significant habitats of indigenous fauna** » (d) the maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers » (e) the **relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga** » (f) the protection of historic heritage from inappropriate subdivision, use, and development » (g) the protection of protected customary rights...
Conservation Act, 1987	6(a), (b): Functions of the Department of Conservation include: "to manage for conservation purposes, all land, and all other natural and historic resources, for the time being held under this Act, and all other land and natural and historic resources whose owner agrees with the Minister that they should be managed by the Department," where "historic resources" refers to the HNZPT Act (2014)

APPENDIX, PART B

FINLAND	Constitution (2000), Sections 17 ("The Sami, as an indigenous people, as well as the Roma and other groups, have the right to maintain and develop their own language and culture.") and 121 ("In their native region, the Sami have linguistic and cultural self-government, as provided by an Act.") Act on the use of the Sami language before the authorities (1991) Act on the Sami Parliament (1995) Decree on the Sami Parliament (1995)
NORWAY	Constitution (1814, last amended 2014), Article 108 ("It is the responsibility of the authorities of the State to create conditions enabling the Sami people to preserve and develop its language, culture and way of life.") The Sámi Act (1987) Planning and Building Act (2008) Nature Diversity Act (2009)
SWEDEN	Constitution, The Instrument of Government[1], Art. 2 ("The opportunities of the Sami people, and ethnic, linguistic and religious minorities to preserve and develop a cultural and social life of their own shall be promoted.") Sami Parliament Act (1992)[2]

1. The Constitution consists of four fundamental laws: the Instrument of Government, the Act of Succession, the Freedom of the Press Act and the Fundamental Law on Freedom of Expression.
2. English translation unavailable. ECOLEX provides an abstract, which states: "This Act provides for a special authority - the Sámi Parliament - with the task of mainly monitoring issues concerning Sámi culture in Sweden. The Sámi Parliament shall, among other things, participate in social planning and ensure that Sami needs are taken into account, including the interests of the river industry in land and water utilization. The Sámi Parliament shall have an Executive Council." **https://www.ecolex.org/details/legislation/sami-parliament-act-19921433-lex-faoc177069/** (last visited Nov 2, 2021).

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