



## Laws, Regulations, and Executive Orders A Quick Guide for Preserving Native American Cultural Resources

### Federal Laws

#### *American Indian Religious Freedom Act of 1978, as amended (AIRFA) [42 U.S.C. 1996]*

AIRFA states that it is U.S. government policy to respect the inherent right of American Indians, Alaska Natives, and Native Hawaiians to practice their traditional religions. This has been interpreted by the courts to mean that Federal agencies must consult with Indian tribes and Native Hawaiian Organizations concerning projects the agencies propose to undertake that may affect traditional religious practices, as well as places and sacred objects used in religious practices. It does not give these groups a veto over agency actions, but does require that agencies consult with them and pay attention to their religious concerns.

For more information go to: [http://www.nps.gov/history/local-law/FHPL\\_IndianRelFreAct.pdf](http://www.nps.gov/history/local-law/FHPL_IndianRelFreAct.pdf)

#### *Archaeological and Historic Preservation Act of 1960, as amended (AHPA) [16 USC 469]*

Also called the Archaeological Data Preservation Act (ADPA), AHPA requires Federal agencies to recover archaeological, historical, and scientific data that may be threatened by construction projects or other related actions undertaken, assisted, or licensed. It also requires pre-project surveys to identify such data. AHPA does not provide specifically for consultation with Indian Tribes or Native Hawaiian Organizations.

For more information go to: [http://www.cr.nps.gov/local-law/fhpl\\_archhistpres.pdf](http://www.cr.nps.gov/local-law/fhpl_archhistpres.pdf)

#### *Archaeological Resources Protection Act of 1979, as amended (ARPA) [16 U.S.C. 470aa-470mm]*

ARPA prohibits people from excavating, removing, or defacing archaeological resources on Federal and tribal land without a permit issued by the responsible land management agency. Permits are issued in accordance with regulations issued jointly by the Departments of Agriculture, Defense, and Interior, and the Tennessee Valley Authority. Federal agencies must consult with Indian tribes and Native Hawaiian Organizations before issuing such permits. Archaeological resources are defined as places and items that are of archaeological interest and over 100 years old.

For more information go to: [http://www.cr.nps.gov/local-law/fhpl\\_archsrcsprot.pdf](http://www.cr.nps.gov/local-law/fhpl_archsrcsprot.pdf)

#### *Endangered Species Act of 1973, as amended (ESA) [16 USC 1531-1544]*

ESA provides a program for the conservation of threatened and endangered plants and animals and the habitats in which they are found. The law requires federal agencies, in consultation with the U.S. Fish and Wildlife Service and/or the NOAA Fisheries Service, to ensure that actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat of such species. The law also prohibits any action that causes a "taking" of any listed species of endangered fish or wildlife. Likewise, import, export, interstate, and foreign commerce of listed species are all generally prohibited.

For more information go to: <http://www.fws.gov/endangered/esa-library/index.html#esa>

#### *National Environmental Policy Act of 1970, as amended (NEPA) [42 U.S.C. 4321-4347]*

NEPA establishes a government-wide policy to protect the human environment and treat it with respect. Together with 40 CFR 1500-1508 (*Protection of the Environment*), NEPA requires Federal agencies to consider the environmental impacts of any actions they propose to undertake, assist, or license.

For more information go to: <http://ceq.hss.doe.gov/nepa/reg/nepa/nepaeqia.htm>



National Historic Preservation Act of 1966, as amended (NHPA) [16 usc 470]

NHPA establishes a government-wide policy favoring the responsible use of historic properties, defined as places included in or eligible for the National Register of Historic Places. The following sections of NHPA are of special importance to Indian Tribes and Native Hawaiian Organizations:

- *Section 101(d)*. Provides a vehicle for Indian tribes to enter into agreements with the National Park Service under which they may take on the functions of State Historic Preservation Officers (SHPOs) within the boundaries within the exterior boundaries of an Indian reservation and appoint a Tribal Historic Preservation Officer (THPO) to carry out these functions (see *Quick Guide – THPO*). In addition, *Section 101(d)(3)* authorizes grants to THPOs and *Section 101(d)(6)* states that places of religious and cultural significance to Indian tribes and Native Hawaiians may be eligible for inclusion in the National Register of Historic Places. Federal agencies are required to consult with Indian tribes and Native Hawaiian Organizations about the treatment of such places under *Section 106*.
- *Section 106* (See Quick Guide – NHPA Section 106). Requires Federal agencies to consider the effects of proposed actions on historic properties. This includes actions they propose themselves and those they propose to assist or license. *36 CFR 800 (Protection of Historic Properties)* outlines how agencies are to consult with State and Tribal Historic Preservation Officers and other interested parties, identify historic properties, determine whether and how such properties may be affected, and resolve adverse effects.
- *Section 110*. Requires Federal agencies to identify and manage historic properties under their jurisdiction and control, encourage the preservation of non-federally owned historic properties, discourage the destruction of historic properties, document historic properties that must be damaged or destroyed, maintain historic preservation offices, respond to comments by the Advisory Council on Historic Preservation, and consult with Indian tribes and Native Hawaiian Organizations, preservation authorities, and others in carrying out agency activities. *Section 110* also authorizes the inclusion of historic preservation costs as eligible project costs in Federal and federally assisted projects.
- *Section 111*. Requires Federal agencies to seek adaptive uses for historic properties under their jurisdiction or control that cannot be used for agency purposes. It authorizes outleases and exchanges of property as ways of making these properties available for public use. *Section 111* may be used by Indian tribes and Native Hawaiian Organizations to acquire the use of federally owned historic buildings and structures.

For more information go to: <http://www.achp.gov/nhpa.html>

Native American Graves Protection and Repatriation Act of 1990, as amended (NAGPRA)

[25 U.S.C. 3001–3013] (See Quick Guide – National NAGPRA)

NAGPRA requires Federal agencies and institutions receiving Federal funding to identify Native American cultural items (human remains, funerary objects, sacred objects, and objects of cultural patrimony) under their control. It also provides lineal descendants, Indian tribes, and Native Hawaiian Organizations a process through which to request that cultural items be repatriated. In addition, NAGPRA requires work stoppage and various forms of coordination and documentation when such items are unearthed on Federal or tribal lands. *43 CFR 10 (Native American Graves Protection and Repatriation Act Regulations)* governs the implementation of NAGPRA. For more information go to: [http://www.cr.nps.gov/local-law/FHPL\\_NAGPRA.pdf](http://www.cr.nps.gov/local-law/FHPL_NAGPRA.pdf)



*Religious Freedom Restoration Act of 1993 (RFRA) [42 USC 2000bb - 2000bb-4]*

RFRA prohibits Federal agencies from substantially burdening any person's practice of religion, unless doing so meets a compelling government interest and the means of doing so is the least restrictive way of meeting that interest. Courts have prescribed varying standards for what constitutes a substantial burden on the practice of religion. Under RIFA, people who practice traditional Native American religions have the same rights as those who practice other religions.

For more information go to: <http://www.gpo.gov/fdsys/pkg/BILLS-103hr1308enr/pdf/BILLS-103hr1308enr.pdf>

## Executive Orders

*E.O. 12898, Environmental Justice, February 11, 1994*

Requires that Federal agencies avoid having disproportionate adverse environmental impacts on low-income populations and minority communities. Impacts may include effects on the cultural environments these populations and communities. Both Federally recognized and non-recognized tribes as well as Native Hawaiian communities may be "environmental justice" communities.

For more information go to: <http://www.archives.gov/federal-register/executive-orders/pdf/12898.pdf>

*E.O. 13007, Indian Sacred Sites, May 24, 1996*

Requires that Federal agencies seek to avoid adverse effects on Indian tribal sacred sites located on Federal or tribal land, and on tribal access to such sites. Sacred sites are identified by Indian tribes, but are required to be discrete and bounded. Tribal religious practitioners are identified by tribal governments.

For more information go to: <http://www.gpo.gov/fdsys/pkg/FR-1996-05-29/pdf/96-13597.pdf>

*E.O. 13175 Consultation with Tribal Governments, November 6, 2000*

Affirms the Federal government's commitment to a government-to-government relationship with Indian tribes, and directs Federal agencies to establish procedures to consult and collaborate with tribal governments when new agency regulations would have tribal implications.

For more information go to: <http://www.gpo.gov/fdsys/pkg/FR-2000-11-09/pdf/00-29003.pdf>

## Government-wide Regulations

*36 CFR 79, Curation of Federally – Owned and Administered Archaeological Collections*

Regulations issued by the National Park Service for the curation and care of federal archaeological collections required by ARPA, NHPA, and the Reservoir Salvage Act. Included in the regulations are standards for determining a repository for archaeological collections and guidelines for acceptable access, loans, and collections use. For more information go to: <http://www.nps.gov/archeology/tools/36cfr79.htm>

*36 CFR 800, Protection of Historic Properties*

Regulations issued by the Advisory Council on Historic Preservation governing implementation of *Section 106* of NHPA. The regulations generally require:

- Early and continuing consultation with tribes, THPOs, SHPOs, and other interested parties.
- Identifying historic properties subject to possible effect by proposed projects.
- Determining how such properties may be affected.
- Negotiating agreements about how such effects will be resolved or mitigated.
- Implementing such agreements.

For more information go to: <http://www.achp.gov/regs-rev04.pdf>



#### 40 CFR 1500-1508, Protection of the Environment

Regulations issued by the Council on Environmental Quality governing implementation of NEPA. The regulations generally:

- Allow agencies to establish categorical exclusions that require little or no NEPA review, but must be screened for extraordinary circumstances that require additional review.
- Provide for Environmental Assessments (EAs) to determine whether projects may have significant impacts on the quality of the human environment.
- Require Environmental Impact Statements (EISs) on projects that may have significant impacts on the environment.
- Results of NEPA review are to be considered by Federal agencies in making project decisions.

For more information go to: [http://ceq.hss.doe.gov/ceq\\_regulations/regulations.html](http://ceq.hss.doe.gov/ceq_regulations/regulations.html)

#### 43 CFR 10, Native American Graves Protection and Repatriation Act (NAGPRA) Regulations

Regulations issued by the National Park Service governing the implementation of NAGPRA. The regulations require Federal agencies and institutions that have received Federal funds to:

- Inventory their holdings to see if they contain Native American human remains or cultural items, and determine whether they have a right to own such remains and items.
- Identify Indian tribes and Native Hawaiian groups with cultural affiliation to such remains and items.
- Subject to negotiation, repatriate such items to tribes and Native Hawaiian groups.
- The regulations also prescribe rules for developing Plans of Action and Comprehensive Agreements for dealing with Native American human remains and cultural items found on Federal and tribal lands.

For more information go to: <http://www.nps.gov/nagpra/mandates/index.htm>

### **Definitions**

For the purposes of these descriptions:

- *Indian tribes* is defined as an American Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an individual tribe pursuant to the Federally Recognized Tribe List Act of 1994, 25 USC. 479a.
- *Native American* is defined as of, or relating to, a tribe, people, or culture that is indigenous to the United States.
- *Native Hawaiian* is defined 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.
- *Native Hawaiian Organization* is defined as any organization which serves and represents the interests of Native Hawaiians; has as a primary and stated purpose the provision of services to Native Hawaiians; and has expertise in Native Hawaiian Affairs.
- *Tribal land* is defined as all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.