CULTURAL RESOURCES PROTECTION: OTHER KEY STATUTES
Jack Trope, Association on American Indian Affairs

I. AMERICAN INDIAN RELIGIOUS FREEDOM ACT (AIRFA)

In 1978, Congress enacted the American Indian Religious Freedom Act (AIRFA), which includes the declaration that it is:

> the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship though ceremonials and traditional rites.[1]

AIRFA should inform land management decisions and can provide land managers with the authority to take action to protect sacred lands. It does not provide for an enforcement mechanism, however, and the Supreme Court has held that AIRFA cannot be used to provide legal redress to Indian individuals or tribes who disagree with a decision by an agency that will have a negative impact on a sacred place.[2]

II. EXECUTIVE ORDER 13,007

For tribal sacred places located on federal lands, the policy statement in AIRFA has been reinforced through Executive Order 13,007, Indian Sacred Sites, issued by President Clinton in 1996.[3] This Executive Order directs federal land managing agencies to:

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[1] Pub. L. No. 95-341 (codified in part at 42 U.S.C. § 1996). In addition to the codified policy statement quoted above, AIRFA also includes a number of "whereas" clauses and a section directing the Secretary of the Interior to prepare a report to Congress. That report, captioned American Indian Religious Freedom Act Report, was completed in 1979 and was submitted to Congress.

[2] *See Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 455 (1988) (noting floor statement by congressional sponsor that AIRFA "has no teeth"). In *Lyng*, the Court held that the Forest Service was not required by the Free Exercise Clause of the First Amendment to demonstrate a compelling need to complete a paved logging road through an area sacred to several tribes. *Id.* at 447. In spite of its "lack of teeth", enactment of AIRFA was still significant as it was an official repudiation of a long history of suppression of Indian religions by the federal government. *See generally* Rayanne J. Griffin, *Sacred Site Protection against a Background of Religious Intolerance*, 31 TULSA L.J. 395 (1995). Jack F. Trope, *"Protecting Native American Religious Freedom: The Legal, Historical and Constitutional Basis for the Proposed Native American Free Exercise of Religion Act",* 20 N.Y.U. REV. L. & SOC. CHANGE 373, 374 (1993); HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM (CHRISTOPHER VECSEY, ed., 1991).

[3] Executive Order 13,007, Indian Sacred Sites, 61 Fed. Reg. 26771 (May 24, 1996) (reprinted in notes at 42 U.S.C. § 1996). The Clinton Administration issued this Executive Order in response to the efforts of a

(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 sites.[4]

This mandate is limited by the qualifying language that federal land managing agencies shall carry out this policy "to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions."[5]

As with Executive orders generally, EO 13,007 does not create any enforceable rights against the federal government or any enforceable responsibilities on the part of the federal government.[6] Similar to AIRFA, EO 13,007 provides a policy framework for applicable to the planning process.

III. RELIGIOUS FREEDOM RESTORATION ACT

The 1990 *Employment Division, Department of Human Resources of Oregon v. Smith*[7] *(Smith)* case involving the ceremonial use of peyote, the U.S. Supreme Court severely limited the test that had previously been applied in First Amendment cases in which persons challenged facially neutral[8] governmental activities or laws that indirectly affected religious activity, a test known as the "compelling governmental interest or strict scrutiny" test.

In 1993, Congress enacted the Religious Freedom Restoration Act (RFRA),[9] which re-established by statute the compelling governmental interest test that had been rejected by the Supreme Court in *Smith* as a matter of constitutional law. Specifically, the Act provides that governmental activity may not substantially burden a person's free exercise of religion unless the activity is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest.[10] Under RFRA, any person whose free exercise is burdened by a governmental activity may seek judicial redress.[11]

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coalition of Native American and other organizations that were seeking legislation to protect the religious freedom of traditional Native Americans after the Supreme Court's decisions in the *Lyng* and *Smith* cases.

[4] *Id.* § 1(a).

[5] *Id.* § 1(a).

[6] *Id.* §§ 3, 4.

[7] 494 U.S. 872 (1990).

[8] A facially neutral activity or law is one that does not target religion *per se*. Rather it has a valid secular purpose, *e.g.*, building a road to facilitate logging, although it may also have an impact upon religious exercise. This is contrasted with a law that specifically targets religion, which would continue to be subject to strict scrutiny under the First Amendment. *See, e.g.*, *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

[9] P.L. 103-141 (1993) (codified at 42 U.S.C. §§ 2000bb to 2000bb-4).

[10] 42 U.S.C. § 2000bb-1(a), (b).

[11] 42 U.S.C. § 2000bb-1(c).

The question is whether it applies to federal land management decisions that substantially interfere with the free exercise of religion by Native religious practitioners. This issue of the applicability of RFRA to federal land management decisions was recently litigated in the case of *Navajo Nation v. U.S. Forest Service*. This case involves the San Francisco Peaks in Northern Arizona. Native Americans from at least 13 different tribes consider the Peaks sacred. It is an active ceremonial area, the abode of spirit beings, contains numerous "shrines" and is the source of water and plants of medicinal and spiritual significance. A ski area that covers 777 acres is located on one part of the Peaks. In 2005, the Forest Service approved a proposal that would allow for the use of treated sewage effluent for snowmaking at the site. A lawsuit was filed by five tribes, two traditional practitioners and a few supporting organizations to prevent this development.

A three judge panel of the Ninth Circuit Court of Appeals found that the development at the San Francisco Peaks violated the RFRA. The Ninth Circuit found that the burden from the project on the religious practices of the tribes, fell "roughly into two categories: (1) the inability to perform a particular religious ceremony, because the ceremony requires collecting natural resources from the Peaks that would be too contaminated — physically, spiritually, or both — for sacramental use; and (2) the inability to maintain daily and annual religious practices comprising an entire way of life, because the practices require belief in the mountain's purity or a spiritual connection to the mountain that would be undermined by the contamination."[12] It concluded that the case of *Lyng v. Northwest Indian Cemetery Protective Association,*[13] which effectively held that the Free Exercise Clause of the First Amendment is not available to protect Native sacred places located on federal lands, did not govern the application of RFRA to the case and issued an injunction against the project as it found that the government did not have a compelling interest in going forward.[14]

The panel's decision was reviewed by Ninth Circuit *en banc* and reversed. The Court held that the term "substantial burden" only includes those governmental actions that coerce religious practitioners to act contrary to their beliefs or deprive individuals of specific government benefits.[15] In essence, it applied the test utilized by the United States Supreme Court in *Lyng* and found that the proposed snowmaking did not place a substantial burden upon the free exercise of religion by the Indian tribes and practitioners.[16] If this definition of

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[12] 479 F.3d 1024, 1039 (9th Cir. 2007), *revd. en banc*, 535 F.3d 1058, *cert. den.*, __ U.S. __ (2009).
[13] 485 U.S. 439 (1988).
[14] *Navajo Nation*, *supra*, 479 F.3d at 1043-1048.
[15] *Navajo Nation*, *supra*, 535 F.3d at 1070.
[16] *Id.* at 1071-1073, 1078.

substantial burden is applied, it will be very difficult, if not impossible, for a RFRA claim based upon desecration of a sacred site to succeed.

The *en banc* decision is only binding in the Ninth Circuit,[17] however. Recently, a District Court in the Tenth Circuit rejected the Ninth Circuit test in an unpublished opinion. Utilizing instead a substantial burden test articulated in a Tenth Circuit case (government action that would "significantly inhibit or constrain religious conduct or expression…[or] meaningfully curtail [an individual's] ability to express adherence to his or her faith'), the Court issued a preliminary injunction in favor of the Comanche Nation in a case where it challenged the government's plan to build a military training facility directly south of the Medicine Bluffs, a site "held in deep reference by the Indian tribes of the area from time immemorial."[18]

Thus, the applicability of RFRA remains an open question in many parts of the country. If it applies, then it places substantive limitations on federal land managers. What is required under RFRA is a fact-specific inquiry in each case measuring the extent of the impact of the government action upon the religious practice in question. If the impact constitutes a substantial burden, approval of such a land management decision is only legally permissible if it is justified by a compelling governmental interest that cannot be achieved by a less restrictive means. The burden of showing compelling interest rests upon the government. Cases interpreting RFRA have ruled that the compelling interest test cannot be met through generalized assertions of government interest, but must be measured by the specific action that would apply to the affected individuals. [19]

IV. TRANSPORTATION ACT – SECTION 4(f)

Section 4(f) of the Department of Transportation Act of 1966[20] allows the Secretary of Transportation to approve transportation projects that will use "publicly owned land of a public park, recreation area, or wildlife or waterfowl refuge…or land of an historic site of national, State or local significance…only if

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[17] The states in the Ninth Circuit are Nevada, Arizona, Idaho, Montana, Washington, Oregon, California, Hawaii and the Territory of Guam.

[18] *Comanche Nation v. United States*, No. CIV-08-849-D, 2008 WL 4426621 (W.D. Okla., Sept. 23, 2008).

[19] *See, e.g., Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegeta*, 546 U.S. 418, 126 S.Ct. 1211 1223-1225 (2006) (government's interest in banning hallucinogen drugs in general is not enough; government must show that it has a compelling interest in not providing an exception for the ceremonial use of hoasca, the actual substance needed for the tea utilized in plaintiff's religious ceremony). *See also Wisconsin v. Yoder*, 406 U.S. 205, 213, 221 (1972) (while accepting the premise that education is a paramount state interest and "despite its admitted validity in the generality of cases", this was not enough to show a compelling interest; rather the government needed to specifically show it had a compelling interest in Amish children attending school after eighth grade).

[20] 49 U.S.C. § 303(c).

there is no prudent and feasible alternative" and the project includes "all possible planning to minimize harm." A project falls within this restriction if it uses a site directly or if there is a "constructive use" of the site; a "constructive use" is a use that would substantially impair the value of a protected site even though it doesn't directly impact upon that site in a physical sense.[21]

The United States Supreme Court has provided parameters to guide interpretation of the statute in *Overton Park v. Volpe*.[22] The Court stated that "feasible" means that an alternative is grounded in "sound engineering." The Court's interpretation of "prudent" was phrased in the negative, focusing on what would disqualify an alternative from consideration by the Secretary: a "prudent" alternative is one that would not present "unique" or "truly unusual" problems, or "costs or community disruption of extraordinary magnitude."[23] The *Overton Park* decision stressed that protection of 4(f) lands was of "paramount importance" under the statute.[24]

Since 1984, however, there has been a trend across many federal circuits toward increased deference to FHWA interpretations of what constitutes an "imprudent" transportation project alternative; one prominent aspect of this trend involves courts' acceptance of agency determinations that an alternative's ability to satisfy the transportation project's stated purpose or need is dispositive when evaluating its prudence.[25] This suggests that agencies may try to satisfy the 4(f) criteria by narrowly crafting their purpose and need statements so as to preclude consideration of anything other than the agency's own preferred alternative plan.

Recent amendments to this section were enacting with the goal of eliminating projects that have only a *de minimis* impact upon historic sites. A finding of *de minimis* impact can be made if there is a finding that there will be no

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[21] 23 C.F.R. § 771.135(p); *see also Coalition Against a Raised Expressway, Inc. (CARE) v. Dole*, 935 F.2d 803, 811 (11th Cir. 1988); *Citizen Advocates for Responsible Expansion, Inc. (I-CARE) v. Dole*, 770 F.2d 423, 427-428, 441 n.2 (5th Cir. 1985).

[22] 401 U.S. 402 (1971).

[23] *Id.* at 413.

[24] *Id.* at 412-413.

[25] *See, e.g., Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190 (D.C. Cir. 1991) (because the purpose was to build a new cargo hub for the airport, it was appropriate to limit consideration to the plan and a no action alternative); *City of Alexandria v. Slater*, 198 F.3d 862 (D.C. Cir. 1999) (10 lane bridge alternative not considered because 12 lane proposal the minimum necessary to meet projected traffic demands); *Arizona Past and Future Foundation v. Lewis*, 722 F.2d 1423 (9th Cir. 1983) (purpose narrowly defined as improving traffic services for Central Phoenix); *Alaska Ctr. for the Environment v. Amrbrister*, 131 F.3d 1285 (9th Cir. 1997) (since purpose of project was to increase traffic to Prince William Sound, improving rail service option would not meet the needs and purpose of the project); *but see Stop H-3 v. Dole*, 740 F.2d 1442 (9th Cir. 1985), *cert. denied,* 471 U.S. 1108 (1985) and *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002) (finding inadequate consideration of alternatives).

adverse effect on the historic site or no historic properties affected by the project. This finding can be made only after consultation with all appropriate parties (which includes tribes when a property has cultural or religious significance) and with consent of the SHPO (or THPO where applicable) and the Advisory Council on Historic Preservation if it has taken part in the consultation process.[26]

In spite of these limitations, section 4(f) is still one of the very few statutes that imposes a substantive limitation upon government action in a context that may be relevant to sacred lands protection. Thus, it should be considered whenever the threatened activity involves a project requiring Department of Transportation approval.

V. ESTABLISHMENT CLAUSE

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion."[27] The standard test utilized to determine whether governmental action violates the Establishment Clause is a three part test. An action is constitutional if it (1) has a secular purpose, (2) does not have the principal or primary effect of advancing religion, and (3) does not foster an excessive entanglement between the government and religion.[28] In recent years, the first two parts of the test have been refined to focus upon whether a particular government action endorses religion, i.e., has the purpose or effect of conveying a message that religion or a particular religious belief is preferred.[29] In the case where government action allegedly prefers one religion over another, courts have also used an analysis similar to that used in equal protection cases involving suspect classifications, namely whether a compelling governmental interest is present and the governmental action is narrowly tailored to further that interest.[30]

It has been long recognized, however, that government may accommodate religious practices without violating the Establishment Clause.[31] In the *Lyng* case, the Court suggested that the lack of protection under the Free Exercise Clause does not mean that federal agencies do not have discretion to manage places where such sites are located in ways that avoid adverse effects. Indeed, the Court specifically stated that the "Government's rights to the use of its own land … need not and should not discourage it from accommodating [Native American] religious practices."[32]

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[26] 49 U.S.C. 303(d)(1) and (2).
[27] U.S. Constitution, Amendment 1.
[28] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).
[29] *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 592-594 (1989).
[30] *Larson v. Valente*, 456 U.S. 228 (1982).
[31] *See, e.g., Hobbie v. Unemployment Appeals Comm/n of Fla*., 480 U.S. 136, 144 (1987).
[32] *Lyng, supra*, 485 U.S. at 454.

These principles provide the backdrop for an issue that has occasionally been raised in a number of recent cases – namely, the extent to which the Establishment Clause of the First Amendment limits the ability of federal agencies to make land use decisions for the purpose of protecting the religious and spiritual integrity of a sacred place and accommodating religious use of the place by Native practitioners.

Thus far, efforts to overturn governmental actions protecting sacred places have had limited success. In many of the cases to date, those challenging these actions have been found to lack standing to sue.[33] Standing is a prerequisite for any court to decide a litigated matter. In order to have standing, a plaintiff must have suffered an injury that is caused by the conduct complained of and which can be remedied by the court.[34]

Where the Courts have reached the substance of the claim, they have generally ruled that the governmental action was a permissible accommodation. *Cholla Ready Mix, Inc. v. Civish*[35] involved a case where the State of Arizona refused to purchase materials for road construction contracts from a company that mined its materials in a manner that had an adverse impact upon a sacred site that had been found to be eligible for the National Register of Historic Places. The Ninth Circuit upheld the State's refusal against a claim that it violated the Establishment Clause. The Court found that the State had a valid secular purpose (protection of a site of religious, historical and cultural importance), its action did not have a primary effect of advancing or endorsing religion (carrying out state construction projects in a manner that does not interfere with religious practices is a permissible accommodation of religion) and there was no excessive state entanglement with religion (noting that tribes are not solely religious in nature, but are ethnic and cultural as well).

Access Fund v. U.S. Department of Agriculture[36] involved Cave Rock -- a large rock formation located on National Forest land near Lake Tahoe. The site is sacred to the Washoe Tribe. The site is also of archeological and historical significance. Following a lengthy process, the Forest Service decided to ban rock climbing at the site. The Access Fund, an organization that advocates on behalf

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[33] *Bear Lodge Multiple Use Association v. Babbitt*, 175 F.3d 814, 821-822 (10th Cir. 1999); *Wyoming Sawmills v. United States Forest Service*, 383 F.3d 1241 (10th Cir. 2004), *cert. den.* 546 U.S. 811 (2005); *Natural Arch and Bridge Society v. Alston*, 98 Fed. Appx. 711 (9th Cir. 2004), *cert. denied sub. nom. DeWaal v. Alston*, 543 U.S. 1145 (2005).; *Native American Heritage Commission v. Board of Trustees*, 59 Cal.Rptr.2d 402, 51 Cal.App.4th 675 (Cal.App. 2 Dist. 1996).

[34] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

[35] 382 F.3d 969 (9th Cir. 2004), *cert. denied*, 125 S.Ct. 1828 (2005).

[36] 499 F.3d 1036 (9th Cir. 2007).

of rock climbers, filed suit arguing that the ban on rock climbing at Cave Rock violated the Establishment Clause. The Ninth Circuit rejected this claim, holding that (1) the Forest Service's limitation on climbing was a permissible secular purpose in that it protected the cultural, historical and archeological features of Cave Rock, (2) the ban could not be viewed as an endorsement of the Washoe religion – particularly because other activities that are incompatible with Washoe beliefs are still allowed, and (3) oversight of recreational activities by the Forest Service cannot be viewed as excessive entanglement between church and state.[37] The Court distinguished two Federal District Court decisions which had previously addressed the Establishment Clause issue. Both courts had upheld voluntary measures to limit recreational activities, but had suggested that mandatory bans might violate the Establishment Clause claims.[38] The Ninth Circuit found that those cases involved measures that advanced solely sacred goals, not secular goals as in the case of Cave Rock.[39]

There is no reported case that has reached the merits of an Establishment Clause claim that has ruled in favor of those challenging the government's action, although there were two lower court unreported rulings referenced in reported cases where First Amendment claims were upheld.[40]

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[37] *Id*. at 1042-1046.

[38] *Bear Lodge Multiple Use Assn. v. Babbitt*, 2 F.Supp.2d 1448, *aff'd*,. 175 F.3d 814 (10th Cir. 1999), *cert. denied*, 529 U.S. 1037 (2000); *Natural Arch and Bridge Society v. Alston*, 209 F.Supp.2d 1207, 1223-1225 (D.Wash. 2002), *aff'd* 98 Fed.Appx. 711 (9th Cir. 2004), *cert. den. sub nom DeWaal v. Alston*, 543 U.S. 1145 (2005). The framework for both cases was that the government could not constitutionally coerce the public to refrain from certain activities, but that it could take actions to voluntarily encourage people to act respectfully. The courts found that the government actions met this test (although one of the courts had issued an injunction at a preliminary phase based upon a finding that one part of the government's plan did not meet this test.) *See* footnote 138. This approach to the Establishment Clause is questionable as a legal proposition.

[39] *Access Fund v. U.S. Department of Agriculture*, 499 F.3d 1036, 1046 (9th Cir. 2007). The voluntary/mandatory approach to the Establishment Clause is questionable as a legal proposition. The concept of "unconstitutional coercion", as used in cases such as *Lee v. Weisman*, 505 U.S. 577, 587 (1992), refers to actions which would force a non-believer to affirmatively provide support for or participate in a particular religion, not to governmental restrictions that accommodate religious free exercise by preventing actions that would interfere with that exercise. Although the court in *Access Fund* chose to distinguish the District Court rulings that had utilized this distinction, as opposed to disavowing those decisions, it is unknown whether the appellate court would fully adopt this reasoning if such a case were squarely presented to it.

[40] In *Bear Lodge*, *supra*, 2 F.Supp.2d at 1450, the District Court in its final decision made reference to a preliminary decision in which it had issued a preliminary injunction against a portion of a Rock Climbing Management Plan at Devils Tower National Monument, a plan that had provided that no commercial climbing licenses would be issued during the month of June in order to accommodate Native American religious needs at the site. That preliminary decision can be found on some web sites, even though it is an unreported decision. In *Native American Heritage Commission v. Board of Trustees*, *supra* note 132, 59 Cal. Rptr. 2d at 404, the court made reference to the trial court decision finding unconstitutional a California statute empowering the court to issue an injunction against activities that would damage sacred sites on public property. It suggested in dicta, however, that it would have had a broader view of what is permissible under the Establishment Clause than the trial court. *Id*. at 409-410.

It should be noted in other contexts (possession and use of peyote and eagles for religious purposes) that the special relationship between Indian tribes and the United States and the concomitant responsibility this relationship places on the United States in terms of protecting and preserving Native communities and cultures has led to court decisions recognizing a more expansive ability on the part of the federal government to take action to accommodate the exercise of Native religions than would otherwise be the case.[41]

Thus, the scope of the Establishment Clause in regard to placing limitations on the authority of the government to protect sacred sites is evolving in a direction that is broadly favorable in terms of upholding government action to protect sacred places, although the exact parameters of the Establishment Clause in this context have not yet been definitively established.

[41] *See, e.g., Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210, 1217 (5th Cir. 1991); *Rupert v. Director, U.S. Fish and Wildlife Service*, 957 F.2d 32 (1st Cir. 1992).