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TRADITIONAL ECOLOGICAL DISCLOSURE: HOW THE FREEDOM OF INFORMATION ACT FRUSTRATES TRIBAL NATURAL RESOURCE CONSULTATION WITH FEDERAL AGENCIES

Sophia E. Amberson *

Abstract: When a federal or state agency administers environmental laws, such as the Endangered Species Act, the agency often consults with tribes. During these consultations, tribes often disseminate traditional ecological knowledge (TEK)—knowledge acquired by a tribe that is a mix of environmental ethics and scientific knowledge about tribal use. However, these consultations may be susceptible to disclosure under the Freedom of Information Act (FOIA). The purpose of FOIA is to inform the public. Because TEK often contains sensitive information about tribal social, cultural, psychological, and economic factors, tribes do not want this information available to those who are not members of a tribe. For example, a tribe may not want historic fishing sites to be disclosed to the public, but information on those sites could be useful for fisheries management. The combination of FOIA and tribal consultation results in a Hobson’s choice for tribes—take a seat at the environmental regulatory table and risk disclosing proprietary information or lose their seat at the environmental regulatory table. This Comment explores the dichotomy between the purposes of FOIA and the protection of tribal culture and knowledge. This Comment then examines the inadequacies of the current FOIA exemptions when applied to protecting tribal information. Additionally, this Comment looks to past attempts at providing legislative reform to protect tribal information and argues that legislative reform is the most appropriate course of action because it can provide a broader protection for tribes.

INTRODUCTION

Between a rock and a hard place, a Catch-22, Milton’s Fork, or a Hobson’s choice; whichever metaphor one uses, tribes face such dilemmas when they consult with federal agencies on natural resource issues. Tribal consultation is a desirable goal for federal agencies with a two-fold purpose to: (1) give tribes a seat at the regulatory table and gain their perspective and (2) improve the decision-making process by

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gaining access to better information and thus leading to better results.¹ Federal agencies, such as the Fish and Wildlife Service and the National Marine Fisheries Service, recently issued their Native American Policy for the U.S Fish and Wildlife Service² with the goal of co-managing natural resources with tribes.³ Tribes want and need to have their perspectives considered when agencies make decisions on natural resources, not only because they have a unique perspective,⁴ but more importantly, they are significantly affected by these decisions.⁵ However, tribes may be skeptical of the consultation process because they feel that the agencies will not truly consider their needs.⁶

In addition to the divergent interests between the agencies and tribes on the two sides of the table, the consultation process can create an additional unintended consequence for the tribes—agencies must disclose information gained through tribal consultation to the public through/via the Freedom of Information Act (FOIA). If a tribe consults with an agency, most of the information provided during such consultations is subject to FOIA. Tribes may not want agencies to disclose all of this information to the general public because it contains sensitive cultural information such as fishing grounds, allocations of water rights, or where commercially valuable plants are located. FOIA was enacted to let the public know what the government is doing. However, there are major implications for both agencies and tribes if agencies do not consult with tribes or take their perspective into consideration—the tribes' needs are not considered and agencies lose the valuable perspective of tribes, who are historically successful managers of their natural resources. Ultimately, tribes face a Hobson's Choice—risk disclosing proprietary information, or lose their seat at the environmental regulatory table.

1. Michael Eitner, *Meaningful Consultation with Tribal Governments: A Uniform Standard to Guarantee That Federal Agencies Properly Consider Their Concerns*, 85 U. COLO. L. REV. 867, 872 (2014) (discussing the different types of tribal consultation by federal agencies).

2. Native American Policy for the U.S. Fish and Wildlife Service, 81 Fed. Reg. 4638, 4638 (Jan. 27, 2016).

3. *Id.*

4. Amanda Cronin & David M. Ostergren, *Democracy, Participation, and Native American Tribes in Collaborative Watershed Management*, 20 SOC'Y & NAT. RESOURCES 527, 530 (2007).

5. Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?*, 24 AM. INDIAN L. REV. 21, 24 (2000) (discussing the importance of tribal consultations).

6. See, e.g., Eitner, *supra* note 1, at 872–73 (2014) (explaining how the Bureau of Land Management did not consider tribal interests in expanding a gold mining project).

This Comment explores how FOIA frustrates agencies' use of traditional ecological knowledge (TEK). Part I explains how TEK is used in a natural resource management context. It explains what exactly TEK is and how it can be helpful to agencies. Additionally, Part I explains that tribes are protective *because of* the contentious relationship. Part II then examines the federal government's attempts to facilitate tribal consultation. Part II looks at the Endangered Species Act (ESA) in relation to TEK but also discusses several other environmental statutes involving tribal consultation. It explains the consultation directives issued by presidents and department heads encouraging agencies to consult with tribes when making natural resource decisions. Part II specifically examines the new Fish and Wildlife Policy on tribal consultation through its stated purpose, as well as the comments the policy received and Fish and Wildlife Service (FWS) and National Marine Fisheries Service's (NMFS) responses. Part III gives a brief overview of FOIA and how its stated core purpose of informing citizens about "what their government is up to"⁷ impinges on tribal consultation. Part III also examines tribal specific contexts of FOIA litigation. Part IV then discusses the legal scholarship surrounding protection of tribal information. Specifically, Part IV discusses the patchwork nature of protection through different statutes and intellectual property laws and why current law does not address the broader issue—unwanted disclosure of tribal information to the public. Lastly, Part V proposes a legislative fix to prevent disclosure of tribal information through FOIA requests. The legislative fix tracks similar attempts to amend FOIA.

I. TRADITIONAL ECOLOGICAL KNOWLEDGE IS IMPORTANT FOR FEDERAL AGENCIES TO MAKE EFFECTIVE DECISIONS WHILE PROPERLY CONSIDERING TRIBAL PERSPECTIVES

A. *Traditional Ecological Knowledge Is a Tribal-Specific Form of Science*

TEK is a frequently-used buzzword by those calling for tribal input in natural resource management, but the term's exact definition can be quite difficult to pin down.⁸ It is also subject to a host of different titles.⁹

7. U.S. Dep't. of Justice v. Reporters Comm. For Freedom of the Press, 489 U.S. 749, 773 (1989) (emphasis omitted) (quoting EPA v. Mink, 410 U.S. 73, 105 (1973) (Douglas, J., dissenting)).

8. See, e.g., Anthony Moffa, *Traditional Ecological Rulemaking*, 35 STAN. ENVTL. L.J. 101, 105 (2016) ("Defining what constitutes 'Traditional Ecological Knowledge' has proved a formidable challenge for regulators and TEK experts alike.").

At the most basic level, TEK is considered the culturally and spiritually based way in which indigenous peoples relate to their ecosystems.¹⁰ “[Traditional knowledge] can consist of experience, culture, environment, local resources, animal knowledge, or plant resources. Communities expand their [traditional knowledge] over many years and develop and research new innovative practices to encourage growth in farming and medicine.”¹¹ Unlike “formal knowledge” that goes through the scientific process and is often written in formal studies, TEK is more informal and usually shared through oral traditions and is culture-specific.¹² For example, TEK could include not just biological information about salmon fisheries, but the legends surrounding the salmon, and the spiritual beliefs of a tribe.¹³ Tribal knowledge is a vital, but often overlooked, perspective in natural resources management decisions. While not every tribe is the same, tribes are inherently connected to their land and especially their natural resources. Social science researchers have recognized that TEK is an important part of managing natural resources effectively.¹⁴

While TEK is valuable and important to share with federal agencies, agencies do not always respect its value. Some question whether TEK is scientifically valid,¹⁵ often equating it with “junk science” or “pseudoscience.”¹⁶ Others state that “[w]estern science, for example, has generally rejected the TEK of indigenous people as ‘anecdotal, non-quantitative, without method, and unscientific.’”¹⁷ Despite these

9. *Id.* at 106 (“[TEK] is variously labeled as folk ecology, ethno-ecology, traditional environmental or ecological knowledge, indigenous knowledge, customary law, and knowledge of the land.” (quoting Martha Johnson, *Research on Traditional Environmental Knowledge: Its Development and Its Role*, in *LORE: CAPTURING TRADITIONAL ENVIRONMENTAL KNOWLEDGE* (Martha Johnson ed., 1992))).

10. Cronin, *supra* note 4, at 530.

11. Lindsey Schuler, *Modern Age Protection: Protecting Indigenous Knowledge Through Intellectual Property Law*, 21 MICH. ST. U. C. L. INT’L L. REV. 751, 773 (2013).

12. STEPHEN BRUSH & DOREEN STABINSKY, *VALUING LOCAL KNOWLEDGE: INDIGENOUS PEOPLE AND INTELLECTUAL PROPERTY RIGHTS* 4 (Island Press 1996).

13. *Id.*

14. Cronin, *supra* note 4, at 530.

15. *See, e.g.*, Moffa, *supra* note 8, at 125.

16. *Id.* (“Some opponents of TEK, and even those who unwittingly use subordinating language to refer to it, delegitimize TEK by putting it in the ‘junk’ science bin.”).

17. Erika M. Zimmerman, *Valuing Traditional Ecological Knowledge, Incorporating the Experience of Indigenous People Into Global Climate Change Policies*, 13 N.Y.U. ENVTL. L.J. 803, 825 (2005) (looking at the cultural tensions between different world views of indigenous peoples and Westerners).

reservations, TEK is accepted in the scientific community,¹⁸ most often as a supplement to Western science.¹⁹ While the dismissive view of TEK is pervasive, it is neither accurate nor appropriate.²⁰

Regardless of TEK's level of support in the scientific community, the information contained therein is still valuable to policy makers. For example, TEK has demonstrated value in the context of global climate change.²¹ In the United States, tribes have been around for centuries and have witnessed changes to the environment.²² As Erika Zimmerman notes in her work:

Case studies of how Arctic indigenous people use TEK to monitor changes they observe in the environment show that “although traditional monitoring methods may often be imprecise and qualitative, they are nevertheless valuable because they are based on observations over long time periods, incorporate large sample sizes, are inexpensive, invite the participation of harvesters as researchers, and sometimes incorporate subtle multivariate cross checks for environmental change.”²³

TEK provides a mechanism for overcoming one of the biggest obstacles to studying climate change: the need for long-term studies.²⁴

TEK is also useful for species management.²⁵ Tribes have often been champions of the environment.²⁶ Tribes depend on wildlife in order to preserve their way of life.²⁷ These long-term interactions with plants and

18. See generally Sophia Amberson et al., *The Heartbeat of Our People: Identifying and Measuring How Salmon Influences Quinault Tribal Well-Being*, 29 SOC'Y & NAT. RESOURCES 1389 (2016).

19. See Fikret Berkes, *Indigenous Ways of Knowing and the Study of Environmental Change*, 29 J. ROYAL SOC'Y N.Z. 151, 151 (2009) (“Over the years, many scientists have been skeptical of indigenous knowledge.”).

20. See Cronin, *supra* note 4, at 530 (arguing that tribes provide a unique perspective in planning).

21. Zimmerman, *supra* note 17, at 827.

22. Cronin, *supra* note 4, at 530 (“[T]ribal ties to land predate memory and extend indefinitely into the future.”).

23. Zimmerman, *supra* note 17, at 828 (quoting Henrik Moller, et al., *Combining Science and Traditional Ecological Knowledge: Monitoring Populations for Co-Management*, 9 ECOLOGY & SOC'Y (2004), <http://www.ecologyandsociety.org/vol9/iss3/art2> [<https://perma.cc/9WG9-5AAH>]).

24. Zimmerman, *supra* note 17, at 827 (“TEK includes continuous, long-term observations of local climate change effects that are not otherwise available to scientists and policymakers.”).

25. Moffa, *supra* note 8, at 117 (“[W]ildlife and fisheries managers stand to benefit from TEK, particularly with regard to species and patterns of behavior about which little is known.”).

26. See, e.g., Amberson, *supra* note 18, at 1392.

27. *Id.* at 1390.

wildlife can provide scientific insight.²⁸ Scholars have examined the impact of natural resources on tribal livelihoods.²⁹ For example, one scholar, examining how salmon impacts Quinault tribal well-being, interviewed several tribal members.³⁰ One member stated, “[w]ell a lot of them make their living off it. You got fish guides up the river who fish. This is how they survive.”³¹ Nisqually elder Willie Frank once declared, “when the tide goes out our table is set.”³² Other tribal members have expressed similar sentiments.³³ Because of this interdependence, tribes are often at the forefront of management practices.³⁴

B. Tribes Often Have a Contentious Relationship with Federal and State Governments

“Since the founding of this nation, the United States’ relationship with the Indian tribes has been contentious and tragic. America’s expansionist impulse in its formative years led to the removal and relocation of many tribes, often by treaty but also by force.”³⁵

The relationship between tribes and both federal and state governments can be characterized as a struggle of control over natural resources. Originally, many of the conflicts arose with tribes clashing with state governments, specifically over access to resources and the state’s regulatory authority over tribes. However, more recently the tribes’ relationship with the federal government suffered from the

28. Moffa, *supra* note 8, at 117 (discussing how managers can benefit from TEK for species for which they do not have a lot of information).

29. *See, e.g.*, Amberson, *supra* note 18, at 1390 (examining how salmon influences tribal wellbeing).

30. *Id.*

31. *Id.* at 1393.

32. Amanda Cronin & David Ostergren, *Tribal Watershed Management: Culture, Science, Capacity, and Collaboration*, 31 AM. IND. Q. 87, 91 (2007) (quoting Charles F. Wilkinson, MESSAGES FROM FRANK’S LANDING; A STORY OF SALMON, TREATIES, AND THE INDIAN WAY 22 (2000)).

33. *See generally* Amberson, *supra* note 18, at 1393–94 (showing different quotes of tribal members discussing how the natural environment, specifically salmon, provides meals for members).

34. *Id.* at 1389; Cronin, *supra* note 32, at 87.

35. Cobell v. Norton, 240 F.3d 1081, 1086 (D.C. Cir. 2001).

Dakota Access Pipeline conflict.³⁶ In both contexts, tribes argued that the government (either state or federal) abrogated their treaty rights. This has resulted in a certain level of distrust by the tribes towards governments.

One example of a contentious relationship with the government can be found in the Pacific Northwest. Tribes and state officials were at odds with each other over salmon management.³⁷ The “fish wars,” as the period between the 1950s and 1970s were known, arose out of conflicts between private owners and state officials against the tribes over tribal treaty rights. States guaranteed tribes certain fishing rights in the Stevens Treaties: “the right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory.”³⁸ While the Stevens Treaty guaranteed tribes access to their “usual and accustomed grounds,” salmon populations began to dwindle due to a combination of overfishing and logging.³⁹ To combat the decline in salmon, Washington State enacted new regulations and restricted certain salmon fishing practices.⁴⁰ A strict standard applied to all private citizens, and the State wanted the tribes to be accountable as well.⁴¹ Tribal members opposed these regulations, arguing that pursuant to the treaties, the tribes had a right to fish their cultural resource.⁴² They protested these regulations with “fish-ins” where they illegally fished in rivers.⁴³ After the federal government sued Washington, the federal district court for the Western District of Washington held that the tribes were entitled to fifty percent of the harvestable catch. This came to be known as the “*Boldt* decision.”⁴⁴ The *Boldt* decision required the tribes and the State to co-manage salmon and steelhead. The Washington tribes have been actively demonstrating their

36. Jack Healy and John Schwartz, *U.S. Suspends Construction on Part of the Dakota Access Pipeline*, N.Y. TIMES (Sept. 9, 2016), <http://www.nytimes.com/2016/09/10/us/judge-approves-construction-of-oil-pipeline-in-north-dakota.html> [https://perma.cc/K46P-P6F2].

37. Cronin, *supra* note 32, at 90.

38. *United States v. Washington*, 520 F.2d 676, 683 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

39. JAQUELINE M. STORM, *LAND OF THE QUINULT* 287 (1990).

40. *Id.* at 288.

41. *Id.*

42. *Id.* at 289.

43. *Id.* at 288.

44. *United States v. Washington*, 384 F. Supp. 312, 350 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

natural resource prowess ever since through effective management of salmon.⁴⁵

More recently, tribal values and government policies clashed over the Dakota Access Pipeline.⁴⁶ The Standing Rock Sioux tribe, located in North Dakota, opposed the construction of a 1,200-mile-long pipeline for a number of reasons.⁴⁷ First, the proposed pipeline would run through land outside the reservation that the Tribe argued is a sacred burial ground.⁴⁸ The Tribe voiced its biggest concern: the potential contamination of the tribal water supply.⁴⁹ The company responsible for constructing the pipeline claimed that it had taken “extraordinary measures to safeguard against disaster.”⁵⁰ However, the smallest amount of oil spilled could contaminate Lake Oahe, the source of the water supply.⁵¹

The Tribe sued the United States Army Corps of Engineers and alleged violations of the Clean Water Act, the National Environmental Policy Act, and the National Historic Preservation Act.⁵² The Tribe claimed that “grading and clearing of land—might damage or destroy sites of great cultural or historical significance to the Tribe.”⁵³ A district court judge denied the Tribe’s motion for a preliminary injunction.⁵⁴ The Corps, the Department of Interior, and the Department of Justice temporarily halted construction in order to continue further studying the

45. Cronin, *supra* note 4, at 535–37.

46. Justin Worland, *What We Know About the Dakota Access Pipeline Protests*, TIME (Oct. 28, 2016), <http://time.com/4548566/dakota-access-pipeline-standing-rock-sioux/> [<https://perma.cc/B8WQ-D58D>].

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 205 F. Supp. 3d 4, 33 (2016).

53. *Id.* However, the court did note that the impacts on tribes if something were destroyed would be disastrous. As one of the plaintiffs stated:

History connects the dots of our identity, and our identity was all but obliterated. Our land was taken, our language was forbidden. Our stories, our history, were almost forgotten. What land, language, and identity remains is derived from our cultural and historic sites. . . . Sites of cultural and historic significance are important to us because they are a spiritual connection to our ancestors. Even if we do not have access to all such sites, their existence perpetuates the connection. When such a site is destroyed, the connection is lost.

Id.

54. *Id.* at 24, 26 (“The Tribe thus cannot demonstrate that the temporary relief it seeks here—*i.e.*, a preliminary injunction to withdraw permitting by the Corps for dredge or fill activities in federally regulated waters along the DAPL route—can prevent the harm to cultural sites that might occur from this construction on private lands.”).

impacts on and around Lake Oahe.⁵⁵ The federal government asked the construction company to take a voluntary pause, but the company declined.⁵⁶ However, the Corps delayed construction again, stating that it needed more time to study the impacts.⁵⁷ Tribal members of the Standing Rock Reservation, other tribal members, as well as environmental, social, and political activists have protested the construction of the pipeline.⁵⁸ In order to remove the protestors, police have employed a variety of tactics.⁵⁹ The Corps told the protestors that they must vacate the premises or risk arrest.⁶⁰ The Corps reasoned that their decision was “necessary to protect the general public from the violent confrontations between protestors and law enforcement officials that have occurred in this area, and to prevent death, illness, or serious injury to inhabitants of encampments due to the harsh North Dakota winter conditions.”⁶¹ The Tribe expressed its discontent:

It is both unfortunate and ironic that this announcement comes the day after this country celebrates Thanksgiving—a historic exchange of goodwill between Native Americans and the first immigrants from Europe. Although the news is saddening, it is not at all surprising given the last 500 years of the treatment of our people. We have suffered much, but we still have hope that the President will act on his commitment to close the chapter of broken promises to our people and especially our children.⁶²

Four days after taking office, President Donald Trump signed a presidential memorandum ordering the Corps to permit construction of

55. Healy, *supra* note 36.

56. *Id.*

57. *Id.*

58. *Id.*

59. Worland, *supra* note 46 (“Police have used pepper spray, rubber bullets and concussion cannons, among other tactics, according to the tribe. Amy Goodman, a journalist with the Democracy Now! program, was arrested while covering the protest for allegedly trespassing. Footage she captured showed police officers allowing their dogs to charge protesters.”).

60. Chas Danner, *Standing Rock Protesters Vow to Remain at Camp, Despite Army Corps Order to Vacate*, N.Y. MAG. (Nov. 26, 2016, 6:37 PM), <http://nymag.com/daily/intelligencer/2016/11/standing-rock-protesters-vow-to-remain-despite-vacate-order.html> [<https://perma.cc/FS3C-JWAA>].

61. *Id.*

62. Martha Ann Overland, *Army Corps of Engineers Tell Pipeline Protesters to Leave*, NPR (Nov. 25, 2016, 9:37 PM), <http://www.npr.org/sections/thetwo-way/2016/11/25/503379401/army-corps-of-engineers-tells-pipeline-protesters-to-leave-camp-by-dec-5> [<https://perma.cc/FBV4-9ZGL>].

the Dakota Access Pipeline as well as the Keystone Pipeline.⁶³ The Corps then granted Dakota Access an easement and withdrew their intent to develop an environmental impact statement.⁶⁴ The Standing Rock Tribe announced they will take legal action to fight the executive order.⁶⁵ The Tribe stated the pipeline “risks contaminating tribal and American water supplies while disregarding treaty rights.”⁶⁶

The Dakota Access Pipeline dispute is an example of how tribes have often felt toward the federal government. Some argue that this situation is history repeating itself with events such as the Battle of Little Bighorn and the Wounded Knee protests.⁶⁷ As one scholar notes, “[t]here are no rights being violated here that haven’t been violated before,” and the common theme is a “bureaucratic disregard for consultation with indigenous people.”⁶⁸

II. EXECUTIVE ORDERS AND AGENCY POLICY ENCOURAGES TRIBAL CONSULTATION AND CONSULTATION IS NECESSARY FOR FEDERAL NATURAL RESOURCE MANAGEMENT

While tribes desire continued involvement in natural resource management decisions, this involvement is not without friction. Confidentiality has often been a point of contention with those who conduct research on or with tribes. Tribes may still be protective of their cultural information needed to address their resource concerns. Social science researchers have noticed that “specific issues of cultural use of [a] resource as well as sacred sites were not something tribal members cared to make public.”⁶⁹ Additionally, the tribal view on natural resource management does not always comport with the Western view. A lack of

63. Brian Naylor, *Trump Gives Green Light to Keystone, Dakota Access Pipelines*, NPR (Jan. 24, 2017, 10:33 AM), <http://www.npr.org/2017/01/24/511402501/trump-to-give-green-light-to-keystone-dakota-access-pipelines> [https://perma.cc/SM8C-EEEW].

64. Notice of Termination to Prepare an Environmental Impact Statement in Connection with Dakota Access, LCC’s Request for an Easement to Cross Lake Oahe, North Dakota, 82 Fed. Reg. 11021 (Feb. 17, 2017).

65. Naylor, *supra* note 63.

66. *Id.*

67. Leah Donella, *The Standing Rock Resistance Is Unprecedented (It’s Also Centuries Old)*, NPR (Nov. 22, 2016, 11:18 AM), <http://www.npr.org/sections/codeswitch/2016/11/22/502068751/the-standing-rock-resistance-is-unprecedented-it-s-also-centuries-old> [https://perma.cc/SZ55-MUWN].

68. *Id.* (quoting Kim Tallbear, a professor for Native Studies at the University of Alberta). Tallbear had previously worked on tribal issues for the U.S. Environmental Protection Agency and the U.S. Department of Energy as an environmental planner. *Id.*

69. Cronin, *supra* note 32, at 95.

cultural awareness has often led to co-management conflicts—particularly about how to manage a particular resource.⁷⁰ Additionally, friction can be seen in the cultural divide between Western and indigenous perspectives on resource consultation.⁷¹ Studies also show that tribes may feel taken advantage of or deprived of benefits from the data or consultation, and this makes them less willing to collaborate in the future.⁷²

While tribes may feel that the federal government does not consult with them when making environmental decisions, there are several statutes and directives that encourage or even require consultation with tribes. This Part first examines the variety of obligations the federal government has when consulting with tribes. Second, this Part specifically examines the consultation process found in the ESA. Last, this Part discusses the new Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) guidance on tribal consultation.

A. *Tribal Consultation Requirements Lack an Enforcement Mechanism*

Formal tribal agency consultation originated with the Nixon administration.⁷³ Prior to the Nixon administration, the federal government attempted to end the tribes' status as sovereign nations.⁷⁴ There was also the Indian Reorganization Act of 1934, which sought to assimilate Native Americans into society.⁷⁵ In 1953, Congress doubled down on their assimilation goal by passing House Concurrent Resolution 108.⁷⁶ Then in 1954, Congress passed fourteen termination acts revoking federal recognition of approximately 110 tribes and bands in eight different states.⁷⁷ In Nixon's Special Message to Congress on Indian

70. *Id.*

71. See Ilena M. Norton & Spero M. Manson, *Research in American Indian and Alaska Native Communities: Navigating the Cultural Universe of Values and Processes*, 64 J. CONSULTING AND CLINICAL PSYCHOL. 856, 859 (1996) ("Confidentiality also is at issue within the generally small and close-knit communities that characterize this special population.").

72. *Id.*

73. Eitner, *supra* note 1, at 873–74; see Special Message to Congress on Indian Affairs, 213 PUB. PAPERS 564, 564–67 (July 8, 1970) [hereinafter Special Message to Congress].

74. Micheal C. Walch, *Terminating the Indian Termination Policy*, 35 STAN. L. REV. 1181, 1191 (1983).

75. 25 U.S.C. §§ 461–494 (2012).

76. Walch, *supra* note 74, at 1185.

77. *Id.* at 1185–86.

Affairs, he stated that he wanted “a new and balanced relationship between the United States government and the first Americans.”⁷⁸ Because of Nixon’s Message, some scholars describe the Nixon era as the era of tribal self-determination.⁷⁹

Later, President Reagan issued an Indian policy that called for a “government to government relationship,”⁸⁰ a policy that both President Bush and President Clinton continued. Clinton’s Memorandum, Government-to-Government Relations with Native American Tribal Governments,⁸¹ directed agencies to “consult, to the greatest extent practicable, and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments.”⁸² One of the goals of the Memorandum was to encourage “open and candid” consultations with the tribes.⁸³

President Clinton issued Executive Order 13,175 six years after signing his Memorandum to continue a government-to-government relationship. Clinton’s Order mandated that “[e]ach agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.”⁸⁴ Further, the Clinton’s Order states that “[t]o the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute,”⁸⁵ unless the agency (1) consulted with the tribe early in the development of the proposed regulation, (2) gave the Office of Management and Budget (OMB) a tribal impact statement that detailed the extent to which the agency consulted with the tribe, and (3) provided any written communications with OMB.⁸⁶ The executive order also

78. Special Message to Congress, *supra* note 73, at 576.

79. Eitner, *supra* note 1, at 873–74 (2014). This is an appropriate characterization as in his message to the Congress on Indian Affairs he stated “[s]elf-[d]etermination [w]ithout [t]ermination.” Special Message to Congress, *supra* note 73, at 565.

80. Eitner, *supra* note 1, at 874. For a more extensive discussion on the history of tribal consultation, see also Memorandum from William J. Clinton, President, United States of America, on Government-to-Government Relations with Native American Tribal Governments to the Heads of Executive Departments and Agencies, 59 Fed. Reg. 22,951 (May 4, 1994).

81. Haskew, *supra* note 5, at 26; Eitner, *supra*, note 1, at 874.

82. Memorandum on Government-to-Government Relations with Native American Tribal Governments, to the Heads of Executive Departments and Agencies, 59 Fed. Reg. 22,951 (May 4, 1994).

83. *Id.* See also Eitner, *supra* note 1, at 874.

84. Exec. Order No. 13,175, 65 Fed. Reg. 67,249, 67,250 (Nov. 6, 2000).

85. *Id.*

86. *Id.*

gives the federal government discretionary authority to cover the costs incurred by the tribe when complying with the regulation.⁸⁷ Further, the executive order requires agencies to state in the preamble of the regulation a statement regarding tribal concerns and whether those concerns have been addressed.⁸⁸ Notably absent, however, is any cause of action to enforce meaningful consultation.⁸⁹

In 2009 President Obama issued his own Memorandum on consultation, which outlined a goal of collaboration and consultation with the tribes.⁹⁰ Again, the President highlighted the “unique legal and political relationship with Indian tribal governments.”⁹¹ President Obama recognized that “the failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable, and, at times, devastating and tragic results.”⁹² He stated that “meaningful dialogue between Federal officials and tribal officials has greatly improved Federal policy toward Indian tribes. Consultation is a critical ingredient of a sound and productive Federal-tribal relationship.”⁹³ Again, the Memorandum did not create any right of action for lack of consultation.⁹⁴

B. The Endangered Species Act and Other Statutes Encourage Consultation

The Endangered Species Act (ESA) encourages agencies to consult with tribes. The ESA’s purpose is to protect “endangered and threatened species” from extinction.⁹⁵ The decision to list a species as endangered, either on the Secretary of the Interior’s own initiative or through petition by an interested citizen, is made solely on the “best scientific and commercial data available.”⁹⁶ Once a species is listed, the Secretary of

87. *Id.*

88. *Id.* at 67,249–51.

89. *See id.* at 67,252.

90. Tribal Consultation, 74 Fed. Reg. 57,881, 57,881 (Nov. 5, 2009).

91. *Id.*

92. Eitner, *supra* note 17, at 876 (quoting Tribal Consultation, 74 Fed. Reg. 57,881 (Nov. 5, 2009)).

93. Tribal Consultation, 74 Fed. Reg. at 57,881.

94. *See id.* at 57,882.

95. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Ore.*, 515 U.S. 687, 690 (1995).

96. 16 U.S.C. §§ 1533(a)(1)(A), (b)(1)(A) (2012). *Compare* *Ctr. for Biological Diversity v. Badgley*, 335 F.3d 1097 (9th Cir. 2003) (upholding the decision to not list Northern Goshawk as an endangered or threatened species because the decision was not supported by best available scientific and commercial data), *with* *Biodiversity Legal Found. v. Babbitt*, 943 F. Supp. 23, 24 (D.D.C. 1996)

the Interior must designate the critical habitat of the species “on the basis of the best scientific data available [and take] into consideration the economic impact or any other relevant impact.”⁹⁷ After an agency lists a species as endangered, it is unlawful for anyone to “take” that species.⁹⁸ Further, no one may adversely affect or modify that species’ critical habitat—any air, land, or sea—the loss of which would segment the species or decrease the likelihood of the species’ continued survival.⁹⁹

The ESA also mandates procedures in which federal agencies must consult with the FWS or the NMFS, the two agencies responsible for ESA implementation. The purpose of this consultation is to ensure that actions by FWS and NMFS will “not jeopardize the continued existence of any endangered . . . or threatened species or result in the destruction or adverse modification of habitat.”¹⁰⁰ This consultation requirement only applies to major federal actions.¹⁰¹ However, the ESA does not directly mandate that FWS or NMFS consult with tribes.¹⁰²

In 1997 the Secretary of the Interior issued an order that directed agencies to “consult with, and see the participation of, the affected Indian tribes to the maximum extent practicable.”¹⁰³ The Order directs agencies to be cognizant of Indian cultures and practices.¹⁰⁴ However, the Order does not grant or create an enforceable right.¹⁰⁵ Accordingly, scholars criticize the Order as being unenforceable since it does not give any recourse to tribes for lack of consultation and does not provide specific procedures on how tribes and federal agencies should consult

(reversing the FWS’s decision to not list a species of wolf because the agency did not consider best available scientific and commercial data).

97. 16 U.S.C. § 1533(b)(2).

98. § 1538(a)(1)(B). “The term ‘take’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” § 1532(19).

99. § 1532(5)(a).

100. § 1536(a)(2).

101. § 1533(b)(2).

102. See Carl H. Johnson, *Balancing Species Protection With Tribal Sovereignty: What Does The Tribal-Rights Endangered Species Order Accomplish?*, 83 MINN. L. REV. 523, 532–33 (1998) (“It is only when Indian tribal rights directly conflict with listed species that Indian tribes are brought into the discussion, and rarely are their rights considered.”).

103. Sec. Order No. 3206, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act (Interior and Commerce Departments, 1997) [hereinafter Sec. Order 3206]. While not published in the Federal Register, the Order is available on the Internet at http://www.nmfs.noaa.gov/sfa/reg_svcs/Councils/Webinar/secretarial_order.pdf [<https://perma.cc/VG7P-L86Q>].

104. *Id.*

105. *Id.*

with each other.¹⁰⁶ Additionally, courts have declined to extend an obligation to federal agencies to consult with tribes.¹⁰⁷ Overall, while tribal consultation is required, tribes have no recourse for an agency's failure to do so.

C. FWS and NMFS's New Policy on Tribal Consultation Does Not Provide Any Enforceable Protections

In early 2016, FWS and NMFS published their final Native American Policy.¹⁰⁸ The purpose of the policy "is to carry out the United States' trust responsibility to Indian tribes by establishing a framework on which to base [their] continued interactions with federally recognized tribes and Alaska Native Corporations."¹⁰⁹ FWS Director Dan Ashe stated that the policy "will work to enhance both our relationships with tribal governments and our value to them by improving communication and cooperation, providing technical expertise, and sharing training and assistance."¹¹⁰ The rationale behind the policy was two-fold: first, to strengthen the relationship between the federal government and the tribes;¹¹¹ second, to help conserve natural resources through this strengthened relationship.¹¹² The policy contains nine separate sections.

Section 1 discusses the "unique" relationship between the tribes and the government. FWS states that it will "acknowledge and respect the diverse Native American religious, spiritual, and cultural identities, and their understanding of ecosystems and cultural resources. We will listen to and consider the traditional knowledge, experience, and perspectives of Native American people to manage fish, wildlife, and cultural resources."¹¹³

Section 2 recognizes the sovereignty of tribes and the need to communicate government-to-government. FWS recognizes that "the

106. See Johnson, *supra* note 102, at 550 ("Nor does it provide a solid mechanism for tribes to obtain redress in the event that federal agencies fail to carry out their instructions. The Order does not bind the Fish and Wildlife Service or the National Marine Fisheries Service to act in the best interests of tribes; instead, it merely provides a guide for agency behavior toward tribes.").

107. See, e.g., *Ctr. for Biological Diversity v. Salazar*, No. 10–2130–PHX–DGC, 2011 WL 6000497, at *10–11 (D. Ariz. Nov. 30, 2011).

108. Native American Policy, 81 Fed. Reg. 4638 (Jan. 27, 2016).

109. *Id.*

110. U.S. FISH & WILDLIFE SERV., NATIVE AMERICAN POLICY (Jan. 20, 2016), <https://www.fws.gov/nativeamerican/pdf/Policy-revised-2016.pdf> [<https://perma.cc/9MD6-ZG2R>].

111. Native American Policy, 81 Fed. Reg. 4638 (Jan. 27, 2016).

112. *Id.*

113. U.S. FISH & WILDLIFE SERV., NATIVE AMERICAN POLICY (Jan. 20, 2016), <https://www.fws.gov/nativeamerican/pdf/Policy-revised-2016.pdf> [<https://perma.cc/9MD6-ZG2R>].

special Federal Indian trust responsibility involves our obligation to exercise due care where our actions affect the exercise of tribal rights.”¹¹⁴

Section 3 describes communication, consultation and information sharing between tribes and federal government. FWS states that it will “use the best available scientific and commercial data and solicit and consider information, traditional knowledge, and expertise of affected tribal governments in policies, agency actions, and determinations that have tribal implications.”¹¹⁵

Section 4 aims to promote co-management and collaborative management of resources. FWS states it will work with tribal governments to manage “eagles and other migratory birds, fish, endangered and threatened species, and other public resources where federal laws apply.”¹¹⁶

Section 5 states that FWS will meaningfully consult with tribes when FWS’ actions may affect tribal “cultural or religious interests, including archaeological resources, cultural resources, and sacred sites, consistent with federal law.”¹¹⁷ Further, FWS explicitly states that tribes may use “federally protected birds, bird feathers and remains, and other animal and plant material for their tribal cultural and religious expression.”¹¹⁸

Section 6 includes cooperative law enforcement between FWS and tribes to enforce fish and wildlife laws. FWS states it will provide training to its employees to “promote tribal cultural competency awareness.”¹¹⁹

Section 7 discusses how FWS will assist with tribes in capacity building, assistance, and funding. This includes agreements through the Indian Self-Determination and Education Assistance Act (ISDEAA),¹²⁰ law enforcement training, and professional development.¹²¹

Section 8 encourages a monitoring program to see whether tribal members support FWS’ policy. FWS states it wants the policy to be collaborative and flexible to adjust to changing priorities of FWS and tribes.¹²²

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

Section 9 provides the limitations of the policy. Notably, this policy is “intended only to improve the internal management of the Service.”¹²³ The policy “does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its departments [and] agencies.”¹²⁴

Overall, the policy aims to encourage consultation with tribes by providing historical background, highlighting specific areas of concern, and stating the goal of cooperation among tribes. However, this policy is also toothless. Tribes do not have recourse if the agencies do not follow this policy as it does not have the force and effect of law.

Several other statutes mandate consultation and apply to all federal agencies, not just FWS and NMFS.¹²⁵ Further, FWS’s policy lists several states that provide authority to FWS to consult with tribes. In addition to the FWS policy, and the ESA, there are several other statutes that encourage consultation. The statutes include: Alaska National Interest Lands Conservation Act of 1980,¹²⁶ Alaska Native Claims Settlement Act,¹²⁷ American Indian Religious Freedom Act,¹²⁸ Archaeological Resources Protection Act of 1979 (ARPA),¹²⁹ Bald and Golden Eagle Protection Act,¹³⁰ Endangered Species Act of 1973 (ESA),¹³¹ Fish and Wildlife Act of 1956,¹³² Fish and Wildlife Coordination Act of 1934,¹³³ Indian Reorganization Act (Wheeler-Howard Act),¹³⁴ Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA),¹³⁵ The Lacey Act of 1900,¹³⁶ Marine Mammal Protection Act,¹³⁷ Migratory Bird Treaty Act,¹³⁸ National Environmental

123. *Id.*

124. *Id.*

125. Eitner, *supra* note 1, at 880 (discussing the American Indian Religious Freedom Act, the Archeological Resources Protection Act of 1979, the National Historic Preservation Act, and the Native American Graves Protection Act).

126. 16 U.S.C. §§ 3101–3233 (2012).

127. 43 U.S.C. §§ 1601–1629h (2012).

128. 42 U.S.C. §§ 1996–1996a (2012).

129. 16 U.S.C. §§ 470aa–470mm.

130. *Id.* §§ 668–668d.

131. *Id.* §§ 1531–44.

132. *Id.* § 741.

133. *Id.* §§ 661–667d.

134. 25 U.S.C. § 461 (2012).

135. *Id.* § 450.

136. 16 U.S.C. § 3371–78.

137. *Id.* § 1361–1423h. For Alaska Native Organization cooperative agreements, see *id.* § 1388.

138. *Id.* § 703–12.

Policy Act of 1969 (NEPA),¹³⁹ National Historic Preservation Act of 1966 (NHPA),¹⁴⁰ National Wildlife Refuge System Administration Act of 1966,¹⁴¹ Native American Graves Protection and Repatriation Act,¹⁴² and the Religious Freedom Restoration Act of 1993.¹⁴³ Although the list of statutes is not exhaustive, it is very comprehensive. As evidenced in the list, FWS and NMFS engage in many activities that can have a direct impact on tribes and their cultural resources.

Overall, when the federal government engages in activities that affect tribes, the federal government aims to consult with tribes even if the statutes do not require it.¹⁴⁴ However, consultation is not always effective in practice, and in many instances if the government does not consult with a tribe, there is no legal recourse for the tribe.

III. THE FREEDOM OF INFORMATION ACT FRUSTRATES TRIBAL CONSULTATION

FOIA inhibits tribal consultation because it requires federal agencies to make their records available to the public. Because FWS and NMFS are federal agencies, they fall within the purview of FOIA. This Part provides a brief description of FOIA. It discusses several cases in which tribes were affected by FOIA. Lastly, this Part discusses comments provided by tribes to FWS and NMFS regarding consultation and FOIA.

A. *The Freedom of Information Act's Purpose Is to Inform the Public*

FOIA's¹⁴⁵ goal is to "pierce the veil of administrative secrecy and open agency action to the light of public scrutiny."¹⁴⁶ FOIA requires, upon request, federal agencies to disclose records to help citizens become informed, a goal that is "vital to the functioning of a democratic society."¹⁴⁷ The Act revised the Administrative Procedure Act's public

139. 42 U.S.C. § 4321 (2012).

140. 54 U.S.C. § 300101 (2012).

141. 16 U.S.C. §§ 668dd–668ee, *amended by* the National Wildlife Refuge System Improvement Act of 1997, Pub. L. No. 105-57 (1997).

142. 25 U.S.C. §§ 3001–13 (2012).

143. 42 U.S.C. §§ 2000bb–2000bb-4.

144. *See, e.g.*, U.S. FISH & WILDLIFE SERVICE, NATIVE AMERICAN POLICY (January 20, 2016), <https://www.fws.gov/nativeamerican/pdf/Policy-revised-2016.pdf> [<https://perma.cc/9MD6-ZG2R>].

145. 5 U.S.C. § 552 (2012).

146. *U.S. Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (quoting *Rose v. U.S. Dep't of Air Force*, 495 F.2d 261, 263 (2d Cir. 1974)).

147. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

disclosure section.¹⁴⁸ Congress had two goals when it enacted FOIA: (1) “to permit access to official information long shielded unnecessarily from public view,”¹⁴⁹ and (2) “to create a judicially enforceable public right to secure such information from possibly unwilling official hands.”¹⁵⁰ The purpose of FOIA is “disclosure, not secrecy.”¹⁵¹ Ultimately, the “core purpose”¹⁵² of FOIA is to inform citizens “about what their government is up to.”¹⁵³

FOIA requires all federal agencies to make records available for public inspection and to allow the public to copy the agency’s opinions, statements of policy, interpretations and staff manuals, and instructions that are not published in the federal register.¹⁵⁴ Upon a request for records, which describes the records with reasonable specificity, an agency must make the records “promptly available.”¹⁵⁵ After an agency receives a FOIA request, the agency has twenty working days to determine if the agency will comply with the request and “immediately notify the person making such request of such determination and reasons therefor.”¹⁵⁶ The agency is also required to notify the requester that the requester has a right to appeal the agency’s determination.¹⁵⁷ If the requester does appeal, the agency has twenty days to reverse or uphold the denial in part or in full.¹⁵⁸ In upholding a denial, or part of a denial, the agency must notify the requester that they have the right of judicial review of the agency’s determination.¹⁵⁹ An agency that refuses to disclose information bears the burden to justify non-disclosure.¹⁶⁰ The

148. See *EPA v. Mink*, 410 U.S. 73, 79 (1973), *superseded by statute on other grounds*, Pub. L. No. 93-502, 88 Stat. 1561 (1974) (discussing how the APA gave agencies broad discretion over disseminating records and the public had no remedy for “wrongful withholding of information”).

149. *Id.* at 80.

150. *Id.*

151. *Rose*, 425 U.S. at 361 (explaining that the objectives and policy of FOIA were to provide the public with access to information). See also *Mink*, 410 U.S. at 80 (stating “[w]ithout question, the Act is broadly conceived”).

152. *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989).

153. *Id.*

154. 5 U.S.C. § 552(a)(2) (2012).

155. *Id.* § 552(a)(3).

156. *Id.* § 552(a)(6)(A)(i).

157. *Id.*

158. *Id.* § 552(a)(6)(A)(ii).

159. *Id.* See also *id.* § 552(a)(4)(B) (stating that a district court has the right “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld.”).

160. *McCutchen v. U.S. Dep’t of Health & Human Servs.*, 30 F.3d 183, 185 (D.C. Cir. 1994).

agency can satisfy this burden by submitting agency declarations of “sufficient detail to describe the withheld material with reasonable specificity, and the reasons for non-disclosure.”¹⁶¹ The district court will review the agency’s decision *de novo*¹⁶² and the court will review the facts and inferences in a light most favorable to the requester of information.¹⁶³

While FOIA has a broad disclosure purpose, an agency can withhold information if it falls within one of nine enumerated exemptions:

- Exemption One covers “material classified under an executive order to be kept secret in the interest of national defense or foreign policy.”¹⁶⁴
- Exemption Two states that “material related solely to the internal personnel rules and practices of an agency” is exempt.¹⁶⁵
- Exemption Three provides that “material specifically exempted from disclosure by statute” does not need to be disclosed.¹⁶⁶
- Exemption Four prohibits disclosure of “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”¹⁶⁷
- Exemption Five encompasses “inter and intra-agency memorandums and letters that are not available by law to another party besides an agency in litigation with the agency.”¹⁶⁸
- Exemption Six protects “personnel and medical files and similar files the disclose of which would constitute a clearly unwarranted invasion of personal privacy.”¹⁶⁹
- Exemption Seven prohibits disclosure of records collected for law enforcement purposes.¹⁷⁰

161. *Sierra Club v. U.S. Dep’t of the Interior*, 384 F. Supp. 2d 1, 14 (D.D.C. 2004); *see also* U.S. Dep’t of Justice v. *Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 753 (1989).

162. 5 U.S.C. § 552(a)(4)(B).

163. *See* *Conservation Force v. Jewell*, 66 F. Supp. 3d 46, 55 (D.D.C. 2014) (citing *Wills v. U.S. Dep’t of Justice*, 581 F. Supp. 2d 57, 65 (D.C. Cir. 2008)).

164. 5 U.S.C. § 552(b)(1).

165. *Id.* § 552(b)(2).

166. *Id.* § 552(b)(3).

167. *Id.* § 552(b)(4).

168. *Id.* § 552(b)(5).

169. *Id.* § 552(b)(6).

170. *Id.* § 552(b)(7). But the exception only applies if the records or information.

- Exemption Eight encompasses records “contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.”¹⁷¹
- Exemption Nine protects “geological and geophysical information and data, including maps, concerning wells.”¹⁷²

Absent an exemption, agencies must disclose the requested information. Even if an agency successfully establishes an exemption, the agency must still disclose any reasonably segregable part of the information.¹⁷³ Congress enacted these exemptions after recognizing that there were “limitations that compete with the general interest in disclosure, and that, in appropriate cases, can overcome it.”¹⁷⁴ Due to the goals and purpose of FOIA, these exemptions are “narrowly construed.”¹⁷⁵ Some FOIA exemptions are discretionary, not mandatory.¹⁷⁶ Therefore, if a record is within the scope of a FOIA

(A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.

Id.

171. 5 U.S.C. § 552(b)(8).

172. *Id.* § 552(b)(9).

173. *Roth v. U.S. Dep’t of Justice*, 642 F.3d 1161, 1167 (D.C. Cir. 2011). *See also* *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 221 (1978) (“[U]nless the requested material falls within one of the nine statutory exemptions, FOIA requires that record and material in possession of federal agencies be made available on demand to any member of the general public.”).

174. *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004). *See also* *Summers v. U.S. Dep’t of Justice*, 140 F.3d 1077, 1080 (D.C. Cir. 1998) (“These exemptions stem from Congress’ recognition that the release of certain information may harm legitimate governmental or private interests.”).

175. *FBI v. Abramson*, 456 U.S. 615, 630 (1982). *See also* *U.S. Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989) (“Consistent with the Act’s goal of broad disclosure, these exemptions have been consistently given a narrow compass.”).

176. *See, e.g.*, 5 U.S.C. § 552(b)(3) (discussing how another statute may require an agency to withhold information).

exemption, an agency may still disclose the record, unless a separate statute expressly prohibits the disclosure.¹⁷⁷

FOIA was amended in 2016 to make it easier for a requester to obtain information from an agency.¹⁷⁸ Some of the notable additions to FOIA include the “Rule of Three”—an agency is now required to make “available for public inspection in an electronic format” records that have been “requested three or more times.”¹⁷⁹ Additionally, an agency “shall withhold information only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption . . . [or] disclosure is prohibited by law.”¹⁸⁰ All in all, an agency has limited power to prevent disclosure of records. This state of affairs poses problems for tribes (that otherwise may want to engage in consultation with an agency) by subjecting tribal information used in that consultation to unwanted public disclosure.

B. Department of Interior v. Klamath Water Users: The Conflict Between FOIA and Tribal Consultation

FOIA creates a barrier to an agency’s ability to promise confidentiality.¹⁸¹ *U.S. Department of Interior v. Klamath Water Users*,¹⁸² evidenced this problem. The Supreme Court of the United States held that information disclosed by tribes to Fish and Wildlife was subject to disclosure under FOIA.¹⁸³ Legal scholars considered the case to be a blow to consultation between federal agencies and tribes because of the implications of FOIA.¹⁸⁴

The facts of *Klamath Water Users* are as follows: several tribes located in the Klamath Basin demanded that the Department of the Interior “maintain high lake levels to protect their fisheries, while [other]

177. *Id.*

178. FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 552 (amended 2016).

179. *Id.*

180. *Id.*

181. Ethan Plaut, *Tribal-Agency Confidentiality: A Catch-22 for Sacred Site Management?*, 36 *ECOLOGY L.Q.* 137, 161 (2009) (“[A]gencies cannot realistically promise Native practitioners that all information they provide about a sacred site in order to aid in agency planning will remain confidential.”).

182. 532 U.S. 1 (2001).

183. *Id.* at 5.

184. Plaut, *supra* note 181, at 147 (“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. Thus, agencies’ ability to keep site information secret turns entirely on FOIA and its exemptions.”).

tribes have demanded increased releases to the Klamath River to benefit their downstream fisheries.”¹⁸⁵ However, if the tribes’ demands were satisfied, it would adversely affect the interests of the Klamath Water Users Protection Association (Association) members.¹⁸⁶ In order to alleviate concerns, the Bureau of Reclamation, an agency in the Department of the Interior, created the Klamath Project Operation Plan.¹⁸⁷ “The meetings disclosed substantial disagreements among irrigation interests and the Tribes, leading the irrigation interests to fear that their water allocations would be cut.”¹⁸⁸ The Association then submitted several FOIA requests to the Bureau of Indian Affairs—which had received information from the tribes.¹⁸⁹ The Bureau claimed that some of this information was exempt from FOIA under exemption five because it included intra-agency communications.¹⁹⁰

The Ninth Circuit reversed the District Court’s finding that the exemption applied because the “Klamath Basin Tribes have a ‘direct interest’ in the subject of their natural resource rights, and thus communications between the Tribes and the Interior Department can never fall within any reading of exemption five.”¹⁹¹ The Ninth Circuit stated that:

[E]ven were we to take an expansive view of the inter-agency/intra-agency test, these documents do not qualify for exemption. To hold otherwise would extend Exemption 5 to shield what amount to ex parte communications in contested proceedings between the Tribes and the Department. Rejection of such an extension does not conflict with the Department’s fiduciary obligations to the Tribes.¹⁹²

The court acknowledged that while the Department of the Interior must act in the interests of the tribes, “it may not afford them greater rights than they would have under the regulatory scheme.”¹⁹³

Judge Hawkins vigorously dissented from this opinion.¹⁹⁴ Judge Hawkins stated “the Bureau and the Department are, by law, required to

185. *Klamath Water Users Protective Ass’n v. U.S. Dep’t of the Interior*, 189 F.3d 1034, 1035 (9th Cir. 1999).

186. *Id.*

187. *Id.* at 1035–36.

188. *Id.* at 1036.

189. *Id.*

190. *Id.*

191. *Id.* at 1039 (Hawkins, J., dissenting).

192. *Id.* at 1038 (majority opinion).

193. *Id.*

represent the interests of Indian Tribes, [and] the majority's holding stands as a barrier to that representation."¹⁹⁵ Hawkins characterized the majority opinion as "fundamentally wrong"¹⁹⁶ because now "FOIA can be used to destroy any opportunity for 'open and honest' consultation between" the tribes and the agencies¹⁹⁷ Further, Hawkins stated that:

The spirit behind [the consultation] policy is not carried out when we not only fail to recognize that relationship, but use it to frustrate the use of this otherwise applicable FOIA exemption. I argue not for giving extra favoritism to the Tribes under an equally applicable law, but for the recognition of the consequences of a true distinction between their position and the positions of others vis-a-vis the Department in this matter.¹⁹⁸

The Supreme Court affirmed the Ninth Circuit's opinion.¹⁹⁹ Justice Souter, writing for the majority, stated that the Department of the Interior ignored "the first condition of Exemption 5, that the communication be 'intra-agency or inter-agency.'"²⁰⁰ The Department argued that it was the federal government's fiduciary responsibilities to the tribes.²⁰¹ The Court stated that the United States' fiduciary responsibility to the tribes does not outweigh the purposes of FOIA.²⁰² The concept of the federal government's fiduciary duties to the tribes is that when tribes agreed to cede their land to the federal government, the federal government agreed to take on "duties to protect tribal lands and cultural and natural resources for the benefit of tribes and individual tribal members/land owners."²⁰³ Therefore as the trustee, the Department claimed, the federal government has an obligation to keep information

194. *Id.* at 1039 (Hawkins, J., dissenting) ("The majority, in an effort which marginally advances the cause of open government, winds up punishing entities the government has a fiduciary duty to protect.").

195. *Id.* at 1040.

196. *Id.*

197. *Id.*

198. *Id.* at 1046.

199. *U.S. Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 5 (2001).

200. *Id.* at 11.

201. *Id.* at 10 ("The Department purports to rely on this consultant corollary to Exemption 5 in arguing for its application to the Tribe's communications to the Bureau in its capacity of fiduciary for the benefit of the Indian Tribes.").

202. *Id.* at 15–16.

203. Plaut, *supra* note 181, at 148 n.74 (quoting ADVISORY COUNCIL ON HISTORIC PRES., ACHP POLICY STATEMENT REGARDING THE ACHP'S RELATIONSHIPS WITH INDIAN TRIBES (2000), <http://www.achp.gov/policystatement-tribes.html> [<https://perma.cc/5JAJ-4SCH>]).

confidential.²⁰⁴ The Court rejected this argument and declined to read a trust/trustee relationship exemption into FOIA.²⁰⁵

While scholars have analyzed *Klamath Water Users*, few address the impacts of the decision on tribes. Shannon Taylor Waldron argues that the decision “refused to recognize the need for agencies and tribes to structure their collaborative efforts unfettered by the glare of public scrutiny.”²⁰⁶ Waldron states that the decision could “have helped clarify the role that agency-tribal consultations play in a well-functioning, sovereign-to-sovereign relationship.”²⁰⁷ This decision, Waldon concludes, could create “a litigious chain of events.”²⁰⁸ “Tribes, knowing that departments must disclose agency-tribal communications at the submission of any FOIA request, may simply refuse to consult with the executive departments.”²⁰⁹ Instead, tribes could file suits against departments alleging that the departments failed to fulfill trust obligations.²¹⁰ “Cutting off the channels of communication may move both parties away from the bargaining table and into the adversarial system, causing relations between the tribal and federal sovereigns to spiral downward.”²¹¹

In contrast, Sean Hill argues that *Klamath Water Users* may actually help tribes rather than hinder them.²¹² Hill acknowledges that “[f]rom a strictly Indian law point of view, *Klamath Water Users* is understandably problematic.”²¹³ However, he states that allowing public access to tribal communications with agencies “will permit the public to determine if the Department is living up to its duties to all concerned, or if it is ignoring its constituents. This, again, would help fulfill the basic aim of FOIA to have a more transparent government.”²¹⁴ Ultimately,

204. *Klamath Water*, 532 U.S. at 15.

205. *Id.* at 15–16 (“All of this boils down to requesting that we read an ‘Indian trust’ exemption into the statute . . . There is simply no support for the exemption in the statutory text, which we have elsewhere insisted be read strictly in order to serve FOIA’s mandate of broad disclosure.”).

206. Shannon Taylor Waldron, *Trust in Balance: The Interplay of FOIA’s Exemption 5, Agency-Tribal Consultative Mandates, and the Trust Responsibility*, 26 VT. L. REV. 149, 149 (2008).

207. *Id.*

208. *Id.* at 193.

209. *Id.*

210. *Id.*

211. *Id.*

212. Sean Hill, Note, *Sunshine in Indian Country: A Pro-FOIA View of Klamath Water Users*, 32 AM. INDIAN L. REV. 463, 482 (2008).

213. *Id.* at 484.

214. *Id.* at 485.

Hill claims that FOIA gives tribal members the power to monitor the government's actions under the trust relationship as citizens.²¹⁵

Other scholars have recognized the inherent tension between tribal consultation and FOIA. For example, Ethan Plaut argues that FOIA, along with the National Environmental Policy Act, creates a problem with confidentiality for sacred site management because tribes' confidential knowledge gets disclosed.²¹⁶ Plaut explains that tribes are secretive about sharing sacred site information with federal agencies.²¹⁷ "According to at least one anthropologist, some Native secrecy regarding religious beliefs is a function of the historical programs of forced cultural assimilation imposed on Native Americans during various historical periods."²¹⁸ Tribes have expressed the view that something "consecrated should not be seen by profane eyes or handled by profane hands," and the more people know about a sacred site the more likely the site will be abused or disrespected.²¹⁹ However, agencies need information about these sites to fulfill their responsibility to consider the impact of their decisions on cultural resources as mandated by statutes such as the NEPA, NHPA, and NGPRA.²²⁰ An agency cannot consider information that tribes do not share, thus frustrating the mandate. When tribes refuse to share information it is often due to an agency's inability to promise confidentiality.²²¹

C. FOIA Hinders Tribal Consultation

Tribal members have expressed their desire to communicate with FWS about natural resource management decisions but have also raised concerns about confidentiality.²²² The confidentiality concerns raised by tribes during FWS's solicitation of comments for its Native American

215. *Id.*

216. Plaut, *supra* note 181, at 140.

217. *Id.* at 145 ("Due to these secrecy concerns, people with information about sacred sites may be reluctant to share this information with land management agencies for fear that the agencies will disclose the information to the public.").

218. *Id.* at 143 (citing Elizabeth Brandt, *The Role of Secrecy in a Pueblo Society*, in *FLOWERS OF THE WIND: PAPERS ON RITUAL, MYTH AND SYMBOLISM IN CALIFORNIA AND THE SOUTHWEST* 12 (Thomas C. Blackburn ed., 1977)).

219. *Id.* at 144.

220. *Id.* at 141–42.

221. *Id.* at 145.

222. Native American Policy for the U.S. Fish and Wildlife Service, 81 Fed. Reg. 4638, 4639 (Jan. 27, 2016).

Policy is one example.²²³ Specifically, commenters stated that “tribal members may not be free to share information on specific cultural locations practices, or actions that could be useful to the [FWS] and asked the [FWS] to accommodate privacy.”²²⁴ Another commenter stated:

If the Service is to request full cooperation and assistance regarding shared information, the final draft [of the policy] must include strong language to protect tribal information. Traditional Ecological Knowledge (TEK), site-specific information, and any information deemed sensitive by the tribes, as being totally protected and *not subject to FOIA requests*.²²⁵

FWS’s response indicated that its hands are tied when it comes to protecting tribal information from FOIA requests.²²⁶ FWS stated that it understood that only some information can be shared and some information may only be shared if there is a promise of confidentiality.²²⁷ FWS stated that it will work with the tribes to protect as much information as possible, and “[i]f the Service relies on any such information as a basis for agency action to protect resources, however, that information will become an agency record subject to FOIA and must be released unless it falls under an exemption.”²²⁸ In another response, the agency stated that “the Service is subject to the FOIA and has no discretion to protect from disclosure tribal information that does not qualify under any of FOIA’s statutory exemptions.”²²⁹

Another example of the tension between tribal consultation and FOIA is in the FWS’s revisions to the ESA regulations.²³⁰ In creating a new final rule that amended the regulations governing the designations of critical habitat, the FWS went through the statutorily mandated notice and comment rulemaking process.²³¹ During that process, tribes commented that “traditional ecological knowledge should constitute the best scientific data available.”²³² The FWS recognized that TEK is

223. *Id.* at 4638.

224. *Id.* at 4640.

225. *Id.* at 4641 (emphasis added).

226. *Id.* (stating that the Service does not have discretion about what is subject to FOIA).

227. *Id.* at 4640.

228. *Id.*

229. *Id.* at 4641.

230. Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat, 81 Fed. Reg. 7414 (Feb. 11, 2016).

231. *Id.* at 7416.

232. *Id.*

important and useful and that the FWS previously used TEK to inform agency decisions.²³³ FWS acknowledged that “in some cases TEK may be the best data available”²³⁴ but that it could not guarantee that it will always be. Furthermore, the FWS cautioned that “any data, including TEK, used by the Service to support a listing determination in the development of a critical habitat designation may be subject to disclosure under [FOIA].”²³⁵

Overall, potential disclosure through FOIA poses a substantial barrier to tribal consultation. Tribes want and need to have their voices heard when agencies are making natural resources decisions. However, agencies can only do so much to protect tribes and fulfill its FOIA responsibilities. If information disclosed by a tribe does not fall within the exemptions of FOIA, then, by law, it must be disclosed.

IV. ATTEMPTS TO PROTECT TRIBAL INFORMATION HAVE FALLEN SHORT

Both scholars and government officials recognize the tension between FOIA and tribe-agency confidentiality and have attempted to find ways to protect tribes from FOIA disclosures.²³⁶ Other scholars have argued that the federal government should do more to consult with tribes. Few acknowledge that while consultation is desirable, FOIA creates a problem. The ones that do acknowledge this problem argue that agencies need to make a more concerted effort to protect tribes. But there is only so much that an agency can do in light of FOIA responsibilities. This Part first looks at the attempts to protect information under the existing exemptions, specifically looking at the potential of Exemption Four. Second, this Part discusses attempts to amend FOIA to protect tribal information from disclosure.

A. *FOIA Exemptions Do Not Provide Adequate TEK Protection*

This Section examines different potential Exemptions that could apply to tribes in order to prevent disclosure. The first subsection discusses how one scholar has examined whether Exemption Three and Exemption Six are adequate to protect tribal information. Exemptions

233. *Id.*

234. *Id.*

235. *Id.*

236. *See, e.g.,* Plaut, *supra* note 181; Native American Policy for the U.S. Fish and Wildlife Service, 81 Fed. Reg. 4638, 4639 (Jan. 27, 2016).

Three and Six are inadequate because they provide a piecemeal approach. The next subsection looks at Exemption Four and concludes that Exemption Four does not provide the necessary protection after all because it requires a very fact-specific inquiry.

1. *Exemptions Three and Six Are Inadequate*

One scholar has already examined Exemptions Three and Six and determined them to be ineffective at protecting tribal information.²³⁷ Ethan Plaut has specifically studied FOIA exemptions to protect tribal information from disclosure in the context of sacred site management, and he specifically examines Exemption Three and Exemption Six.²³⁸ Exemption Three protects information that is specifically exempted from disclosure by statute.²³⁹ Plaut looks to the Archaeological Resources Protection Act (ARPA) and the National Historic Preservation Act (NHPA) as potential statutes to exempt tribal information from disclosure.²⁴⁰ While some information may be protected under ARPA or NHPA, Plaut acknowledges that these statutes have severe limitations when protecting confidentiality.²⁴¹ However, he notes that ARPA only authorizes withholding of information about archeological resources and “material remains of past human life or activities which are archeological interest and are at least one hundred years of age.”²⁴² While ARPA might prevent federal disclosure, state governors are still able to request information protected under this statute.²⁴³

NHPA does not provide the necessary protection either. NHPA protects disclosure of information if disclosure would “cause a significant invasion of privacy[,] . . . risk harm to the historic resources[,] or . . . would impede the use of a traditional religious site by practitioners.”²⁴⁴ Even if NHPA is a statute that allows agencies to withhold information, it would be subject to the limitations above.²⁴⁵

237. Plaut, *supra* note 181, at 149, 157.

238. *Id.*

239. *Id.* at 149.

240. *Id.* at 151.

241. *Id.* at 150–51.

242. *Id.* at 150 (internal quotations omitted).

243. *Id.* (“If, however, the governor of the state where ‘archaeological resources’ are found formally requests that information, federal agencies must provide the information as long as the governor promises that she will ‘adequately protect the confidentiality of such information to protect the resource from commercial exploitation.’” (quoting 16 U.S.C. § 470hh(b) (2012))).

244. *Id.* at 151 (internal quotations omitted).

245. *Id.*

The historic resources requirement presents the biggest hurdle to a full-fledged NHPA exemption.²⁴⁶ In short, Plaut argues that Exemption Three “provides an imperfect patchwork of protection.”²⁴⁷

Plaut also examines Exemption Six which applies to “personnel medical, and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”²⁴⁸ While personnel and medical files do not apply, “similar files” could. Plaut notes that the Supreme Court interprets “similar files” broadly.²⁴⁹ Additionally, Geographic Information System files have been interpreted to be considered “similar files.”²⁵⁰ Plaut recognizes that whether or not disclosure would constitute “a clearly unwarranted invasion of personal privacy” is more suspect.²⁵¹ In *National Association of Home Builders v. Norton*,²⁵² the D.C. Circuit rejected an argument that files containing private property owners observations about owl sightings was “clearly unwarranted” and held that the information was subject to FOIA.²⁵³ The court disagreed with the Department of the Interior that the property owners had a privacy interest that could be circumvented by others traveling to the property to watch birds.²⁵⁴ While the privacy interest in sacred site management is arguably broader, Plaut succinctly acknowledges that “agencies should not promise confidentiality for any sacred site information based on Exemption Six.”²⁵⁵

2. *Exemption Four Is an Insufficient Way to Protect Tribal Information*

Scholars have proposed using the trade secret framework to protect tribal information, and Exemption Four could potentially be used in a similar manner. However, this would not adequately protect tribal information because the Exemption’s application is too fact-specific. As

246. *Id.* at 152.

247. *Id.* at 157.

248. *Id.* (quoting 5 U.S.C. § 552(b)(6) (2012)).

249. *Id.* See also *Wash. Post Co. v. U.S. Dep’t of Health & Human Servs.*, 690 F.2d 252, 260 (D.C. Cir. 1982).

250. *Id.* at 158.

251. *Id.* at 159 (noting that it would be difficult to predict what qualifies as “a clearly unwarranted invasion of privacy”).

252. 309 F.3d 26, 39 (2002). However, the court allowed the agency to withhold individual property owners’ names. See also Plaut, *supra* note 181, at 159.

253. *Nat’l Ass’n of Home Builders*, 309 F.3d at 39.

254. *Id.*

255. Plaut, *supra* note 181, at 161.

previously stated, Exemption Four under FOIA protects trade secrets or information that is privileged or confidential disclosed by an individual with a commercial or financial value.²⁵⁶ There are two ways for information to be protected under Exemption Four: (1) it is a trade secret or (2) it is privileged commercial or financial information disclosed by a person.²⁵⁷

One potential way to prevent disclosure is by defining TEK as “trade secrets” under Exemption Four. Neither FOIA nor the Supreme Court define trade secrets. The D.C. Circuit, the circuit with the most experience in FOIA, has adopted a narrow definition of trade secrets.²⁵⁸ The court defined a trade secret as a “commercially valuable plan, formula, process, or device that is used for making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.”²⁵⁹ The D.C. Circuit promulgated a narrow definition of trade secrets, which has also been adopted by the Tenth Circuit.²⁶⁰ TEK falls outside this narrow definition for trade secrets.

The second way to prevent disclosure under Exemption Four is “information that is commercial or financial, and obtained from a person and privileged or confidential” (CFI).²⁶¹ This form of protection has been successfully applied to the tribes in limited circumstances.²⁶² To qualify as CFI under Exemption Four the information must satisfy a three-part test.²⁶³ The information must be (1) commercial or financial; (2) obtained from a person; and (3) privileged or confidential.²⁶⁴

256. 5 U.S.C. § 552(b)(4) (2012).

257. *Id.*

258. Pub. Citizen Health Research Grp. v. FDA, 704 F.2d 1280, 1288 (D.C. Cir 1983).

259. *Id.*

260. Anderson v. U.S. Dep’t of Health & Human Servs., 907 F.2d 936, 944 (10th Cir. 1990).

261. 5 U.S.C. § 552(b)(4).

262. *See, e.g.*, Flathead Joint Bd. of Control v. U.S. Dep’t of Interior, 309 F. Supp. 2d 1217, 1223 (D. Mont. 2004) (holding that information regarding allocation of water rights on Indian reservation was “commercial or financial information” for purposes of FOIA disclosure exception governing that information; and holding that information created tribes’ negotiating position regarding water, supported their claims, and maximized tribes’ position); Starkey v. U.S. Dep’t of Interior, 238 F. Supp. 2d 1188, 1195 (S.D. Cal. 2002) (holding that well and water information obtained by government for land owned by Indian tribe was commercial or financial information which was exempt from disclosure under FOIA; and holding that release of information would adversely affect tribes ability to negotiate its water rights) (“Water is an article of commerce.” (quoting *Sporhase v. Nebraska*, 458 U.S. 941, 954 (1982))).

263. 5 U.S.C. § 552(b)(4).

264. *Id.*

First, the information must be commercial or financial.²⁶⁵ Information on a company's marketing plans, profits, or costs can qualify as confidential business information.²⁶⁶

Second, it must be disclosed by a person.²⁶⁷ FOIA defines an individual as "an individual, partnership, corporation, association, or public or private organization other than an agency."²⁶⁸ Tribes qualify as individuals within FOIA's definition.²⁶⁹

Third, the CFI must be privileged or confidential.²⁷⁰ Information is privileged if disclosure by the government would likely harm the competitive position of the person who submitted the information.²⁷¹ Information is considered to be confidential if disclosure of the information is likely to (1) impair the government's ability to obtain necessary information in the future or (2) cause substantial harm to the competitive position of the person from whom the information was obtained.²⁷² The impairment factor is met if the entity submitting the information would no longer be willing to provide information in the future if it knew it was subject to disclosure.²⁷³ There is some question about whether there is a difference between information that is voluntarily submitted to an agency and information that is required to be submitted to an agency. Currently, the standard information that is voluntarily submitted to the government is considered confidential for the purposes of Exemption Four "if it is of a kind that would customarily not be released to the public by the person from whom it was obtained."²⁷⁴ However, the Ninth Circuit still applies the "substantial competitive harm" standard, which asks whether a competitor with the company's information could gain key competitive information.²⁷⁵

265. *Id.*

266. *See, e.g.,* Pub. Citizen Health Research Grp. v. FDA, 704 F.2d 1280, 1287 (D.D.C. 1983).

267. *Id.*

268. 5 U.S.C. § 551(2).

269. *Indian Law Res. Ctr. v. U.S. Dep't of Interior*, 477 F. Supp. 144, 146 (D.D.C. 1979) (stating that an Indian tribe "as a corporation that is not part of the Federal Government, is plainly a person within the meaning of the Act").

270. 5 U.S.C. § 552(b)(4).

271. *Nat'l Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); *see also* *Frasee v. U.S. Forest Serv.*, 97 F.3d 367, 371 (9th Cir. 1996).

272. *Nat'l Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

273. *Landfair v. U.S. Dep't of Army*, 645 F. Supp. 325, 328 (D.C. Cir. 1986).

274. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc).

275. *See Am. Small Bus. League v. U.S. Dep't of Defense*, No. 15-15120, 2017 WL 65399, at *1 (9th Cir. Jan. 6, 2017); *Frasee*, 97 F.3d at 372.

While CFI is generally intended to apply to businesses,²⁷⁶ it is potentially applicable to the protection of tribal knowledge. The CFI ensures those who have access to useful business information and are willing to disclose information are not prevented from doing so.²⁷⁷ As previously stated, whether disclosure of the information would impair the government's ability to acquire information in the future is one of the factors to determine confidentiality.²⁷⁸ If an agency is required to disclose this information, then the business is less likely to be willing to provide the agency with said information.²⁷⁹ Here, without the exception, both the business and the agency suffer. The business would be negatively impacted because without the agency having its information, the agency will not take the business's needs into account. Conversely, the agency is negatively impacted because it does not have all the information necessary to make an effective and informed decision. Therefore, public policy dictates that an exemption is necessary.

This logic is applicable to the tribal context. For example, information disclosed by tribes in reference to a species allows for better decisions by the agency that serve both the tribe's and the agency's interest. The tribe is potentially satisfied knowing that their knowledge and concerns are taken into account, and the agency can make a decision using the best data that is scientifically and commercially available.²⁸⁰ Like businesses, tribes may not be willing to disclose information that the rest of the population would have access to because it would harm its interest. Therefore, a trade secret approach to protecting tribal knowledge meets the same public interest goals that Exemption Four seeks to protect.

TEK likely does not meet the elements that CFI requires to be considered under Exemption Four. As previously stated, the elements of CFI are: (1) information that is commercial or financial; (2) privileged and confidential; and (3) obtained from a person.²⁸¹ In certain contexts, tribal information has satisfied these elements. For example, the United States District Court for the District of Montana held that information

276. 5 U.S.C. § 552(b)(4) (2012).

277. *Landfair*, 645 F. Supp. at 328.

278. *Nat'l Parks & Conservation Ass'n v. Morton*, 351 F. Supp. 404, 407 (D.D.C. 1972), *rev'd on other grounds*, 498 F.2d 765 (D.C. Cir. 1974).

279. *Flathead Joint Bd. of Control v. U.S. Dep't of Interior*, 309 F. Supp. 2d 1217, 1222 (D. Mont 2004).

280. 16 U.S.C. §§ 1533(a)(1)(A), (b)(1)(A) (2012).

281. 5 U.S.C. § 552(b)(4).

regarding allocation of water rights on an Indian reservation was a trade secret.²⁸² The court reasoned that the information was commercial or financial data under FOIA because the information created the tribes' negotiating position regarding water, supported their claims, and maximized the tribes' position.²⁸³

The district court stated "[t]here is no doubt that water rights themselves are an object of commerce. They are a property interest that is bought and sold."²⁸⁴ The court also recognized that water rights are limited in availability.²⁸⁵

Therefore, information about the quantity available to a single holder, a holder's priority date, or other similar information would be commercial information, used in negotiating real estate transactions, water leasing, and other commercial dealings. In the Tribes' case, this includes protecting a healthy fishery and the economic benefits that flow therefrom.²⁸⁶

Much of the information that tribes would potentially disclose in the ESA context have commercial value. For example, many tribes have salmon fishing grounds that are divided amongst members of the community.²⁸⁷ These fishing grounds vary in their commercial value depending on where they are located.²⁸⁸ Specifically, in the Quinault Indian Reservation, fishing grounds closer to the mouth of the river yield more fish and therefore are more valuable than fishing grounds located upstream.²⁸⁹ This information could be disclosed to an agency when it is considering listing a species because the agency wants to know how its decisions could impact tribes.²⁹⁰

Tribes will be able to satisfy the "person element" of CFI.²⁹¹ The information disclosed to a federal agency by a member of a tribe or disclosed by the tribe itself will satisfy the person requirement. FOIA

282. *Flathead*, 309 F. Supp. 2d at 1221. *See also* *Starkey v. U.S. Dep't of Interior*, 238 F. Supp. 2d 1188, 1195 (S.D. Cal. 2002) (holding that well and water information obtained by government for and owned by and Indian tribe was commercial or financial information which was exempt under FOIA because the information, if released, would adversely affect the tribe's ability to negotiate its water rights).

283. *Flathead*, 309 F. Supp. 2d at 1221.

284. *Id.*

285. *Id.*

286. *Id.*

287. *Amberson*, *supra* note 18, at 1400.

288. *Id.*

289. *Id.*

290. Sec. Order No. 3206, *supra* note 103.

291. *Indian Law Res. Ctr. v. U.S. Dep't of Interior*, 477 F. Supp. 144, 146 (D.D.C. 1979).

defines a person as “an individual, partnership, corporation, association, or public or private organization other than an agency.”²⁹² The Supreme Court has already decided for the purposes of FOIA that tribes do not qualify as agencies.²⁹³ However, lower courts have held that tribes qualify as persons under FOIA. “[An Indian tribe] as a corporation that is not part of the Federal Government, is plainly a person within the meaning of the act.”²⁹⁴ The D.C. Circuit stated that “obtained from a person” restricts the exemption’s application to data which have not been generated within the Government.²⁹⁵ While the federal government holds tribal reservation property in-trust, an Indian tribe would likely not be considered part of the federal government. Therefore, tribes will likely satisfy the “obtained from a person” requirement.

The biggest burden for tribes to overcome is whether the information they disclose to an agency is confidential under CFI. Different tests apply depending on whether or not information was submitted voluntarily or involuntarily.²⁹⁶ Information that is voluntarily submitted is confidential if it is “of a kind that would customarily not be released to the public by the person from whom it was obtained.”²⁹⁷ However, if information is involuntarily submitted, there is a two-prong test to determine whether or not information is confidential under CFI.²⁹⁸ The disclosure of information must either impair the government’s ability to obtain necessary information in the future²⁹⁹ or the disclosure must cause substantial competitive harm.³⁰⁰

It is likely that tribes can meet the confidentiality burden, but it is very context specific. In most cases, the information submitted by tribes in the realm of the Endangered Species Act is voluntarily submitted.³⁰¹ Therefore, all tribes need to do is show that they would not customarily

292. 5 U.S.C. § 551(2) (2012).

293. U.S. Dep’t of Interior v. Klamath Water Users Protective Ass’n, 532 U.S. 1, 5 (2001).

294. *Indian Law Res. Ctr.*, 477 F. Supp. at 146.

295. Bd. of Trade v. Commodities Futures Trading Comm’n, 627 F.2d 392, 404 (D.C. Cir. 1980).

296. *Comptel v. FCC*, 910 F. Supp. 2d. 100, 115 (D.C. Cir. 2012).

297. *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871, 879 (D.C. Cir. 1992).

298. *Nat’l Parks and Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

299. *Id.*

300. *Frasee v. U.S. Forest Serv.*, 97 F.3d 367, 371 (9th Cir. 1996).

301. *Native American Policy for the U.S. Fish and Wildlife Service*, 81 Fed. Reg. 4638, 4639 (Jan. 27, 2016).

release the information to the public.³⁰² Given that tribes are generally protective of their cultural knowledge and resources, much of their information would not ordinarily be available to the public.³⁰³ This type of information would include valuable plant life, fishing grounds, or water rights that are on the tribes' property. Quinault and other western Washington Tribal lands have many restrictions for non-tribal people.³⁰⁴ Specifically, only tribal members can fish on their reservation, unless a non-tribal member is accompanied by a guide; plants and hunting also require special permits.³⁰⁵ This information is therefore not accessible or generally released to the public. Ultimately, if a tribe does not normally disclose these types of information to the public, they will meet the confidentiality requirement.

Several scholars consider whether intellectual property (which Exemption Four protects) may serve as an appropriate mechanism to protect tribal information.³⁰⁶ "These mechanisms are borrowed from the tools used to protect intellectual property rights in Western science research and include the transfers of money in exchange for rights, contracts dictating which parties are entitled to which rights, and non-disclosure agreements."³⁰⁷ Several legal scholars have applied an intellectual property theory to protecting traditional knowledge outside of the FOIA context.³⁰⁸ For example, one author argues that intellectual property protection is not a proper avenue for tribes.³⁰⁹ CFI states a business purpose and this purpose can be diametrically opposed to the

302. Stephen R. Munzer & Kal Raustiala, *The Uneasy Case for Intellectual Property Rights in Traditional Knowledge*, 27 CARDOZO ARTS & ENT. L.J. 37, 56 (2009) (discussing challenges to tribal intellectual property rights).

303. See Norton & Manson, *supra* note 71, at 856 (discussing issues of confidentiality while conducting research with tribes).

304. STORM, *supra* note 39, at 221.

305. See, e.g., Quinault Indian Nation, Raft River Winter Sport Fishing Regulation – 01 (Nov. 26, 2013), [http://www.quinaultindiannation.com/Fishing %20Regs/raft%20river%20sport.pdf](http://www.quinaultindiannation.com/Fishing%20Regs/raft%20river%20sport.pdf) [<https://perma.cc/3ENX-KEKH>] ("All non-enrolled Quinault fishers must be accompanied by an enrolled Quinault tribal member while fishing. Also, all non-enrolled Quinault fishers must be within 100 feet of their enrolled Quinault tribal member while fishing.").

306. See, e.g., Gerald Carr, *Protecting Intangible Cultural Resources: Alternatives to Intellectual Property Law*, 18 MICH. J. RACE & L. 363 (2013); Moffa, *supra* note 8, at 133; Munzer, *supra* note 302, at 56; Deepa Varadarajan, *A Trade Secret Approach to Protecting Traditional Knowledge*, 36 YALE J. INT'L L. 371 (2011).

307. Moffa, *supra* note 8, at 133.

308. See, e.g., Gerald Carr, *supra* note 306, at 364; Varadarajan, *supra* note 306, at 371.

309. Carr, *supra* note 306, at 365 ("However, as it stands, IP law, in general, may be a poor fit for tribes.").

traditional ecological perspective.³¹⁰ However, the argument that a business purpose was inconsistent with an ecological perspective was made in a folklore and religious ritual context, not a context that involved tribal information that may have economic value.³¹¹ Additionally, intellectual property law could result in the commodification of tribal culture.³¹² Overall, the world of intellectual property law as a means to prevent record disclosure in particular has not been thoroughly examined.

B. Past Attempts to Modify FOIA Disclosures Showcase a Need to Protect Tribal Information

Members of Congress have also recognized the Hobson's choice faced by tribes.³¹³ There have been two attempts to enact legislation to protect tribes in a natural resource context.³¹⁴ First was an amendment to FOIA introduced in 1976.³¹⁵ While the bill never made it out of committee, it did recognize and attempt to address the issues that FOIA implicates in tribal consultation.³¹⁶ In 1976 Senator Peter Domenici introduced a bill that would add another exemption to FOIA.³¹⁷ "S. 2652 would resolve the dilemma of the Indians and their trustee by exempting information concerning the natural resources and assets of tribes from the Freedom of Information Act."³¹⁸ The exact language of the bill was introduced to the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs.³¹⁹ The exemption would have prohibited disclosure of "information held by a Federal agency as

310. *Id.*

311. *Id.*

312. Varadarajan, *supra* note 306, at 372.

313. Congress has twice considered specific proposals to protect Indian trust information. See *Indian Amendment to Freedom of Information Act: Hearings on S. 2652 Before the Subcommittee on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 94th Cong. (1976); *Indian Trust Information Protection Act of 1978*, S. 2773, 95th Cong. (1978).

314. *Indian Amendment to Freedom of Information Act: Hearings on S. 2652 Before the Subcommittee on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 94th Cong. (1976); *Indian Trust Information Protection Act of 1978*, S. 2773, 95th Cong. (1978).

315. *Indian Amendment to Freedom of Information Act: Hearings on S. 2652 Before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs*, 94th Cong. (1976).

316. *Id.* at 2.

317. *Id.*

318. *Id.* (statement of Sen. James Abourezk).

319. *Id.* at 4.

trustee, regarding the natural resources or other assets of Indian tribes or bands or groups or individual members thereof.”³²⁰

Senator Domenici introduced this legislation in response to water rights litigation between the State of New Mexico and several tribes.³²¹ He noted that “[d]isclosure of reports such as these clearly places the tribes in a disadvantageous position in negotiating with companies for the development of these resources.”³²² Senator Domenici reasoned that tribal issues resulting from FOIA are similar to Exemption One: “specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy.”³²³ Further, the Domenici amendment did not want to exempt everything disclosed by a tribe, but only information pertaining to “natural resources or other assets.”³²⁴

Several officials who testified before the Subcommittee about tribal disclosure in consultation supported the amendment. Harley Frankel, the Deputy Commissioner of Indian Affairs in the Department of the Interior,³²⁵ testified that “[i]n essence, we have been placed in the position of being required by law to violate the confidential relationship which we have with Indian tribes and individuals. Indeed, such violations may give rise to claims by tribes or individual Indians against the Federal Government.”³²⁶ Frankel recognized that current exemptions are insufficient to protect tribal interests.³²⁷

An Assistant Attorney General from the Department of Justice’s Land and Natural Resources Division also testified that many of the FOIA

320. *Id.*

321. *See generally* New Mexico *ex rel.* Reynolds v. United States, 408 F. Supp. 1029 (1975). The purpose of the suit, according to Senator Domenici, was to:

[O]btain disclosure of reports on certain U.S. Geological Survey hydrologic studies of water resources of particular interest to several Indian tribes in New Mexico, specifically the Jicarilla Apaches, the Mescaleros Apaches, the Pojoaque Pueblo, the Tesuque Pueblo, the San Ildefonso Pueblo and the Nambe Pueblo. The suit was filed on the basis of information and belief that the results of the studies would be valuable in the development and use of water resources within the State of New Mexico and that the reports are of the nature that the Department of the Interior is required by the Freedom of Information Act to make available upon request.

Indian Amendment to Freedom of Information Act: Hearings on S. 2652 Before the Subcommittee on Indian Affairs of the S. Comm. on Interior and Insular Affairs, 94th Cong. (1976) at 25.

322. *Indian Amendment to Freedom of Information Act: Hearings on S. 2652 Before the Subcommittee on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 94th Cong. (1976) at 25.

323. *Id.* at 11.

324. *Id.* at 2.

325. *Id.* at 16–18.

326. *Id.* at 17.

327. *Id.* at 22.

requests the DOI received in regards to tribes primarily dealt “with those controversial issues of water litigation or land exchange, or those kinds of things.”³²⁸ Agreeing with the DOI’s position, Taft stated that when the DOI acts “as trustee we do not act in the same normal capacity that we do when all our other acts are under the Freedom of Information Act. And I think as trustee that there is a right to protect the relationship between the trustee and the beneficiary, which is the tribe.”³²⁹

Tribal leaders also voiced their concerns regarding FOIA and the need for a tribal specific protection. Wendell Chino, President of the Mescalero Apache Tribe, told the subcommittee that while there are some exemptions, there is no exemption for tribes, which results in “perennial enemies of tribal interests, such as the States, [attempting] to use the Freedom of Information Act to obtain information concerning tribal resources which they could not otherwise obtain.”³³⁰ While the Chairwoman of the Nisqually Tribal Council, Zelma McCloud, supported the amendment, she qualified her support by saying “the mineral resources of an Indian reservation are not the only resources which deserve protection from exploitation by people outside the tribe. The privacy of their ancestry and personal affairs must be protected also.”³³¹

Senator James Abourezk (D-SD) introduced another bill in an attempt to solve the problem—the Indian Information Protection Act.³³² His Act was separate from FOIA and prohibited “the release of information held, obtained, or prepared by the Federal Government . . . as a consequence of the Federal trust responsibility with Indian people.”³³³ This Act was not blanket legislation as it contained eight exemptions.³³⁴ The bill failed

328. *Id.*

329. *Id.* at 19.

330. *Id.* at 35.

331. *Id.* at 45.

332. Indian Trust Information Protection Act, S. 2773, 95th Cong. (1978).

333. *Id.*

334. *Id.*

Notwithstanding the provisions of this Act, the above described information shall be released to the following: (1) in the case of information pertaining to an Indian tribe, to the chief executive officer or any tribal councilman or official of an Indian tribe authorized by the tribe to receive such information by the tribe (2) in the case of information pertaining to an individual Indian, to the individual Indian to whom the information pertains; (3) in the case of information pertaining to an Indian tribe, to any member of the tribe: [p]rovided, [t]hat . . . the release of the information is not inconsistent with the Federal trust responsibility; [(4)] to either House of Congress[:] . . . [(5)] in the case of information pertaining to an Indian tribe, to any person where the chief executive officer or tribal council by resolution authorizes the release of the information; . . . [(6)] to any person where the information has previously been lawfully made public; [(7)] to any person if the information concerns funds provided under Federal grant or contract if such information is required under law . . . [or (8)] to any Federal

to make it out of committee. In 2003, there was another attempt to protect tribal information in the sacred site context called the Native American Sacred Lands Act. This also failed to make it out of committee.³³⁵

While both the Indian Amendment bill and the Indian Protection Act ultimately failed, the reasoning behind both rings true—to adequately protect tribal information, there needs to be specific legislation. The statements by senators, executive officers, and tribal leaders are still valid, and this is reflected by both tribal comments and the FWS and NMFS’s responses to their Native American Policy.³³⁶

V. LEGISLATIVE REFORM IS A BETTER APPROACH TO PROTECTING CONFIDENTIALITY THAN USING THE CURRENT EXEMPTIONS

The inherent tension between FOIA and tribal consultation has not gone unrecognized.³³⁷ Agencies, tribes, and even the courts have recognized that the goals of FOIA and the tribal desire for confidentiality are diametrically opposed.³³⁸ The current ad-hoc approach to protect TEK does a disservice to both tribes and the federal government. The federal government is failing to meet its fiduciary duties to the tribes because the federal government is unable to guarantee confidentiality in the shadows of FOIA.³³⁹ Tribes often will not consult with the government if confidentiality is not guaranteed.³⁴⁰

department, agency, or employee or agent thereof where the information is required in furtherance of official duties.

Id.

335. Native American Sacred Lands Act, H.R. 2419, 108th Cong. (2003). It was introduced to the House in 2003, and referred to the House Committee on Resources. *See id.*

336. *Indian Amendment to Freedom of Information Act: Hearings on S. 2652 before the Subcommittee on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 94th Cong. (1976).

337. *See, e.g.*, Plaut, *supra* note 181, at 137; U.S. Dep’t of the Interior v. Klamath Water Users Protective Ass’n, 532 U.S. 1, 15 (2001); Tribal Consultation, 74 Fed. Reg. 215, 57,881 (Nov. 9, 2009).

338. *See, e.g.*, Plaut, *supra* note 181, at 137; U.S. Dep’t of the Interior v. Klamath Water Users Protective Ass’n, 532 U.S. 1, 15 (2001); Tribal Consultation, 74 Fed. Reg. 215, 57,881 (Nov. 9, 2009).

339. Waldron, *supra* note 206, at 193 (discussing how there may be potential suits against agencies failing to meet their fiduciary duties in regard to natural resource management).

340. Tribal Consultation, 74 Fed. Reg. 215, 57,881 (Nov. 9, 2009) (noting that tribes may be unwilling or unable to consult); Waldron, *supra* note 206, at 193 (“Tribes, knowing that departments must disclose agency-tribal communications at the submission of any FOIA request, may simply refuse to consult with the executive departments when they develop policies affecting trust resources.”).

Because it often cannot be due to FOIA, tribal perspectives are often not considered in the rulemaking process. Not only does this harm tribes, but it results in less effective natural resource management.³⁴¹ While scholars have attempted to find ways around FOIA through the exemptions, this approach is Sisyphean. A better approach would be to enact new legislation to protect tribal information.³⁴²

A. *The FWS Policy Exemptions Do Not Provide Adequate Protection of Tribal Information*

FOIA's current framework provides inadequate protection of tribal information for several reasons. First, an application of an exemption is subject to agency discretion.³⁴³ Second, the piecemeal approach makes it difficult for tribes to know what is protected and what is not protected, as no exemption provides a definite protection from disclosure of tribal information.³⁴⁴ This lack of consistency and uniformity inhibits tribal communication.³⁴⁵

Agencies have discretion to determine whether FOIA exemptions apply to information that is requested unless a statute obligates non-disclosure.³⁴⁶ This may create a lack of consistency internally (within an agency) and externally (among other agencies). For example, if NOAA receives a FOIA request and they deny the request citing an exemption, if the EPA receives the same FOIA request, they may allow the request.³⁴⁷ Additionally, as an agency's leadership changes throughout presidential cycles, its priorities regarding what to disclose may change. Agencies look different and have different priorities depending on the

341. Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat, 81 Fed. Reg. 7414 (Feb. 11, 2016) (discussing how TEK may, in some cases, be the best scientific data available).

342. Plaut, *supra* note 181, at 164 (arguing for a FOIA exemption pertaining to sacred site management).

343. See 5 U.S.C. § 552(a)(3)(A) (2012); Plaut, *supra* note 181, at 146 n.64.

344. Plaut, *supra* note 181, at 156 (discussing how in the NHPA context it would be impossible for the agency to promise confidentiality because the agency must decide whether a site qualifies as a "historic resources.").

345. *Id.* at 162 (acknowledging that a tribe may be reluctant to share information if the agency cannot guarantee confidentiality).

346. *Id.* at 146.

347. *Id.*

agenda of the president.³⁴⁸ Further, the president can direct agencies, with some constraints, to act certain ways.

One scholar noted that tribal information does not always fit one of these exemptions and is thus subject to disclosure, even if there are sound reasons why the information should not be disclosed.³⁴⁹ Agencies do not have discretion to prevent disclosure of information that does not fall within an exemption. This means that if tribes disclose information to an agency and the agency receives a FOIA request, if the information does not fall within an exemption the agency's hands are tied—the information *must* be disclosed.

As Ethan Plaut concluded, the current exemptions provide inadequate protections, resulting in an ad-hoc, piecemeal approach to protecting tribal information.³⁵⁰ He recognizes this in applications of Exemption Three and Exemption Six.³⁵¹ Exemption Three is inadequate because it does not necessarily provide a complete prohibition of disclosure.³⁵² For example, ARPA and NHPA only provide confidentiality in limited circumstances.³⁵³ Exemption Six is inadequate because privacy interests involving natural resources management are unclear.³⁵⁴

Exemption Four also provides inadequate protections.³⁵⁵ Trade secrets do not provide protections to tribes without any negative impacts.³⁵⁶ There are several potential drawbacks that could lower its utility and may potentially outweigh the benefits of trade secrets.³⁵⁷ However only a tribe can determine if the pros outweigh the cons. Nevertheless, the potential adverse impacts and weaknesses of a trade secret approach should still be recognized and dealt with.

One drawback of using the trade secret exemption is that it could inhibit communication between tribes. Under trade secrets law, if a business accidentally discloses a trade secret to its competitor, then trade secret law will not protect the business under FOIA.³⁵⁸ This could be

348. See, e.g., Notice of Termination of the Intent to Prepare an Environmental Impact Statement in Connection with Dakota Access, LCC's Request for an Easement to Cross Lake Oahe, North Dakota, 82 Fed. Reg. 32,11021 (Feb. 17, 2017).

349. Plaut, *supra* note 181, at 164.

350. *Id.* at 161.

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.*

355. Munzer, *supra* note 302, at 96.

356. *Id.*

357. *Id.*

358. Varadarajan, *supra* note 306, at 412.

problematic for western Washington tribes because they have a lot of overlap in their natural resources and often work together for natural resources management decisions.³⁵⁹ Tribes often encourage each other to freely share information.³⁶⁰ FOIA could potentially inhibit effective discussions between tribes because if they do disclose to another tribe, the tribe may not be able to claim confidentiality and therefore will be unable to avail itself of the trade secret exemption.

Another drawback is that the trade secret exemption protects only information that is commercial or financial and a lot of information that could be disclosed to the agency may not necessarily qualify. Tribal cultural information may not have an “economic” value or a value that is recognized by courts. While there is some new research valuing ecosystem services,³⁶¹ cultural information may not have economically valuable data in its own right. For example, a tribe may disclose where it holds the first salmon ceremony and that location may be sensitive, but that location does not have a per se commercial value, only a cultural one.³⁶² Lastly, trade secrets may be improper in the tribal context because trade secrets are sometimes viewed as Westernizing tribal culture.³⁶³

Ultimately, while there are some options to protect tribes through existing FOIA exemptions, these are often attempts to fit a square peg in a round hole.

B. New Legislation Is the Best Way to Protect Tribal Information

The best proposal to protect tribal consultations from disclosure under FOIA is to introduce a new act to amend FOIA or an act to protect tribal information. While previous attempts have failed, two pieces were introduced 40 years ago, but both failed. Perhaps a new attempt would be appropriate, especially in light of a more recent Supreme Court case, *Klamath Water Users*.³⁶⁴ Additionally, there have been stronger attempts by the federal government to consult with tribes. Other scholars have called for a legislative fix in the context of sacred site management.³⁶⁵ Ideally,

359. STORM, *supra* note 39, at 221.

360. *Id.*

361. See generally Andra Ioana Milcu et al., *Cultural Ecosystem Services: A Literature Review and Prospects for Future Research*, 18 *ECOLOGY & SOC'Y* 44 (2013).

362. Amberson, *supra* note 18, at 1393.

363. Munzer, *supra* note 302, at 50.

364. 532 U.S. 1, 5 (2001).

365. Plaut, *supra* note 181, at 137.

comprehensive legislation would encompass both sacred sites and natural resources, as many of them are inherently intertwined.

As recognized in the previous attempts to amend FOIA or to enact new legislation to protect tribal information, the current framework is ineffective and inefficient. Senators attempting to amend FOIA recognized that “[u]nfortunately, the Freedom of Information Act, according to tribal leaders, has in several instances served to work against the best interests of the Indian community. This has occurred when third party interests demand release of information and data concerning Indian natural resources pursuant to the Freedom of Information Act.”³⁶⁶ Further, while the Indian Amendment to the Freedom of Information Act was debated in committee, government officials noted:

As in the case of the fourth exemption both the fifth and ninth exemptions provide a limited degree of protection. However, none of these provide the complete protection that Indian people need, are entitled to, and have a right to expect from their trustee. Thus, we strongly support legislative action along the lines contained in S. 2652.³⁶⁷

A legislative reform has several practical advantages. First, it would allow uniformity. Sweeping legislation would require all agencies to provide a uniform level of protection. Therefore, whatever the EPA withholds, NOAA would also have to withhold, which would provide a level of consistency. Second, a legislative reform would allow Native Americans to know what would and would not be subject to FOIA requests. Having the knowledge to know what could be disclosed allows tribes to make more informed decisions. Further, it would encourage more tribal consultation because agencies would not need to caution that whatever is disclosed to them would be subject to FOIA.

There are some drawbacks to legislative reform, most of them practical. First, the two previous attempts were all unsuccessful. The Indian Amendment to FOIA and the Indian Trust Information Protection Act failed to make it to an actual floor vote.³⁶⁸ While these two pieces of legislation were introduced over forty years ago, another attempt to protect tribal information was made in 2003.³⁶⁹ The Native American Sacred Lands Act

366. *Indian Amendment to Freedom of Information Act: Hearings on S. 2652 before the Subcommittee on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 94th Cong. 1 (1976).

367. *Id.* at 18.

368. *Id.*; Indian Trust Information Protection Act, S. 2773, 95th Cong. (1978).

369. Native American Sacred Lands Act, H.R. 2419, 108th Cong. (2003).

sought to protect tribal lands from disclosure.³⁷⁰ This also failed to make it to a floor vote.³⁷¹ It appears that protecting tribal information is not a priority of Congress. Secondly, this would take extensive time, resources, and lobbying efforts by tribes. However, despite these downsides, legislative reform is the best solution because it would be the most comprehensive.

Overall, the Indian Trust Information Protection Act would probably be the best way to exempt information from disclosure. First, it would provide a clean slate for interpreting what information is protected. Second, if written correctly, it could remove discretion of the agency to decide whether or not to disclose. Specifically, if the statute prohibits disclosure, the agency would not be able to disclose the information. Lastly is practicality, as FOIA was amended in 2016 and it is unlikely to be Congress's focus. While each of these approaches to a new statute has its pros and cons, any of these statutory solutions is much preferable to the status quo.

CONCLUSION

The purposes of FOIA—open government, disclosure, and non-secrecy—are directly at odds with tribal expectations of confidentiality. While tribes want to have a voice when it comes to natural resource management, they may not be able to express their view without sacrificing confidentiality. Going back to the FWS and NMFS's policy on agency tribal consultation, both agencies acknowledged the importance of TEK and that it has been used to “inform decisions under the Act regarding listings, critical habitat and recovery.”³⁷² TEK can be of vital use to agencies when regulating resources, but the federal government cannot use what they do not have. The federal agencies' hands are tied. Because FOIA mandates disclosure, unless a tribe's information falls within one of those nine exemptions, if requested, the information must be disclosed. While the nine exemptions may provide some protection, they do not solve the problem: tribes will not disclose information unless an agency can *guarantee* confidentiality. While confidentiality protections cannot be extended to all information provided by the tribe, a presumption of confidentiality would ameliorate tribal concerns. Therefore, legislation is needed to protect tribal information.

370. *Id.*

371. *Id.*

372. Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat, 81 Fed. Reg. 7414, 7416 (Feb. 11, 2016).