United States Department of Agriculture

Tribal Cultural and Heritage Cooperation Authority Technical Guide

A Companion to the Forest Service Directives

For implementing the Cultural and Heritage Cooperation Authority
25 U.S. Code Chapter 32A

Forest Service FS-1137 October 2019

Cover photo: *Look up in sky inside a Native American tepee. Photo by UpPiJ, iStock.*

Developed by the Forest Service Tribal Relations Program Team

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Contents

Executive Summary 1

Introduction: Why Was the Cultural and Heritage Cooperation Authority Created? 2

Chapter 1—Reburial of Human Remains and Cultural Items: 25 U.S. Code 3053 3
- Purpose 3
- Background and Business Need 3
- Key Concepts—Laws and Agency Policies 4
- Applying NAGPRA, NHPA, and the CHCA 4
- Confidentiality 5
- Suggestions for Reburial of Remains Not Originating From Forest Service Lands 7
- Sample Action Plan for the Reburial of Human Remains on National Forest System Lands 7
- Forest Service Manual Direction for Reburial 8

Chapter 2—Temporary Closure for Traditional and Cultural Purposes: 25 U.S. Code 3054 11
- Purpose 11
- Background and Business Need 11
- Key Concepts 11
- Issuance of Closure Orders Pursuant to 36 CFR 261.53(g) 11

Chapter 3—Forest Products for Traditional and Cultural Purposes: 25 U.S. Code 3055 15
- Purpose 15
- Background and Business Need 15
- Key Concepts—Definitions 15
- Key Concepts—Law and Agency Policy 16
- Applying Free-Use Authorities 16

Chapter 4—Prohibition on Disclosure (Confidentiality): 25 U.S. Code 3056 18
- Purpose 18
- Background and Business Need 18
- Key Concepts 19
- Forest Service-Specific Withholding Statutes 21
- Collecting Confidential Information and Data 22
- Control and Protection of Sensitive Security Information 23
- Managing Confidential Information and Data 24

Appendix A—Definitions 25

Appendix B—The Cultural and Heritage Cooperation Authority 27

Appendix C—Reburial of Human Remains (Chapter 1) 31

Appendix D—Templates for Temporary Closures 40

Appendix E—Templates for the Provision of Forest Products 42

Appendix F—Templates for Confidentiality Agreements (Chapter 4) 49

Acronyms

ACHP	Advisory Council on Historic Preservation
AIRFA	American Indian Religious Freedom Act
ARPA	Archaeological Resources Protection Act
CFR	Code of Federal Regulations
CHCA	Cultural and Heritage Cooperation Authority
CRIA	Civil Rights Impact Analysis
CRPA	Cave Resource Protection Act
DUNS	Dun & Bradstreet Number
EO	Executive Order
FOIA	Freedom of Information Act
FS	Forest Service, an Agency of the U.S. Department of Agriculture
FSH	Forest Service Handbook
FSM	Forest Service Manual
FWS	U.S. Fish and Wildlife Service
GIS	Geographic Information System
GLIFWC	Great Lakes Indian Fish and Wildlife Commission
IPR	Intellectual Property Rights
MOA	Memorandum of Agreement
MOU	Memorandum of Understanding
MTA	Material Transfer Agreement
NAGPRA	Native American Graves Protection and Repatriation Act
NEPA	National Environmental Policy Act
NF	National Forest
NFMA	National Forest Management Act
NFS	National Forest System
NHPA	National Historic Preservation Act
NPS	National Park Service
RFRA	Religious Freedom Restoration Act
SHPO	State Historic Preservation Officers
SSI	Sensitive Security Information
T&E	Threatened and Endangered
THPO	Tribal Historic Preservation Officers
TIM	Timber Management Information System
USC	U.S. Code
USDA	U.S. Department of Agriculture
VITF	Voigt Intertribal Task Force

(Note: All statutory and other hyperlinks were last accessed July 2017.)

Executive Summary

Mike Johanns, then U.S. Secretary of Agriculture, transmitted a legislative proposal to the 109th Congress following recommendations from the Forest Service, an Agency of the U.S. Department of Agriculture (USDA), that addressed recurring impediments to good working relationships between Tribes and the Forest Service. In addition to policy and administrative recommendations, the Forest Service team identified the need for new or clarified legal authorities to improve these relationships. Senator Byron Dorgan (D-ND) introduced those desired measures into the Farm Bill as enacted, and they were later codified at 25 U.S. Code (USC) 32A, the Cultural and Heritage Cooperation Authority (CHCA). The Secretary delegated authority for these provisions to the Forest Service, where they apply only to National Forest System (NFS) lands and to federally recognized Tribes—

- **Reburial of Human Remains and Cultural Items (Section 8103/25 USC 3053):** Explicitly authorizes the reburial of human remains and associated cultural items on NFS lands, if they were originally recovered from NFS or adjacent lands.

  Chapter 1 of this technical guide provides basic information regarding the authorities, options, and scenarios for the reburial of Native American and Alaska Native remains on NFS lands, primarily related to repatriation actions under the Native American Graves Protection and Repatriation Act, as they comprise the bulk of requests the Forest Service has received.

- **Temporary Closure for Traditional and Cultural Purposes (Section 8104/25 USC 3054):** Gives the Secretary of Agriculture authority to temporarily close from public access NFS land for traditional and cultural purposes.

  Chapter 2 provides background information and best practices for the temporary closure of NFS lands for the privacy of Tribal activities for traditional and cultural purposes as well as complementary closure rules in 36 Code of Federal Regulations (CFR) 261.3.

- **Forest Products for Traditional and Cultural Purposes (Section 8105/25 USC 3055):** Authorizes the Secretary to provide certain forest products to federally recognized Tribes, free of charge, when they are used for traditional and cultural purposes.

  The Forest Service receives many requests every year from Indian Tribes and individual Native Americans to acquire forest products, and chapter 3 outlines the authorities and mechanisms by which managers may implement their authority to provide—or not to provide—forest products to federally recognized Tribes for traditional and cultural purposes.

- **Prohibition on Disclosure (Section 8106/25 USC 3056):** Provides the Secretary an exemption under the Freedom of Information Act (FOIA) to withhold information relating to reburials, sites, human remains, or resources of traditional or cultural importance and information relating to traditional and cultural resources and practices provided in the course of research activities.

  The purpose of chapter 4 is to provide information to Agency personnel about the available authorities and protocols for protecting information provided to the Forest Service by Indian Tribes regarding traditional and cultural purposes, traditional knowledge, and sacred sites. Although the legal mandate to share information under FOIA is compelling, exemptions to such sharing further mandate the protection of some Tribal information.

While granting these additional authorities, the CHCA also preserves all existing Tribal rights, all existing agreements between Tribes and the Forest Service, existing trust responsibilities, and any other outstanding rights to use of NFS land or other public land.

The appendixes in this technical guide provide additional information that includes definitions, case studies, sample policies, and templates to further assist decision makers in exercising the CHCA in furtherance of strong Forest Service-Tribal relationships. As a dynamic document, updates and new additions to this technical guide will be made as policies are developed or refined and best practices continue to be identified.

Introduction: Why Was the Cultural and Heritage Cooperation Authority Created?

A U.S. Department of Agriculture, Forest Service team identified several recurring issues that impeded the Forest Service's working relationships with American Indian and Alaska Native Tribes and recommended changes to improve and clarify several key policies, administrative procedures, and legal authorities. Upon review of the recommendations from the Forest Service team, then-Secretary of Agriculture Mike Johanns transmitted to the 109th Congress a legislative proposal to facilitate stronger Federal-Tribal relationships. These efforts led Senator Byron Dorgan (D-ND) to introduce the proposal in the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill), which resulted in Title VIII—Forestry, Subtitle B of Public Law 110–234, the Cultural and Heritage Cooperation Authority (CHCA). The CHCA, now codified at 25 U.S. Code, chapter 32A, sections 3051-3057, provides legal authority to improve numerous matters of concern regarding relations between federally recognized Indian Tribes, the National Forest System (NFS), and Forest Service Research and Development. The CHCA is short. If you have not already done so, read it. It is included at the end of this technical guide as appendix B.

What Is the Purpose of the CHCA?

The CHCA outlines Agency conduct as it pertains to (1) reburials of human remains and cultural items on NFS lands; (2) temporary closure for traditional and cultural purposes; (3) providing forest products free of charge for traditional and cultural purposes; (4) a prohibition on disclosure of information pertaining to reburials, sites, or resources of traditional and cultural importance; and (5) protection of all reserved rights to use NFS land or other public land.

Why Was This Technical Guide Developed?

The team of Forest Service staff who developed this technical guide was engaged in Tribal relations across the country and in the Washington office. They undertook review and evaluation of authorities, policies, tools, protocols, and case studies with the intent to provide—

- Guidance for Agencywide use on how to protect Tribal rights and interests and enhance opportunities for exercising those rights.
- A clear and concise summary of available authorities, and what actions and results are expected in Agency operations.
- Analyses and decision support to effectively meet the tiered goals of the Forest Service Tribal Relations Strategic Plan and the Forest Service Strategic Plan.

This technical guide aims to help Forest Service employees, Tribal partners, and other interested parties engage with one another to work toward mutually beneficial resolutions. Cross-references between specific Forest Service policies and the CHCA provide consistency and predictability in how those policies are applied throughout the Agency. Predictable decision making, actions, and results will enhance key stakeholder confidence in the Forest Service's ability to appropriately implement programs in the context of the CHCA.

The Forest Service directives for Tribal relations (Forest Service Manual 1563 and Forest Service Handbook 1509.13) include policy and guidance related to the implementation of the CHCA. This technical guide is intended for use as a complementary reference to those directives and provides additional recommendations derived from best management practices within the Agency.

This technical guide is intended to be iterative and will be amended as accomplishments provide new examples of successful implementation or with changes to pertinent law or policy. Users should refer to the Forest Service Office of Tribal Relations website for the latest version of this technical guide.

Chapter 1—Reburial of Human Remains and Cultural Items: 25 U.S. Code 3053

Purpose

This chapter of the Cultural and Heritage Cooperation Authority (CHCA) technical guide provides basic information regarding the authorities, options, and scenarios for the reburial of Native American and Alaska Native remains on National Forest System (NFS) lands.

Background and Business Need

The remains of several thousand Native American individuals have been repatriated under the provisions of the Native American Graves Protection and Repatriation Act (NAGPRA). Thousands more will be repatriated in years to come. Consequently, many Indian Tribes and Native communities seek reburial locations on NFS lands. Indian Tribes may also request reburial on NFS lands for remains that were not subject to the provisions of NAGPRA. This chapter aims to provide background for a variety of repatriation situations and recommends best management practices to use in response to Tribal requests.

The reburial section of the CHCA is intended to "authorize the reburial of human remains and cultural items on NFS land, *including* human remains and cultural items repatriated under NAGPRA." The word "including" is italicized here to emphasize that human remains and cultural items repatriated under NAGPRA are not the only human remains and cultural items that can be reburied on NFS land. For instance, human remains and cultural items exhumed or collected by the Smithsonian Institution, State museums, and private collectors may not fall under NAGPRA repatriation authority. Those remains and items may be reburied on NFS land if they meet the other requirements within the CHCA (e.g., originating from NFS lands or an adjacent site). This chapter of the CHCA technical guide focuses primarily on reburials from NAGPRA repatriation actions because they comprise the bulk of requests the Forest Service has received. In addition, reburials of human remains and cultural items that come from outside the context of NAGPRA will usually follow the same processes and procedures as those that come from NAGPRA repatriations. See Scenario 3 on page 36 for an example.

In the context and language of this technical guidance, the terminology used follows the definitions contained in NAGPRA.

For decades, American Indians and Alaska Natives sought legislative authority for the reburial of human remains and cultural items, including those repatriated through NAGPRA. In response to Tribal nations and member requests, the National Congress of American Indians, the United South and Eastern Tribes, the Intertribal Timber Council, and other Tribal organizations collaboratively and successfully worked with Congress to incorporate authority for reburial into Title VIII—Forestry, Subtitle B—Cultural and Heritage Cooperation Authority into the Food, Conservation, and Energy Act of 2008. CHCA, as codified 25 U.S. Code (USC) 3053, provides direction and authority for the Forest Service to—

- Rebury human remains and cultural items on NFS lands providing that those remains were removed from NFS lands or sites adjacent to NFS lands, including human remains and cultural items repatriated under NAGPRA (25 USC 32), at Federal expense, or using other funds;
- Prevent the unauthorized disclosure of information regarding reburial sites, including the quantity and identity of human remains and cultural items reburied and the location of reburial sites;
- Protect the confidentiality of certain information, including information regarding reburials that may be culturally sensitive to Indian Tribes; and
- Strengthen support for protecting and preserving the traditional, cultural, and ceremonial rites and practices of Indian Tribes, in accordance with the American Indian Religious Freedom Act (AIRFA at 42 USC 1996).

This chapter of the CHCA technical guide aims to increase process consistency for the Tribal Relations and Heritage programs planning for the reburial of human remains by describing—

- Law and Agency policy.
- Procedural guidance and tools.
- Key topic areas.
- Possible decisions related to reburial programs.
- Case studies.

This chapter consolidates reburial policy and information into one source in order to—

- Expedite the reburial of human remains by increasing the preparedness and efficiency of Heritage and Tribal Relations staff members.
- Reduce administrative appeals and litigation by clarifying Tribal consultation requirements and treatment of human remains prior to and during reburial.
- Strengthen the Agency's relationships with Indian Tribes through mutually agreed reburial protocols that are well-defined early in the consultation process.
- Ensure the confidentiality and security of reburial locations and all associated information.

Key Concepts—Laws and Agency Policies

CHCA codifies the authority provided to the Forest Service in the 2008 Farm Bill. Section 3053 of the CHCA pertains to reburial.

NAGPRA is a Federal law passed in 1990. This law provides a process for museums and Federal agencies to resolve possessory rights to certain Native American cultural items—human remains, funerary objects, sacred objects, or objects of cultural patrimony—to lineal descendants, and culturally affiliated Indian Tribes and Native Hawaiian organizations. The NAGPRA does not explicitly address reburial of Native American human remains repatriated by museums and Federal agencies subject to NAGPRA. That is, NAGPRA provides for Indian Tribes to take possession of the remains, but does not establish the authority to rebury on NFS lands.

National Historic Preservation Act (NHPA) was passed in 1966 and substantially amended in 1980 and 1992. The NHPA requires all Federal agencies to consider the effects of their projects and programs on historic properties and provides the structure and direction for all Federal management of important cultural resources. The NHPA is the centerpiece of historic preservation legislation, following on and bolstered by the Antiquities Act of 1906, the Historic Sites Act of 1935, the Reservoir Salvage Act of 1960, the Archaeological and Historical Data Preservation Act of 1974, and the Archaeological Resources Protection Act (ARPA) of 1979 (36 Code of Federal Regulations [CFR] 296). The 1992 NHPA amendments are of special interest in this discussion because those amendments incorporated direction for Federal agencies to give special attention to sites of religious and cultural interest to Indian Tribes.

- The regulations (36 CFR 800 and 54 USC 300101)[1] require agencies to consult with various parties—State and Tribal Historic Preservation Officers, Indian Tribes or Native Hawaiian organizations, and others—to determine if the proposed project may have an effect on a property listed or eligible for listing on the National Register of Historic Places, and if so, what measures might be appropriate to minimize or mitigate that effect.
- Many reburials will have very little or no effect on historic properties when reburials avoid the salient features of known historic properties, do not require physical site preparation, and avoid extensive ground disturbance. Such cases usually conclude with an official NHPA determination of "no effect," "no historic properties affected," or "no adverse effect" (36 CFR 800.4(d) and 800.5).
- The NHPA and ARPA provide information confidentiality under provisions of the Freedom of Information Act (FOIA) that add to the confidentiality provisions found in the CHCA.

Applying NAGPRA, NHPA, and the CHCA

Tribal governments and the Forest Service should have meaningful, government-to-government, discussions to determine—

- Mutually acceptable solutions to protect and manage reburial sites.
- How Tribal government organizations will be involved in protecting and managing their reburial sites.
- What framework will be used for future collaborative efforts, with special emphasis on how to incorporate Tribe-authorized members to help protect reburial sites.

Native American and Alaska Native concerns expressed most often during consultation or through personal testimony include—

- Reburied remains may be disturbed in the future.
- Forest Service staff may interfere with Tribal spiritual practices.
- Reburial of culturally unidentifiable human remains should be conducted with sensitivity and in a traditionally appropriate manner.

[1] Effective December 19, 2014, the National Historic Preservation Act (NHPA) has been moved to a new location in the U.S. Code (USC), the official compilation of Federal statutes. The Advisory Council on Historic Preservation expects stakeholders to transition to usage of the new USC citations to the NHPA as soon as they are reasonably able. Note, however, that the law that moved the NHPA to Title 54 specifies that a reference to an old Title 16 provision (e.g., 16 USC 470f, for Section 106 of the NHPA) is legally deemed to refer to the corresponding provision in the new Title 54. No amendments to past NHPA correspondence or existing Section 106 agreements will be needed or expected. The regulations implementing Section 106 of the NHPA, at 36 CFR Part 800, are not affected by this recodification.

Line Officers' Responsibilities

The responsibility for authorizing reburials on NFS lands resides with the regional foresters. The regional foresters may delegate that authority, in writing, to forest and grassland supervisors under their supervision.

1. Timeframe: Ensure that requests for reburial are addressed in a timely manner.
2. Consultation: When authorizing reburials, consult with the lineal descendants or culturally affiliated Indian Tribe(s) to develop a Memorandum of Understanding (MOU) that outlines the reburial process. This may include site protection and management protocols. An understanding may take the form of correspondence rather than a formal MOU. This agreement may include reburial of human remains and associated funerary objects (Forest Service Handbook (FSH) 1509.13).
3. Notification: Inform the appropriate law enforcement agents of reburial activities in order to protect reburial sites through monitoring and surveillance activities.
4. Avoid conflicting uses: Identify areas where anticipated uses will not cause future impacts or physical harm to the site and, in consultation, a location that is consistent with Tribal cultural, spiritual, and religious requirements for reburial purposes.
5. Mitigation measures: Develop and implement mitigation measures in consultation with Tribal governments, clans, and individuals to minimize or avoid adverse impacts to reburial sites that may be caused by particular land uses. Ensure these mitigation measures will be implemented for the long run.
6. Coordination and reporting: A critical first step is to ensure that all requests for reburial are reported and coordinated with the Regional Tribal Relations Program Manager, Regional Heritage Resources Program Manager, and appropriate law enforcement personnel.

Management Tools

1. Placement of remains in a historic property (e.g., within an archaeological site) provides maximum legal protection of the site under the provisions of NHPA and ARPA. Both of these laws provide for additional security of the site and associated information.
2. When remains are known to have been removed from a specific site, consider the reburial of these remains at that location. Evaluate, on a case-by-case basis, whether proposed site preparation may affect any historic property at the site. Alternative locations should be considered if a reburial would cause an adverse effect to known properties.
3. When remains are not reburied at the site of their original interment, consider reburial at another historic property. Evaluate reburial plans on a case-by-case basis for proposals within a known historic property. It is reasonable to follow the standard NHPA review process to determine whether the proposed reburial method would adversely affect the historic property, and if so, what steps (if any) could be taken to reduce or mitigate that adverse effect. Such cases may be resolved with terms and conditions established in a Memorandum of Agreement, or MOA (36 CFR 800.6).
4. During consultation, provide information to Indian Tribes, clans, and family members regarding appropriate reburial locations including the location from which the remains were removed. At this time, it is important to determine the status of the reburial location in regard to the Sacred Sites executive order (Executive Order [EO] 13007). The Forest Service must depend on the Indian Tribes to identify and designate sacred sites.
5. Redirect public use away from reburial sites, including those not located on a historical property. This may require landscape-level considerations of potential land and resource management actions.
6. Restrict permit issuance. Deny or redirect permits for use of areas or materials that contain reburial sites.
7. During the Forest planning process, ensure that consideration is given to special areas identified by Indian Tribes. Create planning information and direction that enables and protects areas suitable for reburial, as well as previous reburial sites. Ensure confidentiality of information, as appropriate, to avoid public disclosure of confidential information during the planning process and in plan documents.

Confidentiality

Forest Service personnel should ensure that information about reburial locations is kept confidential by consulting person-to-person, so that only the appropriate Forest Service staff and Indian Tribe or descendent community retains documentation. This restriction of access to information will help keep reburial locations protected from future development or disturbance. The Agency must provide for the long-term security of this confidential information and ensure that the locational information is available during planning efforts.

Information about the location, character, or ownership of a sacred site can be kept confidential if such disclosure will risk or harm the site, impede the use of the sacred site, or cause a significant invasion of privacy. Agency and Tribal representatives should be aware that not disclosing a site location can also result in harm to the site, impede the use of a sacred site, or cause a significant invasion of privacy.

Managers must balance the disclosure or confidentiality needs for the location and their partners, developing agreed-upon procedures, such as whether to depict sacred places on Geographic Information System (GIS) maps so that when a project is planned, or if unplanned wildland fires occur, appropriate measures for protection can be implemented.

Section 304 of NHPA and section 9 of ARPA, National Environmental Policy Act (NEPA), and section 3056 of CHCA contain site protection provisions that allow sensitive cultural information to be withheld from the public and are supported by EO 13007. Additional information and guidance regarding confidentiality and the security of confidential information is provided in Chapter 4—Prohibition on Disclosure (Confidentiality).

Consider that each individual reburial will require ongoing consultation with the affected Indian Tribe, clan, and family to develop a well-documented, comprehensive plan. Location and security considerations of a reburial site might include some of the following—

- Indian Tribes may desire to rebury repatriated remains and associated materials at the original burial location. As noted previously in the NHPA discussion, reburial at the original location has advantages for the Agency as well.
- Indian Tribes may choose alternative reburial locations as a result of consultation and a collaborative decision to select a location that is not proposed for exchange, mineral development, timber harvest, or other development.
- The Indian Tribe may determine that the reburial ceremony is to be completed by appropriate Tribe, clan, or family members without Forest Service presence.
- The Indian Tribe may determine that the reburial ceremony is to be completed by the Forest Service without a Tribal representative present.

Once a site is selected, complete the NHPA requirements and NEPA process. Utilize NEPA categorical exclusions as appropriate. Specifically, it is recommended that decision makers consider the use of the categorical exclusion for minor activities on "less than five acres" and as identified in the NEPA handbook. Cite this category as 36 CFR 220.6(e)(3). Refer to FSH 1909.15, chapter 30—

(3) Approval, modification, or continuation of minor special uses of NFS lands that require less than five contiguous acres of land. Examples include but are not limited to—

i. Approving the construction of a meteorological sampling site;

ii. Approving the use of land for a one-time group event;

iii. Approving the construction of temporary facilities for filming of staged or natural events or studies of natural or cultural history;

iv. Approving the use of land for a 40-foot utility corridor that crosses one mile of a national forest;

v. Approving the installation of a driveway, mailbox, or other facilities incidental to use of a residence;

vi. Approving an additional telecommunication use at a site already used for such purposes;

vii. Approving the removal of mineral materials from an existing community pit or common-use area; and

viii. Approving the continued use of land where such use has not changed since authorized and no change in the physical environment or facilities are proposed.

As appropriate, Forest Service archaeologists and Tribal Relations Specialists may prepare the reburial site to specifications and procedural requirements as agreed to in consultations. Agency personnel may not be welcome during certain phases of site preparation. Consultation should include discussions about the various personnel to be involved. In some cases, Tribal members employed by the Agency can assist in the reburial. In any case in which reburial occurs on an archaeological site, the act of reburial must not adversely affect site deposits without prior evaluation and, if needed, mitigation; this should be covered under the normal NHPA section 106 process.

Tribal and Forest Service consultations should include the following additional considerations—

- The use of commemorative markers may or may not be appropriate. A natural-looking surface at the reburial site may help to protect the site from further disturbance. The location of the reburial location should be fixed through Global Positioning System, or GPS, technology and photographed as a baseline for future monitoring activities.
- Subsequent site monitoring may be accomplished by Forest Service archaeologists, Tribal Relations Specialists, and Law Enforcement Officers or with independent monitoring by family or clan members or by designated Tribal monitors.

Some reburial locations may require a formal security plan. Consider the following as appropriate for individual cases:

1. Methods used to cover the site (i.e., rip rap or rebar grids under the surface and other physical protective measures). Consider potential weight or compression and other impacts of protective measures over time.
2. Surface rehabilitation that might include reseeding or revegetation following reburial. Revegetation efforts

may include floral deterrents to screen the reburial or discourage disturbance.

3. Physical access closures in sensitive areas.
4. Field trips with Tribal representatives and the Forest Service team to assist in developing the security plan.
5. Inclusion of Law Enforcement and Investigations staff that have technical expertise with remote monitoring (motion sensors, cameras, etc.) to participate in security planning.
6. Need for a written plan to formalize security measures for continuity through changes in personnel and time.
7. Monitoring strategy to assess the effectiveness of the overall security plan through time.
8. Inclusion of Indian Tribal partners for monitoring through a site stewardship program or other formalized agreements.

Suggestions for Reburial of Remains Not Originating From Forest Service Lands

1. All requests are considered on a case-by-case basis. Some reburials can be handled programmatically, but each of these cases is likely to require special considerations. Programmatic protocols may be appropriate in cases where several individuals, such as in the case of museum collections, are involved.
2. In resolving any ambiguities, refer to FSM 1563—

   "Ensure that, when considering requests for reburial of human remains and cultural items, Forest Service Line Officers consider the requirement to avoid, to the maximum extent practicable, adverse impacts to cultural items and human remains which are reburied on Forest Service lands."

   Line officers should uphold both the letter and the spirit of the CHCA by interpreting any ambiguity in a manner that furthers congressional intent to facilitate, and not to impede, reburial of these human remains and cultural items. A few things to consider include but are not limited to:

   - Is the connection between the remains and the NFS land identified for potential reburial reasonable?
   - Is another location other than NFS land more appropriate for the remains to be reburied?
   - What are the relative risks and benefits (legally and for relationships) in authorizing or not authorizing the reburial?
   - Would reburying the remains on NFS land pose a risk to the remains?
3. Expenses associated with reburials are an important discussion point. One consideration is whether the original removals had Federal financial assistance or whether a Federal agency permitted excavations or impacts causing the original removals. In some cases, it may be appropriate to investigate land ownership histories. The Forest Service may fund the entire event and all associated actions, but should examine other potential funding sources and explore Tribal interests and abilities to assist in defraying the expenses of the Forest Service agency.
4. Consider designating one or more "keepsafe" reburial areas. This may simplify future management concerns about multiple protected "dots" all over the map.
5. Ask the Indian Tribe to assist in future monitoring and protection protocols. The case-specific monitoring protocol should be established in the case-specific MOU. Lacking a formal MOU, official letters from designated Tribal officials expressing the understanding with the Forest Service may suffice. Indian Tribes may also be willing to cover associated expenses.
6. If the Forest Service honors the request and decides to use a standard MOU template, understand that the MOU template required by Grants & Applications has at least one provision that does not apply; provision L (Public Notification) must be removed.
7. If the request is denied, consider offering assistance to resolve the request in an alternative manner. It is critical to maintain continuity and transparency with Forest Service Tribal partners for future collaborative efforts. Alternative resolution may be available through arrangements with other agencies, other Indian Tribes, or States.
8. Do not make promises you cannot keep or overpromise on what you can do.

Sample Action Plan for the Reburial of Human Remains on National Forest System Lands

The following are recommended elements of an action plan. These elements may be incorporated into other memoranda or official correspondence guiding the conduct of a reburial.

Forest Service Land Managing Unit:

A. Documentation of reburial consultation:

   1. The following Indian Tribes, clans, or family were notified and consulted.
   2. Date and content of letter, phone calls to officials.
   3. Date of government-to-government consultation(s).

B. Specific Tribal, clan, or family requests for reburial.

C. Reburial statement that includes assigned responsibilities (who will do what, when, and how).

D. Security plan that includes assigned responsibilities (who will do what, when, and how).

E. Signatures of consulting parties.

Forest Service Manual Direction for Reburial

The following sections are excerpted from the Forest Service Manual (FSM) at FSM 1500 - EXTERNAL RELATIONS, FSM 1563 - STATE, TRIBAL, COUNTY, AND LOCAL AGENCIES; PUBLIC AND PRIVATE ORGANIZATIONS, and they apply to repatriation and reburial of human remains and cultural items on National Forest System lands.

1563.04 - Responsibility

1563.04f - Director, Forest Service Office of Tribal Relations in Washington, DC

The Director of the Forest Service Office of Tribal Relations in Washington, DC, has the responsibility to:

…

11. Coordinate regional responses to requests by Indian Tribes or lineal descendants for reburial data essential to program budgeting and policy direction....

1563.04h - Regional Foresters, Station Directors, and the Area Director

Regional Foresters, Station Directors, and the Area Director have the responsibility to:

…

10. Ensure appropriate repatriation of human remains, associated funerary objects, unassociated funerary objects, sacred objects, and objects of cultural patrimony from National Forests under their jurisdiction.

11. Regional Foresters will determine whether to rebury repatriated human remains and cultural items on NFS lands, consistent with uses on NFS land as determined necessary for management of the NFS. This responsibility may be delegated, in writing, to Line Officers with management responsibilities over the lands on which reburials are proposed.

1563.04i - Regional Tribal Relations Program Managers

The Regional Tribal Relations Program Managers have the responsibility to:

…

7. Advise line and staff on their responsibilities to:

…

d. Respond to tribal requests for reburial of human remains in coordination with the Heritage Resources Program Manager.

…

12. Coordinate and provide Agency staff work necessary for processing requests by Indian Tribes and lineal descendants for reburial of human remains and/or cultural items. Provide documentation, budget, and briefing materials necessary for management decisions and reporting. Initiate program and reburial activity reviews necessary to provide quality controls and tribal relations feedback. …

…

14. Conduct periodic reviews to ensure compliance with the Forest Service reburial policy pursuant to requirements of the CHCA of 2008 (25 USC, chapter 32A, section 3053).

1563.04j - Forest, Grassland, and Prairie Supervisors

Forest, Grassland, and Prairie Supervisors have the responsibility to:

9. Develop action plans in consultation with Tribes in accordance with the implementing regulations for NAGPRA (43 CFR 10.3) for discoveries of American Indian human remains pursuant to permitted excavations under the ARPA (see also FSH 1509.13).

10. Ensure that requests for reburial are addressed in a timely manner. Undertake the following actions with requests for reburial of American Indian human remains and associated funerary objects on lands under their jurisdiction—

    a. Ensure that all requests for reburial are reported and coordinated with the Regional Tribal Relations Program Manager and Regional Heritage Resources Program Manager.

    b. Recommend to the Regional Forester actions to be taken on reburial requests by Indian Tribes or lineal descendants. A Forest Supervisor may make determinations regarding reburials if the Regional Forester delegates, in writing, that responsibility.

    c. When recommending that the Regional Forester authorize reburials, consult with the lineal descendants or culturally affiliated Tribe(s) and develop, where desired by the Tribe(s), a Memorandum of Understanding that delineates the reburial process. This agreement may include procedures for reburial of human remains and associated funerary objects.

d. Inform appropriate law enforcement personnel of reburial activities in order to endeavor to protect reburial sites through monitoring and surveillance activities.

e. Comply with FOIA Exemption 3, which covers information specifically exempted from disclosure by statute, to prevent the unauthorized disclosure of information regarding reburial sites, including the quantity and identity of human remains and cultural items and location of sites.

f. Avoid adverse impacts to human remains and cultural items, to the maximum extent practicable.

11. Develop a section of the action plan in consultation with local Tribes (25 USC 3002(d)), for post-1990 ground-disturbing projects that deals with inadvertent discoveries of Native American remains and objects.

1563.3 - Reburial of American Indian and Alaska Native Ancestral Remains and Cultural Items

Tribal requests for reburial of ancestral human remains and cultural items are, in general, closely tied to repatriations of those remains and objects by the Forest Service under the terms of NAGPRA. Guidance is provided, however, to ensure that these two actions (repatriation and reburial) are treated as separate, although often related, processes.

1. **Repatriation.** The Forest Service provides for Indian tribal rights of ownership or control regarding Native American human remains and cultural items, and the Agency has already been repatriating such remains and items to the affected Indian Tribe(s) or lineal descendent(s) under the terms of NAGPRA (25 USC Chapter 32). The NAGPRA does not specifically address reburial. Repatriations of American Indian human remains and funerary remains, as well as other objects defined in NAGPRA, are carried out under the Forest Service's statutory responsibilities. In general, guidance regarding the Forest Service responsibilities regarding repatriation of Native American human remains and cultural items are set forth in the Heritage Program manual at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd488845.pdf.

2. Reburial. American Indians and Alaska Natives have expressed an interest in reburying the repatriated remains and cultural items of their ancestors on NFS lands. Some Forest Service regions and forests have developed procedures for reburials and have approved reburial of American Indian and Alaska Native human remains and associated funerary objects on NFS lands. Because of concerns over consistency within the Agency and because NAGPRA does not specifically address reburial, national policy and direction have been developed regarding the reburial of American Indian and Alaska Native human remains and cultural items on NFS lands.

Reburial of human remains or cultural items in the possession of the Indian Tribe or lineal descendant that have been disinterred from NFS land or adjacent sites may be carried out as a discretionary action within the Agency's administrative authorities pursuant to FSM 1561.01d (Cooperative Land Management and Planning with Indian Tribes).

FSM 1563.31 - General Reburial Considerations

1. The Forest Service retains the discretion to decide whether to authorize reburial of American Indian and Alaska Native human remains and cultural items on NFS lands, and under what conditions reburials will occur.

2. Respect is the foundation for all decisions regarding reburial of American Indian and Alaska Native human remains and cultural items on NFS lands, and Forest Service Officials are expected to be sensitive to the diversity of tribal cultural beliefs.

3. All activities and documentation related to reburial of American Indian and Alaska Native human remains and cultural items must be kept confidential to the extent authorized by law.

4. Prior to authorizing reburial on NFS lands, the Forest Service shall ensure that the lineal descendant(s) or culturally affiliated Tribe(s) has legal ownership or custody of the remains, and that the requirements of NAGPRA have been met.

5. When the Forest Service authorizes reburial on NFS lands, including wilderness and other special designation areas, the Agency shall attempt to accommodate all aspects of lineal descendants and culturally affiliated Tribe(s) requests. Reburials should be at or as close as practicable to the burial sites from which those American Indian and Alaska Native human remains and cultural items were originally recovered. When authorizing reburials, the FS shall comply with NEPA, NHPA, and other applicable laws.

6. For post-1990 excavations or inadvertent discoveries (section 3 of NAGPRA) related to a FS funded, permitted, or licensed project, costs associated with reburial, if authorized, will be considered part of the project costs of the project component.

7. Lineal descendants and/or culturally affiliated Tribal representatives shall be given opportunities to be present and conduct ceremonies at reburial(s) and to be allowed future access to these sites for cultural and spiritual purposes, to the extent permitted by law.

8. In the case of human remains and cultural items recovered from adjacent sites, confirm with the Indian Tribe or lineal descendant in possession of the human remains or cultural items that all applicable State laws

and regulations regarding ownership or custody have been complied with prior to authorization for reburial on NFS lands.

9. Reburial locations will not constitute the establishment of a new cemetery. Although the Forest Service may authorize the use of NFS land for the reburial of human remains or cultural items as described in 25 USC 3053, Indian Tribes and lineal descendants may consider a reburial site to be a sacred site (as defined by EO 13007) and to have traditional and religious significance.
10. Ensure that, when considering requests for reburial of human remains and cultural items, Forest Service Line Officers consider the requirement to avoid, to the maximum extent practicable, adverse impacts to cultural items and human remains which are reburied on Forest Service lands.

Additional information relating to reburial is located in FSH 1509.13.20 and FSM 2364.03(h).

FSM 1563.32 - Reviews for Repatriations and Reburials

The Regional Tribal Relations Program Manager shall conduct periodic reviews to ensure compliance with the FS reburial policy pursuant to requirements of the CHCA (25 USC, chapter 32A section 3053). Each review must include the regional heritage resources program manager and other FS programs, as appropriate. Copies of each review must be provided to the Regional Forester and the Director of the FS Office of Tribal Relations in Washington, DC.

The Regional Tribal Relations Program Manager shall also assist the Heritage Program in conducting periodic reviews on compliance with the requirements of NAGPRA.

Chapter 2—Temporary Closure for Traditional and Cultural Purposes: 25 U.S. Code 3054

Purpose

The purpose of this chapter of the Cultural and Heritage Cooperation Authority (CHCA) technical guide is to provide background information and best practices for the temporary closure of National Forest System (NFS) lands for the privacy of Tribal activities for traditional and cultural purposes.

Background and Business Need

The CHCA of the Food, Conservation, and Energy Act of 2008, codified at 25 U.S. Code (USC), chapter 32A authorizes the Secretary to temporarily close NFS lands for the privacy of Tribal activities for traditional and cultural purposes.

- The CHCA at section 3054 first states that: "*the Secretary shall ensure access to National Forest System land by Indians for traditional and cultural purposes … in recognition of the historic use by Indians of National Forest System land.*" [25 USC 3054(a), emphasis added]
- The next section provides the authority for closing land from public access: "*Upon the approval by the Secretary of a request from an Indian tribe, the Secretary may temporarily close from public access specifically identified National Forest System land to protect the privacy of tribal activities for traditional and cultural purposes.*" [25 USC 3054(b)(1)]
- The law then sets limitations on the closure: "*A closure of National Forest System land under paragraph (1) shall affect the smallest practicable area for the minimum period necessary for activities of the applicable Indian tribe.*" [25 USC 3054(b)(2)]
- Finally, this law is tied directly back to the American Indian Religious Freedom Act (AIRFA): "*Access by Indian tribes to National Forest System land under this subsection shall be consistent with the purposes of Public Law 95–341 (commonly known as the American Indian Religious Freedom Act; 42 USC 1996).*" [25 USC 3054(b)(3)]

On January 19, 2011, the Forest Service, through USDA Natural Resources and Environment, published in the Federal Register a Direct Final Rule that directly reflects the CHCA, adding the following to the list of Prohibitions in Areas Designated by Order (36 Code of Federal Regulations (CFR) 261.53) Special Closures—

g) *"The privacy of tribal activities for traditional and cultural purposes.Closure to protect the privacy of tribal activities for traditional and cultural purposes must be requested by an Indian tribe; is subject to approval by the Forest Service; shall be temporary; and shall affect the smallest practicable area for the minimum period necessary for activities of the requesting Indian tribe."*

Key Concepts

Patience and respect must be used at every step in the process. Tribal cultural practices and social norms can be vastly different from those of Forest Service employees, and this may be apparent in the initial request for a temporary closure for a traditional and cultural purpose. The request could include terminology that may seem vague from the Federal viewpoint, but to the Tribe, it is respectfully accurate without being too specific, most notably when spiritual concerns apply to the request.

During the engagement process, it can be helpful to focus on the offered details of the initial request and work with the Tribal partner to develop and plan the logistical context of the request. To be clear, it is not the Forest Service's role to determine or dictate the exact circumstances by which a Tribal cultural practice may be observed; rather, the Forest Service acts as an agent of the Federal trust responsibility and must accommodate Tribes when and where it can as allowable under Federal law. The information that follows provides a blueprint of actions to take when a request is received.

Issuance of Closure Orders Pursuant to 36 CFR 261.53(g)

1. An administrative record shall be initiated and maintained for each request for temporary closure of NFS lands for traditional and cultural purposes.

   Forests or prairies or grasslands shall maintain strict confidentiality of the administrative record. Executive Order (EO) 13007 (Executive policy for Sacred Sites) clearly states, "Where appropriate, agencies shall maintain confidentiality." Culturally sensitive information is protected from disclosure by certain

laws and regulations. For example, information about locations of certain archaeological or burial sites can be protected through the National Historic Preservation Act, Cave Resource Protection Act (CRPA [16 USC 63]), Archaeological Resources Protection Act, and NAGPRA. Further, CHCA section 3056 can also provide Indian Tribes with protection from disclosure under the Freedom of Information Act. Protection under the CHCA extends to information regarding the identity, use, or specific location in the NFS of a site or resource used for traditional or cultural purposes by an Indian Tribe or any cultural items not covered by section 3053 (reburial) of the CHCA.

2. Upon receipt of a request for temporary closure of NFS lands for traditional and cultural purposes, the forest or prairie or grassland should immediately evaluate the request to determine the following—
   a. Requestor is an authorized agent acting in an official capacity on behalf of a federally recognized Tribal government, department, or subdivision; an intertribal council; or commission serving a group of federally recognized Indian Tribes.
   b. Includes specific dates, times, and location.
   c. Affects the smallest practicable area.
   d. Extends no longer than the minimum period necessary.
   e. Includes affirmation from the impacted Indian Tribe that the temporary closure is for traditional and cultural purposes. This does NOT mean that forest or prairie or grassland supervisors should attempt to evaluate or make their own determination of "traditional and cultural purpose." Rather, they should ensure that the Indian Tribe affirms that the closure is within the meaning of traditional and cultural purpose.
   f. Identify any specific information the Indian Tribe deems sensitive, requiring protection from disclosure.

Note: Submission of requests presents line officers with the opportunity to engage in direct consultation with local Tribal leadership or designated Tribal agents; aim to maximize these interactions by building a strong working relationship. Consider that Tribes appreciate in-person engagement. It may be appropriate to visit the proposed site with the Tribal representative(s). Deference should be given to the Indian Tribe's ceremonial calendar as well as the cultural significance of the site itself. Suggested points to clarify with the Indian Tribe may include—

- Precisely where the gathering will take place (and visit that location).
- Explain that specific details about the ceremony itself are not necessary or required for the Forest Service to evaluate the request. Baseline logistical information is necessary, however, to properly plan out the scope of the request.
- How many people may participate?
- Will food be served to participants?
- Will the proponent Indian Tribe cook on site?
- Do the elders have special needs for comfort?
- Will some sleep or camp onsite?
- What accommodations is the Tribe making for general participant's comfort?
- What sort of cleanup is necessary and how does the Tribe plan to clean the site?
- Where will participants use the bathroom?
- Attempt to gather as much logistical information through this dialogue to prepare the requesting "terms and conditions" in a bilateral agreement. Be patient.
- Introduce a dialogue about the other facets of the gathering related to smaller ceremonies for traditional practitioners.
- Ask if a ceremonial fire will be needed and, if so, the preferred location of this fire.
- Ask if you can be shown a general location that requires use by a traditional practitioner(s) for smaller ceremonies.
- Ask what kind of privacy is needed for the ceremony.
- Schedule a followup meeting if needed, especially if an agreement is to be executed.

3. Provisions for temporary closure may be conditioned or denied for reasons including—
   a. Protecting public health and safety.
   b. Preventing interference with Forest Service and/or commercial operations. Complying with Federal laws and regulations.
   c. Ensuring the sustainability of a species or biological community.
   d. Otherwise protecting NFS land and resources.

   Denials must be well documented and clearly explained to the requesting Indian Tribe.

4. Group use permits and other instruments—

   Tribal uses are not special uses. Tribal uses are the exercise of sovereign rights and interests, on the NFS lands, as enumerated in treaties and statutes recognizing and protecting those rights and interests.

These rights and interests, although recognized in treaties and statutes, are not derived therefrom. They are preexisting rights stemming from the Indian Tribe's inherent sovereignty. Individual Tribal members, or self-identifying Native Americans, who are not delegated representatives of a federally recognized Indian Tribe are not eligible to request a closure under the CHCA; these individuals must go through the procedures available to the general public.

It is the policy of the United States to honor and respect the sovereignty of the individual Indian Tribe, including its sovereign rights and immunities. This is the basis of our government-to-government relationship. Permits are not bilateral in nature and are, therefore, often perceived as an affront to Tribal sovereignty. In general, when the forest or prairie or grassland supervisor desires the cooperation of the Indian Tribe for specific issues of site management, parking, fire prevention, sanitation, and so on, he or she should engage the Indian Tribe in a bilateral agreement (Memorandum of Understanding or other letter of agreement) which stipulates the expectations of each party. Such agreements should not attempt to waive the sovereign rights or immunities of the respective Indian Tribe(s) or be interpreted to do so.

The CHCA provides authority for the proposed Tribal activity, regardless of the number of attendees. Permits are therefore not required. If a bilateral agreement is desired, each provision of such agreement is negotiated in good faith between the parties. Sample agreements and Grants and Agreements (G&A) templates seldom serve the government-to-government relationship. Bilateral agreements with Indian Tribes do not require G&A approval. Your G&A Specialist may provide valuable input in crafting such agreements, however.

5. In general, forests or prairies or grasslands shall follow the procedures outlined in FSH 5309.11, chapter 32—Issuing Orders under 36, Code of Federal Regulations, Part 261, Subpart B. Coordination with the Office of General Counsel and Law Enforcement and Investigations will be maintained consistent with all closure orders.

   Due to the unique nature of orders issued under 36 CFR 261, certain exceptions to standard procedures are recommended as follows—

32.11 – Exemptions

Only the following exemptions should be considered—

1. Persons with a permit specifically authorizing the otherwise prohibited act or omission.

4. Any Federal, State, or local officer, or member of an organized rescue or firefighting force in the performance of an official duty.

6. Any other person meeting exemption requirements specified in the order.

Exemptions considered under this criterion should specify by name the requesting federally recognized Indian Tribe and that Indian Tribe's enrolled members or the names of multiple Indian Tribes and their enrolled members. If the event is an intertribal activity, the name of the intertribal council or commission may be used.

32.2 – EXHIBIT 02, Content of Assessment of Need and Enforcement Plan

Item 3, Enforcement Plan. Enforcement Plans should be amended to caution against disclosing to the affected public the exact nature of the activity or that it is associated with a particular Indian Tribe. This would include onsite posting requirements. American Indian traditional and cultural activities and locations of such activities are protected from disclosure to the public by law. Also, the enforcement plan may consider the use, by the Indian Tribe, of tribal police officers or commissioned tribal game wardens to deal with any internal conduct problems.

32.21 – Order Case Files

Case files should be flagged as sensitive, subject to probable FOIA exemption under provisions of the Food, Conservation, and Energy Act of 2008. Case files should make direct reference to section 8104 of the 2008 Farm Bill and the new 36 CFR 261.53. (See also item 1, page 28.)

32.24 – Civil Rights Impact Analysis

A Civil Rights Impact Analysis (CRIA) must be completed when required per FSM 1730 and FSH 1709.11. The CRIA shall reference statutory requirements under AIRFA, Religious Freedom Restoration Act, and the CHCA.

32.25 – Assessment of Need and Enforcement Plan

The Assessment of Need shall reference statutory requirements under AIRFA, Religious Freedom Restoration Act, and the CHCA.

32.3 – Posting of Orders

Due to the confidentiality of certain culturally sensitive information, posting requirements must be carefully considered. The two-prong requirements for posting 36 CFR 261.51 are—

(a) Placing a copy of the order imposing each prohibition in the offices of the Forest Supervisor and District Ranger, or equivalent officer who have jurisdiction over the lands affected by the order, and

(b) Displaying each prohibition imposed by an order in such locations and manner as to reasonably bring the prohibition to the attention of the public.

When placing a copy of the order imposing the prohibition in Forest Service offices, the Forest or Prairie or Grassland shall redact any information from the order that the Indian Tribe considers to be sensitive. Maps of the affected area will not be posted unless authorized by the Indian Tribe.

When posting the area at locations and in a manner to reasonably bring the prohibition to the attention of the public, post only notices that read, "Temporarily Closed to Public Entry." Units may add to the notice citation of 36 CFR 261.53.g, "For more information call …." Only Forest employees familiar with Government policies protecting culturally sensitive information should respond to public inquiries.

Chapter 3—Forest Products for Traditional and Cultural Purposes: 25 U.S. Code 3055

Purpose

The Forest Service receives many requests every year from Indian Tribes and individual Native Americans to acquire forest products from National Forests and Grasslands. This chapter of the Cultural and Heritage Cooperation Authority (CHCA) technical guide outlines the authorities and mechanisms by which managers may implement their authority to provide—or not to provide—forest products. Forest Service Manual (FSM) 1563, Forest Service Handbook (FSH) 1509.13, FSH 2409.18, and Forest Service regulations at 36 Code of Federal Regulations (CFR) 223.15 include policy and guidance related to the implementation of CHCA section 3055: Forest Products for Traditional and Cultural Purposes. This chapter has been developed to help managers apply this authority. Additionally, this chapter covers requests made by Indian Tribes under treaties or the general free use authority (16 U.S. Code (USC), section 477). Individual Native Americans may also acquire forest products under the general free use authority. Information related to responding to these requests may also be found in this chapter.

Background and Business Need

Section 3055 of the CHCA gives the Secretary of Agriculture the authority to provide trees, portions of trees, or forest products to Indian Tribes free of charge for traditional and cultural purposes. The uses must be noncommercial. Section 3055 has been further implemented at 36 CFR 223.15 and in FSH 2409.18. This authority can be used to grant trees, portions of trees, or forest products to federally recognized Indian Tribes for a wide variety of noncommercial uses that serve to promote traditional native culture, activities, and practices, and may be used where treaty-reserved rights may be absent or ambiguous.

Key Concepts—Definitions

When a treaty reserves or grants lands to an Indian Tribe, Tribal ownership generally includes full hunting, fishing, and gathering rights on those lands. These treaty rights are property rights that cannot be taken without compensation. Additionally, Indian Tribes frequently entered into treaties that expressly reserved hunting, fishing, and gathering rights on specified lands outside reservation borders. Treaties reserving hunting, fishing, and gathering rights over previously owned Tribal lands do not constitute a "grants of rights to the Indians, but a grant of rights from them—a reservation of those not granted."[2] Treaty-reserved hunting, fishing, and gathering rights on off-reservation lands are akin to easements running with the burdened lands and include easements to access hunting, fishing, and gathering sites. These treaty-reserved easements, like the treaty-reserved hunting, fishing, and gathering rights themselves, are property rights within the meaning of the Fifth Amendment and cannot be taken by Congress without compensation.[3]

Note that these rights are retained by the Indian Tribe(s) and are not given by the Government. Few treaties that reserved off-reservation hunting, fishing, and gathering rights specifically enumerated every possible right to hunt, fish, and gather. Nonetheless, in keeping with the Indian law canons of construction, courts have interpreted treaty language reserving rights to hunt, fish, or gather as reserving to the Indian Tribe *all* hunting, fishing, and gathering rights, subject only to specific treaty limitation. Further, treaty-reserved hunting, fishing, and gathering rights extend to the harvest of all species currently existing in the Indian Tribes' reserved harvesting ground, subject only to specific treaty limitation. Thus, for example, Tribal rights to take fish include both natural and hatchery-bred fish.[4] The application of treaty rights may include the commercial use of these trust resources.

It is the policy of the United States to honor these treaty-reserved rights, and it is therefore of great importance that line officers know the treaties affecting their forests and the Indian Tribes whose rights apply to the ceded lands of that forest. No additional statutory authority is required for the transfer of trees, timber, and forest products. Treaty rights are applied only to (1) the signatory Indian Tribes to the treaty; and (2) lands ceded to the United States in that treaty.

[2] *United States v. Winans*, 198 U.S. 371, 381 (1905).
[3] Cohen's Handbook of Federal Indian Law, 18.02, page 1156 (Nell Jessup Newton, ed., 2012)
[4] Ibid at 18.04[2][a], page 1164.

Key Concepts—Law and Agency Policy

Excerpts from pertinent authorities are provided below regarding free use for federally recognized Indian Tribes under the CHCA, and for requests made by Indian Tribes under the general free use authorities.

Cultural and Heritage Cooperation Authority: As noted above 25 USC 3055 authority can be used to grant trees, portions of trees, or forest products to federally recognized Indian Tribes for a wide variety of noncommercial uses that serve to promote traditional native culture, activities, and practices, and may be used where treaty-reserved rights may be absent or ambiguous.

Forest Service implementing regulation stemming from that law and section of the U.S. Code is under 36 CFR 223.15. Regional Foresters or designated Forest Officers may, at their discretion, provide trees, portions of trees, or forest products to federally recognized Indian Tribes free of charge for traditional and cultural purposes provided that (1) the trees, portions of trees, or forest products are provided to tribal officials on behalf of an Indian Tribe for traditional and cultural purposes; and (2) the trees, portions of trees, or forest products will not be used for commercial purposes.

The FSH also provides direction for Tribal requests under section 3055.

General free use authorities: provides discretionary authority to the Secretary of Agriculture to permit, under regulations prescribed by him or her, the use of timber and stone found upon national forests, by bona fide settlers, miners, residents, and prospectors, free-of-charge, for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes. Although not specified in, this authority may provide a clear line of authority for granting timber on National Forest System lands to federally recognized Indian Tribes for community, residential, and other domestic purposes.

General provisions for Forest Service free use authorities for trees, portions of trees, or forest products are located under the 36 CFR Part 223 subpart A—

- Section 223.5 provides the scope of free use granted to individuals and includes free use timber for domestic purposes.
- Section 223.6 (Cutting and Removal of Timber in Free-Use Areas) provides for cutting and removing, for domestic purposes, any dead timber or any green timber previously marked or designated by forest officers.[5]
- Section 223.8 describes which Forest Service officers may be delegated authority to grant (general) free use to individuals. Note: Reference 36 CFR 223.15 for a description of which Forest Service officers may be delegated authority to grant tribal requests made under section 3055 of the Cultural and Heritage Cooperation Authority.

Forest Service Manual 2400—Timber Management contains additional Forest Service policy regarding delegations of authority for free use. (Reference FSM 2404 and FSM 2462.)

Applying Free-Use Authorities

The CHCA authorizes grant of trees, portions of trees, or forest products to federally recognized Indian Tribes for a wide variety of noncommercial uses and "traditional and cultural purposes." Under the Act, definition of the term "traditional and cultural purpose" with respect to a definable use, area, or practice, means that the use, area, or practice is *identified by an Indian Tribe*—not the Forest Service—as traditional or cultural because of the long-established significance or ceremonial nature of the use, area, or practice to the Indian Tribe. Additionally, for requests made under 223.15(d)—

- There are no limitations on the number of requests made by Indian Tribes.
- There are no limitations on the amount of trees, portions of trees, or forest products that may be requested by Indian Tribes.
- There *are* limitations regarding who may grant the request.

Pursuant to 36 CFR 223.8, and in consideration of the Government's treaty and trust obligations to Indian Tribes, all forest supervisors have authority to grant requests for trees, portions of trees, or forest products to federally recognized Indian Tribe. Forest supervisors may redelegate this authority to district rangers and other forest officers in an amount not to exceed $200 per year. Regional foresters may approve requests exceeding $5,000. Amounts exceeding $10,000 require prior review by the Chief.

Agency line officers and managers (who have been authorized by name through official Forest Service correspondence) are authorized by 36 CFR 223.15(e) to provide trees, portions of trees, and forest products under this section subject to the following limitations—

(1) District rangers and forest officers may provide material not exceeding $25,000 in value in any one fiscal year to an Indian Tribe.

(2) Forest supervisors may provide material not exceeding $50,000 in value in any one fiscal year to an Indian Tribe.

[5] This authority provides the basis for the Eastern Region's provision of timber to MOU signatory Indian Tribes (see Great Lakes Indian Fish & Wildlife Commission MOU) for domestic purposes that do not meet the 25 USC 3052 definition of traditional and cultural purpose.

(3) Regional foresters may provide material not exceeding $100,000 in value in any one fiscal year to an Indian Tribe.

(4) The Chief of the Forest Service may provide material exceeding $100,000 in value to an Indian Tribe.

As explicitly stated in 71 Federal Register (FR) 523-524 (dated January 4, 2006), the delegation of authority limitations are "per year per individual," and the Federal Register notice remains in effect.

Note the following guidelines and/or considerations when processing requests made by federally recognized Indian Tribes under the CHCA—

Statutory:

- Requests for trees, portions of trees, or forest products for noncommercial traditional and cultural purposes may be granted to any federally recognized Indian Tribe, under section 3055 authority (and the Forest Service regulation under 36 CFR 223.15), irrespective of treaty reserved rights.
- Ensure that each requesting Indian Tribe is federally recognized. (Refer to the current "Tribal Entities List "of federally recognized Indian Tribes maintained by the Bureau of Indian Affairs per 25 USC 479a-1.)
- Implementation of provisions of CHCA and implementing regulations at 36 CFR 223.15 are based solely on the trust obligations of the United States and the unique political relationship that exists between the United States and Indian Tribes.
- Requests for trees and forest products (under section 3055) by federally recognized Indian Tribes may be conditioned or denied for reasons identified in 36 CFR 223.15(f) (also shown under FSH 2409.18-82.53). These are currently the only reasons by which a line officer may deny a request under the CHCA.
- Regional foresters, forest supervisors, and district rangers will ensure that all decisions made under 25 USC 3055 comply with National Forest Management Act (NFMA), relevant land management plans, the National Environmental Policy Act, the Endangered Species Act, and all other applicable laws and regulations and that they are subject to Tribal treaty and other reserved rights and the savings provisions of the CHCA (35 USC 3057(b). (Refer to 36 CFR 223.15(g).)
- Regional foresters or designated forest officers must document all decisions made under 36 CFR 223.15. (Refer to FSH 2409.18-82.54(3).)

Guidance:

- Forest supervisors and district rangers should make every effort to accommodate any reasonable request(s) made by a federally recognized Indian Tribe for trees, portions of trees, or forest products for noncommercial traditional and cultural purposes.
- Requests may be granted by permit (FS-2400-8 Forest Products Free Use Permit), bilateral agreement, or other letter of agreement.
- In some regions, all timber and forest products granted free of charge to federally recognized Indian Tribes under the CHCA are accounted for in the Timber Management Information System (TIM) using the FS-2400-8 permit record. If the authorization is an MOU or other bilateral agreement, the actual permit will be disposed of per Forest Service accountability requirements (FSH 2409.18, 54). Each permit record shall identify itself by notation as Non-Commercial Tribal Free Use for Traditional and Cultural Purposes. (Additional documentation such as a letter or other agreement may be necessary on a case-by-case basis.)

Tribal uses should not be confused with special uses or other permitted uses. Tribal uses are the exercise of sovereign rights and interests on the National Forest System lands, as enumerated in treaties and statutes recognizing and protecting those rights and interests. These rights and interests, although recognized in treaties and statutes, are not derived from them. They are preexisting rights stemming from the Indian Tribe's inherent sovereignty.

It is the policy of the United States to honor and respect the sovereignty of the individual Indian Tribe, including its sovereign rights and immunities. This is the basis of our government-to-government relationship. Permits are not bilateral in nature and are therefore often perceived as an affront to Tribal sovereignty. In general, when the forest or prairie supervisor desires the cooperation of the Indian Tribe for specific issues of site management, parking, fire prevention, sanitation, and other operating criteria, he or she should engage the Indian Tribe in a bilateral agreement (MOU or other letter of agreement that stipulates the expectations of each party). Such agreements should not attempt to waive the sovereign rights or immunities of the respective Indian Tribe(s).

The CHCA carries its own unique authority to provide for most proposed Tribal activities, including the use of national forest trees, timber, and forest products. This means that permits are not required. If a bilateral agreement is desired, each provision of such agreement is negotiated in good faith between the parties. "Canned" agreements and Grants & Agreements (G&A) templates seldom serve the government-to-government relationship. Bilateral agreements with Indian Tribes do not require G&A approval. Your G&A Specialist may provide valuable input in crafting such agreements, however.

Chapter 4—Prohibition on Disclosure (Confidentiality): 25 U.S. Code 3056

Purpose

The purpose of this chapter of the Tribal Cultural and Heritage Cooperation Authority (CHCA) technical guide is to provide information to Agency personnel about the available authorities and protocols for protecting information provided to the Forest Service by Indian Tribes regarding traditional and cultural purposes, traditional knowledge, and sacred sites (Tribal information). Although the legal mandate to share information under the Freedom of Information Act (FOIA) is compelling, exemptions to such sharing further mandate the protection of some Tribal information. In particular, CHCA provides unique authority to the Forest Service to protect traditional and cultural resources and information, as well as reburials. Although this authority is codified in Title 25 of the U.S. Code, which governs Indian affairs within the U.S. Department of the Interior, the CHCA specifically designates the Forest Service and the Secretary of Agriculture as responsible parties in implementing the provisions of the statute.

Background and Business Need

Across the country, whether on a formal basis through consultation or more operationally during collaborative project design and implementation, the Forest Service is engaged in activities with Indian Tribes through which Tribes might provide culturally sensitive information. In particular, the Forest Service might receive information regarding sacred sites or traditional and cultural practices that may potentially be impacted by agency activities. Sacred sites are defined as—

> *"any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian Tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the Tribe or appropriately authoritative representative of an Indian religion has informed the Agency of the existence of such a site." (Indian sacred sites, Executive Order (EO) No. 13007, 61 Fed. Reg. 26771 [May 29, 1996]).*

The USDA Sacred Sites report (Report to the Secretary of Agriculture—USDA Policy and Procedures Review and Recommendations: Indian Sacred Sites [December 2012]) expands on this definition within the concept of "sacred places." A sacred place is any specific location on National Forest System land, whether site, feature, or landscape, that is identified by an Indian Tribe, or the religious societies, groups, clans, or practitioners of an Indian Tribe, as having historically important spiritual and cultural significance to that entity, greater than the surrounding area itself. Sacred places may include but are not limited to geological features, bodies of water, burial places, traditional cultural places, biological communities, stone and earth structures, and cultural landscapes uniquely connecting historically important cultural sites, or features in any manner meaningful to the identifying Tribe.

As Heritage Program staff has aptly noted—

> *"The character of a sacred site is composed of many components. Most line officers and program managers are familiar with the concept of managing a place for specified outcomes. Wilderness is managed in a way that provides people opportunities for solitude and introspection, while developed campgrounds are managed to provide families opportunities to experience the outdoors, socialize, and build interpersonal bonds. It is the characteristic of the setting, created by nature and management actions which provide the opportunities and resulting human benefits. The character of a sacred site, as defined by a Tribe or authoritative representatives of an American Indian/Alaska Native religion, is also influenced by management actions affecting the potential for beneficial outcomes. It is most important for the line officer to understand what qualities define the character of a sacred site so management actions can be used to protect it."*[6]

Sacred sites are identified by an Indian Tribe or individual Indian practitioner and not the Agency. The same is true of traditional and cultural purposes. The CHCA (25 U.S. Code [USC], chapter 32A, section 3052 (8)) defines the term "traditional and cultural purpose," as—

[6] "Heritage Program Guide for Sacred Sites as Defined by Executive Order 13007 and the National Historic Preservation Act, a Compendium of the April, 2013 meeting of the Forest Service in Albuquerque, New Mexico" (Forest Service draft document, 2013).

"…with respect to a definable use, area, or practice, means that the use, area, or practice is identified by an Indian Tribe as traditional or cultural because of the long-established significance or ceremonial nature of the use, area, or practice to the Indian Tribe."

The Agency may be able to better protect sacred sites and other culturally important resources or to better inform land planning, research, or management decisions if it had more information about site locations or traditional knowledge. For many reasons, however—practical, cultural, religious, or political—Indian Tribes may be reluctant to share information with Federal agencies and risk making it public.

During the listening sessions and the Tribal consultations the Forest Service conducted while developing the USDA Sacred Sites report, the Agency heard directly from Tribes about their significant concerns regarding the Agency's ability to protect confidential information that Tribes may provide. Tribal commenters repeatedly emphasized a lack of trust in the FOIA process and a general lack of Agency capacity to maintain confidentiality.

Many of the Tribes' primary concerns relate directly to observance of traditional and cultural practices. Specific examples of possible hazards to the Tribes' religious practices include disrupted ceremonies, vandalism or looting of sacred sites, or damage to other culturally important resources such as plant communities and water resources. In many cases, Tribal observers may be strictly forbidden to discuss the location, use, origin, and sacred nature of a particular site with others who do not practice the same life ways. These exclusions sometimes include fellow Tribal members who are not elders, traditional practitioners, or members of specific sacred societies. This further complicates matters because without knowing the location of the sacred site(s), it is obviously difficult to offer protection. Although many Tribal people remain reluctant to share information about those sites or about other traditional and cultural practices, an interest is increasing on the part of both the Forest Service and Indian Tribes to incorporate traditional knowledge into Agency operations, land management decisions, and research projects that may require that some Tribal information have additional protection from disclosure.

Protection of confidential Tribal information is a key component of success in achieving such management outcomes and the U.S. policy of "protecting and preserving the traditional, cultural, and ceremonial rites and practices of Indian Tribes."[7] It is therefore incumbent upon Agency personnel to respect Tribal concerns and make full use of available authorities and Tribal consultation in protecting Tribal information from disclosure. In addition to consultation, it is highly recommended that a Memorandum of Understanding (MOU) or Agreement (MOA) be developed that specifies custody of information and protocols for protecting confidentiality.

Key Concepts

The following are Federal legislation or policies that address confidentiality.

The Freedom of Information Act[8]

The release of information that is acquired by the Government to the public is governed by FOIA, which generally provides that any person has a right, enforceable in court, to obtain access to Federal agency records, except to the extent that such records (or portions of them) are protected from public disclosure by one of nine exemptions or by one of three special law enforcement record exclusions. Agency responsibility and authorities to allow protection of Tribal information lie within these exemptions, typically exemption 3, which permits the Government to withhold information that is prohibited from disclosure by a statute. The key exemption at 5 USC 552(b)(3) specifically exempts information that is—

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—

(A) (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the Open FOIA Act of 2009, specifically cites to this paragraph.

The Privacy Act of 1974 provides safeguards against unwarranted invasions of privacy through the misuse of records by Federal agencies by restricting disclosure of personally identifiable records maintained by agencies. As such, other FOIA exemptions for nondisclosure of Tribal information, particularly related to the personal privacy interests of culture keepers and traditional practitioners, may be applicable. Exemption 6 in particular covers information addressing—

[7] 25 U.S. Code, chapter 32A, (Cultural and Heritage Cooperation Authority, citing Native American Graves Protection and Repatriation Act [NAGPRA] and American Indian Religious Freedom Act). Note: neither NAGPRA nor Executive Order [EO] 13007 is considered a withholding statute. NAGPRA does not address nondisclosure and includes no language that identifies it as a withholding statute. An EO does not qualify as a statute and therefore cannot exempt information from disclosure.

[8] For a full discussion of Freedom of Information Act (FOIA) and FOIA exemptions, see U.S. Department of Justice "Freedom of Information Act Guide, May 2004" (May, 2014).

(6) personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Tribal information about sacred sites or areas of traditional use may potentially be "similar files," the disclosure of which would violate the privacy interests of those individuals responsible for maintaining cultural and sacred information. Per the U.S. Department of Justice—

> *Information meets the threshold requirement of Exemption 6 [5 USC 552 (b)(6)] if it falls within the category of "personnel and medical files and similar files." Personnel and medical files are easily identified, but what constitutes a "similar file" warrants more analysis. In United States Department of State v. Washington Post Co.,[9] the United States Supreme Court held, based upon a review of the legislative history of the FOIA that Congress intended the term "similar files" to be interpreted broadly, rather than narrowly. The Court stated that the protection of an individual's privacy "surely was not intended to turn upon the label of the file which contains the damaging information." Rather, the Court made clear that all information that "applies to a particular individual" meets the threshold requirement for Exemption 6 protection.*

When conducting a FOIA analysis, consider the integral nature of FOIA in protecting Tribal information, and sacred sites information in particular—

> *FOIA is the exclusive mechanism through which the public can proactively gain access to Agency information regarding sacred sites. If a member of the public requests an agency's sacred-site information, FOIA directly controls whether disclosure is mandatory or whether the agency can withhold the information under an exemption. Furthermore, the Supreme Court has rejected the possibility that the federal government's unique fiduciary obligations to Tribes uniformly exempt tribal information from FOIA coverage.[10] Thus, agencies' ability to keep site information secret turns entirely on FOIA and its exemptions. ... any given agency can promise Native Americans confidentiality only to the extent that the information provided is exempt from mandatory disclosure under FOIA.[11]*

The concept of Intellectual Property Rights (IPR) has been widely discussed as a mechanism for maintaining confidentiality of Tribal information. IPR concepts of commercialization and public versus private domain use, however, are difficult to apply to knowledge that comes from traditional sources because that knowledge often cannot be valued on a commercial scale or retains any sort of legal "ownership." The Forest Service has multiple statutory authorities available to protect sensitive Tribal information, and this chapter of the CHCA technical guide focuses on those at hand for the moment. For additional guidance, consider the decades-long work of the United Nations Working Group on the Rights of Indigenous Populations and the U.N. Declaration on the Rights of Indigenous Peoples, which consistently frame intellectual property rights as a human rights issue for Tribal nations and integral to their self-determination—

> *"Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions."[12]*

As policy and case law continue to evolve on intellectual property rights in relation to traditional knowledge and cultures, future editions of the CHCA technical guide will undoubtedly expand on these concepts.

A final note on FOIA and transparency; it has been suggested that executive direction on transparency and open Government supersedes FOIA protection. As the openness in Government is presumed,[13] the U.S. Department of Justice will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.[14] In the case of Indian sacred sites and traditional and cultural purposes, both thresholds may be met.

Federal Nondisclosure or "Withholding" Statutes

As the controlling statute in protection of Tribal information, the operative phrase in 552 (b)(3) of the FOIA is, "exempted from disclosure by statute (other than section 552b of this title)." For purposes of nondisclosure, the Forest Service is unique among Federal agencies in having such agency-specific nondisclosure authority in the CHCA. Although FOIA exemption 3 is the most robust general authority for nondisclosure of Tribal information,

[9] 456 U.S. 595 (1982).
[10] *Dep't of Interior v. Klamath Water Users Protective Assn*, 532 U.S. 1, 11 (2001).
[11] Plaut, Ethan, "Tribal-Agency Confidentiality: A Catch-22 for Sacred Site Management?" Ecology Law Quarterly, Vol. 36:137(2009).
[12] United Nations Declaration on the Rights of Indigenous Peoples, 61/295 (September 13, 2007).
[13] Transparency and Open Government, Presidential Memorandum. 74 Fed. Reg. 4685 (January 26, 2009).
[14] The Freedom of Information Act, Attorney General. Memorandum of March 19, 2009.

section 3056 of the CHCA specifically mandates the Secretary of Agriculture to protect particular types of Tribal information, as discussed in the following.

National Historical Preservation Act

Section 307103 of NHPA explicitly limits the disclosure of information regarding sensitive historic resources, and directs the heads of Federal agencies to "withhold from disclosure to the public, information about the location, character, or ownership of a historic property if the Secretary and the Agency determine that disclosure may—

(1) cause a significant invasion of privacy;

(2) risk harm to the historic property; or

(3) impede the use of a traditional religious site by practitioners."

Under NHPA, the Federal agency head or official may further determine who may have access to the information.

Archaeological Resources Protection Act[15]

Section 470hh of Archaeological Resources Protection (ARPA) prohibits disclosure of information about the nature and location of archaeological resources for which the excavation or removal requires a permit or other permission— [16]

(a) Disclosure of information

Information concerning the nature and location of any archaeological resource for which the excavation or removal requires a permit or other permission under this chapter or under any other provision of Federal law may not be made available to the public under subchapter II of chapter 5 of title 5 or under any other provision of law unless the Federal land manager concerned determines that such disclosure would—

(1) further the purposes of this chapter or the Act of June 27, 1960 (16 USC 469–469c) [16 USC 469–469c–1], and

(2) not create a risk of harm to such resources or to the site at which such resources are located.

Administrative Dispute Resolution Act

In some instances, the Administrative Dispute Resolution Act (5 USC 571) may also be used to protect information with a dispute resolution process. Section 574 (subsections (d) and (e) of that Act) provides confidentiality authority in the context of using neutrals in dispute resolution.

In essence, a neutral in a dispute resolution proceeding "shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication or any communication provided in confidence to the neutral." A neutral may disclose information by certain conditions. The parties may agree to disclosure or, if the neutral is requested by way of discovery request or other legal process and the parties do not respond to a notice of that request within a specific timeframe, the neutral may disclose the requested information.

Forest Service-Specific Withholding Statutes

The following are a list of legislation or policy addressing confidentiality that is specific within the Forest Service.

Cultural and Heritage Cooperation Authority[17]

The CHCA derives from the 2008 Farm Bill[18] and provides explicit authority for nondisclosure of information related to reburials, traditional and cultural resources and purposes, and research data provided under express expectation of confidentiality—

3056 Prohibition on disclosure

(a) Nondisclosure of information

(1) In general—The Secretary shall not disclose under section 552 of title 5 (commonly known as the "Freedom of Information Act"), information relating to—

(A) subject to subsection (b)(l),1 human remains or cultural items reburied on National Forest System land under section 3053 of this title; or

(B) subject to subsection (b)(2), resources, cultural items, uses, or activities that—

(i) have a traditional and cultural purpose; and

(ii) are provided to the Secretary by an Indian or Indian tribe under an express expectation of confidentiality in the context of forest and rangeland research activities carried out under the authority of the Forest Service.

(2) Limitations on disclosure—Subject to subsection (b)(2), the Secretary shall not be required to disclose information under section 552 of title 5

[15] 16 U.S. Code (USC) 470aa-470mm. Note that the law that moved the National Historic Preservation Act (NHPA) to title 54 specifies that a reference to an old title 16 provision (e.g., 16 USC 470f, for Section 106 of the NHPA) is legally deemed to refer to the corresponding provision in the new title 54.
[16] Although it is rarely used, one exception to disclosure under Archaeological Resources Protection Act for requests exists for disclosures made by a governor of any State who submits a written request that includes (1) the specific site or area for which information is sought, (2) the purpose for which such information is sought, and (3) a commitment by the governor to adequately protect the confidentiality of such information to protect the resource from commercial exploitation. Upon such requests, the land manager shall provide to the governor information concerning the nature and location of archaeological resources within the State of the requesting governor (36 Code of Federal Regulations 296.18).
[17] 25 USC, chapter 32A.
[18] The Food, Conservation, and Energy Act of 2008 (Pub.L. 110–234, H.R. 2419, 122 Stat. 923, enacted May 22, 2008).

(commonly known as the "Freedom of Information Act"), concerning the identity, use, or specific location in the National Forest System of—

(A) site or resource used for traditional and cultural purposes by an Indian tribe; or

(B) any cultural items not covered under section 3053 of this title.

(b) Limited release of information

(1) Reburial—The Secretary may disclose information described in subsection (a)(l)(A) 2 if, before the disclosure, the Secretary—

(A) consults with an affected Indian tribe or lineal descendent;

(B) determines that disclosure of the information—

(i) would advance the purposes of this chapter; and

(ii) is necessary to protect the human remains or cultural items from harm, theft, or destruction; and

(C) attempts to mitigate any adverse impacts identified by an Indian tribe or lineal descendant that reasonably could be expected to result from disclosure of the information.

(2) Other information—The Secretary, in consultation with appropriate Indian tribes, may disclose information described under paragraph (1)(B) or (2) of subsection (a) if the Secretary determines that disclosure of the information to the public—

(A) would advance the purposes of this chapter;

(B) would not create an unreasonable risk of harm, theft, or destruction of the resource, site, or object, including individual organic or inorganic specimens; and

(C) would be consistent with other applicable laws.

National Forest Management Act

During consultation meetings for the Forest Service Planning Rule, the Agency also heard from Tribal leaders about major concerns about confidentiality. In response, the Planning Rule explicitly addresses confidentiality and emphasizes that authorities to protect information shall be fully exercised—

"During the planning process, the responsible official shall comply with section 8106 of the Food, Conservation, and Energy Act of 2008 (CHCA 3056), EO 13007 of May 24, 1996, EO 13175 of November 6, 2000, laws, and other requirements with respect to disclosing or withholding under FOIA(5 USC 552) certain information regarding reburial sites."

Executive Order 13007 as Nonexempting Under FOIA

Although it is the only Federal policy that solely addresses sacred sites across all Federal land management agencies, EO 13007 is not a withholding statute under FOIA, nor does it statutorily exempt information from disclosure. The EO does, however, direct 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. ***Where appropriate, agencies shall maintain the confidentiality of sacred sites*** (emphasis added). [19]

Collecting Confidential Information and Data

Early development of agreements that outline the rights and responsibilities of all parties in the Forest Service or Indian Tribe relationship may preclude conflicts and challenges later on—and contribute to fulfillment of trust responsibilities as well as sound business practice. Forest Service Regions make frequent use of an MOA or MOU to clarify roles and responsibility within the trust relationship, on issues ranging from consultation to reserved rights and in ceded territories to forest closures for ceremonies. As noted in chapter 3 of this technical guide, agreements are bilateral government-to-government instruments, and each provision of such agreements is negotiated in good faith between the parties. "Canned" agreements and G&A templates may need to be modified to account for the government-to-government relationship. Bilateral agreements with Indian Tribes do not require Grants and Agreements (G&A) approval. Your G&A Specialist may provide valuable input in crafting such agreements, however.

On the issue of confidentiality, it is particularly important to have clarity on how information will be collected, shared between the Indian Tribes and the Agency, and protected from disclosure. Addressing these issues through early consultation can enable flexibility in the protection and nondisclosure of important cultural resources.

Although most memoranda include a standard contract provision regarding FOIA, most do not expand that provision to address Forest Service authorities that trigger

[19] Indian sacred sites, Exec. Order No. 13007, 61 Fed. Reg. 26771 (May 29, 1996) at section 1.

FOIA exemptions and protect Tribal information. Standard references to FOIA exemptions under the National Historic Preservation and ARPA are typically cited but should also include the CHCA,[20] which extends beyond prehistoric or historic resources to cover contemporary traditional and cultural information, particularly Traditional Ecological Knowledge (PA), for both forest and research activities. Provided are sample confidentiality provisions that have been utilized in the regions, plus a template for a research-specific agreement.

Control and Protection of Sensitive Security Information[21]

The USDA has promulgated policy on Sensitive Security Information (SSI)[22] that may address the custody, maintenance, and nondisclosure of confidential Tribal information. In addition to addressing statutory FOIA exemptions, DR-3440-2 provides guidance on identifying, labeling, storing, and accessing SSI. This policy covers information about assets and services that are critical to the "continuity of government operations," and "that if publicly disclosed could be expected to have a harmful impact on the security of the Federal operations or assets," or information that, if released, "harms interstate, international commerce of the United States." As positive and proactive Tribal consultation and relationships are integral to the continuity of Government (Forest Service) operations, and as disclosure of Tribal information has the potential to harm interstate commerce,[23] a case may be made that Tribal information may be classified as "sensitive security information," subject to protections afforded by DR 3440-2. Such protection would facilitate continued Forest Service operations and commerce by reducing litigation and delays.

In some situations, it is desired or necessary that the original holders of sensitive information may be the best holder of that information, sharing only with the Forest Service on an as-needed basis. For example, the exact location of a sacred site may be better protected if a designated Tribal representative holds maps identifying that location. That representative may show the map to Forest Service personnel in response to planning or emergency response activities, but would maintain possession of the map itself.

USDA DR-3440-2 Definitions

a. Critical Infrastructure: physical and cyber-based systems, assets (including information whether stored on paper, electronically, or using other means), and services essential to the government or economy of the United States or to a political subdivision thereof, including, but not limited to, systems, facilities, and stockpiles necessary for the operation, maintenance, or distribution of essential goods and services, such as telecommunications (including voice and data transmission and the Internet), electrical power, gas and oil storage, transportation, banking and finance, public health (including biological, chemical, radiological, and other hazardous materials), water supply, waste water, emergency services (including medical, fire, and police services), and the continuity of government operations;

b. Sensitive Security Information: unclassified information of a sensitive nature, that if publicly disclosed could be expected to have a harmful impact on the security of Federal operations or assets, the public health or safety of the citizens of the United States or its residents, or the nation's long-term economic prosperity; and which describes, discusses, or reflects:

   (1) The ability of any element of the critical infrastructure of the United States to resist intrusion, interference, compromise, theft, or incapacitation by either physical or computer-based attack or other similar conduct that violates Federal, State, or local law; harms interstate, international commerce of the United States; or, threatens public health or safety;

[20] 25 U.S. Code (USC), chapter 32A.
[21] USDA Departmental Regulation 3440-2 (January 30, 2003).
[22] Known elsewhere as "controlled unclassified information" per Controlled Unclassified Information, Executive Order 13556, 75 Fed. Reg. 68675 (November 9, 2010).
[23] The Commerce Clause of the Constitution of the United States at Article I, section 8, clause 3 governs Federal-Tribal relations.

Managing Confidential Information and Data

Just as important as consultation and sensitivity in the collection of Tribal information is the management of that information once in the possession of the Agency. FOIA mandates "appropriate administrative, technical and physical safeguards to insure the security and confidentiality of records."[24] For agencies that maintain Tribal information, compliance plans should take the following precautions, among others, into consideration—

1. Describe what information might or will be collected.
2. Describe what Tribal consultation will be conducted prior to collection of information.
3. Describe how information will be collected and by whom.
4. Explicit notation or marking of information as "CONFIDENTIAL."
5. Each document or GIS layer metadata, and so forth, should quote the appropriate legal exemption(s) from public release.
6. Describe how information will be stored (paper files, electronic files, databases).
7. Describe how information will be protected at every site where it is stored (locked files, password-protected or encrypted e-files, and so on).
8. Describe who will have access to the data and records and why (define "need-to-know").

Sample Compliance Language

Forest Service Manual 2368.1

Secure electronic data in the corporate information management environment through role-level security that restricts access to appropriately designated personnel. Electronic and hardcopy cultural resource information including inventory and evaluation records, maps, raw data, and reports may be withheld from disclosure from the public in order to prevent inadvertent or intentional damage to cultural resources. Both FOIA and Archaeological Resources Protection Act provide direction for the confidentiality of cultural resource records.[25]

Notice of Confidentiality

- The enclosed documents regarding Heritage Resources and Tribal Consultation for the [Name of Project] Project contain sensitive and confidential information that **may not be released to the public**.
- "Notice: This document contains information subject to the confidentiality requirements in the Archaeological Resources Protection Act (codified at 16 USC 470aa through 470mm), the National Historic Preservation Act (codified at https://www.gpo.gov/fdsys/pkg/USCODE-2015-title54/pdf/USCODE-2015-title54-subtitleIII-divsnA-null-chap3001-sec300101.pdf and 307103), EO 13007- Sacred Sites, the Food, Conservation, and Energy Act of 2008 (codified at 25 USC 3056), and the Forest Service Regulations at 36 CFR 296.18 This information is exempt from disclosure under FOIA and shall not be made available to the public."

[24] 5 U.S. Code 552a (e)(10) in full reads: "establish appropriate administrative, technical and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained."
[25] WO Amendment 2300-2008-1, Forest Service Manual 2368.1 on confidentiality.

Appendix A—Definitions

- **Adjacency.** Determined by management considerations of: (1) original burial location, (2) linear distance from the original burial location to the National Forest System lands boundary, (3) Tribal cultural and historical relationship between their prior occupancy and use of the original burial location and the National Forest System (NFS) lands, (4) other Federal or Tribal lands closer to the original burial location than the NFS lands, and (5) duplicate requests. (See Appendix C, "Sample Policy: Southern Region Policy on Reburial of Native American Remains," for expanded discussion.)
- **Bilateral agreement.** Any form of agreement acceptable to the Indian Tribe and the Forest Service line officer that is executed by both a Tribal government official and the appropriate Forest Service line officer, and that preserves the sovereign rights of the Indian Tribe. A bilateral agreement may be used in lieu of a permit as the instrument of transfer of timber and/or other forest products to an Indian Tribe.
- **Ceded territory.** Territory ceded (surrendered or given up) by an Indian Tribe or group of Indian Tribes to the United States through treaty, as defined by the Schedule of Indian Land Cessions of the United States. These land cessions shall be used to determine which Indian Tribes may possess explicit or implicit reserved rights in the granting of free use timber for domestic purposes. The Forest Service GIS Indian Lands Map Viewer, Tribal Connections, shows ceded lands as well as contemporary Indian trust lands and NFS lands.
- **Commercial purpose.** Although not defined under the Food, Conservation, and Energy Act of 2008 nor 36 CFR 223.15, for the purposes of this technical guide it is defined as the resale of trees, timber, or forest products without "value added." Example: Harvest of Balsam boughs when specified by Memorandum of Understanding.
- **Cultural items.** Has the meaning given the term in 25 USC 3001, except that the term *does not include human remains,* e.g.: "associated funerary objects" which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated funerary objects are presently in the possession or control of a Federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects (funerary objects" are the same objects, where the remains are not in the possession or control of the Federal agency or museum, and the objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian Tribe.)
- **Domestic purpose.** The use of trees or timber harvested pursuant to or for the construction of any structure, building, or appenditia (appendages or appurtenances of an estate or house) to be used for Tribal community or residential domestic purposes. Trees or timber harvested for a traditional and cultural purpose are not considered to be used for a domestic purpose.
- **Historic property.** Any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian Tribe or Native Hawaiian organization and that meet the National Register criteria (36 CFR 800.16).
- **Human remains.** The physical remains of the body of a person of Indian ancestry.
- **Indian.** An individual who is a member of an Indian Tribe.
- **Indian Tribe.** Any Indian or Alaska Native Tribe, band, nation, pueblo, village, or other community the name of which is included on a list published by the Secretary of the Interior pursuant to the Federally Recognized Indian Tribe List Act of 1994 (25 USC 479a-1; (List as of January 17, 2017).
- **Lineal descendant.** An individual that can trace, directly and without interruption, the ancestry of the individual through the traditional kinship system of an Indian Tribe, or through the common law system of descent, to a known Indian, the human remains, funerary objects, or other sacred objects of whom are claimed by the individual.

- **National Forest System.** Has the meaning given the term in section 1609(a) of title 16.
- **Noncommercial purpose.** Although not defined under the 2008 Farm Bill nor 36 CFR 223.15, for the purposes of this technical guide it is defined as the harvest of trees, timber or forest products for Tribal use or consumption, whether by the Tribal Community or individual Tribal member. Trees, timber or forest products with "value added" may be resold. Example: Ash bolts may not be resold. Traditional baskets made from ash bolts may be sold, however.
- **Reburial site.** A specific physical location at which cultural items or human remains are reburied.
- **Special forest products.** Products collected from NFS lands and include, but are not limited to, bark, berries, boughs, bryophytes, bulbs, burls, Christmas trees, cones, ferns, firewood, forbs, fungi (including mushrooms), grasses, mosses, nuts, pine straw, roots, sedges, seeds, transplants, tree sap, wildflowers, fence material, mine props, posts and poles, shingle and shake bolts, and rails. Special forest products do not include sawtimber, pulpwood, nonsawlog material removed in log form, cull logs, small roundwood, house logs, telephone poles, derrick poles, minerals, animals, animal parts, insects, worms, rocks, water, and soil (FSH 2409.18, 87.05).
- **Traditional and cultural purpose.** With respect to a definable use, area, or practice means that the use, area, or practice is identified by an Indian Tribe as traditional or cultural because of the long-established significance or ceremonial nature of the use, area, or practice to the Indian Tribe.
- **Treaty rights.** Those rights or interests reserved in treaties for the use and benefit of Indian Tribes. The nature and extent of treaty rights are defined in each treaty. Only Congress may abolish or modify treaties or treaty rights (FSM 1563).
- **Tribal officials.** Elected or duly appointed officials of Indian Tribal governments.
- **Tribal representatives:** Any Tribal agency, department, or commission with authority delegated by an Indian Tribal government or group of federally recognized Indian Tribal governments to represent the interests of that Indian Tribe or group of Indian Tribes.[1]
- **Trust responsibility.** The legally enforceable Federal fiduciary obligation 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 the federally recognized Indian Tribes. The concept of Federal trust responsibility to Indians evolved from not only early treaties with Indian Tribes, but statutes—particularly the Trade and Intercourse Acts—and opinions of the Supreme Court.

[1] Many Indian Tribes delegate certain authorities to entities, such as the Great Lakes Indian Fish & Wildlife Commission, or the 1854 Treaty Authority, for example.

Appendix B—The Cultural and Heritage Cooperation Authority

Sec.

3051. Purposes.

3052. Definitions.

3053. Reburial of human remains and cultural items.

3054. Temporary closure for traditional and cultural purposes.

3055. Forest products for traditional and cultural purposes.

3056. Prohibition on disclosure.

3057. Severability and savings provisions.

3051. Purposes

The purposes of this chapter are—

(1) to authorize the reburial of human remains and cultural items on National Forest System land, including human remains and cultural items repatriated under the Native American Graves Protection and Repatriation Act (25 USC 3001 et seq.);

(2) to prevent the unauthorized disclosure of information regarding reburial sites, including the quantity and identity of human remains and cultural items on sites and the location of sites;

(3) to authorize the Secretary of Agriculture to ensure access to National Forest System land, to the maximum extent practicable, by Indians and Indian tribes for traditional and cultural purposes;

(4) to authorize the Secretary to provide forest products, without consideration, to Indian tribes for traditional and cultural purposes;

(5) to authorize the Secretary to protect the confidentiality of certain information, including information that is culturally sensitive to Indian tribes;

(6) to increase the availability of Forest Service programs and resources to Indian tribes in support of the policy of the United States to promote tribal sovereignty and self-determination; and

(7) to strengthen support for the policy of the United States of protecting and preserving the traditional, cultural, and ceremonial rites and practices of Indian tribes, in accordance with Public Law 95–341 (commonly known as the American Indian Religious Freedom Act; 42 USC 1996).

(Pub. L. 110–234, title VIII, 8101, May 22, 2008, 122 Stat. 1286; Pub. L. 110–246, 4(a), title VIII, 8101, June 18, 2008, 122 Stat. 1664, 2048.)

REFERENCES IN TEXT

The Native American Graves Protection and Repatriation Act, referred to in par. (1), is Pub. L. 101–601, Nov. 16, 1990, 104 Stat. 3048, which is classified principally to chapter 32 (3001 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 3001 of this title and Tables.

The American Indian Religious Freedom Act, referred to in par. (7), is Pub. L. 95–341, Aug. 11, 1978, 92 Stat. 469, which is classified to sections 1996 and 1996a of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 1996 of Title 42 and Tables.

CODIFICATION

Pub. L. 110–234 and Pub. L. 110–246 enacted identical sections. Pub. L. 110–234 was repealed by section 4(a) of Pub. L. 110–246.

EFFECTIVE DATE

Enactment of this chapter and repeal of Pub. L. 110–234 by Pub. L. 110–246 effective May 22, 2008, the date of enactment of Pub. L. 110–234, see section 4 of Pub. L. 110–246, set out as a note under section 8701 of Title 7, Agriculture.

DEFINITION OF "SECRETARY"

"Secretary" as meaning the Secretary of Agriculture, see section 8701 of Title 7, Agriculture.

3052. Definitions

In this chapter—

- **Adjacent site:** The term "adjacent site" means a site that borders a boundary line of National Forest System land.
- **Cultural items:** The term "cultural items" has the meaning given the term in section 3001 of this title, except that the term does not include human remains.

- **Human remains:** The term "human remains" means the physical remains of the body of a person of Indian ancestry.
- **Indian:** The term "Indian" means an individual who is a member of an Indian tribe.
- **Indian Tribe:** The term "Indian Tribe" means any Indian or Alaska Native tribe, band, nation, pueblo, village, or other community the name of which is included on a list published by the Secretary of the Interior pursuant to section 479a–1 of this title.
- **Lineal descendant:** The term "lineal descendant" means an individual that can trace, directly and without interruption, the ancestry of the individual through the traditional kinship system of an Indian tribe, or through the common law system of descent, to a known Indian, the human remains, funerary objects, or other sacred objects of whom are claimed by the individual.
- **National Forest System:** The term "National Forest System" has the meaning given the term in section 1609(a) of title 16.
- **Reburial site:** The term "reburial site" means a specific physical location at which cultural items or human remains are reburied.
- **Traditional and cultural purpose:** The term "traditional and cultural purpose", with respect to a definable use, area, or practice, means that the use, area, or practice is identified by an Indian tribe as traditional or cultural because of the long-established significance or ceremonial nature of the use, area, or practice to the Indian tribe.

(Pub. L. 110–234, title VIII, 8102, May 22, 2008, 122 Stat. 1287; Pub. L. 110–246, 4(a), title VIII, 8102, June 18, 2008, 122 Stat. 1664, 2048.)

CODIFICATION

Pub. L. 110–234 and Pub. L. 110–246 enacted identical sections. Pub. L. 110–234 was repealed by section 4(a) of Pub. L. 110–246.

3053. Reburial of human remains and cultural items

(a) Reburial sites

In consultation with an affected Indian Tribe or lineal descendant, the Secretary may authorize the use of National Forest System land by the Indian Tribe or lineal descendant for the reburial of human remains or cultural items in the possession of the Indian Tribe or lineal descendant that have been disinterred from National Forest System land or an adjacent site.

(b) Reburial

With the consent of the affected Indian tribe or lineal descendent, the Secretary may recover and rebury, at Federal expense or using other available funds, human remains and cultural items described in subsection (a) at the National Forest System land identified under that subsection.

(c) Authorization of use

(1) In general

Subject to paragraph (2), the Secretary may authorize such uses of reburial sites on National Forest System land, or on the National Forest System land immediately surrounding a reburial site, as the Secretary determines to be necessary for management of the National Forest System.

(2) Avoidance of adverse impacts

In carrying out paragraph (1), the Secretary shall avoid adverse impacts to cultural items and human remains, to the maximum extent practicable.

(Pub. L. 110–234, title VIII, 8103, May 22, 2008, 122 Stat. 1287; Pub. L. 110–246, 4(a), title VIII, 8103, June 18, 2008, 122 Stat. 1664, 2049.)

CODIFICATION

Pub. L. 110–234 and Pub. L. 110–246 enacted identical sections. Pub. L. 110–234 was repealed by section 4(a) of Pub. L. 110–246.

DEFINITION OF "SECRETARY"

"Secretary" as meaning the Secretary of Agriculture, see section 8701 of Title 7, Agriculture.

3054. Temporary closure for traditional and cultural purposes

(a) Recognition of historic use

To the maximum extent practicable, the Secretary shall ensure access to National Forest System land by Indians for traditional and cultural purposes, in accordance with subsection (b), in recognition of the historic use by Indians of National Forest System land.

(b) Closing land from public access

(1) Authority to close

Upon the approval by the Secretary of a request from an Indian tribe, the Secretary may temporarily close from public access specifically identified National Forest System land to protect the privacy of tribal activities for traditional and cultural purposes.

(2) Limitation

A closure of National Forest System land under paragraph (1) shall affect the smallest practicable area for the minimum period necessary for activities of the applicable Indian tribe.

(3) Consistency

Access by Indian tribes to National Forest System land under this subsection shall be consistent with the purposes of Public Law 95–341 (commonly known as the American Indian Religious Freedom Act; 42 USC 1996).

(Pub. L. 110–234, title VIII, 8104, May 22, 2008, 122 Stat. 1288; Pub. L. 110–246, 4(a), title VIII, 8104, June 18, 2008, 122 Stat. 1664, 2049.)

REFERENCES IN TEXT

The American Indian Religious Freedom Act, referred to in subsec. (b)(3), is Pub. L. 95–341, Aug. 11, 1978, 92 Stat. 469, which is classified to sections 1996 and 1996a of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 1996 of Title 42 and Tables.

CODIFICATION

Pub. L. 110–234 and Pub. L. 110–246 enacted identical sections. Pub. L. 110–234 was repealed by section 4(a) of Pub. L. 110–246.

DEFINITION OF "SECRETARY"

"Secretary" as meaning the Secretary of Agriculture, see section 8701 of Title 7, Agriculture.

3055. Forest products for traditional and cultural purposes

(a) In general

Notwithstanding section 472a of Title 16, the Secretary may provide free of charge to Indian tribes any trees, portions of trees, or forest products from National Forest System land for traditional and cultural purposes.

(b) Prohibition

Trees, portions of trees, or forest products provided under subsection (a) may not be used for commercial purposes.

(Pub. L. 110–234, title VIII, 8105, May 22, 2008, 122 Stat. 1288; Pub. L. 110–246, 4(a), title VIII, 8105, June 18, 2008, 122 Stat. 1664, 2050.)

CODIFICATION

Pub. L. 110–234 and Pub. L. 110–246 enacted identical sections. Pub. L. 110–234 was repealed by section 4(a) of Pub. L. 110–246.

DEFINITION OF "SECRETARY"

"Secretary" as meaning the Secretary of Agriculture, see section 8701 of Title 7, Agriculture.

3056. Prohibition on disclosure

(a) Nondisclosure of information

(1) In general

The Secretary shall not disclose under section 552 of title 5 (commonly known as the "Freedom of Information Act"), information relating to—

(A) subject to subsection (b)(l)[1], human remains or cultural items reburied on National Forest System land under section 3053 of this title; or

(B) subject to subsection (b)(2), resources, cultural items, uses, or activities that—

(i) have a traditional and cultural purpose; and

(ii) are provided to the Secretary by an Indian or Indian tribe under an express expectation of confidentiality in the context of forest and rangeland research activities carried out under the authority of the Forest Service.

(2) Limitations on disclosure

Subject to subsection (b)(2), the Secretary shall not be required to disclose information under section 552 of title 5 (commonly known as the "Freedom of Information Act"), concerning the identity, use, or specific location in the National Forest System of—

(A) a site or resource used for traditional and cultural purposes by an Indian tribe; or

(B) any cultural items not covered under section 3053 of this title.

(b) Limited release of information

(1) Reburial

The Secretary may disclose information described in subsection (a)(l)(A)[2] if, before the disclosure, the Secretary—

(A) consults with an affected Indian Tribe or lineal descendent;

(B) determines that disclosure of the information—

[1] So in original. Probably should be "(b)(1),".
[2] So in original. Probably should be "(a)(1)(A)".

(i) would advance the purposes of this chapter; and

(ii) is necessary to protect the human remains or cultural items from harm, theft, or destruction; and

(C) attempts to mitigate any adverse impacts identified by an Indian Tribe or lineal descendant that reasonably could be expected to result from disclosure of the information.

(2) Other information

The Secretary, in consultation with appropriate Indian Tribes, may disclose information described under paragraph (1)(B) or (2) of subsection (a) if the Secretary determines that disclosure of the information to the public—

(A) would advance the purposes of this chapter;

(B) would not create an unreasonable risk of harm, theft, or destruction of the resource, site, or object, including individual organic or inorganic specimens; and

(C) would be consistent with other applicable laws.

(Pub. L. 110–234, title VIII, 8106, May 22, 2008, 122 Stat. 1288; Pub. L. 110–246, 4(a), title VIII, 8106, June 18, 2008, 122 Stat. 1664, 2050.)

CODIFICATION

Pub. L. 110–234 and Pub. L. 110–246 enacted identical sections. Pub. L. 110–234 was repealed by section 4(a) of Pub. L. 110–246.

DEFINITION OF "SECRETARY"

"Secretary" as meaning the Secretary of Agriculture, see section 8701 of Title 7, Agriculture.

3057. Severability and savings provisions

(a) Severability

If any provision of this chapter, or the application of any provision of this chapter to any person or circumstance is held invalid, the application of such provision or circumstance and the remainder of this chapter shall not be affected thereby.

(b) Savings

Nothing in this chapter—

(1) diminishes or expands the trust responsibility of the United States to Indian tribes, or any legal obligation or remedy resulting from that responsibility;

(2) alters, abridges, repeals, or affects any valid agreement between the Forest Service and an Indian tribe;

(3) alters, abridges, diminishes, repeals, or affects any reserved or other right of an Indian tribe; or

(4) alters, abridges, diminishes, repeals, or affects any other valid existing right relating to National Forest System land or other public land.

(Pub. L. 110–234, title VIII, 8107, May 22, 2008, 122 Stat. 1289; Pub. L. 110–246, 4(a), title VIII, 8107, June 18, 2008, 122 Stat. 1664, 2051.)

CODIFICATION

Pub. L. 110–234 and Pub. L. 110–246 enacted identical sections. Pub. L. 110–234 was repealed by section 4(a) of Pub. L. 110-246.

Appendix C—Reburial of Human Remains (Chapter 1)

Sample Policy: Southern Region Policy on Reburial of Native American Remains

Topic: The 2008 Farm Bill; Regional Process for Considering the Reburial of Native American Remains on National Forest System (NFS) Lands

Issue: The Southern Region's units are receiving reburial requests at an increasing rate and this policy provides a consistent process for considering and approving the reburial of Native American remains on NFS lands, while accounting for the uniqueness of each request. Currently, some reburial requests are active or pending in the Southern Region. This is the Southern Region's Process for Considering the Reburial of Native American Remains under the 2008 Farm Bill Authority as expressed in the Forest Service Manual (FSM) 1560 section for Tribal Relations (and as codified in 25 USC, chapter 32A, section 3053). It focuses on four key considerations when considering reburial requests from federally recognized Tribes: (1) delegation of authority, (2) regional coordination, (3) adjacency considerations, and (4) land management considerations. It will also inform Tribes of Forest Service information needs and process when they make a request.

Southern Region Process:

Delegation of Authority:

The regional forester (RF) may delegate, in writing, authority to a forest supervisor, area supervisor, or forest manager to accept or reject reburial requests. In such cases, all regional office coordination requirements remain in place.

Regional Coordination:

Coordination between the region, forest, and Tribes is vital to provide a timely response to requesting Tribe(s), account for potential overlapping requests to multiple units, and ensure consistency in application of requirements.

1. When reburial requests are received on units, early notification, and coordination with the regional planning director through the regional Tribal Relations staff is required. The Tribal Relations Staff will coordinate with the Heritage Program Manager.
2. Following receipt of a request and early notification to the regional office, the unit's fully developed recommendation should be submitted through formal correspondence to the RF through the Regional Planning Director. This recommendation should include—
   a. The original reburial request.
   b. The original location.
   c. How the Tribe is in legal possession of the remains (e.g., Native American Graves Protection and Repatriation Act (NAGPRA).
   d. How adjacency is determined.
   e. The unit's recommendation.
3. Upon RF acceptance of a reburial request, the forest will develop a reburial Memorandum of Understanding (MOU) with the requesting Tribe or Tribes that delineates the reburial process. As the authorizing official, the RF or the RF's delegate will be a signatory to the MOU. The unit should circulate the MOU with the Regional Planning Director and Tribal Relations Program Manager concurrently with the requesting Tribe(s).
4. When the RF has declined a reburial request, the RF will inform the Tribe of the denial and the decision-making rationale in writing in a timely manner.

Adjacency Considerations:

The regional Heritage and Tribal Relations staff will help units build an understanding of adjacency for each request to assist in developing the forest supervisor's recommendation to the regional forester. Regional office coordination will provide consistency, particularly in cases when the same request is made to more than one unit.

As a result, the forest supervisor, as the recommending official, together with the RF, as the deciding official, can act with consistent and legal discretion in reviewing adjacency and making determinations regarding reburial requests.

Key management considerations when making determinations regarding the adjacency of a reburial request include—

1. Where was the original burial location? Exact locations are not always known by museums. If the exact location is not known, can the county of origin be determined?

2. What is the linear distance from the original burial location to the NFS lands boundary?
3. What is the Tribal, cultural, and historical relationship between their prior occupancy and use of the original burial location and the NFS lands? In other words, how are the original burial location and the NFS lands related in Tribal geography, history, and land use?
4. Are other Federal or Tribal lands closer to the original burial location than the NFS lands? How are Federal lands arrayed in the area of the original burial location? Is the NFS unit the closest in proximity? What would the requesting Tribe(s) view as the most appropriate location for reburial if the Agency was not constrained by current land ownership patterns?
5. Has the reburial request been made to other Southern Region units (or units in other regions) now or in the past? With a duplicate request, are other NFS or Federal lands in closer proximity?

Land Management Considerations:

The Forest Service retains the discretion to decide whether to authorize reburial of American Indian and Alaska Native human remains and cultural items on NFS lands, and under what conditions reburials will occur.

Key Forest Service Manual (FSM 1563) Considerations for land management regarding reburial include—

- Avoid adverse impacts to human remains and cultural items to the maximum extent possible.
- National Environmental Policy Act (NEPA), National Historic Preservation Act (NHPA), and other legal processes are required for reburials.
- Many Tribes consider reburial sites to be sacred sites.
- Tribes will desire continued access to these sites and may want to visit for ceremonial purposes.
- Develop and implement mitigation measures in consultation with Tribal governments to minimize or avoid adverse impacts to reburial sites that may be caused by land uses.
- Information on the reburials and reburial locations is exempt under Freedom of Information Act (FOIA) under specific legal authority.
- Information about the location, character, or ownership of a sacred site is kept confidential if such disclosure will risk or harm the site, impede the use of the sacred site, or cause a significant invasion of privacy.

Key Southern Region Considerations

Key regional considerations regarding land management and reburial include—

1. Tribes are reburying the remains of their ancestors and cultural items they never expected to be disturbed in the first place. Tribes desire their ancestors to have an undisturbed resting place.
2. Accepting a reburial is a long-term commitment and has implications for land management at least in the immediate vicinity of the reburial.
3. Consider locations that are likely to remain undisturbed, such as areas with restricted land management options and areas that may be withdrawn from mineral entry. These may include—
   - Wilderness where management activities and development are restricted.
   - Research Natural Areas where activities may be highly constrained.
   - Other areas with restricted administration under the Land Management Plan.
   - Administrative sites with broad discretion. Sites selected for reburials, however, should not be locations under consideration for transfer or sale.
   - Areas geographically unlikely for intensive resource management activities.
   - Areas unlikely to be leased or explored for mineral production (locatable and leasable).
4. Coordinate with Tribes to find reburial location(s) suitable to them.
   - Match desired locations against locations with the best protection in the long term.
   - Security and protection of reburial sites cannot be guaranteed. Seek ways to mutually monitor locations against damage and looting.
   - Work to balance access for Tribes and Tribal elders with the protection provided by remoteness.
5. Track reburial locations to provide oversight and continued protection from management activities that would be destructive, including emergency activities. Reburial locations should be recorded in a secure corporate database to enable review of reburial locations when projects are planned and emergency undertakings occur to protect reburials in the long term. Reburial locations can be shared with Tribes who requested or were a part of the reburial.
6. Maintain confidentiality using the 2008 Farm Bill FOIA exemption and any other applicable legal authorities to keep information about the location and reburial details confidential.
7. Tribes may consider reburial locations as sacred sites. If so, site setting may play a role and continued

access may be necessary, either of which may affect management options.

8. Include objectives for the proper management of known sacred sites during Forest Plan revision, as outlined in FSH 1909.12, 23.23g (2)(c). These objectives are to be developed in consultation with the appropriate Tribe(s). This may include identifying appropriate management areas and desired future conditions that are aligned with avoiding ground disturbance at reburials.

When Tribes are making reburial requests to Forest Service forests, the following information, provided in writing, would facilitate the Forest Service's consideration of the request—

1. A request to the Forest Service can be made by the Tribal Historic Preservation officer, NAGPRA officer, or elected head of a federally recognized Tribe. The request should be written and can be submitted either by physical letter or by email from an official Tribal government email account. The request can be made to the forest supervisor or area manager or the Tribal Relations staff on the unit. If the request is made of unit staff, they should immediately share the request with the forest supervisor.
2. In the written request, the Tribe (or Lead Tribe if several Tribes are involved) should provide key information requested by the Agency, including the Tribe(s) making the request, the number and original location of the burials, how they were returned to the Tribe, and any other relevant information.
3. Upon approval of the reburial request by the Forest Service, the Forest Service and the requesting Tribe will work together to develop an MOU.

Case Studies

The following scenarios are actual cases. The identities of the parties, both Tribal and agency, have been removed from these descriptions of events in order to maintain confidentiality. Additional information regarding specific cases is available through the Office of Tribal Relations.

Common authorities applied in each case are as follows, with additional authorities or explanatory notes found under individual cases—

- Archaeological Resources Protection Act, (section 9) along with NAGPAP, NHPA, Cultural and Heritage Cooperation Authority, (CHCA) include provisions that allow sensitive cultural information to be withheld from the public. Information about the location, character, or ownership of a site can be kept in confidence if such disclosure will risk or harm the site, impede the use of the site, or cause a significant invasion of privacy.
- CHCA authorizes reburial on NFS lands.
- NAGPRA, which provides a process for Federal agencies to return certain Native American cultural items—human remains, funerary objects, sacred objects, or objects of cultural patrimony—to lineal descendants, and culturally affiliated Indian Tribes and Native Hawaiian organizations.
- NHPA, which requires agency officials to consult with Indian Tribes concerning the effects of undertakings on historic properties of traditional and cultural importance to Indian Tribes.

Scenario 1: Reburial of Multiple Sets of Native American Remains and Associated Funerary Objects

A formal request by Indian Tribes for compliance with NAGPRA initiated a multiyear program of work. The human remains, associated funerary, and unassociated funerary objects had been removed from lands currently managed by the forest. They were removed during 19th and 20th century archaeological investigations conducted to aid in project implementation. After repatriation and in consultation with the Indian Tribes, it was mutually agreed that the reburials would occur in three individual locations across the forest. The locations of the reburials were determined based on areas from which the remains were originally removed. This scenario is exceptional for the large number of remains and associated funerary materials, and the duration of associated events.

Issues Under Consideration

The forest made a commitment to two Indian Tribes to rebury the remains of their ancestors exhumed from forest managed lands over the past century. The forest and regional office agreed that it is appropriate to pay Tribal cultural advisors who perform the ceremonies necessary to rebury the remains. To assist in maintaining confidentiality and to increase the Indian Tribe's confidence level regarding sensitivity and protection, a Tribal backhoe operator was employed.

The complex system of payment through the agency's acquisition process created roadblocks. Following the completion of a year's work on reburial, both the Tribal cultural advisor and backhoe operator expected immediate payment. The cultural advisor is well into his 80s and had never held a bank account. The backhoe operator is retired. These individuals had neither a Dun & Bradstreet

Number (DUNS),[1] which is typically used for government contracting, nor even basic access to internet services. The reservation is extremely remote; many homes lack utilities, which are common in greater society. The cultural advisor was eventually paid by check 9 months after he had performed the 2010 ceremony. The backhoe operator was not paid for either year's work until 30 days after the 2011 reburial was completed for both years.

To prevent another delay of payment, the Forest Tribal Relations Program Manager went to the Cultural Preservation Office to work one-on-one with the individuals to set them up as contractors. It was later realized, however, that the contracting process would create a further delay in payment because the required bank account and routing number to release the funds did not exist. Payment to both individuals was under $2,500, which is the authority threshold of the purchasing agent, so in this case, the regional office and forest agreed to allow the purchasing agent to pay the funds directly by check following receipt of an invoice. Please note that Washington Office authorization is required for any payment amount by check greater than $2,500 in order to prevent similar situations faced by the forest purchasing agent.

The Indian Tribe wants protection of the reburial location in perpetuity. It has proposed the Forest Service provide an easement to the Indian Tribe to ensure any future Forest Service action at this location would require advanced Tribal approval. The forest will investigate the feasibility of this proposal and continue to consult with the Indian Tribe on this concept. The forest archaeologist updated the site record and map to include the reburial location within the existing archaeological site boundary. Other options for protection could be a determination of eligibility to the National Register and to formally nominate the site. A National Register listing, or even an Agency determination of eligibility for listing, for this site would provide additional consultation and analysis, if any future proposed action is considered for this area.

Actions

The reburial included three basic areas of work—

Consultation

Seven meetings and field trips in 2010 and six meetings and field trips in 2011 were held to determine locations, schedules, cultural protocols, and processes. Program managers also participated in teleconferences with regional staff to facilitate research of where remains were originally located and to document previous consultations and internal decision making. A ground-penetrating radar specialist and technology were needed to determine adequate depth and potential to disturb other resources and to aid in consultation.

NEPA Compliance

The process includes but is not limited to: (1) developing the proposed action; (2) analyzing Geographic Information System (GIS) data and associated maps; (3) drafting the project summary sheet; (4) conducting effects analysis for wildlife, water and soil, and cultural resources; (5) drafting the decision memorandum; and (6) filing logistical requirements for maintaining and archiving project documentation. Six individuals were needed for the analysis for this reburial.

Reburial

A Tribal consultant was needed to ensure appropriate cultural protocols were followed, to prepare ceremonial items for the dead, and to help spiritual transition after the reburial. At the reburial site, heavy equipment was used to dig the trench for the reburial. Bedding material and a dump truck that hauled in rock for added security of the reburied remains were used. A contract was developed for the reburial in consultation with the Indian Tribes. Program managers or specialists and other employees helped to unpack, unload, place in the burial pit, and lay bedding material over human remains and items. To prepare for the fiscal year (FY) 2012 reburial, the forest dug two test trenches adjacent the FY 2011 reburial area to ensure additional subsurface remains would not be disturbed.

Statutory and Other Authorities and Policies Applied

Archaelogical Resources Portection Act (ARPA), (section 9), NAGPRA, NHPA, and CHCA.

Outcomes

The Indian Tribe requested to rebury the remains adjacent to an existing prehistoric archaeological site. The Forest Service had permitted the human remains and artifacts to be removed from this site in the late 1920s, and a portion of the remains reburied are from that activity.

The Indian Tribe requested no additional sub-surface protection for the reburied remains (such as boulders or rebar to prevent any future attempt to dig in this area) to ensure that the remains "naturally deteriorate and return to the earth." This was a departure from the reburial during FY 2010. This reburial location is adjacent to a road with daily traffic, which affords a level of additional surveillance and protection. The Indian Tribe made a request to conduct a ceremony at the forest with Forest Service assistance.

The reburial is legally protected under the provisions of the ARPA. Additional protection will include an updated

[1] A DUNS is a nine-digit number that is unique to a company and used to create a business credit file, similar to how a Social Security number is used to identify personal credit reports. The Federal Government uses the DUNS to track how Federal money is allocated.

archaeological site record expanding the site boundary to include the reburial locations for FY 2011, FY 2012, and FY 2013. The site is on the forest's archaeological site-monitoring program and is monitored throughout the year. In the first month following the reburial, the frequency of site monitoring was increased to daily observations. The frequency of monitoring was subsequently decreased to weekly, which will continue year-round.

Lessons Learned

During 2010 and prior to this reburial, small numbers (one to two sets) of human remains had been sent to and stored in forest offices for reburial. For this reburial, several institutions sent human remains and objects to the forest supervisor's office. As the forest began receiving shipments from the various repositories, Tribal members employed as mail clerks came in contact with the reburial items. Contact with human remains is culturally forbidden for these Tribal peoples. Arrangements were made for temporary storage at additional cost to securely house the incoming shipments. As a result of the building being "contaminated by the dead" a cleansing ceremony was conducted by a medicine man who was paid for his services. The forest also authorized affected employees administrative leave for separate cleansing ceremonies. Reburial items are now sent to an alternative location at a museum to prevent this from happening again in the future.

During 2011, due to the magnitude of the collection, the reburial unexpectedly took 2 full days to complete. Reburial began in the morning of the first day and, by sunset, it was apparent that still many more hours of work were necessary.

During the backhoe operations to cover the exposed remains in the burial pit, the backhoe suffered a mechanical failure resulting in total breakdown. A second loader was needed to finish covering the exposed remains. Just before nightfall, the original backhoe was repaired and ready for use the next morning. Since the burial pit was partially exposed to accommodate additional artifacts and remains overnight, law enforcement officers kept the area secure.

Problems in issuing timely payments made to Tribal helpers were eventually alleviated through getting checks, rather than requiring DUNS and direct deposit bank accounts. The delays could have been reduced or eliminated if Forest Service procurement and other personnel had been knowledgeable and if procurement personnel had been involved from the beginning of the process.

Scenario 2: Reburial by Tribal Entities on Tribal Lands

Contractors discovered a site in 1994. During additional work at the site, a spear point and the discovery of a human jaw, pelvis, and vertebra were discovered. Upon discovery of the human remains, work ceased, and the District Archaeologist took possession of all the human remains and cultural materials and notified four Tribal presidents.

Issues Under Consideration

The discovery triggered immediate government-to-government consultation. Out of this initial discovery grew a meaningful relationship between the Forest Service and the affected Tribal governments that continues to strengthen over time. In the week after the discovery, the four Tribal councils held a meeting and passed resolutions supporting research and further excavations. Researchers immediately expressed interest in this opportunity to conduct forensic and DNA studies. Throughout the research process, consultation remained ongoing and focused primarily on the return and reburial of the remains and cultural items.

Actions

The reburial included three basic areas of work—

Consultation

Consultation with Indian Tribes began the same day the human remains were discovered. Through each step of the process leading up to reburial, the forest consulted with the Tribes on research proposals, subsequent research activities, and partnerships with other Native entities for video documentation, media coverage, and professional paper presentations. Researchers secured Tribal approval and research funding to initiate immediate excavation and provided for American Indian student internships. Throughout the project, the scientists made annual presentations to share information with the local Tribal communities. The District Archaeologist attended Tribal council meetings on a regular basis and provided updates on the status of the work. Tribal council members identified the project as a Tribal priority, so the forest worked to ensure all progress reports and research information was shared with the Tribes. This ongoing consultation process spanned 11.5 years. This relationship is a model for how scientists, Indian Tribes, and Federal agencies can work together.

ARPA Compliance

Compliance with ARPA included a permit and inspection process.

Reburial

The forest transferred custody of the human remains to the Tribal governments. A reburial committee led by Tribal governments (with participation of the forest and other Indian entities) planned a 2-day event to honor the ancient ancestor and celebrate the knowledge he had passed on. The remains were reburied on Tribal lands. Approximately 500 guests attended the celebration.

Statutory and Other Authorities and Policies Applied

NAGPRA, NHPA, and CHCA. ARPA establishes a permit process for the excavation or removal of any archaeological resources from Federal and Indian lands.

Outcomes

Once the research was completed, the forest, having received a request from the Indian Tribes and after public notice in compliance with NAGPRA, transferred custody of the human remains to the Tribal governments. This marked the first time since passage of NAGPRA that remains of this antiquity have been transferred to Native American claimants.

A reburial committee led by the Tribal governments (with participation by the forest) considered a variety of reburial locations that included: onsite, in an established community cemetery, and other Forest Service locations. The committee finally determined that the burial would occur on Tribal land. Tribal members performed a formal ceremony, followed with a 2-day celebration.

Lessons Learned

Design solutions to address the specific or unique needs of an Indian Tribe and Tribal communities. The reburial of ancestral remains is an emotional ceremony, often requiring considerable discussion about specific protocols between family, clan, spiritual leaders, and Tribal members.

The ongoing government-to-government consultation and information sharing initiated a special relationship with the four Tribal councils and communities. This relationship continues to grow stronger. The reburial event honored the endurance and resilience of modern Tribal communities, celebrated the knowledge of their ancient ancestor's legacy, and underscored what can be achieved through successful Federal-Tribal partnerships.

Scenario 3: Reburial of Remains Absent NAGPRA

During the late 1990s, a search for a person lost in a boating accident led to discovery in a rock shelter of human skeletal remains.

Issues Under Consideration

The rock shelter is on Forest Service lands but on an island whose ownership was split between the Forest Service and a village corporation. Oral traditions confirm that smallpox victims were buried at the site. State law enforcement officials and Forest Service personnel differed in their viewpoints regarding the disposition of the human remains.

Actions

The discovery was reported to the State Troopers, who in turn contacted the District Archaeologist. The District Archaeologist assisted with exhumation of the skeleton as potential evidence and determined that the skeleton was older than the boating accident, which had occurred 5 years earlier. The archaeologist encouraged the troopers to see it as an archaeological site and leave it in situ. The remains, however, were ultimately removed to an evidence locker within the community.

The remains were eventually repatriated to the local Indian Tribe and, after Tribal consultation with the Forest Service, were reburied in the rock shelter from which they were removed.

Statutory and Other Authorities and Policies Applied

The CHCA was not in force at the time of this action. This case, however, does serve as an example of the Forest Service following what is now the spirit and intent of that Authority CHCA.

Outcomes

The reburial included three basic areas of work—

Consultation

Tribal consultation was accomplished to determine the desired disposition of the remains. The Indian Tribe requested that the Forest Service would reinter the human remains.

NAGPRA Compliance

No formal NAGPRA notifications or process were conducted in this case.

Reburial

With assistance from a forensic specialist, measurements and observations eventually demonstrated to the troopers that the remains were old and were within an archaeological site. At that point, the troopers returned the remains to the Indian Tribe. Following Tribal consultations, the remains were placed in a locally constructed cedar box and reburied in the rock shelter from which they were removed. Large rocks were placed over the box, and Forest Service employees monitored the site twice a year after reburial. The lack of additional ground disturbance resulted in a NHPA determination of "No Effect."

Lessons Learned

Tribal consultation can often expedite the reburial process. Special forensic expertise may be essential to the process. Consultation and coordination with Indian Tribes and other cooperators regarding the reburial is mutually beneficial to all partners and creates opportunities for productive government-to-government relations. Reburial of human remains outside of NAGPRA authority is possible under the CHCA if the basic requirements of the CHCA are met.

Scenario 4: Unresolved Case

In 1997, a human cranium was illegally excavated on an island located within a ranger district, resulting in a felony ARPA conviction.

Issue Under Consideration

The cranium has been in a law enforcement evidence locker since the beginning of the case. A Tribe requested that the cranium be reburied.

Action

Planning for the reburial included three basic areas of work—

Consultation

Tribal consultation has been ongoing, and it was determined that the Forest Service would continue to safeguard the human remains until the human remains are returned to their place of origin.

ARPA Compliance:

An individual removed the human remains, and subsequently an ARPA, case developed and the individual was convicted.

Reburial

The human remains will be reburied at the location of origin.

Statutory and Other Authorities and Policies Applied

NAGPRA, NHPA, and CHCA.

Outcomes

Ongoing Tribal Consultation has occurred, and the reburial details have been determined.

Lessons Learned

Patience is key to work through these processes, as Tribal consultation can often be lengthy. Consultation and coordination with Indian Tribes and other cooperators for reburial benefits all partners and creates opportunities for productive government-to-government relations on many fronts. Tribes or lineal descendants may not have to have physical possession of human remains for those remains to be considered repatriated. Disposition can be determined in consultation.

Scenario 5: Reburial in Original Location

Human remains and funerary objects were removed from a rock shelter located on a national forest and determined to be within the territory of an Indian Tribe.

Issues Under Consideration

Consultation occurred with seven Indian Tribes and Tribal entities that determined that repatriation of the human remains and funerary object would be the responsibility of a designated entity, provided that no additional claimants came forward. No additional claimants were identified, and the remains were repatriated and transferred to the entity under the terms of NAGPRA. The Forest Service unit continued to curate the remains in response to the Tribal request.

Actions

The district ranger consulted with the State Historic Preservation Officer (SHPO) regarding Forest Service intent to reinter the remains and funerary objects at the site of origin within a previously excavated unit. The Forest Service determined the proposed action would result in "no adverse effect" to the archaeological site. The SHPO concurred with that determination.

The reburial included three basic areas of work—

Consultation

A federally recognized Indian Tribe requested that the remains be taken back to the site and further stated that the work was "to be completed by the FS archaeologists with care and decency in cooperation with a representative of the tribe to witness the final reburial."

NAGPRA Compliance

A Notice of Inventory Completion published in the Federal Register provided notice that the forest had completed an inventory of human remains and associated funerary objects. This notice included an assessment of the human remains, representing a minimum of 18 individuals, and associated funerary items. Repatriation of the human remains and cultural objects followed.

Reburial

A Tribal representative joined the district ranger, district archaeologists, and a native liaison to rebury the human remains and funerary objects at the location from which they were excavated.

Statutory and Other Authorities and Policies Applied

NAGPRA, NHPA, and CHCA.

Outcomes

Forest Service archaeologists and the Tribal representative returned to the site, where the human remains and cultural items were placed within an excavated hollow in the ground, which was backfilled and returned to a natural appearance.

Lessons Learned

Consultation and coordination with Indian Tribes and other cooperators for reburial benefits all partners and creates opportunities for productive government-to-government relations on many fronts.

Scenario 6: Honored Requests for Reburial of Remains From Off-Forest Locations

A federally recognized Indian Tribe made multiple requests to a national forest to rebury remains that come from off-forest locations.

Issues Under Consideration

Multiple remains originating from two different locations off of NFS lands were associated with traditional historic or precontact towns of the Indian Tribe. Federal funding was involved with the original excavation of these remains. The sites from which the remains had been removed were adjacent to NFS lands.

Actions

The regional forester honored the request for reburial of the remains that had originated very close to the forest, and protocols for the reburial were established in an MOU.

Statutory and Other Authorities and Policies Applied

NAGPRA, NHPA, and CHCA.

Outcomes

Consultation and coordination with Indian Tribes and other cooperators for reburial benefits all partners and creates opportunities for productive government-to-government relations on many fronts. Finding a permanent resting place for Tribal ancestors, in accordance with law and policy.

Lessons Learned

Forest Service line officers should use their discretion when considering requests for reburial of human remains and cultural items. Their discretion includes the ability to rebury human remains and cultural items as requested by an Indian Tribe when their decision upholds the letter and the spirit of section 3053 of the CHCA. In this case, the questions surrounding adjacency were resolved by recognizing that the site that encompassed the location of the original interment is adjacent to forest lands in the sense of being reasonably close. This resolution stands in contrast to the following scenario.

Scenario 7: Denial of Reburial Request

An Indian Tribe requested reburial of human remains that originated from a site located more than 30 miles distant from the national forest. A National Historic Landmark is within sight of the original burial location. The Indian Tribe initially approached both the USDI National Park Service (NPS) and another Federal agency for assistance because the burial locations were on or near those Federal lands. Although local managers were supportive of hosting the remains, the request was rejected at higher levels in both agencies. The national forest was their third choice.

Issues Under Consideration

Issues included consideration of the original location of the burials and any other connection the burials may have to NFS lands. The Agency determined that the remains originating from more than 30 miles from the NFS lands and having no connection to those lands would more appropriately be reburied in a location more proximate to the original burials than the NFS lands.

Actions

Additional collaboration with the NPS, which administers NAGPRA program for all Federal agencies, may develop new NPS policy or legislation on the issue and consider reburial of these remains on NPS land.

Statutory and Other Authorities and Policies Applied

NAGPRA, NHPA, and CHCA.

Outcomes

The Indian Tribe's request for reburial on NFS lands was denied based upon the interpretation that the human remains and cultural items were from a location that was not reasonably close to the forest. Related communication with the NPS may lead to broader authorities for reburial.

Lessons Learned

Forest Service line officers should use their discretion when making recommendations regarding requests for reburial of human remains and cultural items. Regional foresters' discretion includes the ability to turn down requests for reburial of human remains and cultural items when their decision upholds the letter and the spirit of section 3053 of the CHCA.

Having a governmentwide reburial authority would enable better accommodation of Tribal requests for reburials.

Scenario 8: Unanticipated Discovery and Subsequent Reporting of Native American Human Remains by Non-Agency Personnel

Cavers reported human remains in a cave on Forest Service lands, in about 1988, before NAGPRA was passed and before the CHCA.

Issues Under Consideration

The forest archaeologist compiled a team of cavers, scientists, and members of the Indian Tribe to discuss how

to proceed with investigations and reburial. Issues included recreational and public access, human remains, and cultural resources, as well as relationships between the Forest Service and Tribes, and between the Forest Service and other organizations.

Actions

After consultation and all partners came to agreement, site studies were accomplished and journalists published the narrative. The remains were respectfully reburied in the cave system, and a Tribal spiritual leader conducted a ceremony. A cave gate was constructed to secure the site from disturbance.

Statutory and Other Authorities and Policies Applied

NHPA.

Outcomes

This discovery, the reburial event, and the considerate manner in which it was accomplished prior to NAGPRA, served to enhance Tribal relations with the forest.

Lessons Learned

In this case, the outstanding lesson was that the unanticipated discovery and subsequent reporting of Native American human remains by nonagency personnel can be the impetus for a consultation process and resolution that is beneficial to all involved.

Scenario 9: Reburial of Remains From Lands Now in Other Ownership

An archaeological site, known to contain human remains since the 1970s, is located within a modern community. The community began under Forest Service permit as a logging camp and eventually became an incorporated community.

Issues Under Consideration

Although the site was in Forest Service ownership (discovery to about 1985), several partial human skeletons were collected. In 1985, the State took over ownership and the State Office of Archaeology conducted extensive test excavations and recovered additional partial skeletons. In 1997, a sewer and waterline project disturbed an additional three burials that were previously undisturbed by adjacent backhoe work. The State then divided the 11-acre site into three parcels. It designated about one-third of the site as totally disturbed and conveyed that parcel to the city. It has since been developed for housing and business purposes. The three burials discovered in the 1997 sewer and waterline project were in this parcel designated (A). The middle parcel (B) was deemed eligible for conveyance to the city if a significant data-recovery project (archaeological excavation) was conducted. Parcel (C) was determined to be relatively undisturbed and was held in State ownership in perpetuity.

Actions

These excavations resulted in recovery of additional Native American human remains. Several episodes of reburial have occurred in the community. NAGPRA consultation occurred for repatriation of the remains in 2000. In 2000, the Forest Service spearheaded an effort to collect all remains recovered up until that point. In consultation with the affected Indian Tribe in 2007, the District reburied those remains in one of the State's decommissioned test pits. (A test pit is typically used at construction sites during the initial excavation process to examine subsurface conditions and soil content.) In 2007, the remains collected in 2006 were reburied in the same location. The later reburials were not connected with any formal NAGPRA actions.

Statutory and Other Authorities and Policies Applied

NAGPRA, NHPA, and CHCA.

Outcomes

That reburial site now has a white picket fence and a commemorative plaque and is maintained by the city on State land.

Lessons Learned

Patience is key to working through the process, and Tribal consultation can often be lengthy. Consultation and coordination with Indian Tribes and other cooperators for reburial benefits all partners and creates opportunities for productive government-to-government relations on many fronts. In this case, the Forest Service facilitated the reburial effort when no NFS lands were involved, and thereby enhanced Tribal relations.

Appendix D—Templates for Temporary Closures

Example of a Properly Formatted Order

SMOKEY BEAR NATIONAL FOREST

Pine Tree Ranger District

Anytown, USA

Order No. RR-YY-XX-XX

FOREST ORDER

Temporary Closure for Traditional and Cultural Purposes

Pursuant to 16 USC 551, 25 USC 3054, and https://www.gpo.gov/fdsys/granule/CFR-1999-title36-vol2/CFR-1999-title36-vol2-part261/content-detail.html.50(a) and 261.50(b), the following acts are prohibited on the Pine Tree Ranger District, Smokey Bear National Forest:

Going into or being in the Old Baldy and Sacred Falls area, as shown on the attached map [36 CFR 261.53(g)].

This area will be closed to the general public from 6:00 a.m., Friday, April 20, through 6:00 p.m., Thursday, April 26, 2012, for the privacy of Tribal activities for traditional and cultural purposes.

The following persons are exempt from this Order—

1. Any enrolled member of a federally recognized Indian Tribe, as authorized by the [insert name of federally recognized Indian Tribe or Tribal Commission or Intertribal Council].
2. Any Federal, State, Tribal or Local Law Enforcement Officer or member of an organized rescue or fire fighting force in the performance of an official duty.

Executed in Anytown, USA this **XX** day of April 2012.

_____

JANE SMITH

Forest Supervisor

Smokey Bear National Forest

Violation of these prohibitions is punishable by a fine of not more than $5,000 for an individual or $10,000 for an organization, imprisonment for not more than 6 months, or both [16 USC 551, 18 USC 3559 and 3571].

Exhibit D.1—Example of Appropriate Onsite Posting

THIS AREA IS TEMPORARILY CLOSED BY ORDER OF THE FOREST SUPERVISOR

Please respect the privacy of American Indian ceremonial activities occurring at this site from April 20 through April 26, 2012.

Jane Smith, Forest Supervisor

Appendix E—Templates for the Provision of Forest Products

Exhibit E.1—

Tribal Self-Regulation Agreement

(Excerpted from the Memorandum of Understanding Regarding the Recognition and Implementation of Tribal Ceded Territory Rights Guaranteed by the Treaties of 1836, 1837, and 1842 or "GLIFWC MOU.")

This Tribal Self-Regulation Agreement [hereafter Self-Regulation Agreement] is entered into as part of the parties' ratification of the [Title or Name of MOU] [hereafter MOU]. Specifically, the Self-Regulation Agreement implements the MOU's provisions regarding the Administration of Justice outlined in MOU section VI.E.

1. **Parties.** The entities that may be parties to the Self-Regulation Agreement are the same as those that may be parties to the MOU, as set forth in MOU section II.
2. **Incorporation of MOU's Provisions.** The MOU, as may be amended from time to time, is specifically incorporated by reference into the Self-Regulation agreement as if set forth in its entirety. The Self-Regulation Agreement shall be construed consistent with the purposes and provisions of the MOU and, except as otherwise specifically provided herein, terms in the Self-Regulation Agreement shall have the same definition as provided in the MOU.
3. **Scope and Purposes of the Self-Regulation Agreement.** The Self-Regulation Agreement pertains to the administration of justice regarding the Indian Tribes' exercise of their treaty-reserved ceded territory rights. Its primary purposes are to:
   a. Facilitate the exercise of the Indian Tribes' self-regulatory authority over the exercise of those rights; and
   b. Prevent dual prosecution in tribal and federal forums stemming from conduct regulated by an Indian Tribe's Off-Reservation National Forest Gathering Code that complies with the MOU's provisions [hereafter Complying Tribal Code].
4. **Enforcement and Prosecution of Alleged Violations of Tribal Law.** The parties acknowledge that conduct governed by a Complying Tribal Code also might be governed by Federal statutes or regulations which the FS is authorized to enforce in Federal forums. Where the underlying conduct or act would be a violation of a Complying Tribal Code and of a federal statute or regulation, the parties agree that the Indian Tribe's court is the preferred forum for dealing with the alleged violation. Specifically, the parties agree:
   a. Except as provide in subs. b, any conduct or act which is an alleged violation of a Complying Tribal Code shall be administered and prosecuted in accordance with the provisions of the Complying Tribal Code, provided:
      i. The Complying Tribal Code is in force at the time of the alleged violation; and
      ii. The Indian Tribe maintains a Tribal court with jurisdiction to enforce the Complying Tribal Code.
   b. After consultation with the affected Indian Tribe, the FS may initiate a Federal enforcement action where the underlying conduct is egregious in nature. Factors to determine egregiousness shall include: the type of conduct involved; the amount of natural resources illegally taken; the nature and extent of the natural resource damages caused by the illegal act; considerations for specific and general deterrence; and considerations for compensating those persons or entities harmed or damaged by the conduct or act.
5. **Agreement Effective Date/Termination**. The Self-Regulation Agreement shall take effect when at least one Indian Tribe, the FS's Eastern Region and the Region's Law Enforcement and Investigations have properly ratified it in accordance with their respective governmental procedures. The Self-Regulation Agreement shall be binding as to and between those entities that ratify it upon notice to the other parties of their ratification as provided in MOU section IX.

   The Self-Regulation Agreement shall automatically terminate at such time when the requisite combination of parties to make it effective no longer exists, or when the MOU terminates.
6. **Dispute Resolution**. The parties agree that any controversies, disputes, differences, or misunderstandings arising out of the Self-Regulation Agreement shall be addressed as disputes under the MOU and handled in accordance with the MOU's

provisions. The agreement should not be interpreted as a waiver of sovereign rights or immunities of the respective Indian Tribe(s).

7. **Amendment of Agreement**. The parties agree that amendments to the Self-Regulation Agreement shall be addressed in accordance with the provisions of MOU section VI.F.
8. **Required Notices/Parties' Designated Representatives.** The parties agree that the provisions of MOU section IX shall apply to Notices of Ratification of and Withdrawal from the Self-Regulation Agreement and to the parties' designation of representatives regarding the Self-Regulation Agreement.

Exhibit E.2—

Tribal Timber Harvest Framework Agreement

(Excerpted from the Memorandum of Understanding Regarding the Recognition and Implementation of Tribal Ceded Territory Rights Guaranteed by the Treaties of 1836, 1837, and 1842 or "GLIFWC MOU.")

This Tribal Timber Harvest Framework Agreement [hereafter Timber Harvest Framework] is entered into as part of the parties' ratification of the [Title or Name of MOU] [hereafter MOU]. Specifically, the Timber Harvest Framework implements the MOU's provisions regarding Natural Resource Harvest Management outlined in MOU section VI.C. It is through the implementation of the Timber Harvest Framework that the Forest Service exercises its authority pursuant to 16 USC 477; 25 USC 3055; and the treaties between the Unites States and [Tribe(s)], specifically the Treaty of XX, 7 Stat 491, the Treaty of 1837, 7 Stat. 536, and the Treaty of 1842, 7 Stat. 591.

1. **Parties.** The entities that may be parties to the Timber Harvest Framework are the same as those that may be parties to the MOU, as set forth in MOU section II.
2. **Incorporation of MOU's Provisions.** The MOU, as may be amended from time to time, is specifically incorporated by reference into the Timber Harvest Framework as if set forth in its entirety. The Timber Harvest Framework shall be construed consistent with the purposes and provisions of the MOU, and, except as otherwise specifically provided herein, terms in the Timber Harvest Framework shall have the same definition as provided in the MOU:
   a. For the purpose of this Timber Harvest Framework, timber shall be defined as any "tree" as defined in the attached Model Code that is not a "lodgepole" or "firewood" as defined in the attached Model Code.
3. **Scope and Purposes of the Timber Harvest Framework.** The Timber Harvest Framework pertains to the Natural Resource Harvest Management principles regarding the Tribes' exercise of their treaty-reserved ceded territory rights. Its primary purposes are to:
   a. Facilitate the exercise of the Tribes' self-regulatory authority over the exercise of those rights through the implementation of a timber harvest management system; and
   b. To detail the process pertaining to the Tribes' implementation of the harvest of timber and salvage timber for domestic and non-commercial traditional and cultural purposes.
4. **Timber Harvest Conditions.** The Parties acknowledge the following conditions to the Timber Harvest Framework:
   a. Timber and salvage timber harvested pursuant to the Timber Harvest Framework may not be used for commercial purposes.
   b. The harvesting of timber and salvage timber pursuant to the Timber Harvest Framework must comply with relevant land management plans, the NEPA, and all other applicable laws and regulations.
   c. The harvesting of timber and salvage timber pursuant to the Timber Harvest Framework shall be in compliance with 36 C.F.R. 223.8.
   d. The harvesting of timber and salvage timber pursuant to the Timber Harvest Framework may be conditioned or denied for reasons including:
      i. Protecting public health and safety,
      ii. Preventing interference with FS and/or tribal activities,
      iii. Complying with federal, tribal, and state laws and regulations,
      iv. Ensuring the sustainability of a forest product or tribal sensitive species,
      v. Otherwise protecting ceded territory land and resources.
5. **Timber Harvest Framework Principles.** The parties agree to the implementation of the following Timber Harvest Framework:
   a. A Tribe initiating a request for the harvest of timber or salvage timber for domestic or non-commercial traditional and cultural purposes shall inform the Voigt Intertribal Task Force [hereafter VITF] of such intent for the purpose of conducting intertribal coordination.
   b. Once the VITF has conducted the proper intertribal coordination, the Commission shall send a letter to the Tribe of such intent, thereby notifying it whether there is an intertribal conflict with the request.

c. If the VITF determines that there is no intertribal conflict with a request, the Commission staff shall notify the Forest Service that the VITF has conducted intertribal coordination pertaining to the Tribe's initial intent to harvest timber or salvage timber for domestic or non-commercial traditional and cultural purposes and that there is no intertribal conflict pertaining to the request. Thereby, the notification shall include a request to consult on the Tribe's initial desire to make a request for the harvest of timber or salvage timber for domestic or noncommercial traditional and cultural purposes.

d. The Commission, in consultation with the Tribe, shall set up a meeting with the FS, the Tribe and the Commission to discuss the specifics of the potential formal request, which shall include the following:

   1) Potential locations where the Tribe may desire to harvest;

   2) Approximate number of trees the Tribe desires to harvest;

   3) The species and size of timber the Tribe desires to harvest;

   4) The approximate year and season when the Tribe desires to harvest;

   5) The purpose for which the timber or salvage timber will be put:

      i. For domestic purposes, as this term is defined in the attached Model Code.

      ii. For non-commercial traditional and cultural purposes, as this term is defined in the attached Model Code.

e. The Forest Service, the Tribe, and the Commission shall set up a site evaluation(s) to determine the feasibility of the proposed harvest location(s). Proposed harvest locations shall be agreed to by consensus of all parties.

f. The Tribe shall submit a formal "Letter of Request of the Tribe for Timber Harvest Purposes" to the District Ranger. The letter of request shall include:

   1) The location of harvest;

   2) The approximate number of trees to be harvested;

   3) The species and size of timber to be harvested;

   4) The approximate year and season the timber shall be harvested; and

   5) The purpose for which the timber or salvage timber will be put:

      i. For domestic purposes, as this term is defined in the attached Model Code.

      ii. For non-commercial traditional and cultural purposes, as this term is defined in the attached Model Code.

      The Tribe shall provide a courtesy copy (cc) of this letter of request to the Forest Supervisor, the Tribal Liaison for the Chequamegon-Nicolet, Hiawatha and Ottawa National Forests, the VITF, and Commission staff.

g. The Forest Service in consultation with the Tribe and the Commission shall develop an area of operation map.

h. The FS in consultation with the Tribe and the Commission shall develop the necessary decision and analysis documents, including those required by the NFMA and the NEPA. If either the Tribe or the Commission has the capacity, they may exercise the option to jointly develop the necessary decision and analysis documents for the requested site location.

i. The Commission, the Tribe and the FS shall develop the specific provisions of the "Operating Plan."

j. The Tribe shall issue a tribal permit to the "member" or "tribal entity" as defined in the attached Model Code.

k. The Tribe in consultation with the Commission and the FS shall conduct the necessary monitoring and evaluation of the timber harvest operation.

l. The Tribe in consultation with the Commission shall provide the FS with a final notification that the filed operations on the timber harvest operation are complete.

m. The Tribe in consultation with the Commission shall provide the FS with a final briefing (success story) on the results of the timber harvest request.

6. **Agreement Effective Date/Termination.** The Timber Harvest Framework shall take effect when at least one Tribe and the Forest Service Eastern Region have properly ratified it in accordance with their respective governmental procedures. The Timber Harvest Framework shall be binding as to and between those entities that ratify it upon notice to the other parties of their ratification as provided in MOU section IX. The Timber Harvest Framework shall automatically terminate at such time when the requisite combination of parties to make it effective no longer exists, or when the MOU terminates.

7. **Dispute Resolution.** The parties agree that any controversies, disputes, differences or misunderstandings arising out of the Timber Harvest Framework shall be addressed as disputes under the MOU and handled in accordance with the MOU's provisions.

8. **Amendment of Agreement.** The parties agree that amendments to the Timber Harvest Framework shall be addressed in accordance with the provisions of MOU section VI.F.

9. **Required Notices/Parties' Designated Representatives.** The parties agree that the provisions of MOU section IX shall apply to Notices of Ratification of and Withdrawal from the Timber Harvest Framework and to the parties' designation of representatives regarding the Timber Harvest Framework.

Exhibit E.3—

Tribal Request for Trees, Timber, or Forest Products

Check List (Recommended for Timber Requests)

The following is an example of the information that is necessary for evaluating and processing an individual Indian Tribes' request for trees, timber, or forest products from National Forest System lands.

☑	REQUESTING TRIBE	TURTLE CREEK BAND OF LENAPE INDIANS
☑	TRIBAL DEPARTMENT	DEPARTMENT OF CULTURAL PRESERVATION
☑	TECHNICAL CONTACT	JANEY SMITH, DIRECTOR (555) 555-1234
☑	INTER-TRIBAL COORD	NORTHERN OHIO INTER-TRIBAL COUNCIL
☑	RECEIVING UNIT	
☐	REGION	
☑	FOREST	FALLEN TIMBER NATIONAL FOREST
☑	TREES or FP REQUESTED	HOUSELOGS FOR TRADITIONAL ROUND HOUSE
☑	SPECIES	RED PINE or JACK PINE
☑	NO. TREES OR VOLUME	275 TREES
☑	APPROXIMATE SIZE	9-11" DBH
☑	LOCATION	
☑	DISTRICT	TURTLE CREEK RANGER DISTRICT
☑	AREA	SEE TURTLE CREEK TS MAP
☑	PURPOSE CERTIFICATION	
☑	NONCOMMERCIAL	REQUEST CERTIFIES NONCOMMERCIAL USE
☑	T&C PURPOSE	REQUEST FOR TRADITIONAL ROUND HOUSE CONSTRUCTION
☐	DOMESTIC PURPOSE	
☐	COMMERCIAL PURPOSE	
☑	LEGAL COMPLIANCE	
☐	RESERVED RIGHTS	N/A
☑	FOREST PLAN	COMPLIANT WITH STANDARDS & GUIDELINES (SEE CH. 5, SEC VII)
☑	NEPA	NEPA- READY PROJECT (TURTLE CREEK EA)
☑	FREE USE AUTHORITY	25 USC 3055/ 36 CFR 223.15/ 36 CFR 223.8(A)
☐	REGIONAL FORESTER	
☑	FOREST SUPERVISOR	APPROXIMATE VALUE LESS THAN $5,000[1]
☐	FOREST OFFICER	
☐	DENIAL CRITERIA	NO DENIAL
☐	PUBLIC HEALTH & SAFETY	
☐	INTERFERE WITH OPERATIONS	
☐	UNLAWFUL	
☐	SUSTAINABILITY	

[1] Note: This amount may be increased under the Cultural and Heritage Cooperation Authority. For example, Forest Supervisors (if delegated) have authority not to exceed $50,000 in value in any one fiscal year to an Indian Tribe under 36 CFR 223.15(e).

Processing requests for Tribal use of timber and forest products

STEP 1:	FEDERALLY RECOGNIZED TRIBE [**YES** or **NO**]:	IF **YES**, GO TO STEP 2 IF **NO,** THIS IS NOT TRIBAL USE
	Check current list of federally recognized Tribes. If individual tribal member, check tribal ID, CDIB card, etc.	
STEP 2:	IS REQUEST FROM TREATY TRIBE [**YES** or **NO**]:	IF **YES**, GO TO STEP 3 IF **NO**, GO TO STEP 3B
	A "treaty Tribe" is a Tribe signatory to the land cession treaty for the area of the national forest from where the timber or forest products are to be harvested.	
STEP 3:	DOES THE TRIBE SELF-REGULATE [**YES** or **NO**]:	IF **YES**, TRIBE WILL ISSUE THE PERMIT IF **NO**, GO TO STEP 4
	When the Tribe self-regulates within their ceded territory, they will issue appropriate gathering permit, monitor for regulatory compliance, or follow relevant guidelines in MOU with the Forest Service.	
STEP 3B:	REQUEST FOR SPECIAL FOREST PRODUCTS [**YES** or **NO**]:	IF **YES**, GO TO STEP 4B IF **NO**, GO TO STEP 5B
STEP 4:	REQUEST FOR SPECIAL FOREST PRODUCTS [**YES** or **NO**]:	IF **YES**, ALLOW GATHERING WITHOUT PERMIT [END] IF **NO**, GO TO STEP 5
	Special forest products are defined as products collected from National Forest System lands that include, but are not limited to, bark, berries, boughs, bryophytes, bulbs, burls, Christmas trees, cones, epiphytes, fence material, ferns, firewood, forbs, fungi (including mushrooms), grasses, mine props, mosses, nuts, pine straw, posts and poles (tipi poles), roots, sedges, seeds, shingle and shake bolts, transplants, tree sap, rails, and wildflowers.	
STEP 4B:	CONSULTATION REQUIRED [**YES** or **NO**]:	IF **YES**, GO TO STEP 6 IF **NO**, ISSUE 2400-8 PERMIT [END]
	The Forest Service has agreements with several treaty Tribes requiring that we consult with them before authorizing harvest of timber or forest products by non-treaty Tribes.	
STEP 5:	REQUEST FOR TIMBER [TRIBE or TRIBAL MEMBER]:	IF TRIBE, NEGOTIATE BILATERAL AGREEMENT [END] IF FROM MEMBER, NOT ALLOWED
	Timber, meaning the cutting of green merchantable trees for saw timber, house logs, nonsawlog material removed in log form, pulpwood, telephone poles, etc. Tipi poles and other posts and poles are not included as timber.	
STEP 5B:	REQUEST FOR TIMBER [TRIBE ONLY]:	TRADITIONAL USE: MAY AUTHORIZE [END] COMMERICAL USE: MAY NOT AUTHORIZE
	May authorize through bilateral agreement or letter of authorization if for "non-commercial traditional and cultural purpose;" may be subject to prior notification or consultation with any affected treaty Tribe(s).	
STEP 6:	CONSULTATION or COORDINATION WITH TREATY TRIBES *Any time a non-treaty Tribe or non-treaty Tribal member requests timber or forest products within the ceded territory of a Tribe with reserved rights within that territory, the Forest Service should coordinate with the treaty Tribe or engage in consultation before granting the request. Coordination may be at staff level or involve Tribal leadership. Ultimately, the line officer will give due consideration to the concerns of the treaty Tribe before making the decision to grant the request of the non-treaty Tribe or member.*	

Sample Framework 3.2: Kaibab and Coconino National Forests Official Policy on Forest Products for Traditional and Cultural Purposes

Introduction

The Kaibab and Coconino National Forests (Forests) recognize the importance of providing access to forest products to Native Americans for traditional and cultural purposes. Current Forest Service policy directs Forests to "assist tribal members in securing ceremonial and medicinal plants" (FSM 1563.03). The Kaibab and Coconino National Forests will accommodate traditional use of the Forests by Native Americans provided it complies with existing laws and regulations. The Forests may amend this policy to address future issues in consultation with federally recognized Tribes. This policy will become effective on April 1, 2012 and will be reviewed every 5 years.

Definition

Traditional and cultural purpose: The term "traditional and cultural purpose," with respect to a definable use, area, or practice, means that the use, area, or practice is identified by an Indian Tribe as traditional or cultural because of the long-established significance or ceremonial nature of the use, area, or practice to the Indian Tribe (Food, Conservation, and Energy Act of 2008).

Objectives

1) To provide simple, clear, and consistent policy on Native American traditional use for both Forests.
2) To accommodate traditional use of the Forests by Native Americans.
3) To prevent resource damage and ensure that collection of forest products does not result in undesirable impacts to natural and cultural resources.

Legal Authority

Existing law, regulation, and policy regarding Native American traditional use of Forest Service Land guides this policy.

Food, Conservation, and Energy Act of 2008, SEC. 8105. Forest Products for Traditional and Cultural Purposes.

(a) In General—Notwithstanding section 14 of the NFMA of 1976 (16 USC 472a), the Secretary may provide free of charge to Indian tribes any trees, portions of trees, or forest products from NFS land for traditional and cultural purposes.

(b) Prohibition—Trees, portions of trees, or forest products provided under subsection (a) may not be used for commercial purposes.

American Indian Religious Freedom Act

- Henceforth it shall be 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.

Religious Freedom Restoration Act

(a) IN GENERAL—Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) EXCEPTION—Government may burden a person's exercise of religion only if it demonstrates that application of the burden to the person –

(1) furthers a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

Forest Service Manual 1563.03

- Administer programs and activities in a manner that is sensitive to traditional American Indian and Alaska Native spiritual beliefs and practices and assist tribal members in securing ceremonial and medicinal plants... and the use of specific geographic places, consistent with Federal policy under American Indian Religious Freedom Act and EO 13007 (Forest Service Manual 1563).

Kaibab and Coconino National Forest Memoranda of Understanding with Indian Tribes

- The Forest[s] shall "[a]llow access to shrines and resources...for traditional uses, including the collection of medicinal and ceremonial plants from traditional use areas. Such access is assured through the AIRFA and EO 13007, provided the activity is in compliance with other laws and regulations (including FSM 1563 and the Code of Federal Regulations).
- [Tribal members] are encouraged but not required to obtain a free use permit and information on local availability and access...."

Policy

The following are policies on providing specific forest products to Native Americans for traditional and cultural purposes. Policy direction is provided for three categories of forest products—

1) Ceremonial fuelwood.

2) Timber products.

3) All other forest products.

All forest products collected under these permits must be for traditional use only and may NOT be used for commercial purposes. An individual found to be in violation of this policy may receive a citation or the Forests may refuse subsequent requests for permits. For any request outside the scope of this policy, an individual or Tribe may outline the request to the forest supervisor or district ranger in writing, and each request will be considered on a case-by-case basis.

1. **Ceremonial fuelwood** Free ceremonial fuelwood, including ponderosa pine, pinyon pine, juniper and oak, will be provided at no charge to Tribes and Tribal members under the following conditions. Unless otherwise stated, all fuelwood permit requirements at the district level apply to any ceremonial fuelwood permit as follows—
   - A permit is required for all ceremonial fuelwood. A ceremonial fuelwood permit costs no fee.
   - A valid Native American Church membership card, Tribal identification card, or a letter from a Tribe or Tribal Chapter requesting free ceremonial fuelwood is required.
   - A limit of one cord per permit, two permits per year, will be issued to any individual for free ceremonial fuelwood. Requests for ceremonial fuelwood exceeding this amount must be made in writing to the forest supervisor or district ranger and will be addressed on a case-by-case basis.
   - Ceremonial fuelwood permits will be valid for up to one month within the regular fuelwood season.
   - Ceremonial fuelwood is not restricted by length.
   - Permits for collection of **oak** are for dead and down oak only unless otherwise stated specifically in the permit.
   - Ceremonial fuelwood permits will not be issued outside of the personal use or commercial use fuelwood season.
   - Unless otherwise stated here, all other local restrictions for fuelwood cutting apply to ceremonial fuelwood permits.
   - Any area limits to personal use fuelwood cutting is also off limits for collection of fuelwood under a ceremonial permit.
   - Individuals must be present to have a ceremonial collection permit issued. Requests on behalf of another person will be denied.
   - If an individual indicates that requested fuelwood is not for ceremonial purposes, the request for ceremonial fuelwood will be denied.
2. **Timber products** Timber products other than fuelwood, including trees, posts, poles, saplings, and other special timber products, will be provided to Tribes and Tribal members at no charge under the following conditions—
   - A permit is required for all timber products for traditional use. This permit costs no fee.
   - Requests for traditional use timber products must be made in writing to the forest supervisor or district ranger. The request must state that the materials are needed for traditional use.
   - Transportation of timber products must be provided by the individual or Tribe requesting the materials.
   - Any area limits to personal use fuelwood cutting is also off limits for collection of timber products under a ceremonial permit.
3. **Other forest products**
   - No permit is required for the collection of small amounts of forest products by Native Americans for medicinal, ceremonial, and traditional uses provided resource damage is not occurring. Forest products covered under this policy include small amounts of plants, wildflowers, mushrooms, moss, nuts, seeds, bark, berries, boughs, branches, cones, grasses, seeds, soil, and minerals.[1] Tribal members are encouraged, but not required, to obtain a free-use permit and information on local availability and access of forest products by contacting a Forest Service office. The Forests will address specific resource issues resulting from the collection of forest products on a case-by-case basis in consultation with federally recognized Tribes.
   - Tribal members are advised that **some forest products**, such as agave, **require a permit** from the State of Arizona. Tribal members are encouraged to contact the State of Arizona regarding State permit requirements.
   - The U.S. Fish and Wildlife Service (FWS) is the responsible Agency for issuing permits for listed Threatened and Endangered (T&E) species federally listed under the Endangered Species Act (1973) that occur on the Forests. When Tribal members request collection permits for T&E plant species, the Forests will immediately refer them to the FWS. The FWS maintains lists for T&E species federally listed under the Endangered Species Act (2973) at www.fws.gov/endangered.
   - Tribal members can contact the following Tribal Relations staff on the Forests for information and assistance regarding collection of forest products: Michael Lyndon, Kaibab National Forest Tribal Liaison, (928) 635–8272; Craig Johnson, Coconino National Forest Tribal Liaison, (928) 527–3475; and Mable Franklin, Kaibab National Forest Navajo Liaison, (928) 679–2037.

[1] Soil and minerals are not considered forest products under Title 36 Code of Federal Regulations 223; reference Forest Service Handbook 2409.18, 87.05.

Appendix F—Templates for Confidentiality Agreements (Chapter 4)[1]

In general, and subject to specific limitations, the Cultural and Heritage Cooperation Act provides that—

The Secretary shall not disclose under section 552 of title 5 (the "Freedom of Information Act"), information relating to:

(A) subject to subsection (b)(l)[2], human remains or cultural items reburied on National Forest System land under section 3053 of this title; or

(B) subject to subsection (b)(2), resources, cultural items, uses, or activities that—

  (i) have a traditional and cultural purpose; and

  (ii) are provided to the Secretary by an Indian or Indian tribe under an express expectation of confidentiality in the context of forest and rangeland research activities carried out under the authority of the Forest Service.[3]

Template 1

Maintain as confidential records, maps, photographs, and other information about places significant to the (Tribe), which are prehistoric or historic resources. Such information that the (Tribe) provides is considered Tribal property on loan to the (forest unit). All (Tribe) information may be subject to exemption number 3 of the Freedom of Information Act, the Archaeological Resources Protection Act (ARPA), and the 1992 Amendments to the National Historic Preservation Act to protect confidentiality. This information will not be made available to the general public without the prior approval of the (Tribe). The Tribal Liaison and Forest Archaeologist will work to ensure the location of such places remain confidential, except on a need-to-know basis to forest officers charged with the protection of these places.

FOIA. Any documents or records of which the (NF) has possession and is custodian are subject to the FOIA and its exemptions, as applicable. As such, both parties are aware that FOIA requests for particular records and/or documents will be determined on a case-by-case basis, including those subject to FOIA Exemption at section (b)(3) which protects records specifically exempted from disclosure by statute other than 5 USC 552 (b). Records or documents that are protected from disclosure by other statutes, including the ARPA and the NHPA, will not be made available to the general public without the prior approval of the (Tribe). All FOIA requests received by the (NF) related to the (Tribe)'s interests will be coordinated with the (Tribe) to provide the proper response and/or to redact protected and potentially sensitive cultural information.

Template 2

Maintain as confidential records, maps, photographs, and other information about places significant to the (Tribe), including prehistoric and historic resources. The confidentiality of these places is assured through exemption 3 of FOIA, the Archaeological Resources Protection Act, and the 1992 Amendments to the NHPA. This information shall not be made available to the general public without the prior approval of the (Tribal Chair or Leader) and/or the Cultural Resource Program Coordinator. The Tribal Liaison and Forest Archaeologist shall ensure the location of such places remain confidential, except on a need-to-know basis to forest officers charged with the protection of these places. The (NF) will work with the (Tribe) to establish an agreement on guidelines to ensure confidentiality of this information.

Template 3

The Forest Service will utilize and safeguard confidential records, maps, photographs, or other Tribe-authored information about properties and places on the national forests significant to the Tribe(s). The Forest Service will use cultural or historic information about sacred sites that has been disclosed during mutual exchange or collected by the Forests only for the protection and management of (Tribal) traditional places and practices. Such information, as is provided to the national forests by the Tribe(s), will be retained only with Tribal permission and will be held in confidence for the Tribes by the Forest Archaeologists and shall not be made available to the general public without the prior approval of the Tribes, subject to FOIA and its

[1] Template language is drawn from existing Memorandum of Agreements/Memorandum of Understandings across Regions.
[2] So in original. Probably should be "(b)(1)."
[3] Furthermore and to the extent allowed by Federal law, information on the location and nature of all cultural resources and traditional cultural information on land shall be held confidential as also provided by: section 304 of the National Historic Preservation Act (16 USC 470w-3); 2) 36 CFR 800.11(c), section 9 of the Archaeological Resources Protection Act (16 U.S. Code 470hh; 43 Code of Federal Regulations 7.3), and other applicable Federal laws.

exemptions. Information protected from disclosure by ARPA and the NHPA are exempted from disclosure under FOIA, Exemption (b)(3). The forest supervisors shall ensure that the locations of such properties and places are made known on a strictly need-to-know basis only to forest officers charged with the protection of these properties and places and to permitted researchers whose work has been approved by the Forest Archaeologists in furtherance of the protection of these properties and places.

Template 4

In order to better protect and preserve Tribal heritage values on (NF) land, it is mutually beneficial for both parties to share information necessary for the forest to manage such resources, provided that such information sharing and the use of that information in making management decisions are both conducted in strict confidentiality as provided for in Stipulation D.10 of this document. The reports generated as the products of any contracts with the (Tribe) become the property of the (NF). The information in these reports will be held in confidence for the (Tribe) by the Forest Archaeologist and shall not be made available to the general public without the prior approval of the (Tribe). All other sensitive and privileged information provided by the (Tribe) shall remain Tribal property, but may be used and retained by the forest as needed on an ongoing basis. The (Tribe) has the right to reclaim this property at its discretion, acknowledging that without such property, the forest may no longer be able to protect the places it refers to.

(NF) will utilize and safeguard confidential records, maps, photographs, or other Apache-authored information about properties and places on the forest significant to the (Tribe). The forest will use cultural or historic information about sacred sites that has been disclosed during mutual exchange or collected by the forest only for the protection and management of (Tribal) traditional places and practices. Such information, as is provided to the forest by the (Tribe), will be retained only with Tribal permission and will be held in confidence for the (Tribe) by the Forest Archaeologist and shall not be made available to the general public without the prior approval of the (Tribe), subject to theFOIA and its exemptions. Information protected from disclosure by the ARPA and the NHPA are exempted from disclosure under the FOIA, Exemption (b)(3). The forest supervisor shall ensure that the locations of such properties and places are made known on a strictly need to know basis only to forest officers charged with the protection of these properties and places and to permitted researchers whose work has been approved by the Forest Archaeologist in furtherance of the protection of these properties and places.

D. THE FOREST SERVICE FURTHER AGREES to the following stipulations to implement consultation with the Tribes under NEPA, NHPA, AIRFA, Native American Graves Protection and Repatriation Act, E.O. 13007, E.O. 13175, and Forest Service consultation policy with American Indian and Alaska Native Tribes (FSM 1563)—

10. Forest Service will utilize and safeguard confidential records, maps, photographs, or other (Tribe)-authored information about properties and places on the national forests significant to the Tribes. The Forest Service will use cultural or historic information about sacred sites that has been disclosed during mutual exchange or collected by the forests only for the protection and management of (Tribe) traditional places and practices. Such information, as is provided to the national forests by the Tribes, will be retained only with Tribal permission and will be held in confidence for the Tribes by the Forest Archaeologists and shall not be made available to the general public without the prior approval of the Tribes, subject to the FOIA and its exemptions. Information protected from disclosure by ARPA and NHPA is exempted from disclosure under the Freedom of Information Act, Exemption (b)(3). The forest supervisors shall ensure that the locations of such properties and places are made known on a strictly need-to-know basis only to Forest officers charged with the protection of these properties and places and to permitted researchers whose work has been approved by the Forest Archaeologists in furtherance of the protection of these properties and places.

Template 5

Issues to be Addressed in Consultation: The parties intend that all issues relevant to the protection and enhancement of Treaty and trust resources shall be addressed in consultation, including but not limited to the following: coordination and consultation between the parties regarding impacts on habitats affecting fish, plants, and wildlife populations; the application and use of watershed analysis and ecosystem management; and any scientific concepts that may succeed these approaches; appropriateness or effectiveness of existing plans; policies and guidelines for resource protection; cultural components of resource use and protection; and protection of cultural resources, including maintaining confidentiality regarding such resources.

Template 6

IT IS MUTUALLY UNDERSTOOD AND AGREED BY AND BETWEEN THE PARTIES THAT—

1. FOIA. Any information furnished to the Forest Service under this instrument is subject to FOIA (5 USC 552). Exemptions exist, however, for information that the parties deem as sensitive. Under NHPA 16 USC 470hh **Confidentiality of information concerning nature and location of archaeological resources** part (a) Disclosure of Information in part states: "Information concerning the nature and location of any archaeological resource for which the excavation or removal requires a permit or other permission under provision of Federal Law may not be made available to the public." Furthermore, 16 USC 470w-3(a) provides for the confidentiality of the location of sensitive historic resources, which includes, among others, the protection of the use of traditional religious sites by practitioners.

Template 7

*** Note: The following sample of a Research Joint Venture Agreement takes the strategy of leaving project data in the possession of the Tribe versus the Agency.**

Background and problem statement: The (Tribe) and the Forest Service have experience working together to understand the relationship between residents of the (Reservation, Rancheria, Village) and the (landscape descriptor: mountain range, valley, watershed, etc.). Past experience has focused on how these relationships influence (attitudes, practices, natural resource strategies, policies, etc.) in maintaining ecosystem health through vegetative management and fire applications. Currently, it is necessary to further understand how Reservation or Rancheria or Village residents and Tribal resource managers perceive forecasted climate change trends that may interact with long-term dependence on natural resources (e.g., water, wildlife, vegetation, aesthetics, traditional landscapes) in order to build adaptive capacity into a long-term forest plan. This agreement represents a collaborative effort between the (Tribe) and the (Research Station) to facilitate long-term forest and fire planning that includes environmental change uncertainties.

Establishment of mutual benefits and interests: The Forest Service is interested in consultations with American Indian entities to assist in developing knowledge about relationships people have with natural resources, understanding how natural resource professionals feel that climate change will affect the resources they manage, and facilitate interaction between climate change scientists and both natural resource managers and the public in order to build adaptive capacity to minimize impacts on the flow of benefits from collectively held lands to future generations of American citizens. The (Tribe) is committed to developing long-term forest management plans that are responsive to changing environmental and social factors, balance environmental well-being with cultural values and human well-being, including revenue production and emotional attachments to landscapes, and apply the latest scientific knowledge. Both the Forest Service and the (Tribe) are committed to conducting research that increases potential for protecting the environmental well-being and human well-being for future populations of people living on the (Reservation, Rancheria, etc.).

Work Plan:

The work plan should fully describe all work, tasks, studies, reports, inspections, consultations, and cooperation the Forest Service will perform.

A. Specific (Tribal) tasks:

   1. Assign a Tribal liaison (name) with primary responsibility to interact with the Forest Service and other cooperators (list partners) to cooperatively develop a study plan, collect information, and assist in summarizing and presenting findings.
   2. Develop a study plan, cooperatively with the Forest Service and Forest Service cooperators (list partners) by (date) for a case study that focuses on the following—
      (i) Describe past, current, and desired future attributes of one significant landscape within the (Reservation, Rancheria, Village), pertaining to water security and fire regime attributes.
      (ii) Include perceptions from relevant Reservation or Rancheria or Village residents and Reservation natural resource managers.
   3. Conduct the study following agreed upon study plan methods.
   4. Provide a PowerPoint presentation with illustrations that explains the chosen landscape parameters (describe the physical area of focus on the Reservation or Rancheria or Village), summarizes methods used, explains the purpose of the case study, describes the resident and natural resource manager characteristics, and summarizes findings and implications for forest planning.

B. Specific (Forest Service) Tasks:

   1. Cooperate to develop a mutually acceptable study plan by (date).
   2. Provide technical support for data collection methodology and analysis through the partner(s), cooperator and recipient of Forest Service funds

targeted in support of this data collection and analysis project with (Tribe).

3. Facilitate review and input by qualified (Research Station) scientists engaged in climate change research.
4. Co-write a final report with (Tribe) that describes the purpose of this project, outcomes, and likely application potential for other landscape segments within the (Reservation, Rancheria, Village)'s long-term forest planning process.

It is mutually agreed that …

A. Due to inclusion of potentially sensitive information regarding personal and community relationships with specific places within the (Reservation, Rancheria, Village), the Forest Service will serve in a consultative role, guiding the (Tribe) in data analysis and reporting, though all data records will remain with (Tribe) for safekeeping and cooperative additional analysis as opportunities arise.

Templates for Other Instruments Regarding Confidentiality

*** Note: Several approved nondisclosure agreements are available for Agency use that address confidentiality from the perspective of trade secrets or commercial or financial information that is privileged or confidential. This approved language, however, merits further consideration for its applicability to the protection of Tribal information—**

Template 8—Cooperative Research and Development Agreement (excerpted)[4]

Article 3. Confidentiality

3.1 The Forest Service will process all requests for the release of information in accordance with the FOIA.

3.2 Confidential Information, which is owned by one party to this Agreement and disclosed to the other, must be labeled "CONFIDENTIAL" by the submitter and must not be disclosed by the recipient without permission of the owner, or for the period as defined per article 3.

3.3 Confidential information will only be shared with personnel who have a need to know.

3.4 To the extent either party orally submits its Confidential Information to the other party, the submitting party will prepare a document marked "CONFIDENTIAL" embodying or identifying in reasonable detail such orally submitted Confidential Information and provide the document to the other party within thirty (30) days of disclosure.

3.5 Neither party shall be bound by confidentiality if the Confidential Information received from the other party:

a. Already is available to the public or known to the recipient;

b. Becomes available to the public through no fault of the recipient; or

c. Is non-confidentially received from another party legally entitled to it.

3.6 Confidential Information, provided by and which would otherwise be controlled in accordance with 5 USC 552(b)(4), and which is used or integral in the development of an invention or other intellectual property conceived or first reduced to practice under this Agreement, and which is patentable or otherwise protectable under Title 35 of the United States Code (7 USC 2321, et seq.) or under the patent laws of a foreign country, must only remain confidential for a period of years, months, following the development of said invention or other intellectual property.

3.7 All information developed under this Agreement falling within the scope of the Agreement must be considered by both the cooperator and the Forest Service as confidential for a period of years, months, following the development of the information.

3.8 Public access to grant or agreement records must not be limited, except when such records must be kept confidential and would have been excepted from disclosure pursuant to Freedom of Information regulations (5 USC 552).

Template 9—Nondisclosure Agreement (excerpted)[5]

For and in consideration of the mutual understandings by (the cooperator) and the Forest Service, it is hereby agreed:

1. The Proprietary Information may include, for example, data, know-how, formulas, processes, designs, sketches, photographs, plans, drawings, specifications, samples, reports, customer lists, price lists, studies, findings, inventions or ideas, but is not limited to those items.
2. The Discloser, which can be either (the cooperator) or the Forest Service, intends to maintain the confidential status of its Proprietary Information.
3. The Discloser shall designate or mark the proprietary nature of its Proprietary Information so the Recipient, which can be either (the cooperator) or the Forest Service, is aware that its receipt is governed by the terms of this Agreement.
4. The (cooperator's or the Forest Service's) proprietary information, and uses therein, includes:

[4] Cooperative Research and Development Agreement (OMB 0596-0217 FS-1500-13).
[5] Nondisclosure Agreement (OMB 0596-0217 FS-1500-13B).

5. The parties' representatives for disclosing and receiving Proprietary Information are designated below. Said representatives shall make all arrangements and be informed of all communications relating to this Agreement. Any changes in representative by one party shall be made upon written notice to the other party.
6. Individuals listed below are authorized to act in their respective areas for matters related to this agreement.
7. While the amount of Proprietary Information to be disclosed is completely within the discretion of the Discloser, all disclosures hereunder shall be completed by (date).
8. The Recipient shall exercise reasonable care to prevent disclosure of Discloser's Proprietary Information to any third party, except as may be authorized in writing by Discloser, and internal dissemination of Discloser's Proprietary Information by the Recipient shall be limited to those employees whose duties justify their need to know such information and then only on the basis of a clear understanding by these employees of their obligation to maintain the confidential status of such information and to restrict the use of such information solely to the use granted to the Recipient under this Agreement.
9. Recipient shall not use the Proprietary Information disclosed by Discloser except for any purpose as stated in paragraph 4, above.
10. Nothing hereinabove contained shall deprive Recipient of the right to use or disclose any information:
    a. which is, at the time of disclosure, generally known to the trade or the public;
    b. which becomes at a later date generally known to the trade or the public through no fault of Recipient and then only after said later date;
    c. which is possessed by Recipient, as evidenced by Recipient's written or other tangible evidence, before receipt thereof from Discloser;
    d. which is disclosed to Recipient in good faith by a third party who has an independent right to such information; or
    e. after a period ending (date).
11. Nothing hereinabove contained may be construed as granting or implying any right under any Letters Patent or to use any invention covered thereby.

Template 10—Material Transfer Agreement (excerpted)[6]

A Material Transfer Agreement (MTA) authorizes the formal transfer of material from one party to another. Discussions are often initiated by non-Forest Service entities for the purposes of gaining access to Forest Service-developed materials. The MTA limits who may analyze/test the material and requires the recipient to share with the provider any data derived from the testing. The MTA also limits publication and licensing, offers no material merchantability or warranty, and restricts the transfer of material deemed confidential. The provider instructs the recipient as to the return or disposal of the material.

Material is released to Recipient under the following conditions:

13. Terms of Confidentiality:

a. shall not disclose Material marked "Confidential" or "Proprietary" to any third party nor use such Confidential Information for any purpose other than that given above without written permission from the Forest Service.
b. shall use the same degree of care to protect Confidential Information received under this Agreement as it uses to protect its own information of a similar nature, but in any event not less than reasonable care under the circumstances.
c. The Confidential Information must be excluded from confidentiality if can demonstrate that (a) it had possession of the information prior to disclosure; or (b) the information generally is available to the public at the time of disclosure, or becomes generally available, after disclosure, through no fault of the Forest Service; or (c) receive(s) the information from a third party having the right to the information and who does not impose confidentiality.
d. It is not a breach of this Agreement if is/are required to disclose the Confidential Information by a valid order of a court or other government body, or as otherwise required by law, or as necessary to establish the rights of either party under this Agreement PROVIDED THAT the party(s) shall provide prompt prior notice thereof to the Forest Service, to enable the Forest Service to seek a protective order or otherwise prevent such disclosure, and PROVIDED FURTHER THAT the Confidential Information otherwise must continue to be confidential.

[6] Material Transfer Agreement (OMB 0596-0217 FS-1500-13A).