**WRITTEN STATEMENT FOR THE RECORD**
**OF THE SANTA CLARA PUEBLO, ACOMA PUEBLO, HUALAPAI INDIAN TRIBE AND THE UNITED SOUTH AND EASTERN TRIBES SOVEREIGNTY PROTECTION FUND**

**BEFORE THE**
**U.S. HOUSE OF REPRESENTATIVES**
**COMMITTEE ON NATURAL RESOURCES**
**SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS**

**OVERSIGHT HEARING:**
**"EXAMINING IMPACTS OF FEDERAL NATURAL RESOURCES LAWS GONE ASTRAY, PART II" (July 18, 2017)**

**TOPIC ADDRESSED IN THIS STATEMENT:**
**THE IMPORTANCE OF THE NATIONAL HISTORIC PRESERVATION ACT FOR NATIVE AMERICAN RELIGIOUS FREEDOM**

On behalf of the Santa Clara Pueblo, the Acoma Pueblo, the Hualapai Indian Tribe and the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), please include this statement in the record of the hearing captioned "Examining Impacts of Federal Natural Resources Laws Gone Astray, Part II," which was held on July 18, 2017. Each of the Indian tribes that joins in this statement is federally recognized. The Santa Clara Pueblo and Acoma Pueblo are located in New Mexico. The Hualapai Tribe is located in northwestern Arizona. USET is an intertribal organization comprised of twenty-six tribes located in seven southern states and five northeastern states.

The National Historic Preservation Act (NHPA) is one of the federal natural resources laws that was addressed in this hearing. We are submitting this written statement to bring to the attention of the Committee just how important the NHPA has become in protecting religious freedom for American Indians, Alaska Natives, and Native Hawaiians.

**"Or Eligible for" the National Register of Historic Places.** In written testimony for this hearing, one of the witnesses, Amos Loveday, recommended that this Committee "revisit" one particular aspect of the review process pursuant to section 106 of the NHPA – the inclusion of properties that are eligible for inclusion on the National Register of Historic Places as well as those properties that have been formally listed on the National Register. If the Committee does revisit this issue, Committee members should be aware of the importance of the NHPA section 106 process in protecting religious freedom for members of federally-recognized Indian tribes by vesting tribes with a procedural right to advocate for the preservation of places that are sacred according to tribal traditions if such places are threatened with damage or destruction that would result from federal agency actions. Mr. Loveday's written testimony did not mention the implications of his recommendations for Native American religious freedom.

As the Hearing Memorandum prepared by Majority Staff explains, NHPA section 106 provides that, prior to any proposed federal or federally-assisted "undertaking," the federal agency must take into account the effects of the undertaking on "any historic property," a term that is statutorily defined to include properties that are "eligible for inclusion on" the National Register as well as properties that are formally listed. Hearing Memorandum (July 14, 2017), at 7, citing 54 U.S.C. §§ 306108, 300308.

**Places of Traditional Religious and Cultural Importance.** As provided in amendments enacted in 1992, a property "of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization" may be eligible for the National Register and, if a proposed undertaking would affect such a property, then, in the section 106 process, the federal agency has a statutory duty to consult with the Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to the property. 54 U.S.C. § 302706. This statutory duty is implemented through numerous provisions in the regulations of the Advisory Council on Historic Preservation (ACHP). 36 C.F.R. Part 800.

The express recognition that tribal sacred places may be eligible for the National Register confirmed the pre-existing policy of the National Park Service (NPS), the agency that the NHPA charges with acting for the Secretary of the Interior. 54 U.S.C. §§ 100102(1), 300316. In 1990, NPS had issued a guidance document that, among other things, explains how tribal sacred places may be evaluated for the National Register. National Register Bulletin 38, *Guidelines for Evaluating and Documenting Traditional Cultural Properties* (hereinafter *Bulletin 38*). The term "traditional cultural property" (TCP) refers to a particular kind of historic property that is "eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community." *Bulletin 38*, at 1. Not all tribal sacred places are TCPs, but many are.

The 1992 amendments also enacted the statutory authorization for Indian tribes to establish Tribal Historic Preservation Officer (THPO) programs and assume functions within their reservations that would otherwise be performed by State Historic Preservation Officer (SHPOs). 54 U.S.C. § 302702. Since these tribal statutory provisions were enacted, the extent to which Indian tribes have become engaged in our national historic preservation program has increased dramatically. As of December 2016, some 170 tribes have THPO programs that have been approved by the Secretary of the Interior to assume SHPO functions.

When considering the involvement of tribes in historic preservation, it is important to remember that one of the main themes of American history is the transfer of the possession of land from tribal nations to the United States and its non-Indian citizens. In present-day America, most Indian reservations consist of small fractions of aboriginal tribal homelands; many other reservations are in locations to which tribal nations were removed. For virtually all tribes, present-day tribal homelands are but small fractions of their aboriginal territories. For most tribes there are places beyond reservation boundaries that continue to be important for tribes in a variety of ways.

The Hualapai Reservation comprises about one-seventh of the Tribe's aboriginal territory, and tribal members continue to have religious and cultural ties to many places that are outside the Reservation's boundaries. Accordingly, the Tribe's THPO program maintains the Hualapai Register of Heritage Places, which includes many off-Reservation places.

For places that are historically significant, and that hold traditional religious and cultural importance, the NHPA provides tribes with the right to be consulted when a proposed federal undertaking would affect such a place. This is not a right to stop a proposed project – rather, it is a procedural right to be a consulting part in the NHPA section 106 process, an opportunity to make federal agency officials aware of tribal concerns before they make decisions. To appreciate the importance of this procedural right, it may be helpful to recall some of the history of federal policy toward traditional tribal religions.

**Religious Freedom for American Indians.** Religious freedom is a fundamental American value, enshrined in the First Amendment, but for a major portion of American history, religious freedom did not include members of Indian tribes who were trying to carry on their tribal religious traditions. Rather, federal policy sought to suppress traditional tribal religions and convert Indians to Christianity. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 14.03[2][c] (2012 ed.) Federal policies and programs that sought the assimilation of Indian people into mainstream American society had many kinds of adverse impacts on traditional tribal religions. During the late nineteenth century and early part of the twentieth century, federal regulations treated participation in some tribal religious ceremonies as criminal offenses.

It was not until 1978, during the early years of the self-determination era of federal Indian policy, that Congress enacted the American Indian Religious Freedom Act (AIRFA). Pub. L. No. 95-341 (codified in part at 42 U.S.C. § 1996). AIRFA declares 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 through ceremonials and traditional rites.

AIRFA was enacted as a Joint Resolution of Congress, and only the "Resolved" clause is codified in the United States Code. The Joint Resolution also included a number of "Whereas"' clauses, including one which states:

> [T]he religious practices of the American Indian (as well as Native Alaskan and Hawaiian) are an integral part of their culture, tradition and heritage, such practices forming the basis of Indian identity and value systems.

In many tribal traditions, it is difficult, and not particularly meaningful, to draw distinctions between religion and culture.

**The U.S. Supreme Court's Ruling in the *Lyng* Case.** In 1988, the U.S. Supreme Court held that the policy proclaimed in AIRFA cannot be enforced in court. The Court ruled that the Act

did not create a cause of action, saying that it "has no teeth." *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 455 (1988) (quoting floor statement by Representative Morris Udall, 124 Cong. Rec. 21444 (1978)). The tribal plaintiffs in *Lyng* had sought to stop the construction of a paved logging road through a sacred area in a national forest, and, in addition to AIRFA, they also argued that the proposed federal action would violate the Free Exercise Clause of the First Amendment. The *Lyng* Court ruled against the Indian plaintiffs on the constitutional issue as well, saying, "Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land." 485 U.S. at 453 (emphasis in original). The Court reached this result even though it assumed that the appellate court was correct in predicting that constructing the road would "virtually destroy the … Indians' ability to practice their religion." 485 U.S. at 451.

In the *Lyng* case, the dissenting opinion provides an instructive capsule explanation of some of the key differences between Native American religions and the major religions of Western civilization:

> Where dogma lies at the heart of Western religions, Native American faith is inextricably bound to the use of land. The site-specific nature of Indian religious practice derives from the Native American perception that land is itself a sacred, living being. Rituals are performed in prescribed locations not merely as a matter of traditional orthodoxy, but because land, like all other living things, is unique, and specific sites possess different spiritual properties and significance. Within this belief system, therefore, land is not fungible; indeed, at the time of the Spanish colonization of the American Southwest, "all ... Indians held in some form a belief in a sacred and indissoluble bond between themselves and the land in which their settlements were located."

485 U.S. at 460-61 (Brennan, J., *dissenting*, *quoting* E. SPICER, CYCLES OF CONQUEST: THE IMPACT OF SPAIN, MEXICO, AND THE UNITED STATES ON THE INDIANS OF THE SOUTHWEST, 1533–1960, p. 576 (1962), other citation omitted).

After the ruling in *Lyng*, President Clinton issued Executive Order 13007, "Indian Sacred Sites," which provides, in part:

> In managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (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. Where appropriate, agencies shall maintain the confidentiality of sacred sites.

Ex. Ord. No. 13007, May 24, 1996, 61 Fed. Reg. 26771 (May 29, 1996) (reprinted following 42 U.S.C. § 1996). Executive Order 13007 does not create a private cause of action and so, like AIRFA, is not judicially enforceable.

**Protecting Sacred Places with Historic Preservation.** In the absence of enforceable substantive rights, tribes increasingly regard their procedural rights pursuant the NHPA as of great importance. Many tribes are devoting substantial resources to becoming proficient in their interactions with federal agencies in the section 106 process, including the development of staff expertise to identify, evaluate, and document historic properties of tribal religious and cultural significance. As a practical matter, this work takes time. It is not uncommon for specific information about sacred places to be limited to certain individuals or groups within the tribal membership, for a variety of reasons: the knowledge may be held by a religious society within the tribe; information may be kept secret with the hope of avoiding vandalism or looting of sites; secrecy may be an adaptive response to the historical federal policies of suppressing traditional tribal religions, or an adaptive response to perceived lack of respect for tribal traditions from members of the general public. Moreover, for NHPA purposes, that a place is sacred is not in itself enough – it must also have historic significance. In addition to fieldwork and literature reviews, evaluating and documenting eligibility may also require interviews with elders and others with specialized knowledge of tribal traditions. If a tribal sacred place is not under threat from a proposed federal or federally-assisted undertaking, a tribe may perceive little benefit in devoting resources to documenting a case for eligibility for the National Register.

In any case, if faithful compliance with the ACHP regulations were to become the standard practice by federal agencies, the time that it takes to identify tribal sacred places and evaluate their eligibility for the National Register could turn out to be time well-spent – it could contribute to federal agency decisions that are actually consistent with the policy proclaimed in the American Indian Religious Freedom Act, including "the freedom to worship through ceremonials and traditional rites" at particular sacred places. The ACHP regulations require that, at the beginning of the section 106 process, federal agencies make "reasonable and good faith" efforts to identify tribes that attach religious and cultural significance to historic properties that may be affected and invite them to be consulting parties. 36 C.F.R. § 800.3(f)(2). When agencies actually engage will tribes early, the chances are improved for avoiding adverse impacts on tribal sacred places.

Unfortunately, in many cases, federal agencies have not sought to engage potentially concerned tribes early enough in the review process. In some cases, delayed engagement of tribes may be a result of inadequate coordination of the NHPA section 106 process with the review process under the National Environmental Policy Act (NEPA). In some cases, delay may be the result of inappropriate reliance on a "phased" approach to identification and evaluation of historic properties, an approach that is appropriate in some circumstances, 36 C.F.R. § 800.4(b)(2), as when archaeological excavation is an acceptable mitigation strategy for previously unknown sites. For traditional cultural properties, however, avoidance is usually the preferred mitigation strategy, and for avoidance to be possible, such places must be identified early enough to allow for a change in the footprint of a project.

Delayed engagement of tribes tends to be particularly problematic for federally-assisted undertakings in which the real proponent of a project is a non-federal entity that is legally required to obtain authorization from a federal agency. In such cases, the non-federal applicant is typically responsible for producing the documentation needed for compliance with federal environmental laws, including NHPA and NEPA. While the ACHP regulations allow federal

agencies to authorize applicants "to initiate consultation with the SHPO/THPO and others," the same section of the regulations also provides: "Federal agencies that provide authorizations to applicants remain responsible for their government-to-government relationships with Indian tribes." 36 C.F.R. § 800.2(c)(4). Moreover, the statutory requirement to consult with tribes is a federal agency responsibility. Accordingly, one way to deal with the problem of waiting too long to seek the engagement of tribes is for federal agencies to devote more attention and resources to building their government-to-government relationships with Indian tribes.

**Making the NHPA Work Better.** For land-managing federal agencies, another way to engage tribes earlier would be for agencies to devote more attention and resources to fulfilling their responsibilities under section 110 of the NHPA. 54 U.S.C. § 306102. Among other things, this statutory provision directs land-managing agencies to ensure that historic properties under their jurisdiction or control are "managed and maintained in a way that considers the preservation of their historic, archeological, architectural, and cultural values." This statutory section also provides that each agency's "preservation-related activities are carried out in consultation with . . . Indian tribes." We recommend that land-managing agencies pro-actively consult with tribes to develop strategies for identifying and evaluating traditional cultural properties and other historic properties of tribal significance on lands under federal ownership. This consultation should also address possible roles for tribal governments in helping to manage and maintain historic properties on federal lands in ways that make use of tribal cultural knowledge and expertise.

The caption of this hearing characterizes the NHPA as a federal natural resources law that has "gone astray." We believe it is more accurate to describe it as a law that has not yet lived up to its potential. If federal agencies were to faithfully carry out their obligations under the statute and the ACHP regulations, including the early engagement of tribes, unnecessary delays could be avoided and historically significant places that hold tribal religious and cultural significance could be preserved. In addition, an approach to management of historic properties on federal lands that is informed and assisted by the tribes could contribute to accomplishing the policies of the NHPA. Beyond historic preservation, the NHPA has the potential to help make genuine respect for the religious beliefs and practices of traditional tribal members an integral facet of federal land management. Religious freedom is a core American value, a fundamental right for all citizens, but the promise made in the American Indian Religious Freedom Act of 1978 remains unfulfilled. Our national historic preservation program has the potential to help make religious freedom a reality for American citizens who carry on traditional tribal religions.