POSTSCRIPT: TOWARD A SACRED LANDS POLICY INITIATIVE

In the native belief system sacred places are not sacred because native people believe they are sacred. They have sacredness in and of themselves. Even if we all die off, they will continue to be sacred.

> Christopher H. Peters Seventh Generation Fund

ven the most casual reading of the stories in this book clearly reveals that the policy deck is stacked against the preservation of sacred land in the United States. In some cases the federal land-managing agenciesÑthe Forest Service, National Park Service, and othersNare sensitive to the cultural importance of sacred lands, and of the right of American Indians freely to conduct their religious observances. But more often they ignore the sacredness of traditional places of worship and ceremony, for the U.S. government has no clear policy requiring these agencies to be concerned with the use and disposition of sacred lands. As for private lands, while the Congress authorizes nearly a billion dollars a year to state and federal agencies for the purchase and development of recreational areas, virtually nothing is allocated to help Indian tribes and organizations protect sacred lands that are in private ownership.

We—the authors of this book—believe we have presented compelling evidence within these covers that the policy failure at the federal level (as well for states, tribal governments, and landowning corporations and institutions), must be addressed forthrightly, and soon. Accordingly, on January 26, 2001, Liveoak Editions convened a Opolicy workshop" in Albuquerque, New Mexico, to determine what might be done. Attending were representatives of the Native American organizations that have co-sponsored this book along with other experts.

The participants were Bineshi Albert, Alicia Maldonado, Sonny Weahkee, and Laurie Weahkee of the SAGE Council, host for the meeting; Christopher H. Peters of the Seventh Generation Fund; Tom Goldtooth of the Indigenous Environmental Network; Shelley Means of the Washington Association of Churches; Dean B. Suagee of the First Nations Environmental Law Program, Vermont Law School; Kurt Russo of the Native American Land Conservancy and consultant to the Lummi Nation; Jack Trope of Save the Children; Christopher (Toby) McLeod of the Sacred Land Film Project, Earth Island Institute; M. Lynne Corn of the Congressional Research Service, Library of Congress (speaking for herself, not CRS); and Charles E. Little of Liveoak Editions.

The following analysis draws on the comments of these participants as expressed in the meeting and in subsequent discussions as well as in published articles and papers supplied by them. Of necessity, our analysis tends to simplify what are quite complex legal matters and to leave out many collateral issues pertaining to religious rights, trust-land doctrine, and laws governing public land use and management. One participant suggested, in fact, that only a CD-ROM would be big enough to contain all the statutory, legal, and historical material pertaining to sacred lands preservation.

The Legal Setting

Certainly, it is not as though the destruction of sacred sites is a big surprise to members of Congress. In the early 1990s, a number of field hearings were held on a bill, introduced by Senator Inouye, the primary provision of which was to protect sacred sites. (Other provisions had to do with the religious use of peyote, eagle feathers, and similar matters.) The testimony was passionate and persuasive, and yet, while the secondary parts of the bill were enacted, sacred land was left in the dust, as it were, in substantial part the result of the 1994 change of leadership in the House of Representatives suddenly making the Congress a resolutely conservative body with an agenda that had little room for legislation that might interfere with the economic development of natural resources.

This was a pity, for the sacred sites provision of the Inouye bill was meant to correct an egregious 1988 Supreme Court decision that tended to vitiate the American Indian Freedom of Religion Act of 1978, a foundational piece of legislation, albeit not clearly enforceable, that establishes the importance of sacred sites as a Constitutional matter. The 1978 act reads, in part: "...henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions...including but not limited to access to sites...."

In 1988, however, when Indian tribes sued the U.S. Forest Service to stop building a road (the so-called G-O road, connecting the towns of Gasquet and Orleans in northern California) that would obliterate traditional sacred sites, they found, once again, that the U.S. government didn't really mean what it said. While the Indians' suit was upheld in the federal district court and on appeal by the circuit court, the conservative majority of the Supreme Court, in a fit of judicial activism (by a court majority that claims an opposite inclination) rejected the lower courts' decision (*Lyng v.*



Northwest Indian Cemetery Protective Association).

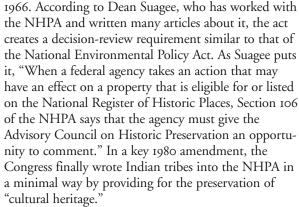
As Chris Peters of the Seventh Generation Fund describes the situation, "The Supreme Court contended that an infringement on native religion could only be invoked if natives were coerced to change their religious belief system in some manner. So if the Forest Service wants to let a contract to bulldoze a sacred area and totally destroy the religious significance of the area, it was not 'a violation of our belief system' because we were not coerced to act against our belief system. That type of logic is totally beyond me."

In the *Lyng* decision the Supreme Court obviated a generally accepted three-part test to determine whether a government action infringes on the free exercise of religion clause of the First Amendment. The test is, as Indian law expert Dean Suagee explains it: "If a government action imposes a burden on religion (I), then the action must be justified by a compelling governmental interest (2) that cannot be met through less restrictive means (3)." The court's majority opinion, says Suagee, found that the government had not placed a burden on religion in the strange, absolutist sense that they defined a burden—that it did not coerce the Indians to act against their belief system. Justice Brennan, in his dissent, called such reasoning "cruelly surreal."

Given this situation, which effectively stripped away constraints on federal agencies to protect sacred sites, the Inouye bill (Native American Free Exercise of Religion Act of 1993), explicitly referred to the *Lyng* decision as a matter to be corrected. Later, a Religious Freedom Restoration Act was introduced to affirm the primacy of the "three-part test," among other matters. And in 1994 Congressman Bill Richardson introduced amendments to the American Indian Religious Freedom Act that would also restore the three-part test as a cause of action (i.e., a lawsuit could be brought based on a violation). But none of these bills passed, with the result that sacred lands still have no direct statutory protection—in fact they have even less protection than they had before the Rehnquist Court reversed the circuit court decision on Lyng. At length, President William J. Clinton tried to make up for this failure by issuing an executive order in 1996 (No. 13,007) requiring federal agencies to take great care in managing sacred lands. But the order was hedged about with so many loopholes that it had little effect and in any case could not in itself provide a cause of action since lawsuits based on the order were expressly prohibited.

Existing Authorities and Programs

Unfortunately, there's not much to work with in terms of federal laws and programs to preserve sacred lands that are not already within Indian reservations (and even those are not immune to destruction). The most effective program thus far has been the National Historic Preservation Act (NHPA), signed into law in



Unlike Clinton's sacred sites executive order and the largely precatory American Indian Freedom of Religion Act, NHPA does provide a cause of action and was, in fact, part of the basis for the *Lyng* case (along with the American Indian Religious Freedom Act) since the entire area in question had been declared eligible as a historic site. In recent years, according to Suagee, Indian people have become increasingly involved in historic preservation and have helped a new preservation category emerge, which the National Park Service (administrators of the NHPA) calls traditional cultural places. "In the Park Service's view," Suagee explains, "this eligibility, being cultural, does not run afoul of the 'establishment of religion' clause of the First Amendment since it does not mean that you are supporting one religion over another."

Another means to protect sacred lands is for Indian tribes to have sacred lands in public ownership transferred to "trust status" as, in effect, a part of an Indian reservation. "If you really want to control the way land is used," says Suagee, "getting it into trust status is the preferable outcome." The process would be complicated since the agencies (such as the Park Service) transferring the land would want guarantees that the sites would be protected and not developed. And this, in turn, would tend to vitiate tribal sovereignty over their own land.

As for privately owned sacred land, acquisition is not just underfunded by the federal government, it is unfunded. There is a major source of money for preserving recreational land, the Land and Water Conservation Fund. The fund has two "sides," one providing the wherewithal for acquiring, developing, and managing land by federal agencies, such as the National Park Service; the other providing grants to the states to implement comprehensive outdoor recreation plans. The LWCF derives its income from offshore oil lease revenues, which in recent years has brought fund authorizations to about \$1 billion annually. There is no direct provision for grants to Indian tribes preserving sacred lands, although as natural resources policy analyst Lynne Corn points out, "There's nothing in the statute that would prohibit federal agencies or the states from acquiring sacred land." But it rarely happens.



A Policy Agenda for Sacred Lands

Given the inadequacy of federal authorities and programs, many policy experts favor the development of a big, comprehensive bill that would not only improve what programs there are but also create quite major new ones, and in the process help elevate the sacred lands issue in the Congress and among the general public. Others (especially those burned by the misbegotten *Lyng* decision and the failed Inouye bill, and bills that followed) believe that a more targeted approach to policy reform would be preferable. Jack Trope, a lawyer who worked on the Inouye bill and the subsequent Religious Freedom Restoration Act, points out that a comprehensive bill would require perhaps a five-year effort, but that "in the meantime there are specific things to be done."

Among the things to be done on an immediate basis would be to introduce the notion of American Indian sacred sites into pending legislation known as "CARA," the Conservation and Reinvestment Act, which would provide increased funding—an authorization of up to \$3 billion annually—for a variety of resource protection programs. One possibility for a new CARA program could be to establish an "American Indian Sacred Lands Foundation" by congressional charter that could provide funding for the purchase of private lands by Indian organizations. In the view of Lynne Corn, such a foundation could be modeled after the National Fish and Wildlife Foundation, established by Congress in 1984, which now awards federal and private funds as challenge grants to "on-the-ground conservation projects." In 1999 the foundation supported 598 projects, committing \$17 million in federal funds, matched with \$50 million in nonfederal funds, for a total of \$67 million.

Another prospect for immediate legislative action would be to shore up the "106 process" of the National Historic Preservation Act. According to Dean Suagee, 1992 amendments to the act provided that if a federal action affects a historic property to which an Indian tribe attaches religious and cultural significance, then the tribe has the right to be consulted, no matter where the property is. "This is a procedural right," says Suagee, "but it is a significant procedural right which gives federal agencies the discretional authority to deny permits, such as for mining, based on the 106 process." To improve the 106 process, Suagee believes a further amendment to the NHPA could be offered that would restore the "three-part test," famously obviated by the Rehnquist Court, and at the same time provide administrative mechanisms to create a structured dispute resolution process. One of the potential outcomes of a 106 consultation might well be, as Suagee puts it, "some kind of land transaction—to buy land or get conservation easements to protect the sanctity of the place."

In addition to improving NHPA, amendments to laws governing trust lands should be created to facilitate the transfer of sacred sites outside reservation boundaries to trust status, plus necessary policy changes to provide for "government-to-government" cooperative agreements for the management of sacred lands that are also places of rich biological diversity of interest to federal land management agencies.

Such remedies as these, significant as they are, still do not address the need for explicit legislation directing all agencies of the federal government to preserve sacred lands in the public-land holdings under their management, nor the need for a fairness in doling out federal grants for the purchase and management of privately owned sacred sites.

With regard to public land policies, one of the thorniest issues is determining where religious sites are located and why particular areas are especially important. As Jack Trope explains, "Here in the Southwest, I've heard stories about pueblo people being kicked out of religious activities just for revealing any information about sacred areas." At the same time, when the choice is between secrecy and the destruction of sacred areas, an accommodation can often be worked out. In fact, as Kurt Russo, consultant to the Lummi Nation of northwestern Washington, points out, some 14 tribes in Washington, realizing that their sacred sites were at risk, undertook a survey of the Mt. Baker-Snoqualmie National Forest, specifically identifying some 450,000 acres as sacred. One of the report volumes, says Russo, contains maps with very detailed information on "exactly where people go for spirit questing, for spiritual bathing, for gathering traditional materials, for depositing regalia, and for collecting traditional medicines. But the information is strictly confidential and cannot be accessed without permission of the tribes. Even so, there are people on the reservations in the Northwest that don't think these sacred places should have been talked about, especially with the U.S. Forest Service. But when they were given information to make informed decisions—that they needed to reveal the location of sacred sites so that they would not be clearcut—then consensus could form."

In view of such issues, a legislative proposal governing the procedures of federal land-managing agencies should specifically address the conduct (and funding) of surveys and pertinent issues of secrecy. Such provisions, if added, for example, to the earlier Richardson Bill (The American Indian Religious Freedom Act Amendments of 1994, H.R. 4155), might, along with the sacred-sites title in the Inouye bill and its successors, provide a starting point for drafting a new legislative initiative. Significantly, all these earlier bills explicitly provide a "cause of action" if federal lands are managed in such as manner that undermines and frustrates a traditional Native American religion or religious practice.



For the other major policy failure, the lack of a fair share of federal grants for land acquisition, the most direct approach would be through an amendment to the Land and Water Conservation Fund Act (LWCF) to provide grants to tribes as well as states and federal agencies. Even a small percentage of the \$1 billion authorized for the fund would fulfill the obligation of the U.S. government to assist tribal governments in protecting traditional sacred sites. The LWCF is traditionally seen as the source of grants for acquiring recreational land, but it would do no damage to this policy principle to include recreational land in the formulation. Indeed, the fund is not just for heavily used parks, but also for the preservation of valued natural areas, which describes nearly all American Indian sacred sites.

Finally, as Dean Suagee proposes, any legislative package should include model statutes for states and tribal governments to support and perhaps expand on federal initiatives in sacred lands preservation.

The Legislative Elements

In summary, then, whether contained in a single comprehensive bill or introduced piece by piece, some of the salient opportunities are these:

- A bill to create a congressionally chartered and federally funded "American Indian Sacred Lands Foundation," structured along the lines of the Fish and Wildlife Foundation, to make matching grants to non-profit organizations for preserving sites and to seek the donation of private land and money for this purpose. The foundation idea could be introduced as a title in the Conservation and Reinvestment Fund Act or as a freestanding bill.
- An amendment to the National Historic Preservation Act to strengthen Section 106 by providing for the explicit application of the "three-part test" regarding management decisions on public lands, namely: "If a government action imposes a burden on religion, then the action must be justified by a compelling governmental interest that cannot be met through less restrictive means."
- An amendment to the trust statutes administered by the Bureau of Indian Affairs allowing for the purchase and transfer of sacred lands outside reservation boundaries to trust land status with appropriate safeguards to insure their protection as places for religious observances.
- An amendment to the American Indian Freedom of Religion Act for the management of federal lands so as not to undermine Native American religious practices. The amendment would specifically provide for the funding of sacred land surveys by tribes or Indian organizations, methods of embargoing (or not requiring)

confidential religious-practice information, the explicit establishment of the "three-part test" (as stated above), requirements for the comanagement of designated sacred lands, and a specific cause-of-action provision for enforcement.

- An amendment to the Land and Water Conservation Fund Act to provide for direct grants to Indian tribes for survey research and the purchase (in fee or less-than-fee title) of sacred sites on private lands, and their development and maintenance.
- Model legislation for states and tribes supporting the foregoing, among other provisions.

Obviously, these are not the only initiatives that could be contemplated by tribal leaders and others concerned with sacred lands, and they might not be set forth in the manner that some might prefer (including some of those at the policy workshop). However, the six ideas listed can, we hope, provide something of a starting point for discussion.

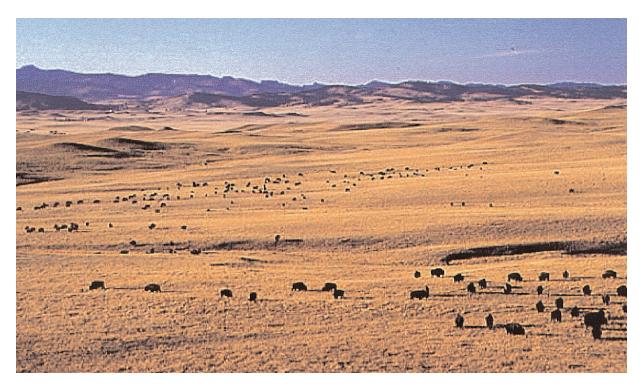
Strategic Considerations

Whatever form a sacred lands legislative initiative may take, there are certain strategic "givens" that should be considered.

To begin with, while the earlier effort to enact sacred lands legislation failed, there is much to build on. Field hearings were held that filled some seven hefty Senate Committee Print volumes, a record that should be analyzed and the participants and their organizations identified. Certainly a powerful coalition is necessary and perhaps quite possible to develop for a sacred lands initiative, as Shelley Means of the Washington Association of Churches points out. The association has had good success over the past decade in creating coalitions of Indian, church, and environmental organizations.

The earlier bills, some of which contained provisions for the use of peyote, gathering eagle feathers, and the right of Indian prisoners to wear their hair in accordance with religious custom, attracted non-Indian organizations, especially churches, to support the legislation despite the diversity of concerns addressed. This time out, with a single, and quite universal, matter at issue—the preservation of sacred lands—it may be possible to expand the reach of a support coalition. Certainly, if churches and major environmental groups back an effort by Indian organizations in support of sacred land legislation, a powerful voice has been created representing a substantial fraction of the U.S. population.

The beginning point for coalition building, in the view of Tom Goldtooth, head of the Indigenous Environmental Network, must, however, be tribal leadership. "Tribal leaders must buy in to the concept first," says Goldtooth. "In this campaign, Indians must



Bison ply the plains in sight of South Dakota's Black Hills, holy place for the many "fires" of the Sioux.

speak for Indians." As Laurie Weahkee of the SAGE Council puts it, "We're getting very cynical about alliances. We need people who know the subtleties of sacred site battles."

Another strategic element concerns the effective use of informational and educational materials. Chief among these at present is the film *In the Light of Reverence*, produced by Christopher McLeod, described elsewhere in the appendix, and this book, *Sacred Lands of Indian America*. The film, says McLeod, has several goals, among them "to win legislation that guarantees religious freedom and the protection of sacred sites on public land, and to facilitate access to and protection of sites on private land." Both McLeod and Liveoak Editions (the creators of this book) agree that book and film should be used together aggressively to influence decision makers and enlist local, grassroots organizations in sacred land preservation efforts.

Lastly, what is required is a "secretariat"—an administrative team—to coordinate efforts on behalf of a coalition in support of a legislative initiative. This was a purpose of the "Sacred Earth Conference" organized by the Seventh Generation Fund and held in Seattle in the spring of 2001. To be effective, the secretariat will need to represent Indian tribes and organizations as well as work with churches and environmental groups. And it will have to work effectively both at the local level and in Washington, D.C. An early item on the agenda for the coalition secretariat might well be to encourage the relevant committees of Congress to hold field hearings on sacred lands, preliminary to the introduction of specific legislation. This would not only provide a means for Indian leadership to make a direct contribu-

tion in shaping a legislative initiative, but also build interest nationally in sacred lands preservation.

A Final Word: What to Do

Usually, books that seek to raise public consciousness about a serious national problem prompt the reader to ask, "Yes, that's important, but what can I do?" Actually, there's quite a lot individuals can do about preserving sacred land. To begin with, they can ask their elected representatives to pay attention to sacred land issues in their district or state, and to address the issues on a national basis as well. This book, *Sacred Lands of Indian America*, is meant to be distributed to key members of Congress, so legislators should not be able to claim ignorance as an excuse.

In addition, individuals can send money, volunteer time, write letters on behalf of sacred land battles, or take on a leadership role themselves by organizing study-and-action groups to discuss sacred land preservation, using the film and this book for background and perhaps inspiration. For information on this kind of activity, readers are encouraged to contact the Seventh Generation Fund or other organizations listed elsewhere in this appendix, or to visit the Liveoak Editions Website, www.liveoak.org.

Clearly, the desecration of sacred sites is intolerable not just for Native Americans, but for non-natives too, for these places, as Chris Peters points out, have sacredness in and of themselves. "In talking about this land," adds Tom Goldtooth, "we are talking about sacredness for all of us. So let us cast our prayers widely to save the land, as a fisherman casts his nets. May the Creator continue to bless this work."

ORGANIZATIONS CONCERNED WITH SACRED LANDS

The following list provides a starting point for those interested in becoming involved in sacred lands protection. The entries are divided into two parts: first, the five American Indian organizations that have worked with Liveoak Editions to bring this book into being and, second, other important national and regional organizations concerned with sacred land that were suggested by our cosponsors. Not included are the many local project groups such as those mentioned in the text of this book. Readers can learn about local efforts—and they number in the hundreds—by calling the organizations listed here or logging on to their websites.

Project Cosponsors

Indigenous Environmental Network

The Indigenous Environmental Network is a nonprofit national Native environmental organization working with some 200 local, national, and regional groups. IEN activities include youth programs, training, organizing, and advocacy on environmental justice, natural resource management and conservation, protection of sacred sites, biodiversity, treaty rights, and building sustainable communities.

Contact: Tom Goldtooth

P.O. Box 485 Bemidji, MN 56619

phone: (218) 751-4967 fax: (218) 751-0561 e-mail: ien@igc.org website: www.ienearth.org

Indigenous Women's Network

The IWN was created in 1985 to support the self-determination of indigenous women, families, communities, and nations in the Americas and the Pacific Basin. The network supports public education and advocacy for the revitalization of our languages and culture, elimination of all forms of oppression, the attainment of self-sufficiency, the protection of ancestral lands, and the right to control the biological diversity of our Native territories.

Contact: Pamela Kingfisher

13621 FM 2769 Austin, TX 78726 phone: (512) 258-3880 fax: (512) 258-1858

website: www.almademujer.com

Native American Land Conservancy

The Native American Land Conservancy is a 501 (c)(3) grass-roots intertribal organization with central offices in Coachella, California. The NALC was established by tribal governments and communities to promote the preservation of sites of historic, biological, and cultural importance to tribes in the greater Mojave Basin. In addition to acquiring and preserving these landscapes, it also encourages both the preservation of traditional Native American culture and cross-cultural understanding through programs of environmental education and public conferences. Tax-deductible donations to the NALC can be directed to either land purchases or its educational programs.

Contact: Theresa Mike 46-200 Harrison Place Coachella, CA 92236 phone: (760) 775-6866

SAGE Council

The SAGE Council is a community organization building self-determination and relationships through organizing, education, and leadership development. The council is committed to influencing the social, economic, and political decisions affecting indigenous peoples to prepare for the future generations. The SAGE Council promotes the spiritual and political values that respect Mother Earth, the Petroglyphs, and all People, with truth, honesty, respect, compassion, generosity, humility, and prayer.

Contact: Sonny Weahkee

P.O. Box 82086

Albuquerque, NM 87198 phone: (505) 260-4696

fax: (505) 260-1689

e-mail: sonny@SAGECouncil.org

Seventh Generation Fund

Founded in 1977, the Seventh Generation Fund is the only Native American intermediary foundation and advocacy organization dedicated to promoting and maintaining the uniqueness of native peoples and our nations. The foundation's work has grown in vision and direction over the decades to reach indigenous community-based projects with a dynamic integrated program of issue advocacy, small grants, technical assistance, management training, and leadership development.

Contact: Christopher H. Peters

P.O. Box 4569 Arcata, CA 95518 phone: (707) 825-7640 fax: (707) 825-7639 website: www.7genfund.org

Other National and Regional Organizations

American Indian Policy Center 749 Simpson Street St. Paul, MN 55104 phone: (651) 644-1728 fax: (651) 644-0740

American Indian Ritual Object Repatriation

Foundation 463 East 57th Street New York, NY 10022 phone: (212) 980-9441 fax: (212) 421-2746

website: www.airpi.org

website: www.repatriationfoundation.org

Apache Survival Coalition

P.O. Box 1237 San Carlos, AZ 85550 phone: (520) 475-2543

Association on American Indian Affairs

Box 268

Sisseton, SD 57262 phone: (605) 698-3998 fax: (605) 698-3316

website: www.indian-affairs.org

Cultural Conservancy P.O. Box 72086 Davis, CA 95617 phone: (916) 759-2285 fax: (916) 759-2268

website:

www.rahunzi.com/costano/CulturalConservancy.html

First Nations Development Institute

11917 Main Street Fredericksburg, VA 22408 phone: (540) 371-5615 fax: (540) 371-3505

website: www.firstnations.org

Honor the Earth 2801 21st Avenue South Minneapolis, MN 55407 phone: (800) 327-8407 fax: (612) 278-7162

website: www.honorearth.com

Indian Law Resource Center 602 North Ewing Street Helena, MT 59601 phone: (406) 449-2006 fax: (406) 449-2031

website: www.indianlaw.org

Montana Wilderness Association

P.O. Box 635 Helena, MT 59624 phone: (406) 443-7350 www.wildmontana.org=

National Congress of American Indians 1301 Connecticut Avenue NW, Suite 200

Washington, DC 20036 phone: (202) 466-7767 website: www.ncai.org

National Religious Partnership for the Environment

1047 Amsterdam Avenue New York, NY 10025 phone: (212) 316-7441 fax: (212) 316-7547 website: www.nrpe.org

National Tribal Environmental Council

2221 Rio Grande Blvd. NW Albuquerque, NM 87104 phone: (505) 242-2175 fax: (505) 242-2654 website: www.ntec.org

Native American Rights Fund

1506 Broadway Boulder, CO 80302 phone: (303) 447-8760 fax: (303) 443-7776 website: www.narf.org

Northern Plains Resource Council 2401 Montana Avenue, Suite 200

Billings, MT 59101 phone: (406) 248-1154 fax: (406) 248-2110 website: www.nprcmt.org

