INDIAN SOVEREIGNTY AND RELIGIOUS FREEDOM: UNITED STATES PUBLIC LAND MANAGEMENT AND INDIAN SACRED SITES, 1978-2014

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ABSTRACT

Combining historical and policy analysis, this study argues that executive and congressional actions have strengthened and deepened the consultation process instituted by the American Indian Religious Freedom Act of 1978, which requires federal authorities to take into account the preferences of Native Americans regarding the uses of public lands that violate their sacred sites. The consultation process has helped bridge the gap in cultural understanding and knowledge of the Indigenous peoples, federal authorities, and private developers at odds over the management of public lands encompassing Indian sacred grounds. On the other hand, a continuing lack of First Amendment free exercise constraints on official land management choices has left open the door for administrators to allow cultural prejudices shape their decisions in ways inimical to the protection of tribal religious grounds. Improved understanding of Native American religions and of federal policy regarding Indian lands can help advance a new understanding of sovereignty for Native Americans and protect their constitutional right to religious freedom.

Introduction

Christopher Columbus commented in his log that it would be easy to Christianize the indigenous people he had recently made the acquaintance of because he felt they had no discernible religion.[1] For centuries European settlers refused to recognize the religions of American Indians as real religions. This fundamental disrespect played an important part in the legal rationalizations for the long history of diminishing American Indian sovereignty and trampling Indian religious freedom well into the twentieth century. This fundamental disrespect played an important part in the government of the United States repeatedly desecrating places sacred to practitioners of indigenous religions. Some have attributed the fundamental differences in the indigenous and European religions as the source of continuing conflict over the protection of Indian sacred sites into the early twenty-first century. While the significant differences in religion between the indigenous and non-Indian communities may have played a part in rationalizing the motivation for violations of Indian religious freedom in the past, these differences alone are not sufficient to explain the recent history of struggles to protect Indian sacred sites.

While it would be an exaggeration to accept the perception of Columbus that the indigenous peoples of the Western Hemisphere had no religion, the Indians of North America conceptualized their religion in such significantly divergent ways that, before meeting the Europeans, no nation had a word for religion.[2] Indian religions have a great

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1 Walter Echo-Hark, "Five Hundred Nations within One: the Search for Religious Justice," Phil Cousineau, ed. A Seat at the Table: Huston Smith in Conversation with Native Americans on Religious Freedom, (Berkley: University of California Press, 2006), p. 31.

2 Cousineau, A Seat at the Table, xix.

deal of diversity, but there are some commonalities that set Indian religions apart from most of those of European populations. For many Indians, religion has been conceived of as a way of life.[3] To study the history of Indian religion is to study the totality of the history of an Indian people's art, culture, economics, music, dress, and politics.[4] Religion has been a community centered way of life that includes animals, the land, and the spirits of the dead.[5] Being centered on the community that included both living and dead, the Lokota found the suppression of their religion by the United States government in the late nineteenth and early twentieth century to be particularly distressing and commented that the "white man" harassed their people even in death.[6] This encompassing way of life for religious experience differed significantly from the general experience of non-Indian populations from the late nineteenth century to today. Generally the religions of European origins came to conceive of religion as something separable from other aspects of life and based in a set of core beliefs and behaviors that are distinct from the customs and practices of any particular society.[7]

Western European religions have long help a different view of the land and natural world than that of Native American religions. Among the early European people to invade the Western Hemisphere, John Winthrop commented that European claims to the lands of the Western Hemisphere were stronger because the settlers made greater use of

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3 Walter Echo-Hark, "Five Hundred Nations within One: the Search for Religious Justice," Cousineau, ed., 30.

4 Joel W. Martin, The Land Looks After Us: a History of Native American Religion, (Oxford University Press, 2001), p. X.

5 Vine Deloria Jr., "The Spiritual Malaise in America: the Confluence of Religion, Law, and Community," Cousineau, ed., 9.

6 Martin, The Land Looks After Us, 92.

7 Brian Edward Brown, Religion, Law, and the Land: Native Americans and the Judicial Interpretation of Sacred Land, (Westport, Connecticut: Greenwood Press, 1999).

the land by implementing their style of agriculture upon the land.[8] This view of Christian immigrants was consistent with the later liberal notion that land not put to the most economically productive use was wasted. Christian liberals often resorted to these values to rationalize what they saw as a greater claim to lands Indians lived on and cultivated for use in significantly different ways.[9]

Indian religious perspectives, by contrast, tended to see the land and the bounty of nature as being part of the greater community the people belonged to. These contrasting perspectives can be discerned by the differing answers to the question, "Does the land belong to me or do I belong to the land?"[10] For most Indian religions, the people belonged to the land and their beliefs of their origins and cultural interactions with the land and nature are part of that religious practice and observation. Another way to contrast the general perspectives is to compare the origin stories of the religions. Most Indian religions saw the Earth as the mother and origin of the people, an important part of the larger spiritual community, while Europeans have a story about being expelled from the natural world into a world of struggle and torment. The existence of the lives of many European religious practitioners are in conflict with the Earth.[11] Many Indian religions stress the responsibility of the individual to the community, including the land.[12] By contrast, liberal Christians brought to North America the notion of individual property rights responsible to no one. "Land exists in a condition of servitude; it ultimately

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8 Robert S. Michaelson, "Dirt in the Courtroom: Indian Land Claims and American Property Rights," David Chidester & Edward T. Linenthal, ed., American Sacred Space, (Bloomington, Indiana University Press, 1995), p. 53.

9 Ibid., 54.

10 Ibid., 49.

11 Charolette Black Elk, "The Homelands of Religions: the Clash of Worldviews Over Prayer, Place, and Ceremony," Cousineau, ed., 62.

12 Deloria, "Spiritual Malaise," 14.

belongs to someone who enjoys control over the allocation of resources contained within its boundaries."[13]

For more than a century United States policies towards indigenous peoples had been predicated on the assumption that Indian religions and cultures would disappear, making room for the invaders to take all of North America, but Indians refused to be eliminated. The United States government took Indian lands containing sacred sites, destroyed indigenous economies, caused famine, and tried to destroy the very fabric of Indian society through outlawing religion, forcibly removing children from their homes, forcibly destroying indigenous land management, and declaring that Indian nations lacked full national sovereignty because they were not Christian nations. Indian peoples found themselves involuntary minorities in their own homelands with wealth and military power firmly in the hands of the Europeans that decided to stay. Despite these enormous difficulties, indigenous peoples continued their fight to survive. Recalcitrant to this day, Indian peoples continue to survive as distinct cultures with their own religions, languages, cultures, and historical perspectives.

The complete failure of the policies designed to eliminate Indian peoples from North America has led to the current reality where the United States has to be a multicultural society, whether it wants to admit it or not. Since the time of sustained contact between the hemispheres of the world, the Christian nations debated what was the status of indigenous peoples under international law. In 1831, Chief Justice John Marshall in Cherokee Nation v. Georgia referred to this evolving body of international

[13] Brown, Religion, Law, 2.

law to claim indigenous nations had lost some part of their inherent sovereignty by being discovered by Christian Europeans, and were not properly foreign nations.[14] This body of international law has changed over time as people of European ancestry have learned more about those they share the planet with. The United Nations General Assembly adopted the Declaration of the Rights of Indigenous Peoples in 2007, recognizing the rights of indigenous peoples for the first time in such areas as self-determination, traditionally held lands, and the protection and access to religious and cultural sites. The United States President announced in 2010 that his nation would drop its official position as the last government in the world to opposed the declaration (initially four nations, the United States, Canada, Australia, and New Zealand voted against the UNDRIP, but the others accepted it before the United States).[15] World opinion has changed, even in the European nations, and eliminating Indian societies is no longer a reasonable option for the United States.

The Nixon administration began the first tentative steps towards creating a multicultural society where indigenous peoples can exercise meaningful cultural and political self-determination. President Nixon had the courage to renounce a policy implemented while he was Vice President in the Eisenhower administration: termination. The goal of this policy was the elimination of Indian nations as political and cultural communities within the United States. The Nixon administration undertook policies designed to improve respect for Indian societies and the practical implementation of greater Indian self-determination. This process continued with the passage of the Indian

[14] 30 U.S. 1 (1831).

[15] Valarie Richardson, "Obama adopts U.N. manifesto on rights of indigenous peoples," The Washington Times, Dec. 16, 2010.

Religious Freedom Act of 1978. This law guaranteed the practitioners of indigenous religions access to sacred sites on public lands and a right of consultation when administrative decisions might impact Indian sacred sites.

Since 1978 the executive and legislative branches have continued to take steps towards creating a multicultural society based on mutual respect for cultural differences, while the judiciary has engaged in a campaign to undermine Indian sovereignty and legal protections for religious diversity. Through a series of laws and executive orders in the late twentieth and early twenty-first centuries, the consultation process regarding sacred sites has been expanded and deepened, providing administrators with new legal options for protecting sacred sites. At the same time, the Supreme Court removed all substantive constitutional protections for religious freedom, for Indians and non-Indians alike, and has restricted the self-determination of Indian governments again and again. The Supreme Court acted against the emerging consensus of international opinion regarding indigenous rights and self-determination.

This dissertation brings several new avenues of investigation and conclusions to the study of the legal histories of Indian sacred sites, Indian religious freedom, and the place of these ongoing histories in the context of changes in Indian sovereignty. While other studies have examined aspects of these legal issues, those studies have been almost exclusively from a legal perspective.[16] The current study is the first to examine the consultation process and the related administrative records and the first study to look at this administrative record for indigenous sacred sites as it relates to the changing and

[16] Allison M. Dussias, "Friend, Foe Frenemy: The United States and American Indian Religious Freedom," Denver University Law Review, Vol. 90 (2012), in particular is a broad examination of the government briefs in some of the cases examined here.

competing perspectives on sovereignty found in the courts, Congress, the executive branch, and Indian communities.

The research question this dissertation seeks to answer is: what are the strengths and weaknesses in the history of the use of the mandatory consultation process with regards to the management of Indian sacred sites? Upon assessing these strengths and weaknesses, this dissertation will then seek to answer the question: what new sovereign relations might be established between Indian and non-Indian communities to better protect Indian religious sites outside of reservation boundaries?

This dissertation uses a variety of sources, with a significant contribution being the first historical academic look at the administrative record for the case studies below. While the administrative record is the primary sources for the main case studies, the sources vary from case study to case study. The first case study below was the only case to have testimony at trial regarding the consultation process, and thus there is only one case that uses trial transcripts among its sources. While court records and decisions are relied upon in all studies, some cases do not have the same record of appeals and thus do not have as many judicial opinions to consider. All studies rely upon press reports to some degree and all depend heavily on secondary sources for the histories of the various Indian nations involved in these cases. This will also be the first study to examine the Forest Service review of its own policies (and recommendations for the future) from 2012 and the first study to look at the 2015 proposal of a coalition of five Indian nations, the Hopi, Navajo, Uintah and Ouray Ute, Ute Mountain Ute, and Zuni, for cooperative

management with the federal government of 1.9 million acres in Utah, as a solution to the question of how to manage Indian sacred sites on public lands.

Chapter one will present the theoretical background for this study and provide a brief history of Indian law in the United States, up to 1978, as well as an introduction to First Amendment and relevant administrative law with regards to sacred sites and public lands management in the years leading up to the case studies of the present project. This examination will first cover the troubled history of cases regarding the free exercise of Indian religion and public lands management and then delve into the confused state of public lands management and the question of what administrative actions might constitute the impermissible establishment of religion, before the Cave Rock case began to sort out much of the judicial confusion on this issue. The final part will examine leading academic positions on the state of the law and the protection of Indian sacred sites on public lands.

The second chapter will examine the history of the Forest Service management of the San Francisco Peaks and the ongoing concerns of the Hopi. The Peaks are sacred to many indigenous peoples, but this examination will focus on the Hopi perspective and Hopi struggles against an ever expanding ski resort on the mountain. In 2005, the Forest Service approved an expansion to the ski resort that included the creation of a snowmaking system that would use reclaimed sewage effluent. This chapter will examine in detail the Forest Service consultation with the Hopi and the first challenge to sacred site management under the Religious Freedom Restoration Act. The case climaxed in 2008 when the Ninth Circuit Court of Appeals decided that the Religious Freedom

Restoration Act did not recognize the desecration of Indian sacred sites on public lands as a "burden" on religion under the meaning of the law.

The third chapter will examine the case of Cave Rock and the Washoe Indians. Cave Rock became a challenging and unique site for recreational climbing in the 1980s. After a lively and at times contentious consultation process where administrative opinions went back and forth, the Forest Service ultimately decided to ban all rock climbing at Cave Rock, the most sacred of places to the Washoe Indian nation in 2002. The Access Fund, an organization that supports access for climbers to various sites, challenged the decision on the grounds that the administrative decision served to establish religion by banning all climbing to protect the integrity of the site. This case ended in 2009 when the Ninth Circuit Court of Appeals decided the ban furthered the secular purpose of protecting the Traditional Cultural Property of Cave Rock.

Chapter four examines the lengthy consultation process surrounding a new Forest Service travel management plan for Badger-Two Medicine, a place sacred to the Blackfeet people adjacent to their reservation in Montana. In this case the Forest Service set out to make a comprehensive travel plan for all of the Rocky Mountain District of the Lewis and Clark National Forest, but in the process of consultation learned a great deal about both Blackfeet religious and cultural concerns, as well as Blackfeet reserved treaty rights to hunting, fishing, and harvesting lumber. While issuing a plan in 2007 for the remainder of the District, the Forest Service delayed decisions regarding Badger-Two Medicine while additional consultation took place. In 2009, the Forest Service issued a travel management plan much in line with all Blackfeet concerns. This case ended in

2011 in the Great Falls Division of the Montana Federal District Court, when the court decided that the management plan did not improperly establish religion by banning all snowmobile travel at Badger-Two Medicine.

Chapter five examines several related cases, none of which involve Forest Service administrative decision, but do involve actions relevant to the ongoing issues of public lands management and Indian religious freedom. The first involves the struggles of the Makah Indian nation to revive its reserved treaty rights to whaling. While the federal government supported Makah whaling, a movement of minor environmentalist groups fueled a racist backlash and filed a law suit claiming federal environmental regulations abrogated Makah treaty rights.

The second part of chapter five looks at two cases regarding the struggles of the Quechan Indian Nation to protect sacred sites in southern California. In the first case, the Quechan found many allies in California as they sought to prevent a gold mine that would damage cultural and sacred sites. This case culminated in a North American Free Trade Agreement Arbitration Tribunal that ruled, in part, that the emerging norms of indigenous rights under international law were a reasonably foreseeable business expense in 2009. The Quechan were the first indigenous nation allowed to present a third party brief before such an arbitration tribunal.

The second Quechan case is significant because of the ignorance and racism at the heart of the public reaction. In 2008, the Bureau of Land Management began the process of crafting an environmental impact statement for a solar project it wanted to approve that would be located on lands of cultural and religious significance to the Quechan. The

Quechan informed the Bureau of their interests and the requirements of the consultation process. The Bureau never initiated any consultation, despite the notice, and the Quechan obtained a preliminary injunction against the approval of the solar project in 2010. The Quechan were widely condemned for protecting their rights as some portrayed them as selfishly opposing the solar project.

The final section of chapter five will investigate the problematic case of Apache Leap and Oak Flats. These two places were part of the Tonto National Forest in Arizona. Oak Flats is, for the time being, used by the Western Apache for female puberty ceremonies. Apache Leap was where Apache committed suicide rather than surrender to the U.S. military in the 1870s. As a last minute rider to a 2014 appropriations bill, Oak Flats and Apache Leap were given to an Anglo-Australian mining corporation and removed from requirements of public lands management, as the sacred sites would become private land owned by a foreign corporation.

Chapter Six examines the emerging legal context of continued struggles for protecting indigenous sacred sites and evaluates several proposals for altering sovereign relations with the United States government. The emergence of Supreme Court hostility to recognizing Indian sovereignty will be examined in an international context, placing the jurisprudence of the United States at odds with the growing international consensus on the rights of indigenous peoples. Many of the existing proposals for altering sovereign relations with the United States go beyond concerns for protection of sacred sites to include provisions for protection for indigenous rights in face of the unchecked plenary power of Congress and the emerging common law approach of the Supreme Court. This

chapter will also provide the first examination of the proposal of a coalition of five Indian nations for the joint U.S.-Indian management of 1.9 million acres of Utah, the first such proposal in U.S. history.

The conclusion will bring the disparate parts of these several case studies together and examine the ongoing concerns of Indian peoples as related in the 2012 Forest Service internal evaluation of sacred site management. The conclusion will offer additional suggestions as how historians might address ongoing underlying difficulties at the heart of protecting indigenous sacred sites in the United States.

Chapter One

Protection of Native American Sacred Sites:
A New Battleground in United States Indian Policy

Charting the rise of Native American religious freedom as an historical question and as an important ideological challenge for lawmakers and jurists must begin with four major historical ideological approaches to the history of American Indians. The earliest is the frontier or conquest perspective that viewed Indian societies as inevitably giving way to settler expansion. The second approach views humans as either racially or developmentally divided into hierarchies, and the indigenous and settler populations were seen as divided by one or both of these hierarchical division. The modernist approach examined social boundaries between the settler and indigenous populations, conceiving of these boundaries as fixed but capable of being transcended. The fourth approach, which has emerged beside the modernist approach in the post World War Two era, is the Post Modern or Post Colonial approach, "Contemporary writing in which texts and histories seek to deal with the tension between the liberating dissolution of boundaries and the constant reshaping of them as political memories of the colonial past[.]"[1]

The History of American Indians is generally broken into six broad periods directly linked to the changing Indian policies of non-Indian governments. The changing policies of each period impacted the practical expression of Indian national sovereignty and religious freedom. The current United States government and its predecessor

[1] Philip Deloria, "Historiography," in A Companion to American Indian History, ed. Philip J. Deloria & Neal Salisbury (Malden: Blackwell Publishing, Ltd., 2004), 7-8.

governments have changed policies as their society has changed and developed. Scholarship on these changing policies and Indian history has changed over time as Western Civilization has made progress in accepting cultural diversity. There have been over thirty-thousand books written on American Indians, and Indian scholarship has been largely the province of anthropologists. Over ninety percent of the literature on American Indians has been produced by non-Indians.[2]

The major eras of policy and history of American Indians are (1) the international relations phase; (2) domestic dependent nation phase; (3) allotment and assimilation; (4) Indian Reorganization Act or "Indian New Deal"; (5) termination, and (6) sovereignty and government to government relations. While certain policy changes came with distinctive historical actions, such as the Indian Reorganization Act, the transition between other periods has been more gradual. Similarly, in the scholarship, there is a large amount of overlap from one era of historical approach to another. It should be noted that there is a great deal of history before the beginning of transatlantic contact became regularized, and while a growing field, this period is generally not considered part of American Indian legal history. In a sense, it would perhaps be better to say there are six periods in which non-Indian governments have been trying to conceptualize indigenous people as existing within the Anglo-American legal system.

The initial interactions between the European settlers and the indigenous population of North America were those governed by international relations and international law, from the perspective of the non-Indians. Beginning in the seventeenth century, the various settler and European governments entered into trade treaties as well

[2] Philip Deloria, "Historiography," 6.

as military alliances with the various Indian nations, within a context of international law. During its war for independence, in the late eighteenth century, the United States engaged in the European practice of treaty making and conducting military alliances with Indian nations. This practice continued through the young nation's formative years. The foreign relations, or international law, era is considered to last until 1830.[3] The later part of this period is marked by expansion by war on the part of the United States government, supplemented by treaties for land cessions, trade agreements, and military alliances. Herman Viola has examined the Indian policies of the time in his biography of Superintendent of Indian Trade and the first Superintendent of Indian Affairs, Thomas L. McKenny, Thomas L. McKenny: Architect of America's Early Indian Policy, 1816-1830 (1974).[4]

The case of Cherokee Nation v. State of Georgia (1831), marked the transition from international law to the period of domestic dependent nations. One of the "civilized" Indian peoples that had largely adapted to living near the expanding settler populations, the Cherokee Nation, found itself besieged by the State of Georgia. The State stepped up its aggression against the Cherokee Nation in its continuing attempts to dispossess the Cherokee of their lands. The Cherokee Nation responded by bringing an original action before the United States Supreme Court as a foreign nation. Chief Justice John Marshall found himself in a difficult situation. If the Supreme Court accepted jurisdiction of this case between a foreign government and a state and ruled against Georgia's aggression, as the legal standards of civilized peoples would require, the

[3] Donald Fixico, "Federal and State Policies and American Indians,"in A Companion to American Indian History, ed. Philip J. Deloria & Neal Salisbury (Malden: Blackwell Publishing, Ltd., 2004), p. 380.
[4] Ibid., 381.

authority of the Court would be jeopardized. The hostile chief executive, Andrew Jackson, would likely seek to undermine or render impotent any ruling against Georgia's aggression. Rather than face the potential of a decision that might be ignored by the federal executive, Marshall described the Cherokee Nation as a " domestic dependent nation" thus denying the Court jurisdiction as the action was not between a foreign nation and a state.[5]

Chief Justice Marshall, while denying Indian nations status as foreign nations, established the unenforced right under United States law of Indian nations to occupy, as domestic dependent nations, the land Indians believed was theirs. The aggression of the State of Georgia and the executive branch could not be checked by the limited legal rights of land occupation Marshall had tried to establish for the indigenous populations, and this period was marked by forced removal and relocation of Indians, including the Cherokee "Trail of Tears."[6] The central study for this period is Ronald Satz's American Indian Policy in the Jacksonian Era (1975).

Jill Norgren has provided two excellent examinations of the context and outcomes of the Cherokee Cases, the Marshall opinions that form the contemporary foundation for Indian law. The first of these, "The Cherokee Nation Cases of the 1830s," detailed the political context of the cases. This examination explored the conflict over states' rights with Jackson and the difficulties the Judiciary faced. Ultimately Norgren concluded in this essay that while Worcester v. Georgia (the final of the Cherokee cases) now serves as a foundational case for Indian law, it failed as a test case to protect Native American

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5 Jill Norgren, "The Cherokee Nation Cases of the 1830s," Journal of Supreme Court History, Vol. 19, No. 1 (1994): 65, 71-2.

6 Fixico, "Federal and State Policies," 381-82.

sovereignty and land rights.[7] Norgren expanded this examination into her 2004 book, The Cherokee Cases: Two Landmark Federal Decisions in the Fight for Sovereignty, (University of Oklahoma Press), reaching largely the same conclusions; Marshall twisted the history of events prior to the Cherokee Cases to suit his position that Indian nations were domestic dependent nations with merely the right to occupy their lands (while ultimate title rested with the Federal government) and he failed in protecting Indian sovereignty and land tenure.

Taken together with Johnson v. McIntosh,[8] an 1823 land title precedent the later cases relied upon, Cherokee Nation v. Georgia and Worcester v. Georgia created the theoretical foundations for situating indigenous peoples in the legal system of the United States, and are known as the Marshall Trilogy. Operating under a modified form of the Doctrine of Christian Discovery, Johnson established the legal notion that simply discovering indigenous peoples established ownership by the discovering Christian European power of the underlying title to the lands Indian peoples lived on. This gave the discovering power the exclusive right to buy the lands the indigenous peoples continued to have the legal right to occupy. As Indian nations did not own the lands they occupied and could only sell their lands to the discovering power, or their successor in law (as the United States was to Great Britain after Independence and France after the Louisiana Purchase), Indian nations were not fully sovereign foreign nations, but domestic dependent nations, with the United States standing as their guardian (in theory, but rarely in practice), as Marshall determined in Cherokee Nation. In Worcester,

[7] Norgren, 81.
[8] 21 U.S. 543 (1823).

Marshall affirmed the supremacy of the United Sates government in Indian relations and the powerlessness of the states over Indians and the internal affairs of sovereign Indian nations. This was the established legal theory, even if historical practice did not necessarily conform to the theory.

In "Beyond Worcester: the Alabama Supreme Court and the Sovereignty of the Creek Nation," Tim Alan Garrison examined cases of the Alabama Supreme Court that challenged federal supremacy in Indian affairs and exemplified the aggressive support of some state governments for forcibly removing the Indian populations.[9] Along with the State of Georgia, other states enacted similar repressive measures violating Indian sovereignty, with Alabama alone taking measures as draconian as the State of Georgia in its assault on Indian rights and sovereignty. Garrison forcefully argued that the courts in southern states engaged in legal arguments that twisted or ignored precedent and adopted positions on the history of treaty making and conquest that were unsupported by the historical record. He concluded that the southern judiciary abetted the illegal and unjust assault on indigenous rights and that the chain of cases provided by this unethical behavior provided the actual precedents that filled the vacuum left by the non-enforcement of Worcester.[10]

Ethan Davis has provided historians with a detailed look at the first large-scale administrative action of the executive branch in his detailed essay, "An Administrative Trail of Tears: Indian Removal." Starting with a challenge to the notion that United States administrative law began with the 1887 Interstate Commerce Commission, Davis

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[9] Tim Alan Garrison, "Beyond Worcester: the Alabama Supreme Court and the Sovereignty of the Creek Nation," Journal of the Early Republic, Vol. 19, No. 3 (Autumn, 1999): 423-450.

[10] Ibid., 449-450.

ably presented a case that the execution of the Indian Removal Act of 1830 was so bereft of Congressional planning and oversight; so much discretion in implementation was left to the executive branch, and the undertaking was so massive and expensive, that the executive branch developed an administrative agency with no judicial or congressional oversight.[11]

Davis examined the competing political views and the dishonest tactics used by agents of the executive branch to secure removal treaties. Congress repeatedly abdicated any oversight or authority and only pressed for more frugality in execution with no humanitarian concerns.[12] Davis concluded that the execution of the removal policy was an example of a dramatic failure of administrative law, only in part due to the difficulty of the task undertaken.[13]

Stuart Banner provided with his book- How the Indians Lost their Lands: Law and Power on the Frontier- an overview of settler manipulation of the law and legal frameworks to separate Indians from their lands.[14] This book examines the nuance of settler and Indian relations ranging from the beginnings of the republic and examining the change from Indian ownership to occupancy, the Cherokee removal, through to the reservation system and allotment. Banner concluded that the modified doctrine of discovery found in McIntosh provided the basis for the dispossession of allotment.

Lindsey G. Robertson provided another look at this case with the book Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their

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11 Ethan David, "An Administrative Trail of Tears," The American Journal of Legal History, Vol. 50, No. 1 (2008): 49-50.
12 Ibid., 74-5.
13 Ibid., 99-100.
14 Stuart Banner, How the Indians Lost Their Land: Law and Power on the Frontier, (Cambridge: Belknap Press of Harvard University, 2005).

Lands.[15] This work examines in detail the case of Johnson v. McIntosh. Robertson examined corporate records of the parties involved to provide greater context and detail to the story involved. Robertson challenged Marshall's historic account that Indians were only able to sell land to the British officials, and that Indians merely had occupancy rights in colonial times. Robertson concluded that this reduction to occupancy and dependent domestic nation status was what ultimately provided Georgia with the grounds for its aggressive push for sovereignty over the Cherokee lands, and that Marshall recanted much of this opinion by his defense of Cherokee sovereignty in Worcester.

A more intimate look at Indian law can be found in Mark Carroll's Homesteads Ungovernable: Families, Sex, Race and the Law in Frontier Texas, 1823-1860. This examination of the social history of sexual and family relations includes detailed examinations of how indigenous peoples interacted with European settlers. These relations then formed the basis for differing Mexican and Anglo-Texan laws regarding family relations with indigenous peoples that differed from the law in the early United States.[16]

The era of domestic dependent nations involved a long period of transition and for the initial decades of this period the Indians of the southwest were not under any claim of United States jurisdiction. The treaty making process remained in place until 1871.[17] Over this period the U.S. government pressured Indian nations to remove from the east, cede land, and used negotiation or force to reduce indigenous land holdings to smaller

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[15] Lindsay G. Robinson, Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of their Lands, (Oxford, UK: Oxford University Press, 2005).

[16] Mark M. Carroll, Homesteads Ungovernable: Families, Sex, Race, and the Law in Frontier Texas, 1823-1860, (Austin: The University of Texas Press, 2001).

[17] John H. Vinzant, The Supreme Court's Role in American Indian Policy, (El Paso: LFB Scholarly Publishing LLC, 2009), p. 50.

and smaller reservations. Marking attempts to limit the indigenous population to reserves in less violent ways, the federal government moved the Indian Office from the Department of War to the Department of the Interior in 1849.[18] Initially intended by many of the non-Indian population as places for the indigenous peoples to retain self-government, by the late nineteenth century, Indian reservations had begun to be seen and used as tools for the destruction of Indian self-governance and the forced adoption of Christian faiths and the cultural ways of the dominant non-Indian population.[19] Loring B. Priest with Uncle Sam's Stepchildren: The Reformation of United States Indian Policy, 1865- 1887 (1969) is the standard treatment for this transition. American Indian Policy in Crisis: Christian Reformers and the Indian: 18650-1900 (1976) by Francis Paul Prucha, and American Protestantism and United States Indian Policy, 1869-1882, (1983) by Robert Keller, Jr. cover the relations between Christian missionary efforts and federal policy.[20]

As the domestic dependent nation period was coming to a close, and the U.S. government was about to embark on a more aggressive set of policies designed to wipe out indigenous governments, religion, and culture, the first books by those among the non-Indian population seeking to reform Indian policy appeared. In a descriptive expose, Helen Hunt published A Century of Dishonor: A Sketch of the United States Government's Dealings with Some Indian Tribes, in 1881. Among those books exposing the poverty and disease on reservations were the first scholarly treatments of Indian conditions, including Our Indian Wards (1880), by George Manypenny. Manypenny's

[18] Fixico, "Federal and State Policies," 383.
[19] Vinzant, The Supreme Court's Role, 48-9.
[20] Fixico, "Federal and State Policies," 382-83.

book is a survey of Indian history. Francis Paul Prucha has provided, as editor, a series of essays covering the work of these reformers, Americanizing the American Indians: Writings by the "Friends of the Indians" 1880-1900. Robert Mardock has presented his own account of reformers in the same period in his The Reformers and the American Indian (1971).[21]

The assault against indigenous culture and sovereignty began one of its more aggressive phases with allotment. In 1887 the U.S. Congress passed the Dawes act which called for forcing reservations to be broken up into individual allotments privately owned by individuals. Each head of an indigenous household was to receive one hundred sixty acres of land and expected to become a farmer.[22] The "surplus" land was to be made available for use by the settler population. In the period of allotment, land held by the indigenous population shrunk from 138 million acres to 48 million, with 20 million acres of that land being semi-arid or desert.[23] The systematic abuses of this period have been recounted in The Dispossession of the American Indians, 1887-1934 (1981) by Janet McDonnell.

During era of allotment, Indian reservations were ruled by Indian Agents of the Federal government.[24] As part of the policy of the destruction of indigenous religion and culture, the federal government provided for Christian missionary boarding schools that were intended to prevent the transmission of indigenous religion and culture to the next generation. It was during this period that resistance, both indigenous and non-Indian, grew to these repressive policies. Non-Indians who hoped to secure constitutional

[21] Fixico, "Federal and State Policies," 383-84.
[22] Ibid., 384.
[23] Vinzant, The Supreme Court's Role, 53.
[24] Fixico, "Federal and State Policies," 385.

protections for Indian religious freedom worked to get the 1924 Citizenship Act passed. This act conferred upon American Indians United States citizenship, whether they wanted it or not. Though initiated by those seeking to promote Indian religious freedoms, the 1924 act providing U.S. citizenship to the indigenous population has been viewed by many as another avenue with which to force the indigenous population to abandon their culture in favor of that of the European immigrant population.[25]

Frederick Hoxie has presented an account of the role ethnocentric social scientists played in the effort to destroy indigenous culture in A Final Promise: The Campaign to Assimilate the Indians, 1880-1920. Hoxie argued in his examination that ethnocentric social scientists played a key role in shaping public and Congressional opinion, and thereby Federal Indian policy, by presenting the indigenous population as lacking the mental capacity to duplicate white culture, and therefore did not need either land or education. Ironically, this led to a loosening of educational standards and efforts of the Federal government with regard to Indians and provided indigenous culture breathing room to survive.[26] Leonard A. Carlson, by contrast, found economic considerations, rather than intellectual forces drove Congress to loosen restrictions on the alienation of allotted land, in his essay, "Federal Policy and Indian Land: Economic Interests and the Sale of Indian Allotments, 1900-1934." By means of statistical analysis, Carlson concluded that rather than being staffed by moralistic administrators, the Indian bureaucracy conducted its policies in compliance with the economic interests of the settler population rather than the indigenous population it was purportedly serving.[27]

[25] Fixico, "Federal and State Policies," 385.
[26] James Riding In, "Scholars and Twentieth-Century Indians," in New Directions in American Indian History, ed. Colin G. Calloway (Norman: University of Oklahoma Press, 1988), 133.
[27] Ibid., 134.

1934 marked the next major shift in Federal Indian Policy with the passage of the Indian Reorganization Act, or Indian New Deal. Championed by John Collier, a cultural pluralist who became Commissioner for Indian Affairs, the IRA was an attempt to reverse the policy of governmental, religious, and cultural destruction of indigenous societies. The IRA promoted the adoption of Indian governments modeled on European-American political forms. Collier ended the Bureau of Indian Affairs policies that criminalized indigenous cultural practices and instituted a revolving development fund to promote economic growth on reservations. Allotment, while already largely abandoned due to indigenous resistance, was repudiated as a policy.[28]

Indian reactions to the Indian Reorganization Act process of creating European style governments was as varied as the conditions of Indian peoples. Many indigenous groups who were on the brink of social destruction were able to restructure and revive under IRA governments, like the Washoe. The Blackfeet Nation, whose traditional form of government had disintegrated, was already operating with the Blackfeet Tribal Business Council lobbying on behalf of Blackfeet issues and simply legitimized that de facto government as their legal government. Others Indian nations with surviving traditional governments, such as the Hopi, found the IRA government to be in direct competition with their traditional forms of organization, and adoption of IRA governments caused new political divisions within Indian societies.

Donald Parman examined the Navajo experience with the IRA in The Navajos and the New Deal (1976), and Laurence Hauptman, the Iroquois in The Iroquois and the New

[28] Fixico, "Federal and State Policies," 385.

Deal (1981).[29] Though Vine Deloria, Jr. and Clifford M. Lytle have written a general history of Indian sovereignty, their book The Nations Within, provides a detailed account of the legislative history of the IRA.[30] Generally historians have found Collier to be a well meaning and benevolent figure, if some view the IRA governments as another move towards the destruction of indigenous culture; Lawrence C. Kelley's 1983 biography of Collier presents a different picture. In The Assault on Assimilation: John Collier and the Origins of Indian Policy Reform, Kelly presents a picture of a ruthless and uncompromising propagandist that was outwardly aggressive while being troubled with self-doubts. Kelly's research is considered methodical, but lacking in any account by indigenous peoples who were personally familiar with the man or his policies.[31]

After the Second World War, federal policy changed yet again with a renewed assault on indigenous sovereignty and the termination era began. The federal government sought to terminate federal services that provided economic support to indigenous peoples and eliminate tribal governments. In 1946 the United States government started the Indian Claims Commission to provide financial redress for lands illegally appropriated from indigenous peoples by the federal government. The Indian Claims Commission was a special administrative court designed to examine historical claims against the United State government for the illegal or unconscionable dispossession of indigenous peoples from their lands in the lower forty-eight states. It was not empowered to return to return lands under any circumstances. Highly conservative in its approach, the ICC was intended to last only a decade but was not concluded until the late 1970s. A

[29] Fixico, "Federal and State Policies," 385.
[30] George S. Grossman, "Indians and the Law," in New Directions in American Indian History, ed. Colin G. Calloway (Norman: University of Oklahoma Press, 1988), 110.
[31] Riding In, "Scholars and Twentieth-Century Indians," 125.

narrative overview of the life of the ICC can be found in H.D. Rosenthal's Their Day in Court: A History of the Indian Claims Commission (1990). Edward Lazarus' Black Hills: White Justice (1991) provides a detailed account of the decades of struggle the Lakota faced in seeking first compensation for and later the return of the Black Hills.

The ICC was intended to lay to rest outstanding claims; the supporters of termination felt that, by addressing these outstanding grievances, the path would be cleared to end the separate political and cultural identity of Indian communities. To further this end, indigenous people were offered financial incentives to move to urban areas and leave reservations. Additionally, Public Law 280 provided states with the power to take full criminal jurisdiction over Indian lands. In 1953, Congress passed legislation allowing for the removal of federal recognition and services to Indian nations, and the Federal government terminated the political and legal existence of 109 Indian groups between 1954 and the early 1970s.[32]

An overview of the termination period is Kenneth Philip's Termination Revisited: American Indians on the Trail to Self Determination (1999). The rise of urban Indian populations has been examined by Alan Sorkin's The Urban American Indian (1978) and Donald Fixico has provided a general overview of urban Indians with The Urban Indian Experience in America (2002).[33] An account of termination and indigenous resistance is to be found in Menominee Drums: Tribal Termination and Restoration: 1954-1974 (1982) by Nicholas Peroff.[34] Donald Fixico has provided another useful overview of termination with Termination and Relocation: Federal Indian Policy 1945-1960 (1986).[35]

[32] Fixico, "Federal and State Policies," 386-87.
[33] Ibid.
[34] Ibid., 388.
[35] William T. Hagan, "The New Indian History," in Rethinking American Indian History, ed. Donald L.

During the 1950s the study of American Indians was underwent something of a revival. In 1950, no history department in the United States offered Indian History as a major field of study for graduate students and no department offered even a single undergraduate course in the topic. The Indian Claims Commission created a demand for expert testimony and this need revived the field of Western Indian History.[36] As the termination process revived the historical study of Indian History, it also revived indigenous efforts to preserve their religions, cultures, and political sovereignty.

The 1960s saw the rise of Red Power and Indian militancy, with the participation of the Hopi Traditionalist movement in this new militancy as well as Blackfeet activists. In 1968 the American Indian Movement was founded. In 1969, Indian activists seized Alcatraz Island, justifying their actions on treaty provisions that stated unused federal installations were to be returned to local Indians. In 1972, AIM and other Indian organizations participated in the larger cross country caravan known as the Trail of Broken Treaties. This event ended with an unplanned occupation of the Department of Interior building where the Bureau of Indian Affairs was headquartered in the District of Columbia. The occupation ended peacefully through negotiations. Among other concessions, the U.S. Government agreed to pay the fairs of the occupiers to return home. In 1973, AIM occupied the church at Wounded Knee in what has come to be known as Second Wounded Knee.[37] Vine Deloria, Jr.'s Custer Died for Your Sins (1969) and N. Scott Momaday's House Made of Dawn (1968) are important works of the era that provided some of the first Indian voices addressing Indian history and issues.[38] Dee

Fixico, (Albuquerque: University of New Mexico Press, 1997), 37.

[36] Ibid., 30.

[37] Fixico, "Federal and State Policies," 388.

[38] Ibid.

Brown provided another treatment sympathetic to Indian positions with Bury My Heart at Wounded Knee (1971).[39] Paul Chatt Smith and Robert Allen Warrior provide a sympathetic, yet critical, account of this era of Indian activism in their 1997 book, Like A Hurricane: The Indian Movement from Alcatraz to Wounded Knee.[40]

The Indians were not without allies, dissidents in the non-Indian community, that did not support the policies of their government, and after decades of struggle, American society changed in many ways. In the early 1970s, the President Nixon admitted, "The American Indians have been oppressed and brutalized, deprived of their ancestral lands, and denied the opportunity to control their own destiny."[41] In the face of the new Indian militancy, the Nixon administration reacted both with a carrot and a stick. As part of the Cointelpro counterintelligence program that also targeted such groups as the Black Panthers, AIM members were harassed and many Indian activists died under mysterious circumstances in the early seventies. James Vanderwall and Ward Churchill present a collection of related documents from the Nixon Administration in The Cointelpro Papers: Documents from the FBI's Secret Wars Against Dissent in the United States (1990). The two had earlier presented a treatment of this material in Agents of Repression: the FBI's Secret War Against the Black Panther Party and the American Indian Movement (1988). Both books have been reprinted in 2002 and 2001 respectively.

Among the less deadly actions of his administration, President Nixon renounced termination and ushered in what is known among scholars as the era of renewed Indian sovereignty or the era of government to government relations. The Nixon administration

[39] Fixico, "Federal and State Policies," 388.
[40] Paul Chatt Smith and Robert Allen Warrior, Like A Hurricane: The Indian Movement from Alcatraz to Wounded Knee, (New York: The New Press, 1997).
[41] Paul Vandevelder, "What do We Owe the Indians?" American History, Vol. 44 Issue 2 (June 2009): 36.

undertook reforms that promoted government to government relations between Indian governments and the United States. Both Indians and official governmental policy supported this new era of self-determination. The federal government ceded control of more and more functions to Indian governments. The policy gained formal standing as law in 1975 with the passage of the Indian Self-Determination and Education Act. Native Americans and Nixon (1981) by Jack Forbers presents the shift in Nixon policy that promoted greater Indian self-determination.[42]

1978 saw the passage of two landmark pieces of legislation that addressed Indian rights. The U.S. Congress passed the Indian Child Welfare Act in 1978 in part to address the widespread abuses by state children services agencies taking Indian children and placing them in non-Indian homes, for both foster care and adoption.[43] That same year saw the United States Congress pass the American Indian Religious Freedom Act. This law changed the official stated policy to one of preserving and protecting the religions of the indigenous peoples of the land it now occupied. The Indian Religious Freedom Act provides for consultation with Indian leaders when governmental actions might impact Indian sacred sites, but provides no substantive protections, as shall be discussed in detail below.

Indian Sacred Sites: Scholarship and Perspectives

Existing legal interpretations of United States policy on Indian religious freedom emphasize the repeated failures of the courts to provide any substantive legal or constitutional protections to the many sites of religious significance and have called into

[42] Fixico, "Federal and State Policies," 389.
[43] Ibid.

question the sufficiency of the legal reasoning of the courts, with the notable exception of Marcia Yablon. While much academic ink has been spilled trying to explain the sources for the markedly anti-Indian trend of the courts, especially the Supreme Court of the United States, Marcia Yablon has argued that Lyng v. Northwest Indian Cemetery Protective Association, (1989) provided the most practical way of protecting Indian religious properties on public lands. The Lyng opinion, written by Justice O'Connor, is infamous as it definitively declared that the American Indian Religious Freedom Act and the U.S. Constitution offered no protection to those places sacred to Indian peoples on public lands, even when Indian plaintiffs demonstrated the proposed Forest Service action would likely destroy their ability to practice their religion.[44] Yablon's study has shown that despite the lack of legal protections for sites sacred to practitioners of Indian religions, the statutorily mandated process that required the Forest Service consult with Indian governments and representatives of traditional Indian religions has by and large provided practical protections for Indian sacred sites as a change in Forest Service culture and attitudes have become permanent.[45]

Yablon has argued that Lyng was the proper decision and that it offered the most practical form of protection for sites of cultural and religious significance to Indians.[46] Yablon's argument is essentially the same argument as to the necessity for regulatory authority residing within the executive branch. Yablon argued that administrative agencies are best suited to take all views into consideration and make decisions that accommodate Indian religious concerns. She felt that creating a coherent unifying legal

[44] Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1989).
[45] Marcia Yablon, "Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land," The Yale Law Journal, Vol. 113, No. 7 (May, 2004): 1623.
[46] Ibid., 1658-59.

standard would be difficult and further stated that continual judicial or legislative acts would be too cumbersome to work practically.[47] While Yablon acknowledged that there had been failures in the consultation process in the past, she was moved to optimism and the belief that the change in the Forest Service's behavior was permanent by the accommodation ordered by the Clinton Administration in the case of the Lyng road expansion.[48] She noted that the courts have repeatedly enforced the required consultation process with Indian groups over culturally and religiously significant sites, even if there was no legal obligation to avoid the complete destruction of an indigenous religion. She noted that in the years following Lyng, administrative agencies have generally been receptive to the notion of tailoring their policy decisions to accommodate Indian religions.[49] Yablon argued that if the administrative process failed to protect religious sites, Congressional protection could be sought.[50]

Yablon acknowledged the limitations of the Anglo-American court system of the United States and argued that administrative agencies were best suited to acknowledge and accommodate Indian concerns that did not so readily fit this western European mold. Many have criticized the inability of the courts of the U.S. to comprehend or apply notions outside of European conceptions of property and property rights when confronted with indigenous religious and cultural issues. As indigenous religious perspectives tend to view land as incapable of reduction to private ownership by individuals, the courts, by being bound by precedent, have been incapable of making any legal concessions to this

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47 Yablon, "Property Rights," 1636, 1658-59.
48 Ibid., 1627, 1646. Specifically Yablon noted the failure of the consultation process to prevent the first major expansion of the Snowbowl ski resort in 1980.
49 Ibid., 1642-43.
50 Ibid., 1661.

alternative view. Yablon argued this inability to be legally cognizant of alternative views will always result in a failure of the courts to protect Indian religious interests when it comes to public lands management. Alternatively, Yablon argued, the administrative agencies such as the Forest Service were not strictly bound by precedent and with the required consultation process can be brought to a greater understanding of perspectives outside the narrow notions of Western European property ownership.[51]

While there had been some minor backsliding in the initial days of the second Bush administration with regards to the protection of Indian holy sites, Yablon was optimistic that the general change in administrative policy would be permanent because of the institutionalization of the required consultation process and the flexible solutions administrative agencies were able to offer the challenges of managing federal lands for multiple use while accommodating Indian religious concerns.[52]

Vine Deloria, Jr. has not been optimistic about the U.S. Supreme Court's general trend regarding the broad range of Indian issues. This pessimism is largely due to the Supreme Court decision in the 1990 case, Employment Division v. Smith. While the case was nominally about the ceremonial use of peyote by members of the Native American Church, Justice Scalia wrote a sweeping opinion that ended all substantive constitutional protections for religious freedom, not just for Indians, but for all that might fall under the jurisdiction of the United States.[53] Deloria has stated, "The Supreme Court is decidedly anti-Indian. That much is clear."[54] Placing Supreme Court decisions regarding Indian

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51 Yablon, "Property Rights," 1633-34.
52 Ibid., 1657-58.
53 Employment Division v. Smith, 494 U.S. 872 (1990). The Lyng and Smith decisions will be examined at length below.
54 Vine Deloria, Jr., For This Land: Writings on Religion in America, (New York: Rutledge, 1999), p. 218.

religious freedom in historical context, he wrote:

> Traditional [Indian] religions are under attack not because they are Indian but because they are fundamentally religious and are perhaps the only consistent religious groups in American society over the long term. If kidnapping children for boarding schools, prohibiting religious ceremonies, destroying the family through allotments, and bestowing American citizenship did not destroy the basic community of Indian people, what could possibly do so? The attack on religion today is the secular attack on any group that advocates and practices devotion to a value higher than the state. That is why the balancing test has been discarded and laws and ordinances are allowed primacy over religious obligations.[55]

Deloria contended the Smith and Lyng decisions are part of a greater secularization of the United States, including the secularization of mainstream Christian religions. Deloria characterized the combined meaning of Smith and Lyng as, "The real message of these Supreme Court decisions is that the state is supreme and that no one, Indians or anyone else, need bother to pray for the earth and its living things. Presumably these kinds of prayers would interfere with the prayers of others who want to have BMWs and assorted goodies."[56]

Deloria's position that Justice Scalia's assault was directed towards religion, rather than specifically Indian religion, has some merit. Justice O'Connor provided Scalia with the argument in her concurrence that would have allowed the Supreme Court to merely rule that the particular practice of the Native American Church was not protected by the Constitution, rather than religious freedom generally being abrogated in the face of general laws. Justice O'Connor reacted, much like the broad based coalition opposed to Scalia's opinion, and characterized the opinion as an assault on the idea of religious

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[55] Deloria, For This Land, 228.
[56] Ibid., 268.

freedom; though Justice O'Connor would have been fine with the particular infringement upon religious freedom of Indians. This may in part be due to how many viewed Indian religions, as compared to European religions.

American Indian Studies and Political Science scholar David Wilkins found the more recent anti-Indian trend of the Supreme Court to be potentially grounded in three things. First, he argued, the justices did not consider indigenous religions to be real religions and are not to be taken seriously. The justices saw the world through their own Judeo-Christian values and were unable or unwilling to understand the radically different indigenous views of the world.[57]

The second reason for the recent and consistent stance against Indian religious freedom, Wilkins argued, may have been that the justices were still operating within the assimilationist mindset that was only so recently pushed, in part, from Congress and the executive branch. By destroying indigenous cultural and religious sites and restricting religion through generally applicable laws, Indian religious and cultural traditions can finally be destroyed and Indians will presumably assimilate into the dominant mom-Indian population, in the hopes of the justices. Related to this argument, Wilkins suggested that it may also be the case that the Supreme Court was wedded to a classical legal theory that sought to dispense with the inherent rights and powers of Indian sovereignty and declare the U.S. Government as the highest power.[58]

The third potential intellectual basis for this change in the Court, Wilkins wrote, was the Court's adherence to their form of State's Rights Federalism. Indian nations have

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[57] Wilkins, "Who's in Charge of U.S. Indian Policy? Congress and the Supreme Court at Loggerheads Over American Indian Religious Freedom," Wicazo Sa Review, Vol. 8, No. 1 (Spring 1992): 56.

[58] Ibid., 56-7.

a myriad of jurisdictional and taxation related conflicts with the States. The struggle over water rights was but one place where the Supreme Court had favored States as the twentieth century came to a close. The Smith decision was another.[59]

Allison M. Dussias identified three main difficulties Indian religious freedom cases face. First the courts regularly were unable to recognize religious claims as such and re-categorized them as cultural concerns.[60] Second, courts have often been reluctant to recognize Indian beliefs as being religious in character, largely because of the significant structural differences between indigenous American religions and European colonial religions.[61] Finally, the courts have consistently protected property rights, including the property rights of the federal government on expropriated indigenous lands, over the religious freedom rights of American Indians.[62]

More recently, Dussias has expanded her study of public lands management and religious freedom cases to the arguments found in government briefs. While covering many post-Smith decisions, Dussias confines her focus to government arguments and the outcomes of the cases. Dussias notes the government positions across cases are inconsistent (which should be no surprise as lawyers will craft their legal characterizations and arguments to the particulars of a case; consistency between cases rarely causes problems). When defending agency decisions that harm Indian sacred sites, the government argued there is no burden on religion. But when when facing establishment clause arguments challenging agency decisions protecting Indian sacred

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59 Wilkins, "Who's in Charge," 58.

60 Allison M. Dussias, "Ghost Dance and Holy Ghost: the Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases," Stanford Law Review, Vol. 49, No. 4, (Apr. 1997): 806-07.

61 Ibid., 810-15.

62 Ibid., 850-51.

sites, the government argued that the protection prevents burdens on Indian religion or culture, and that secular purpose is legitimate.[63] Dussias concluded that the government was a "frenemie" to Indian nations in land management cases and the courts pretty much affirm any agency decision.[64]

Brian Edward Brown has taken a distinctly different interpretation of the Lyng decision. Brown largely ignores Justice O'Connor's statement that nothing in the opinion should indicate that the federal government should not work to accommodate Indian religious concerns, simply that the constitution does not require adequate consideration of Indian sacred places. For Brown, the Lyng decision was a statement that, in American law, property rights will be superior to religion.[65] He interprets the case as preventing people from revering or holding land to be sacred and of religious significance.[66] For Brown sacred land has been reduced to mere property by the Lyng decision.[67] Brown concluded, quite correctly, that religious freedom has been reduced to the freedom to worship in a wasteland, if property owners, such as the U.S. government, decided to destroy and desecrate Indian sacred sites.[68]

The difficulty with the analysis of Brown and the others that place religious differences at the center of the conflict is that they focus their attention solely on the lack of constitutional protections for Indian religious concerns regarding sacred places. In the wake of the Smith case, no one in the United States has constitutionally protected religious freedom (short of the government directly outlawing or penalizing religious

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63 Dussias, "Friend, Foe," 347.
64 Ibid., 411-12.
65 Brown, Religion, Law, 5-6.
66 Ibid., 7.
67 Ibid., 177.
68 Ibid., 175.

practice as religious practice). Brown and others are also mistaken that practitioners of European religions have had no sense of sacred places that they feel should be respected above property rights and economic interests. As Dassius points out, the government has often acted to protect Indian sacred site, entering into inconsistent legal arguments to protect them.

Lloyd Burton in his 2002 book, Worship and Religion: Culture, Religion, and Law in the Management of Public Lands and Resources, explained, in part, the growing political acceptance of Indian religious views of the land.[69] Burton identified a growing diversity and appreciation for nature in the non-Indian populations of the United States.[70] He noted that in many cases, including Lyng, that Christian and Jewish groups offered briefs in support of protecting Indian sacred sites on public lands as part of protecting religious freedom.[71] Burton concluded Lyng, Smith, and sacred site cases keep us locked in a fruitless rights based dialogue that places Indian rights at the bottom of concerns.[72] Burton identified a significant historical shift in a significant elements of practitioners of mainstream European religions in the United States supporting Indian rights and accepting Indian religious perspectives.[73] Burton identified the struggle as existing in the non-Indian community, with such groups as the Mountain States Legal Foundation engaging in a war against pluralism in its attack of the cultural education program elements of the Bear's Lodge Climbing Management Plan of the National Park Service.[74]

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[69] Lloyd Burton, Worship and Wilderness: Culture, Religion, and Law in the Management of Public Lands and Resources, (Madison: University of Wisconsin Press, 2002).
[70] Ibid., 160.
[71] Ibid., 261-3.
[72] Ibid., 292.
[73] Ibid., 293.
[74] Ibid., 294.

Burton identified negotiation as not always being possible as the forces against pluralism often are only interested in complete domination and subjugation.[75] A potential path forward for Burton is to better use National Parks and Monuments as classrooms for educating more and more people of the rich cultural diversity in the United States.[76]

Indian Sacred Sites and the Law from 1978

The eighties and nineties saw a marked reaction against Indian sovereignty and religious freedom as the United States Supreme Court challenged the new trajectory of Congress and the executive branch. As shall be examined in more detail below, the United States Supreme Court effectively ended any substantive constitutional protections for indigenous religious freedom with the Lyng v. Northwest Indian Cemetery Protective Association (1989) and Employment Division v. Smith (1990) decisions.[77] The United States Supreme Court, in these decisions, undermined what little remained of the "official" policy of the federal government to respect and protect indigenous religions, as enunciated in the American Indian Religious Freedom Act of 1978. For its part, the Congress of the Unites States acted to protect religious freedom in the United States and in 1993 passed the Religious Freedom Restoration Act in response to the Smith decision. The late twentieth and early twenty-first centuries have also been a time of increased executive attention to strengthening and clarifying the consultation process required by

[75] Burton, 290.
[76] Ibid., 295.
[77] Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1989), Employment Division v. Smith, 494 U.S. 872 (1990).

the Indian Religious Freedom Act of 1978 and expanded possibilities for protecting Indian sacred sites by Congressional amendments to existing historical preservation laws.

The reactionary attack of the United States Supreme Court upon indigenous religions has been dealt with in a number of books and essays. Vine Deloria, Jr. presents several essays on Lyng, Smith, and general issues regarding secularization, Indian religious freedom, and the reactionary bent of the contemporary U.S. Supreme Court in For This Land: Writings on Religion in America, (1999). David Wilkins presents his opinion that the Supreme Court's views on Federalism are the source of this attack on Congressional attempts to preserve religious freedom in the United States in "Who's in Charge of U.S. Indian Policy? Congress and the Supreme Court at Loggerheads Over American Indian Religious Freedom."[78] In A"Ghost Dance and Holy Ghost: the Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases," Allison M. Dussias argues the courts have several difficulties in recognizing Indian religious concerns as such and, when combined with the courts' tendency to favor property rights above all else, have become largely hostile forums for Indian religious concerns.[79] Marcia Yablon argues in "Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land" that the approach taken in Lyng, while fraught with certain risks, was ultimately the most practical approach to the issue of managing federal lands with consideration of American Indian religious freedom.[80] The perspectives of these scholars will be examined in more detail below.

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[78] Wilkins, "Who's in Charge," 40-60.
[79] Dussias, "Ghost Dance," 773-852.
[80] Yablon, "Property Rights," 1623-62.

Continuing the general trend of increased executive and legislative respect for Indian religious concerns, Congress also acted to bring a modicum of respect with regards to Indian graves in the early 1990s. Congress passed the Native American Grave Protection and Repatriation Act to bring under control the ghoulish practice of non-Indian scientists treating ancient Indian grave sites as places where human remains could be dug up and used as specimens for their experiments.[81] NAGPRA, along with the American Indian Religious Freedom Act, was another law passed by Congress requiring administrative consultation when Indian religious and cultural concerns were implicated in administrative actions. Later, Congress amended the National Historic Preservation Act so that sites of religious and cultural significance to Indian peoples became eligible for inclusion on the National Register of Historical Places as Traditional Cultural Properties.[82] Strengthening the consultation process, the Clinton Administration issued executive order 13,007 in 1996. This order called on administrative agencies to avoid adverse impacts and maintain the physical integrity of public lands of cultural significance to Indians.[83] This executive order was supplemented by orders 13,084 (1998) and 13,175 (2000). The first directed the National Park Service to develop regular policies for consultation and communication with Indian officials and the second expanded the requirement to other agencies.[84]

Free Exercise of Religion and Indian Sacred Sites

Legal questions regarding American Indian religious beliefs, practices, and

[81] Fixico, "Federal and State Policies," 391.
[82] Dassius, "Friend, Foe," 357.
[83] Yablon, "Property Rights," 1646.
[84] Dassius, "Friend, Foe," 367-8.

cultural rights often involve a complex interaction between administrative law, constitutional law, and Congressional statutes. Many sites of religious and cultural significance to Americans Indians are located on land owned and operated by the United States government. The federal government of the United States claimed ownership of this land and for more than a century has placed much of it in their national forests, parks, and other federal lands. This places many sites of cultural, religious, and historical significance of Indians under the management of the executive branch through various federal agencies including the Forest Service, the National Park Service, and the Bureau of Land Management. When these agencies formulate and implement land management policies, they often impact places of historical, religious, or cultural importance to Indians. Many agency actions have harmed or destroyed Indian sacred sites. As these agency actions are government actions, for a time many felt the First Amendment provisions protecting the free exercise of religion might be called upon to protect sacred sites from agency actions.

By contrast, federal administrators have occasionally curtailed some land uses to protect and preserve Indian sacred sites and, in these instances, some have claimed that either protecting or educating the public about sacred sites amounted to an unconstitutional establishment of religion. Other interests thought that perhaps the First Amendment prohibitions against government establishment of religion might force agencies to implement policies that would harm or destroy Indian sacred sites, when their recreational or economic interests were harmed by respecting Indian sacred sites. What emerged from the legal struggles of the late twentieth and early twenty-first centuries was

broad discretion for administrators in how they implemented and formulated policies that impact Indian sacred sites. The free exercise clause did not protect sacred sites and the establishment clause did not prevent their protection.

In the last decades of the twentieth century, the general trend has been for the legislative and executive branches of the federal government, in the face of growing Indian protest, to end the more overtly destructive Indian policies and support greater Indian sovereignty and cultural rights (end of termination, greater sovereignty over social services, the Indian Child Welfare Act, the American Indian Religious Freedom Act, and Native American Grave Protection and Repatriation Act). By contrast the courts have departed from their more traditional role of being the only limited source within the federal government of protection for Indian interests to a position many have seen as one of outright hostility.[85] As shall be shown below, the U.S. Supreme Court has recently refused to recognize any constitutionally protected religious freedom rights of American Indians when those rights might interfere with how the government agencies manage U.S. public lands.

Administrative agencies are rule making bodies within the executive branch that Congress has delegated rule making authority to. Congress found the myriad number of rules and regulations necessary to manage a modern bureaucratic society were impossible to be created strictly by individual legislative enactments. In addition, Congress decided that certain levels of expert knowledge are necessary to evaluate which rules or regulations might be best for any particular circumstance. Thus, they delegated the

[85] Vine Deloria, Jr. & Clifford M. Lytle, American Indians, American Justice, (Austin: University of Texas Press, 1983), 11.

essentially legislative power of rule making to administrative agencies within the executive branch. Constitutionally, Congress was required to provide clear guidelines and definitions under which these administrative agencies promulgate rules and make decision, and there must be some form of administrative process where those potentially adversely impacted may appeal the administrative decision to the administrative body. Administrative rule making agencies may further be directed by executive orders from the President, guiding policy formation and agency decisions.

Once administrative appeals have been exhausted, the appellate review of the courts has been rather limited. The courts have given great deference to administrative decisions, and only those administrative actions the courts found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" were set aside.[86] The theory being that such administrative bodies had superior understanding and expertise over the courts, and only the most openly faulty decisions were to be overturned.

Further complicating this process of administrative appeals were those decisions that might have been "otherwise not in accordance with the law." A claim that an administrative decision violated a protection of religious freedom or unlawfully established religion would be a claim that the decision was not in accordance with the law. Until the 1930s, the official policy of the U.S. government was to suppress the practice of indigenous religion with criminal penalties.[87] The Indian Reorganization Act

[86] Center for Biological Diversity v. United States Forest Service, 349 F.3d 1157, 1165 (9th Cir. 2003), as quoted in Navajo Nation, et al. v. U.S. Forest Service, et al., Case Nos. CV 05-1824-PCT-PGR, CV 05-1914-PCT-EHC, CV 05-1949-PCT-NVW, CV 05-1966-PCT, United States District Court for the District of Arizona, the Honorable Paul G. Rosenblatt presiding, Order of the Court, January 11, 2006, p. 5.

[87] Brown, Religion, Law, 66.

ended this policy, and Congress passed the American Indian Religious Freedom Act in 1978.[88] This act made the stated policy of the U.S. Government one that was to protect and preserve the inherent rights of the American Indians to believe.[89]

The American Indian Religious Freedom Act placed three duties on administrative agencies. First, agencies were to evaluate policies and procedures with the aim of protecting American Indian religious freedom. Second, the law required Federal agencies to consult with Indian groups regarding proposed agency actions. Third, agencies were to refrain from prohibiting access to religiously and culturally significant sites of Indians, and refrain from prohibiting possession and use of religious objects or the performance of religious ceremonies.[90] The Hopi and Navajo brought the first challenge to a Forest Service decision on religious freedom grounds under the AIRFA with Wilson v. Block. The Appellate Court for the District of Columbia in 1982 approved the major expansion of the Snowbowl resort on the San Francisco Peaks, found these consultation requirements had been met, and that no burden was placed on the religious freedom of the Indian plaintiffs.[91]

The arguments on the Senate floor in favor of the American Indian Religious Freedom Act made it clear that the act provided no substantive rights.[92] Subsequent litigation has plainly established that the AIRFA provides merely a procedural requirement for consultation.[93] The courts ruled that the AIRFA did not provide a basis for review of the decisions of administrative agencies, even if those decisions could

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88 Brown, Religion, Law, 67.
89 Ibid., 73-4.
90 Ibid.
91 Ibid., 87.
92 Deloria, For This Land, 223.
93 Brown, Religion, Law, 73, 136.

arguably be shown to be "arbitrary, capricious, an abuse of discretion" with regards to preserving and protecting Indian religions. While the law, along with later legislation, created substantive consultation requirements, so long as the Forest Service provided access to religiously and culturally significant sites, the law provided no basis for judicial review of administrative decisions. Some have characterized the act as nothing more than empty verbiage.[94]

Lyng v. Northwest Indian Cemetery Protective Association (1989) demonstrated conclusively that the United States Supreme Court would not protect any substantive religious rights on public lands with either the American Indian Religious Freedom Act or the constitution. In Northwest California there is a remote stretch of land that is of the highest cultural and religious significance to the Yurok, Karok, and Tolowaa Nations.[95] After engaging in consultation with Indian interests, the Forest Service formulated several options regarding two roads in an area being logged. Despite Indian complaints, the Forest Service chose the most destructive option through the most sacred of the areas, dividing sacred sites viewed as indivisible by Indian religious practitioners.[96] After an initial injunction, the first two appeals sided with the indigenous practitioners and found the proposed Forest Service action would create an undue burden on the religious freedom of the affected tribes. The United States Supreme Court took the appeal and in 1989 issued its opinion reversing the lower courts and allowing the Forest Service to go forward with the proposed action.[97]

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94 Brown, Religion, Law, 172.
95 Ibid., 119, 123-4.
96 David E. Wilkins, American Indian Sovereignty and the U.S. Supreme Court, (Austin: University of Texas Press, 1997), p. 247.
97 Brown, Religion, Law, 150.

Justice O'Connor wrote the opinion for the majority of the Supreme Court and found that the consultation with affected Indians had taken place, as required by the American Indian Religious Freedom Act and other statutes. Most interestingly, the Court noted and agreed with the Forest Service assessment that the proposed road was a grave threat to Indian culture. The road would, "virtually destroy the Indians' ability to practice their religion."[98] The Supreme Court ruled this destruction of Indians' ability to practice their religion was properly constitutional as the actions of the government on its lands violated no cognizable rights under the Constitution.[99] As the O'Connor wrote:

> The Government does not dispute, and we have no reason to doubt, that the logging and road-building project at issue in this case could have devastating effects on traditional Indian religious practices. . . . Even if we assume that we should accept the Ninth Circuit's prediction, according to which the G-O road will "virtually destroy the Indians' ability to practice religion," the Constitution simply does not provide a principle that could justify upholding respondents' legal claims.[100]

Further illuminating O'Connor's opinion is its relationship to Supreme Court free exercise jurisprudence at the time. In Wisconsin v. Yoder (1972), the High Court had ruled that a state law that "unduly burdens the practice of religion" without a "compelling interest," even though it might be "neutral on its face," would be unconstitutional. The majority ruling in Lyng was that federally-authorized road-building and timbering on federal lands including Native American religious sites did not burden Native American religious practice at all – at least within the intendment of the free exercise clause of the First Amendment. By holding that the land policies of the Forest Service in Lyng constituted no burden at all – the Court by-passed entirely the existing "strict scrutiny"

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[98] Lyng, 485 U.S. 451.
[99] Brown, Religion, Law, 151.
[100] Lyng, 485 U.S. 451-52.

standard requiring a compelling interest to justify an undue burden on Native American religion or any other religion.

Justice Brennan, dissenting from the decision of the Court, articulated quite clearly the practical impacts of the decision on Indian religious freedom, the American Indian Religious Freedom Act, and Indian cultural survival. Justice Brennan is quoted at length to provide the full nuance of the implications of the Court's decision:

> Today, the Court holds that a federal land-use decision that promises to destroy an entire religion does not burden the practice of that faith in a manner recognized by the Free Exercise Clause. Having thus stripped respondents [i.e., the Yurok, Karokm and Tolowa tribes] and all other Native Americans of any constitutional protection against perhaps the most serious threat to their age-old religious practices, and indeed to their entire way of life, the Court assures us that nothing in its decision "should be read to encourage governmental insensitivity to the religious needs of any citizen." I find it difficult, however, to imagine conduct more insensitive to religious needs than the Government's determination to build a marginally useful road in the face of uncontradicted evidence the road will render the practice of respondents' religion impossible. Nor do I believe that respondents will derive any solace from the knowledge that although the practice of their religion will become "more difficult" as a result of the Government's actions, they remain free to maintain their religious beliefs. Given today's ruling, that freedom amounts to nothing more than the right to believe that their religion will be destroyed. The safeguarding of such a hollow freedom not only makes a mockery of the "policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise their traditional religions," it fails utterly to accord with the dictates of the First Amendment.[101]

Fortunately the opinion of the United States Supreme Court was not the final act in the Lyng case. While the Lyng decision made it quite clear that the U.S. government may use land it claimed title to as it pleases, the majority opinion clearly stated that the Constitution did not prohibit the U.S. government from considering the impact on

[101] Lyng, 486 U.S. 476-77.

indigenous religion and the Court encouraged accommodation that would minimize the disruptions that concerned Indian peoples.[102] The Clinton administration, acting within this suggestion of the Court to accommodate religious concerns, moved the road of marginal utility with a six mile detour.[103]

In Employment Division v. Smith (1990), the United States Supreme Court explicitly abandoned its long held standards regarding the free exercise of religion.[104] Previously the standard had been that when laws of general applicability were found by the courts to penalize, directly or indirectly, religious practice, the government action was then examined to see if the measure forwarded a compelling governmental interest. If it did not, the governmental action was unconstitutional as applied. In Smith, the United States Supreme Court abandoned this long held standard and upheld the application of an Oregon law that forbade the use of peyote under any circumstances, including religious use. The Supreme Court acknowledged that the statewide ban on peyote use infringed upon the religious beliefs of Smith, a member of the Native American Church, but refused to apply the rest of the established test, instead finding generally applicable laws were constitutional.[105]

Al Smith, from whom the case takes its name, has been described as a "twentieth century Indian Everyman," and was born in 1919 at Modoc Point, Oregon.[106] Smith, a Klamath Indian, often went by his "restaurant name" of "Red Coyote." Though his grandparents were fluent in the Klamath language, they did not teach the language to

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[102] Lyng, 486 U.S. 454.
[103] Wilkins, "Who's in Charge," 58.
[104] 494 U.S. 872 (1990).
[105] Wilkins, "Who's in Charge," 57.
[106] Garrett Epps, To an Unknown God, Religious Freedom on Trial, (New York: St. Martin's Press, 2001), p. 9-10.

Smith for fear it might hold him back in life. Unquestionably a full blooded Indian by looks, Smith would use the name "Red Coyote" when he had to wait for a table at a restaurant. When this name was called, he knew he would not disappoint those who looked up to see.[107]

Smith's life closely followed the changing Indian policies of the twentieth-century and the ups and downs of the Klamath people. At age seven he was forcibly sent to a brutal Catholic boarding school. There he resisted; falsely telling the Nuns he had already been baptized. He regularly ran away from the school. In the 1930s he moved to a Bureau of Indian Affairs boarding school in Nevada. At first he was out of place among the Paiute that made up most of the school population, but won his place among the students by stealing large quantities of homemade alcohol from a local and sharing it with the other students.[108]

Smith was an alcoholic at the same time the Klamath Nation hit its low point. The Klamath nation was among those first selected for termination in the 1950s. Smith, a Klamath without a nation, entered Alcoholics Anonymous in 1957 and began working the program. At first Smith ran into difficulty as the program was very much based in protestant Christianity, and his only experience with Christianity was as an oppressive force he previously fought against. Smith sought out Indian religious practices and educated himself. Ultimately he was able to make the AA program work for him, and remained sober since 1957.[109]

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[107] Epps, To an Unknown God, 9-10.
[108] Ibid., 14-16.
[109] Ibid., 17-19.

As Indian resistance to termination turned in to political resistance and a religious revival, Smith revived his life in professional and religious ways. Smith became a successful addiction counselor with a specialty in helping Indian people cross the cultural gap to make the Alcoholics Anonymous program work for them.[110] Smith continued his own religious awakening into the 70s, participating in Indian religious ceremonies and learning more.[111] In 1977, Smith adapted the AA method to work with the needs of the practitioners of Indian religions.[112]

The 1980s saw the restoration of the Klamath nation and the Douglas County Council on Alcohol and Drug Abuse Prevention and Treatment (ADAPT) hired Smith. After years of protest, a portion of the Klamath National Forest was returned to the Klamath. The Klamath nation and reservation were restored in 1986.[113] Smith started work for ADAPT because of the treatment center's goal of better serving Indian clients.[114] It would not be long before Smith came into conflict with his employers over the Native American Church and their sacramental use of peyote.

The Native American Church was an Indian innovation created to keep religious activities alive in the face of government repression. American Indians have been using peyote for at least ten thousand years for religious purposes, and in the 1880s developed new ceremonies that blended in Christian rituals and theology.[115] The Native American church incorporated in 1918 and added talk of Jesus in their ceremonies to try and escape

[110] Epps, To an Unknown God, 42-3.
[111] Ibid., 46.
[112] Ibid., 49.
[113] Ibid., 51-2.
[114] Ibid., 94.
[115] Ibid., 59-60.

government attempts to wipe out indigenous religions.[116] The Native American Church spread and grew. It was not always welcomed by Indian groups, but the religion had positive impacts on many. Scientific studies from the 1970s showed active members of the Native American Church that partook of the sacrament of peyote had better recovery rates than other drug and alcohol abusers.[117]

While not a member of the Native American Church in 1983, Smith knew participation in the church was a successful path to recovery for many Indians and clashed with ADAPT administrators over the issue. That year a fellow employee participated in Native American Church ceremonies and partook of peyote. That employee was fired and Smith protested vigorously. As Smith continued to clash with management, they altered ADAPT policies to make it clear partaking in peyote, even for religious reasons, was grounds for immediate termination.[118]

A local congregation of the Native American Church invited Smith to partake in their ceremonies in 1984. Smith informed ADAPT of his plan to participate in Church sacraments over the weekend. When he returned on Monday, ADAPT fired Smith. Smith said of his actions, "You go to church, and then you get terminated. It is a continuation of being put down, to my people and our religion not being recognized by you newcomers. They just riled me up to the point where I'm ready for a fight."[119]

Terminated, Smith applied for unemployment benefits. ADAPT challenged the validity of the claims, stating that Smith was fired for good cause. Smith and the other terminated employee appealed and won at every level, up to and including the Oregon

[116] Epps, To an Unknown God, 64.
[117] Ibid.
[118] Ibid., 107-9.
[119] Ibid., 111.

Supreme Court. The lower courts all applied the compelling interest test and found religious use of peyote could be accommodated. The Oregon Supreme Court found the legal status of peyote in the state was irrelevant, and there was no state interest in denying unemployment compensation to those terminated for religious conduct.[120] Ominously, the Supreme Court agreed to take the case in 1987.[121]

In 1989, when the Smith case went to oral arguments before the United States Supreme Court, the controlling precedent was Sherbert v. Verner.[122] This was another employment case where working on Saturdays conflicted with the religious practices of a Seventh Day Adventist. In that case the Supreme Court established a test to determine whether or not a generally applicable law impermissibly violated First Amendment religious freedom rights. When religion has been infringed upon, the government must show it has a compelling interest to do so and that the law was narrowly tailored to carry out the compelling interest. At oral arguments no one challenged the validity of the Sherbert compelling interest test. Both the attorneys for Oregon and Smith confined their arguments to the terms of the compelling interest test, simply arguing that the test was and was not met by Oregon's law.[123]

Justice Scalia delivered the opinion of the Court in 1990 and abandoned the compelling interest test. Overturning almost thirty years of precedent, the majority of the Court ruled that generally applicable laws, that did not specifically target religion, did not violate the free exercise clause of the First Amendment. In his opinion, Justice Scalia noted, by making reference to the Lyng case, that the Supreme Court had previously

[120] Epps, To an Unknown God, 147.
[121] Ibid., 149.
[122] 374 U.S. 398 (1963).
[123] Epps, To an Unknown God, 216.

departed from applying the compelling interest test to laws where the central tenants of the religious beliefs of an individual were burdened by a law of general applicability.[124]

Justice O'Connor, author of the Lyng decision, agreed with the outcome of the majority's decision, but in her concurring opinion she argued that Lyng was different because it regarded how the United States government used its own land, and that applying the prior compelling interest test to Smith the same results would be achieved.[125] Justice O'Connor was quite disturbed that the majority endorsed an opinion that had as an unavoidable consequence the disfavoring of minority religions.[126] She was referring to Scalia's comment, "It may be fairly said that leaving accommodation [of religious belief] to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."[127]

The dissent in the Smith would have applied the compelling interest test and found religion unconstitutionally burdened. Justice Brennan wrote, "I do not believe the Founders thought their dearly bought freedom from religious persecution a 'luxury,' but an essential element of liberty – and they could not have thought religious intolerance 'unavoidable,' for they drafted the Religion Clauses precisely to avoid that intolerance."[128]

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[124] 494 U.S. 883.
[125] 494 U.S. 894-95.
[126] Ibid., 902.
[127] Ibid., 890.
[128] Ibid., 908-09.

The reaction to Justice Scalia's opinion, which offended many beyond those who traditionally supported Indian religious freedom, was relatively quick. The swift reaction of a broad coalition was due to the immediate recognition of the wide ranging threat to religious freedom in the United States the Smith decision presented. Justice Scalia's opinion threatened more than simply the religious freedom of American Indians. Shortly after Scalia's opinion was delivered, Amish exemptions from having to place silver reflectors on their buggies in Minnesota ended; Jews and Hmong were forced to have autopsies the deceased and their families found religiously offensive; Presbyterian and Lutheran Churches lost their cause of action against the Federal government who had sent covert agents into their churches to spy on the sanctuary movement, and people realized general meat handling regulations could potentially prevent the preparation of kosher foods.[129]

The national reaction to this threat to more than just indigenous religious freedom grew. Several publicly accused Scalia of eliminating religious freedom in the United States and some opponents accused him of trying to use a drug-use dispute to eliminate all claims of infringement of religious freedom from the courts.[130] Politicians acted quickly to introduce a bill into Congress to reverse Scalia's decision.[131] Though the bill was held up for a couple of years, by 1993, the Religious Freedom Restoration Act had

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[129] David W. Inlander, "Don't Let Laws Impede Religion Practices," Chicago Sun Times, March 7, 1992, p.18, Ethan Bronner, "Curbs On Religious Freedoms Rally Crusade," The Oregonian, Portland Oregon, January 12, 1991, p.C08, Samuel Rabinove, "The Supreme Court and Religious Freedom," The Christian Science Monitor, June 25, 1990, p.19.

[130] Samuel Rabinove, "The Supreme Court and Religious Freedom," The Christian Science Monitor, June 25, 1990, p.19, Nat Hentoff, "Justice Scalia Vs. the Free Exercise of Religion," The Washington Post, May 19, 1990, p.A25, Larry Witham, "Bill on Religion Gathers Support Across Spectrum," The Washington Times, March 13, 1993, p.A4.

[131] Nat Hentoff, "Is Religious Freedom a Luxury?" The Washington Post, September 15, 1990, p.A23.

broad support. Supporters of the law included the American Jewish Congress, the Mormon Church, the Southern Baptist Convention, the National Council of Churches, the National Conferences of Catholic Bishops, People for the American Way, the Traditional Values Coalition, and the American Civil Liberties Union.[132]

The Congress of the United States passed the Religious Freedom Restoration Act of 1993 in direct response to the Smith case.[133] The law prohibited the government of the United States in all cases from substantially burdening the religious freedom of any person, unless that burden promoted a compelling governmental interest, and the interest was achieved in the least restrictive means possible. The protections provided religion in this act go beyond the prior standards overturned by Smith in that the test is to be applied in all cases where religion was burdened (previously there had been numerous exceptions for the military, prisons, and public lands) and any compelling governmental interest must be achieved in the least restrictive means possible. Despite these obvious expansions beyond the former protections, with the exception of the Ninth Circuit Court of Appeals, federal appellate courts consistently found prior exceptions to the compelling interest test from pre-Smith case law to be exceptions to the compelling interest test mandated by the RFRA when Indian religious freedom was involved.[134]

While the RFRA was deliberately crafted to be ambiguous on the use of peyote for religious purposes, proponents of Indian religious freedom continued to lobby Congress and obtained protections for Indian uses of peyote. In 1994, Congress passed a law exempting registered members of Indian nations from state and federal criminal

[132] Hentoff, Peter Steinfels, "Clinton Signs Boost for Religious Freedom; Liberals, Conservatives Back New Law," The Houston Chronicle, November 17, 1993, p. A6.
[133] 42 U.S.C. § 2000bb.
[134] Dussias, "Ghost Dance," 844-845.

prosecution for the use, possession, or transport of peyote for the purposes of traditional religious use. The law also directly addressed the Smith case by prohibiting the denial of any benefits because of such traditional peyote use. Native American Church congregations differ in their policies regarding allowing non-Indians to participation in services, but the law only permitted registered tribal members to use, posses, or transport peyote.[135]

Even with the advent of the Religious Freedom Restoration Act, there remained much debate as to what was the proper extent of the protections afforded indigenous religious sites on public lands. While the RFRA explicitly overturned Smith, the statute itself made reference to precedents that predate Lyng.[136] Some commentators have argued that Lyng did not properly apply the substantial burden on religion test as applied in these precedents, as Justice Scalia claimed in Smith.[137] Those that hold this position argue that, by Scalia's reference to Lyng in Smith, Lyng was similarly overturned by the Religious Freedom Restoration Act.[138] The majority in the Ninth Circuit case, to be examined below, held a contrary opinion and stated that Lyng was still the controlling precedent with regards to management of public lands. Thus, for the Ninth Circuit Court of Appeals, any action that destroys indigenous religion, short of coercing a party to act contrary to one's religious beliefs, was a legally proper act under the laws and

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[135] Epps, To an Unknown God, 235. It is worth noting that the statutory exception for American Indian use and possession of peyote has caused the Supreme Court to protect the religious rights of other groups to posses and use otherwise banned substance. See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

[136] Navajo Nation v. United States Forest Service, 535 F.3d 1058 (9th Cir. 2008), 1085.

[137] Wilkins, "Who's in Charge," 57-8, Brown, Religion, Law, 151.

[138] Navajo Nation, 535 F.3d 1085-87.

constitution of the United States.[139] The Ninth Circuit opinion in Navajo Nation v. Forest Service will be examined in detail below.

Management of Sacred Sites: Establishment of Religion Concerns

At the end of the twentieth century, with the advent of the American Indian Religious Freedom Act of 1978, practitioners of indigenous religions and Indian governments sought to greater protection for sacred sites on public lands and this led to increased judicial discussion of fears the government might act to unconstitutionally support Indian religions. In some cases these were Indian led challenges to administrative decisions that harmed or jeopardized the integrity of sacred sites, but what emerged from the beginning of the consultation process in the 1980s was the occasional case where administrators acted to protect Indian sacred sites. Some who found their activities limited by administrative decisions protecting sacred sites brought suit, claiming that protecting Indian sacred sites violated the First Amendment by establishing religion. At other times, against better judicial practice, judges entered into hypothetical musings about protective procedures that were not before the courts, creating a string of opinions in cases that mused that more vigorously protecting Indian sacred sites would impermissibly establish religion.

The historical cases below set the contours for the state of First Amendment establishment law as it related to the protection of sacred sites that is necessary for understanding two of the case studies in the current dissertation. The first case involves Bear's Lodge, more popularly known as Devil's Tower, the first national monument

[139] Navajo Nation, 535 F.3d 1085.

recognized in the United States and a location for religious ceremonies since time immemorial. The second case examined is highly representative of the changes taking place in public lands management over the last decades of the twentieth century and involves Rainbow Bridge. A sacred place to the Navajo and others, the National Park Service first ignored Navajo pleas to more respectfully manage the site in the early 1980s, only to later turn to the Navajo for assistance in formulating plans to rehabilitate the area at the end of the century. What emerged from these cases was a trail of problematic comments not relevant to the logic of the decisions. In these comments the courts speculated that limiting access to sacred sites in order to protect or preserve them in accord with Indian religious beliefs would violated the constitutional ban on the establishment of religion. When the court engages in such idle speculation on issues neither briefed by the parties nor before the court in the current case, it is an example of dicta. These opinions of the court that have no bearing on the current disposition are widely considered to be of little legal weight. This trail of problematic dicta repeated the unsupported opinion that administrative bans on access to public lands to protect sacred sites would amount to government establishment of religion. Opponents of management plans at Cave Rock and Badger-Two Medicine would later plan their arguments around this judicial language.

Long ago in what would later come to be known as the northeast corner of Wyoming, seven young girls of the Kiowa nation strayed from camp. Soon they found themselves being chased by bears. They sought refuge on a rock, maybe three feet in height. One of the girls prayed for the rock to take pity on them. The rock was moved by

her prayers and began to grow, pushing the girls out of reach of the bears. The bears jumped and scratched at the sides of the growing rock, leaving long distinct lines along its column-like shape. The girls then ascended to the sky and became the seven stars of the Pleiades cluster. Today the Kiowa and other Indian nations refer to this iconic location as Bear's Lodge.[140] Non-Indians mistranslated this name and call the location Devil's Tower.[141]

Bear's Lodge has been a place of significance for both indigenous and non-Indian peoples. In the modern era, Bear's Lodge was located in Lakota territory before annexation by the United States government. Bear's Lodge plays a role in the religious understandings of the practitioners of many indigenous religions, including the Crow and Cheyenne, as well as the aforementioned Kiowa and Lakota.[142] For centuries Bear's Lodge served as a place for many religious ceremonies that required solemnity and solitude, including Sun Dances and vision quests.[143] While the United States government sought to eliminate indigenous religion during the period of forced assimilation and outlawed the Sun Dances,[144] President Theodore Roosevelt declared Devil's Tower to be the first National Monument under the 1906 Antiquities Act.[145]

As recreational climbing grew in popularity in the United States, the increased

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[140] Llyod Burton and David Ruppert, "Bear's Lodge Or Devil's Tower: Inter-Cultural Relations, Legal Pluralism, and the Management of Sacred Sites on Public Lands," Cornell Journal of Law and Public Policy, Vol. 8, No. 2 (Winter 1999): 201.

[141] Ibid., 203.

[142] Ibid., 202-03.

[143] Bear Lodge Multiple Use v. Babbit, 175 F. 3d 814 (10th Cir. 1999), 816.

[144] Joei Brady, "'Land is Itself a Sacred Being': Native American Sacred Site Protection on Federal Public Lands Amidst the Shadows of Bear Lodge," American Indian Law Review, Vol. 24, No1 (1999/2000), 165.

[145] Raymond Cross and Elizabeth Brenneman, "Devils Tower at the Crossroads: The National Park Service and the Preservation of Native American Cultural Resources in the 21st Century," Public Land and Resource Law Review, Vol. 18 (1997), p. 16.

presence of climbers disrupted both religious services at Bear's Lodge and the environmental integrity of the site. In 1973 there were but three-hundred-twelve climbers that year, but by the 1990s over six thousand climbers visited annually. Over the years climbers established two-hundred-twenty climbing routes and placed some six hundred bolts in the rock face of Bear's Lodge.[146] In the 1980s a tourist climbing industry arose where professional guides took amateurs on excursions at the site.[147] Many were not aware of the religious significance of the place, including Park Service personnel entrusted with managing the site.[148] Climbers would remove prayer bundles, photograph people engaged in worship, approach people who were praying or fasting. Climbers also disrupted religious ceremonies with their hammering, shouting, and climbing.[149] By 1992 the National Park Service recognized that climbing was having significant negative impacts on animal habitats and natural resources and a climbing management plan needed to be created.[150]

The National Park Service initiated a consultation process for creating a climbing management plan designed to reach some consensus among interested parties.[151] The Park Service created a working group with representatives from the climbing community, environmental organizations, local government, and interested American Indian communities.[152] Initially groups were completely at odds with each other. In the first of the working group meetings, participants expressed their maximalist goals. Climbers

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146 Bear Lodge, 175 F. 3d 818.
147 Burton & Ruppert, "Bear's Lodge," 211.
148 Ibid.
149 Eric Freedman, "Protecting Sacred Sites on Public Land, Religion and Alliances in the Mato Tipila-Devils Tower Litigation," American Indian Quarterly, Vol. 31, No. 1 (Winter 2007), p. 14.
150 Burton & Ruppert, "Bear's Lodge," 210.
151 Cross & Brennemen, "Devils Tower," 24.
152 Burton & Ruppert, "Bear's Lodge," 212.

wanted few or no restrictions on access, while Indian representatives called for a ban on all climbing, declaring the practice to be a desecration of a sacred place.[153] The Park Service administrators attempted to foster cross-cultural communications and were aided in this by communication skills of Elaine Quiver.[154]

Initially not an official representative of any Indian group, Elaine Quiver of Pine Ridge, emerged as a leader that was instrumental in bringing the working group to consensus. Quiver demonstrated to all she was someone who could clearly explain the positions of Indian Elders to outsiders in terms they could understand.[155] Quickly all parties came to agree some form of preservation program was necessary.[156] Climbers feared any ban on climbing and tried to express what they felt was a religious like experience in climbing.[157] Through the process, Indian interest groups remained united on the position that a mandatory climbing ban for the month of June was necessary as that was the most crucial month for religious ceremonies, but it was also the busiest month for climbing. Quiver and other Indian leaders returned to their communities and learned that many Indian people felt that a voluntary climbing ban would be much more meaningful to them. People felt that a call for climbers to voluntarily abstain from climbing in June would be more meaningful as it would allow for climbers to freely express their respect for Indian religions and culture.[158]

The Climbing Management Plan that emerged from the working group bore no resemblance to the maximalist positions of any group. The expansion of areas for

[153] Burton & Ruppert, "Bear's Lodge," 213.
[154] Ibid., 214-5.
[155] Ibid., 215.
[156] Cross & Brennemen, "Devils Tower," 25.
[157] Burton & Ruppert, "Bear's Lodge," 215.
[158] Ibid., 217.

climbing would stop as no new routes would be permitted. Existing climbing equipment would be camouflaged and no new climbing bolts would be placed; existing ones could be replaced only to preserve safety. Bear's Lodge would be closed to climbing during raptor mating season. The climbing community and Park Service were to encourage climbers to abstain from climbing in the month of June. To facilitate this last part, the Park Service planned to stop issuing commercial permits for guides for the month of June.[159] The plan also stated the goal for the cultural education components was to have the June voluntary climbing closure reach one-hundred percent compliance. If ethical suasion through this education program failed to do the job, the Park Service would revisit the issue of a mandatory closure.[160]

In many ways the changed approach of the National Park Service in formulating a Climbing Management Plan for Bear's Lodge was emblematic of broader changes in the approach to public lands management in the federal government. In 1994, President Clinton signed an executive memorandum that reiterated the obligation of the federal government to work with Indian governments as sovereigns and required departments and agencies to consult with Indian governments to the greatest practical extent in matters that impacted Indian interests.[161] This memorandum was followed by Executive Order 13,007 in 1996 that required federal land managers to accommodate Indian use of sacred sites and avoid adversely impacting Indian sacred sites.[162]

While the working group had come to consensus, commercial climbing guides took issues with the Climbing Management Plan and in 1995 both challenged the plan

[159] Cross & Brennemen, "Bear's Lodge," 26.
[160] Bear Lodge, 175 F. 3d 821.
[161] Dussias, "Friend, Foe," 357-8.
[162] Ibid., 357.

and sought an injunction against implementation of the ban on the issuance of commercial permits in June.[163] Working with the Mountain States Legal Foundation, climbing interests challenged the ban on June commercial permits, the cultural education programs, and the voluntary June climbing closure on the grounds that the Park Service was engaged in the unconstitutional establishment of religion. They immediately requested a preliminary injunction against the June permit ban.[164]

Judge Downes of the U.S. District Court for Wyoming issued an injunction preventing the ban on June commercial guide permits from going into effect in a highly questionable legal opinion. Rather than engage in any substantive analysis of precedent in the Tenth Circuit Court of appeals, Downes instead based his decision on dicta from a religious freedom case where the Navajo Nation challenged the Park Service management of Rainbow Bridge as desecrating a sacred place to the Navajo. The case of Rainbow bridge will be examined in more detail below, but in that 1980 case the Tenth Circuit Court of appeals speculated that the request by the Navajo to exclude everyone year round from the Rainbow Bridge National Monument, except for religious services, might run afoul of the constitutional prohibition against religious establishment.[165] Downes' order also failed to distinguish the fact that the Climbing Management Plan merely called for a temporary periodic cessation of commercial permits and the order failed to acknowledge that many places managed by the federal government, such as Arlington National Cemetery, Ebenezer Baptist Church in Georgia, Bethesda Baptist Church in Pennsylvania, and Annunciation Chapel were regularly closed for religious

[163] Bear Lodge, 175 F. 3d 820.
[164] Bear Lodge, 175 F. 3d 820.
[165] Cross & Brennemen, "Devils Tower," 34.

services.[166] Ultimately the issue was never fully litigated as the Park Service withdrew the ban in 1996.[167]

Despite this initial legal failure, and serious reasons to question Judge Downes partiality, the Park Service, Indian interests, and their allies, succeed in defending the remaining parts of the Climbing Management Plan from claims that it was an impermissible establishment of religion. After the initial injunction and the subsequent removal of the June permit ban, Judge Downes berated government attorneys for wasting government resources and expertise on this case. Judge Downes told them, on the record, that the resources would be better spent on programs diverting the Indian youthful offenders he saw in his court from crime and alcohol, rather than activities to preserve Indian culture.[168] Despite any misgivings he expressed on the propriety of the use of government resources to defend the case, Judge Downes found that the plaintiffs both lacked standing and that the cultural education aspects and voluntary June closure did not establish any religion in violation of the first amendment of the U.S. constitution.[169]

By the 1990s establishment jurisprudence was a muddied affair and contemporary critics felt Judge Downes was not engaging in the proper analysis in his decisions.[170] While making mention of the then nominally controlling case, Lemon v. Kurztman, 403 U.S. 602 (1971), Judge Downes never engaged in the three part analysis recommended by Lemon in his decision for the preliminary injunction.[171] The Lemon test examines whether or not the government action (1) has a secular purpose, (2) advances or inhibits

[166] Freedman, "Protecting Sacred Sites" 18.
[167] Bear Lodge, 175 F. 3d 820.
[168] Burton & Ruppert, "Bear's Lodge," 229.
[169] Bear Lodge Multiple Use Association v. Babbit, 2 F. Supp. 2d 1448, (1998).
[170] Cross & Brennemen, "Devils Tower," 28.
[171] Ibid.

religion, and (3) fosters excessive government entanglement with religion.[172] With Lee v. Weisman, 505 U.S. 577 (1992), Justice Kennedy stressed the key element to be considered was coercion.[173] Justice O'Connor instead had suggested endorsement of religion was key, as determined by examining the purpose and effect of the alleged establishment of religion and this was the controlling test for the Tenth Circuit.[174] Contemporary commentators felt that Judge Downes should engage in some form of Lemon analysis in determining whether or not any part of the Climbing Management Plan served to establish any of the various Indian religions considered in the Park Service plan.[175]

When the issue of the validity of the Climbing Management Plan returned to Judge Downes for final disposition on the establishment claims, Judge Downes applied the Lemon test, modified by Justice O'Connor's endorsement test, which had become the test within the Tenth Circuit. In the analysis, Judge Downes examined the purpose and effect of the voluntary closure. Judge Downes found the purpose of the voluntary closure was to allow for the accommodation of Indian religions, not to promote them.[176] Judge Downes found the effect of the voluntary closure was not, as the climbing guides claimed, coercion preventing them from climbing.[177] Judge Downes then examined the level of entanglement the government now had with religion and found there was minimal government involvement with religion in this program.[178]

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[172] Bear Lodge, 2 F. Supp. 1454.
[173] Cross v. Brennemen, "Devils Tower," 31.
[174] Bear Lodge, 2 F. Supp. 1454.
[175] Cross & Brennemen, "Devils Towers," 28-9.
[176] Bear Lodge, 2 F. Supp. 1455.
[177] Ibid., 1456.
[178] Ibid., 1456.

While Judge Downes ruled the voluntary closure was not the establishment of religion, in dicta he again reiterated his opinion that a ban on climbing would serve to establish religion. Misreading precedent, Judge Downes quoted dicta from the 1980 Rainbow bridge case, Badoni, that stated a free exercise of religion claim cannot be used to prevent the normal use of an area.[179] Here Judge Downes was again ignoring the fact that the government often closed public places for religious services and the normal historic use of Bear's Lodge was for religious services, not climbing. This twice repeated dicta about permanent closures unconstitutionally establishing religion would concern Forest Service planners later at Cave Rock and give hope to climbers seeking to continue climbing the most sacred of Washoe places, as shall be examined in more detail below.

The guides and their legal allies appealed Judge Downes' decision to the Tenth Circuit Court of Appeals, but found no relief. Indian organizations solicited friend of the court briefs from Christian and Jewish religious organizations to add a broad moral force to their defense of the management plan.[180] Though the Tenth Circuit ultimately affirmed Judge Downes' decision, the unanimous opinion of the court only partially adopted Judge Downes' reasoning. The Tenth Circuit agreed that various plaintiffs lacked standing to challenge parts of the plan, but the court also determined that climbers and guides lacked standing to challenge the voluntary closure. The court reasoned that while the Park Service stated it might contemplate an involuntary closure sometime in the future, the current plan that merely urged climbers to refrain from climbing in June out of respect for others was not a current harm that was actionable in court. The potential threat of a

[179] Bear Lodge, 2 F. Supp. 1455.
[180] Freedman, "Protecting Sacred Sites," 10.

mandatory closure was too remote and the Tenth Circuit never revisited the issue of the management plan serving to establish religion as the climbers and guides had not alleged any actual harm. Thus they lacked standing to seek relief from the courts on all aspects of their claims.[181]

In the initial years after the implementation of the Climbing Management Plan, the voluntary closure was highly successful. The United States Supreme Court refused to take the case on appeal. Initially climbing in June dropped by 79% from pre-plan average use.[182] Climbing guides remained a permanent economic interest whose livelihoods were in some part dependent upon encouraging people to not respect the June closure of Bear's Lodge. In June of 2004 the climbing use of Bear Lodge was only 69% less than that of pre-plan averages, and 55% of the 2004 climbers were led by paid guides.[183]

Rainbow Bridge

One of the Navajo hero gods was hunting long ago when he was caught in a flash flood in what is now southern Utah. He faced certain death by drowning, but then Sky Father intervened and cast a rainbow for him to run across. Later the rainbow turned to stone and this Rainbow Bridge remains to this day.[184] Rainbow Bridge remains the world's largest natural bridge. The bridge spans 278 feet. It is 290 feet high, 33 feet wide, and 42 feet thick at the top of the arch. Located in the middle of Navajo territory,

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[181] Bear Lodge, 175 F. 3d 821-22.
[182] Freedman, "Protecting Sacred Sites," 2.
[183] Ibid., 2.
[184] Natural Arch & Bridge Society v. Alston, 209 F. Supp. 2d 1207 (Federal District Court of Utah, Central Division, 2002), 1210.

Rainbow Bridge remained remote and unpublicized to the outside world until 1909.[185]

While located inside Navajo territory, Rainbow Bridge is of religious significance to several indigenous religions. The Hopi understand Rainbow Bridge to be where the Snake Clan first dropped into this world. Rainbow Bridge is the remnant of a rainbow swinging around to strike Navajo Mountain and dropping the Snake Clan of the Hopi into this existence. In addition the Paiute and other Indian peoples historically have beliefs Rainbow Bridge is a place of religious significance. For many, it is impermissible for anyone to pass beneath Rainbow bridge without saying the proper prayers.[186]

The history of United States management of Rainbow Bridge is in many ways emblematic of the changes in public lands management of Indian sacred sites in the twentieth century. During the assimilation period, when the U.S. government sought to eradicate Indian religions, President Taft unilaterally declared the 160 acres surrounding Rainbow Bridge to be a National Monument with Presidential Proclamation Number 1043 in 1910. In 1916 the National Park Service took over management of the site.[187] The Glen Canyon Dam finished construction in 1963, during the era of termination, and began to flood the monument site, forming Lake Powell. By 1977 the water beneath Rainbow Bridge was over twenty feet deep. The creation of Lake Powell increased tourist traffic to the site significantly.[188]

As the United States government switched to government to government relations and the 1978 American Indian Religious Freedom Act brought hopes that consultation requirements and an "official" policy of protecting Indian religions might bring some

[185] Natural Arch, 209 F. Supp. 2d 1210
[186] Ibid., 1210-11.
[187] Ibid., 1211.
[188] Badoni v. Higgins, 638 F. 2d 172 (10th Cir. 1980), 175.

protections to Indian sacred sites, the actions of federal land managers of Rainbow Bridge and the courts again disappointed the Navajo. For practitioners of traditional Navajo religion, the United States government had drowned their gods and denied them access to sacred sites with the growth of Lake Powell. Many felt the government permitted tourist traffic completely desecrated Rainbow Bridge.[189] Practitioners of traditional Navajo religion brought suit against the government complaining that the drowning of their gods and the presence of tourists violated Navajo rights to the free exercise of religion. The Tenth Circuit Court of Appeals ruled in 1980 that the presence of Lake Powell did burden Navajo religion, but that the operation of Glenn Canyon Dam was a compelling governmental interest sufficient to outweigh consideration for Navajo rights in Badoni v. Higgins.[190]

The Badoni court, in its consideration of the tourist issue, was somewhat cavalier in its analysis and created dicta that would later cause Judge Downes problems in the 1990s, as discussed above, and concerns in the management decisions for Cave Rock, as shall be discussed below. While the Navajo objected to the presence of all tourists, they also particularly complained of the disorderly and often drunk conduct of the tourists as prohibiting their ability to engage in religious ceremonies in peace. Without specifically identifying whether or not the particular permitted conduct was a burden on Navajo religious practitioners, the court determined existing Park Service regulations were sufficient to deal with drunk and disorderly persons and the Navajo could apply for permits for park closures like other groups.[191] Most problematic to posterity was the

[189] Badoni, 638 F. 2d 176.
[190] Ibid., 177.
[191] Ibid., 179-80.

court's dicta regarding a total ban on tourists. Without engaging in any analysis of existing case law on the establishment of religion, the court simply stated that a total ban on tourists would clearly violate the constitutional prohibition on the establishment of religion.[192]

As with other cases, such as the management of the San Francisco Peaks, the Navajo were unable to find satisfaction through the American Indian Religious Freedom act, but the Park Service Managers of Rainbow Bridge monument quickly changed their opinions and wanted greater input from the Navajo by 1985. Increased boat access across Lake Powell to Rainbow Bridge quickly proved problematic. In 1955 merely 1,000 outsiders visited Rainbow Bridge. In 1974 that number increased to 55,000. By 1986 this was 65,000 or about 270 a day. By 1995 this number had ballooned to 346,000.[193] By 1985 the visitors were problematic. Vegetation had been trampled and destroyed, erosion and soil loss proliferated, visitors defaced petroglyphs, rocks were covered with graffiti, and litter became a problem.[194] In 1985 the Park Service recognized the need to reorganize management of the site and officials wanted to improve relations with the Navajo Nation and obtain their assistance in managing and protecting the site. The Park Service consulted Navajo and other Indian groups in formulating a new management plan.[195]

The Park Service issued its Draft Environmental Impact Statement for the new General Management Plan in 1990 and issued a final plan in 1993 designed to both

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[192] Badoni, 638 F. 2d 179.
[193] Natural Arch, 209 F. Supp. 2d 1212.
[194] Ibid., 1213.
[195] Ibid., 1213.

respect Indian religious concerns and rehabilitate the environment of Rainbow Bridge.[196] The General Management Plan included a program to rehabilitate trails, eliminate tourist created trails, maintain a cement paved trail from Lake Powell Docks to Rainbow Bridge viewing areas, a program to discourage the use of informal trails, a program to rehabilitate native species of plants, and close some areas for revegetation. Most important to the Navajo and other concerned Indian groups was Park Service inclusion of an educational program designed to improve awareness of the sacred character of the place, in the eyes of practitioners of indigenous regions. As part of this program, signs, park materials, and park rangers would ask that visitors refrain from walking under Rainbow Bridge out of respect for traditional Indian religious beliefs.[197]

After the implementation of the plan, Earl DeWaal visited the Rainbow Bridge and loudly complained about the cultural education program. DeWaal reportedly demanded the right to go anywhere in the park and became verbally abusive to park rangers. DeWaal vocally complained that the signs informing the public of the sacred character of the national monument were all lies created by a conspiracy involving Indians and environmentalists. He reportedly used the word "Injun" in his loud complaints, and finally left after other visitors asked him to leave.[198]

DeWaal joined the Natural Arch & Bridge Society, and other less belligerent parties, in a law suit challenging the validity of the cultural awareness portion of the General Management Plan in 2000. The plaintiffs accused the National Park Service in engaging in the establishment of religion by educating the public about Indian religious

[196] Natural Arch, 209 F. Supp. 2d 1213-14.
[197] Ibid., 1214-15.
[198] Ibid., 1221.

concerns and asking visitors to respect those beliefs by voluntarily abstaining from walking under Rainbow Bridge. Judge Bruce S. Jenkins for the Federal District Court of Utah, Central Division, issued his opinion in 2002.[199]

While Judge Jenkins dismissed many of the plaintiffs' complaints against the Park Service for lack of standing, he did conduct a substantive establishment analysis regarding the cultural program of the GMP. By 2002, the Tenth Circuit Court of Appeals was using the Lemon test as modified by Justice O'Connor as the standard test for determining if a governmental action does in the fact serve to establish religions. This variant examines the purpose and effect of the government action and then examines if the government may have become too entangled in religion.[200] With regards to the Rainbow Bridge cultural awareness program, Judge Jenkins found the purpose of the program was to educate and inform.[201] When considering effect, the court considered what effect the program would have on a reasonable and aware observer. Judge Jenkins determined the cultural program could not possibly have the effect of leading a reasonable and aware observer to believe the Park Service had adopted this religion.[202] As to entanglement, Judge Jenkins determined that the program merely called for new signs, a new website, and new brochures, and, considering the nature of the work of the Park Service in managing sites, this could not be considered entanglement. Judge Jenkins went further and commented the cultural awareness program merely made the area more conducive to worship by Native Americans and the American Indian Religious Freedom Act of 1978 required the consultation of Indian religious communities in creating

[199] Natural Arch, 209 F. Supp. 2d 1214-15.
[200] Ibid., 1222.
[201] Ibid., 1223-24.
[202] Ibid., 1224.

management plans.[203] Though the determination of Judge Jenkins fully supported the GMP, Judge Jenkins added to the growing list of cases that did not engage in a substantive analysis of an involuntary ban on activities at an Indian sacred site and opined in dicta that a ban on travel under Rainbow Bridge, "could possibly" have violated constitutional prohibitions on the establishment of religion.[204]

Perhaps remaining belligerent to the end, Earl DeWaal, joined only by one other visitor to Rainbow Bridge, appealed the decision of Judge Jenkins to the Tenth Circuit Court of Appeals. The Tenth Circuit Court of Appeals found that the remaining plaintiffs had suffered no injury in fact. The appellate court affirmed the dismissal on the grounds that the cultural program and request to not walk under Rainbow Bridge in no way injured the plaintiffs and they lacked standing to challenge the General Management Plan.[205]

Entering the twenty-first century, the courts were providing wide latitude for administrative agencies regarding the management of sacred sites, but with several statements that agencies might not be able to prohibit use of sacred sites by non-Indians to protect those places. Essentially the First Amendment placed no limitations on agency discretion, so long as agencies consulted Indians in accordance with the law. While none of the courts that ruled on fully briefed and argued challenges to involuntary bans on uses of Indian sacred sites that protected the sacred quality of those sites, several judges stated they felt such hypothetical involuntary bans would violate the establishment clause. In

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[203] Natural Arch, 209 F. Supp. 2d 1225-26.
[204] Ibid., 1223.
[205] Natural Arch Bridge Society v. Alston, 98 Fed. Appx. 711 (9th Cir. 2004).

the first decade of the twenty-first century this issue would finally be settled as shall be seen in the case of Cave Rock, below.

As the new millennium started there was cause to be hopeful despite the lack of Constitutionally protected religious freedoms in the United States. The executive and legislative branches of the United States government had taken positive steps to respect indigenous religions and offered some respect for indigenous religious sensibilities. Congress amended the National Historic Preservation Act in 1992 and sites of religious and cultural significance to Indian peoples were made eligible for inclusion on the National Register of Historical Places as Traditional Cultural Places.[206] The Clinton Administration issued executive order 13,007 in 1996. This order called on administrative agencies to avoid adverse impacts and maintain the physical integrity of public lands of cultural significance to Indians.[207] This executive order was supplemented by orders 13,084 (1998) and 13,175 (2000). The first directed the National Park Service to develop regular policies for consultation and communication with Indian officials and the second expanded the requirement to other agencies. In 2009, President Obama ordered agencies to report on their compliance with these orders.[208] The 2008 Farm Bill expanded protections for confidential information regarding sacred sites from Freedom of Information Act Requests.[209]

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[206] Dassius, "Friend, Foe," 357.
[207] Yablon, "Property Rights," 1646.
[208] Dassius, "Friend, Foe," 367-8.
[209] USDA Office of Tribal Relations and USDA Forest Service, REPORT TO THE SECRETARY OF AGRICULTURE: USDA Policy and Procedures Review and Recommendations: Indian Sacred Sites, December 2012. p. 20.

A Self-Determination Model for Analysis and Solutions

Together with the expansion of legislative and executive actions offering regularized consultation and new options for protection through designating sites as Traditional Cultural Places, there is no reason to believe the differences in religious perspectives fundamentally prevents non-Indians from understanding and respecting the views of others. One needs only look at the efforts of non-Indians to protect sites of historical and cultural significance to understand notions of sacred places are not so alien to the European mind.

The non-Indian mainstream population of the United States has found at least two places to be of such cultural significance that many have called them "sacred" and sought federal protection of these sites. While the definition of sacred is contested by some, there are definitions that include places that are removed from ordinary places by extraordinary patterns of action. These patterns do not necessarily have to be religious in origin, but may be of political or cultural significance.[210] On the fiftieth anniversary of the Japanese attack on the U.S. military base in Hawaii at Pearl Harbor, there was a great deal of controversy surrounding the National Park Service handling of the exhibit and the celebrations. The content of this outrage is beyond the scope of this current examination, but many concerned with that the actions of the National Park Service might desecrate this "national shrine" called for the site to be managed by the United States Department of Defense.[211] Practitioners of European religions were among those that identified the

[210] Chidester & Linenthatl, American Sacred Space, 9.

[211] Ibid., 5. One can debate whether or not those that called the USS Arizona or Gettysburg meant what they said when they called those places a "national shrine" and "sacred," but this debate is irrelevant to the arguments here. What is undeniable is that many of those who identified these places as a "national shrine" and "sacred" were at least nominally practitioners of religions of European origins, such as

site of the USS Arizona as a "national shrine" and called for it to be treated with special reverence.

In 1893 the federal government used the power of eminent domain to to force the purchase of privately owned land that was part of the Gettysburg Battlefield. Privately owned land was converted to public ownership to protect this "sacred ground."[212] A unanimous Supreme Court upheld the use of eminent domain to convert private property to public property because the land in question touched "the heart and comes home to the imagination of every citizen, and greatly tends to enhance his love and respect" for the nation.[213] Practitioners of European religions have had a sense that certain places are of more importance than others for cultural reasons for at least a century. They understand that these sacred places can be desecrated by human action and should be protected over the values of property as dictated by liberal capitalism. Though it should be noted that while the Supreme Court recognized the power of Congress to protect sacred places such as Gettysburg, there has never been a Constitutional requirement that places sacred to the non-Indian populations be protected from desecration.

While there has been and remains significant differences between Indian religions and settler religions and how they conceptualize the significance of place in their

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various denominations of Christianity, and that these same people identified these places as extraordinary in some sense and worthy of special reverence and protection. Thus it was within the normal understandings of the practitioners of settler religions (regardless of whether or not these understandings were religious in origin) that certain places deserve different treatment than others and not all common activities, including commercial activities, should necessarily be conducted at such places. As there is some notion of "sacred" that sets aside places from ordinary use or treatment that is not necessarily religious in origin, and this was the language used by those who sought to set aside these places, albeit for political, historical, and cultural reasons that were likely not directly religious, the word "sacred" will be used in describing these likely secular notions of extraordinary places of significance that should not be treated like ordinary places.

[212] Michaelson, "Dirt in the Courtroom," 79.

[213] U.S. v. Gettysburg Electric Rail Co., 160 U.S. 668 (1896).

respective religious lives, there are places within the cultural lives of non-Indians that have near religious significance and take on a sacred character. Many among the non-Indian communities have viewed it as an intolerable burden to allow these places to be desecrated and have approved or called for action by the federal government to protect those sacred places. While the United States constitution offered no one protection for their sacred places, or a broader sense of religious freedom after Smith, the Supreme Court has interpreted the constitution as not preventing the federal government from acting to protect even Indian sacred sites.

The difficulty arises then, not from a different sense of the primacy of private property or individual rights over the protection of sacred space, but instead a widespread lack of understanding on those that claim the property rights, such as the federal government. This lack of understanding leads to a lack of respect for the places sacred to the peoples finding themselves under the political and military domination of others in their homelands. Congress and the executive branch have been more sensitive to desires of the non-Indian population to protect their sacred sites because they share the same cultural understanding of the sacred qualities for those places. The non-Indian population has the capacity to respect Indian people, but lacks the knowledge, understanding, and education to do so.

As the non-Indian population has become more civilized and its representatives in the executive and legislative branches have become more receptive to the ideas of respecting indigenous sovereignty, cultures, and religions, the most aristocratic branch of government has left its more traditional role of being the only refuge for indigenous

interests and become markedly anti-Indian at the close of the twentieth century. The executive branch previously penalized indigenous cultural practices and the legislative branch actively sought to destroy indigenous society, and through struggle and organizing, combined with the development of Pan-Indian awareness, indigenous interests have pressed those two branches of the non-Indian government to announce their official policies are to protect indigenous religion and culture and require a fair hearing of indigenous concerns when government action will adversely impact Indian religion and culture.

As administrative agencies offered more and more protection to Indian sacred sites, a wave of cases entered the courts where corporate and business interests attempted to challenge these administrative decisions as violations of the First Amendment prohibition on the establishment of religion. Consistently the courts found the administrative decisions of agencies to be in compliance with the federal government's special trust responsibility to American Indians and furthering the policy goals of the American Indian Religious Freedom Act.[214] The current study will move beyond this purely legal framework and examine the strengths and weaknesses of the administrative consultation process that emerged at the end of the twentieth and beginning of the twenty-first centuries and evaluate suggestions to strengthen protection for Indian sacred sites for the future.

As indicated, this study will use a synthesis of approaches to the understanding of indigenous sovereignty and its relation to the legal and constitutional protection of Indian sacred sites. In the first instance, the international law principle that all peoples are

[214] Yablon, "Property Rights," 1648-49.

entitled to self-determination is accepted here. Additionally it is assumed that the various indigenous peoples of the world are peoples under the meaning of international law. In this regard, something needs to be done to address the alarming trajectory of the United States Supreme Court and the unchecked plenary power of Congress. The essence of self-determination is the ability to self-define how a people relates to other peoples, and by and large indigenous nations seek a recognition of their inherent sovereignty.[215]

This study explicitly adopts a universalist approach to indigenous sovereignty. This approach is both essentialist and pragmatic. Following the lead of legal theorist Raymond Cross, the current work views freedom as both a means and an end and acknowledges the importance of providing individuals and peoples the conditions necessary to act as agents in their own lives, while positing freedom as essential to human existence. Erich Fromm, in his analysis of Marx's concept of humanity, identified freedom as the essence of humanity.[216] At the heart of the difficulties humanity faces is alienation. Fromm understood alienation for Marx to be that, "man does not experience himself as the acting agent in his grasp of the world, but that the world (nature, others, and he himself) remain alien to him. They stand above and against him as objects of his own creation. Alienation is essentially experiencing the world and oneself passively[.]"[217] For Fromm, this was the same problem created by idolatry, "instead of experiencing himself as the creating person, he is in touch with himself only by the worship of the

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[215] Christine K. Gray, The Tribal Moment in American Politics, The Struggle for Native American Sovereignty, (New York: Roman & Littlefield, 2013), 198.

[216] Erich Fromm, Marx's Concept of Man, (New York: Continuum, 2000), p. 65. It is also worth noting that the form of freedom here, and its centrality to the human experience, differs in no significant ways from the concept of freedom as a measure and end of economic development of Amartya Sen, discussed in Chapter Six below.

[217] Ibid., 44.

idol."[218] Thus the goal of social organization is the abolition of alienation and the realization of the ideal of freedom in the positive sense of exercising creative possibilities.[219] This study accepts the conceptualization of development as expanding the abilities and possibilities in freedom of both individuals and peoples.

Cultural and religious self-determination are crucial aspects necessary for expanding human freedom. Cross and others acknowledged meaningful cultural and religious freedom are part of the positive expression of freedom as the development of human societies. Pragmatically, Huffman, Miller, Begay, Cornell, Jorgenson, Kalt, and a host of others, have shown development, in all senses, does better under conditions where indigenous peoples are provided resources to manage as they see fit.[220] Thus self-determination as an expression of a less (or non-) alienated social organization will have beneficial results both economically and culturally. As many indigenous sacred sites are found outside of the territorial confines of Indian nations, concepts of extraterritorial sovereignty will have to be considered in any analysis of conditions. For practical implementation of cultural self-determination, Indian sovereignty will likely have to be extended beyond the territorial boundaries of reservations, rather than curtailed or eliminated altogether.

This current study takes the position that freedom and self-determination are positive values that should be extended and improved in practice for the lives of all peoples, including indigenous peoples. Historically, these norms have become more and more accepted by the legislative and executive branches of the U.S. government in recent

[218] Fromm.
[219] Ibid., 68.
[220] See Chapter Six.

decades, as well as the international community. Yet the United States Supreme Court has become more hostile to these notions of freedom and equality. From this tension in branches of the U.S. government, the consultation process has emerged. The following case studies examine the details, successes, and limitations of the legal contours of the consultation process for federal management of Indian sacred sites at the turn of the century. Acknowledging that the power dynamics of Congressional plenary power and Supreme Court hostility to the emerging international consensus on indigenous rights, this study will look to what can be learned from the consultations of the early twenty-first century so as to provide insights in to what needs to be considered to protect the cultural and religious self-determination of Indian peoples as the United States moves forward to the multicultural society it must eventually become.

Chapter Two

The Arizona Snowbowl Resort and the Hopi

The San Francisco Peaks are known to the Hopi as Nuvatukyaovi, and, for those that practice the traditional Hopi religion, Nuvatukyaovi has been the most important of sacred places since time immemorial. Since the mid-nineteenth century, the United States government claimed ownership of the San Francisco Peaks and incorporated Nuvatukyaovi into the national forest system in 1907. In the early twentieth-century, the U.S. government allowed a ski resort to be built on Nuvatukyaovi. The United States Forest Service decided in 2002, in consultation with the owners of the ski resort, Arizona Snowbowl Resort Limited Partnership, that the ski season on the San Francisco Peaks needed to be regularized by building the infrastructure necessary for artificial snow making. The Forest Service began the required consultation process with Indian communities with achieving this goal as their primary objective. In 2005, the Forest Service approved the upgrade for the Snowbowl ski resort, including artificial snowmaking with reclaimed sewage effluent.

The Hopi, environmentalists, local activists from the greater community of northern Arizona, and other Indian nations protested this decision of the Forest Service and sought to prevent implementation of the plan in federal court. The federal court in Prescott, Arizona, joined the various lawsuits of the Navajo, Hopi, environmental groups, and individuals on July 8, 2005. Navajo Nation v. United States Forest Service, as the

case was titled, was the first case to test the limits of the Religious Freedom Restoration Act of 1993 as it applied to Forest Service management of public lands and the adverse actions taken by the Forest Service against indigenous religious and cultural sites. The litigation efforts of the Hopi and other Indian nations met with failure as the Federal District Court of Arizona and the Ninth Circuit Court of Appeals ruled the types of harms suffered by the Indian plaintiffs to their religion were not the types contemplated by the Religious Freedom Restoration Act. The potential for legal remedy ended when the United States Supreme Court refused to accept an appeal of the case on June 8, 2009.

This is a case where existing financial interests with significant and high level contacts with Forest Service administrators initiated the decision making process and the consultation process provided no substantive protections to Indian cultural and religious interests. Arizona Snowbowl Resort personnel had daily interactions with Forest Service administrators and it was the desire of ASR owners to increase the value of their investment and ongoing for-profit operation of the ski resort that pushed administrators to consider expanding the existing infrastructure to include snowmaking with reclaimed sewage effluent. Former Interior Secretary Bruce Babbit Forest contacted Supervisor Nora Rasure on behalf of ASR to assure the supervisor the courts would support any decision to desecrate Indian sacred sites.

Despite the almost procedural approach some Forest Service administrators took to the consultation process, Hopi political and religious leaders were able to inform Forest Service staff as to the nature and depth of their concerns. While Supervisor Rasure ultimately approved the expansion in 2005, the consultation process successfully

educated administrators as to the concerns and perspectives of the Hopi and other Indian groups. This case demonstrates the ability of the consultation process to bridge cultural gaps in understanding, even from administrators have strong reasons to be resistant, and the lack of substantive protections for Indian sacred sites from the decisions of Federal administrators, even after the passage of the Religious Freedom Restoration Act.

Hopi History and the Sacred

Insulated from European contact longer than many indigenous peoples, the Hopi had a strong sense of culture based upon a singular but highly varied and differentiated religious tradition. The Hopi name for themselves is Hopitu-Shinumu, which means "the people of peace."[1] The diversity in Hopi religion was deeply linked to the decentralized and clan based political organization of Hopi life. These intertwined religious and political traditions have played important roles in the long history of Hopi resistance to European domination, including the resistance to the expansions of the skiing facilities on the San Francisco Peaks.

Never having entered any treaty with the United States government, the Hopi found both themselves and their most sacred of places incorporated into the United States without their consent. The Hopi nation is located in the northeast corner of what is now the state of Arizona in the United States. In 1907 the United States government incorporated Nuvatukyaovi, known to the settlers as the San Francisco Peaks, into one of their national parks. Nuvatukyaovi is the most holy of places to the Hopi. The primary Hopi deity, Maasaw the owner of the Fourth World, resides there. The spirits of the Hopi

[1] Harry C. James, Pages From Hopi History, (Tucson: University of Arizona Press, 1974), xii.

dead dwell on Nuvatukyaovi, and the mountain serves as the home of the Kachinas when they are not visiting Hopi villages. The Hopi nation has always been located in a desert and moisture remains a central component of Hopi religious existence. Moisture from Nuvatukyaovi represented life itself to the Hopi.

When faced with challenges to their way of life, the Hopi have used their traditional religion to bring them strength and provide additional motivation to the political positions they have taken. This connection between religion and politics has had significant impact on the political struggles of the Hopi people and came to define much of the place of the current Hopi government in Hopi life. The central significance of Nuvatukyaovi in Hopi religious life could only lead to the most strenuous of objections to the desecration of such an important sacred site.

Hopi Religion

Hopi religious life was quite diversified long before Hopi contact with European explorers and this diversity was due to organizational structures of both Hopi political and religious life. Hopi politics were organized in decentralized village structures spread over three different mesas. Each village had its own government and there was no overarching national Hopi government.[2] Religious life was, and continues to be, further diversified as the Hopi are organized into matrilineal clans. Each clan was responsible for keeping and performing different religious ceremonies.[3] Without a written language to create definitive sacred texts, traditional Hopi religion and prophecies were transmitted

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2 James, Pages, xiii

3 Navajo Nation v. Forest Service, Case Nos. CV 05-1824-PCT-PGR, CV 05-1914-PCT-EHC, CV 05-1949-PCT-NVW, CV 05-1966-PCT, trial transcript pp. 427, 531, hereinafter abbreviated Tr.

by oral means. Traditional Hopi religion, legends, stories, and myths varied historically by locality and clan, and this diversity continues to this day. Despite these differences, there was and continues to be a recognizable common religion among the Hopi people.[4]

Despite being one of the most studied and written of peoples, the Hopi have always guarded their religious privacy. Hopi traditional religion has been based upon knowledge gained through secrecy and initiation.[5] The Hopi term for sacred, "utihi'i" has a deeper nuance than a simple translation to "sacred" and also includes meaning that the sacred thing in question cannot be shared or revealed to those not eligible to receive it.[6] Among Indian peoples, the Hopi led the claim that the notes and records of anthropologists were the cultural property of the Indian peoples and have demanded their closing to further academic research.[7] Some Hopi have expressed the desire to prevent all publications on Hopi culture, even those based on secondary sources.[8]

Prophecy has been a central part of Hopi religion and interpretation of the various prophecies are linked to the clan structure.[9] Generally the Hopi view Maasaw (the central Hopi god), ancestors, or an elder uncle all as legitimate sources of prophecy.[10] One central prophecy that has been the source of much differentiation and disagreement

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4 James, Pages, xiii.

5 Armin W. Geertz, "Contemporary Problems in the Study of Native North American Religions with Special Reference to the Hopis," American Indian Quarterly, Vol.20 No.3, (1996): 408.

6 Maria Glowacka, Dorothy Washburn, and Justin Richland, "Nuvatukya'ovi, San Francisco Peaks: Balancing Western Economies with Native American Spiritualities," Current Anthropology, Vol.50, No.4, (August 2009): 553.

7 Johnathan Haas, "Power, Objects, and a Voice for Anthropology," Current Anthropology, Vol.37, Supplement, (February 1996): S4.

8 Geertz, "Contemporary Problems," 409.

9 Armin W. Geertz, The Invention of Prophecy: Continuity and Meaning in Hopi Indian Religion, (Berkley: University of California Press, 1994), 46-7.

10 Geertz, Invention of Prophecy, 52.

among the Hopi is the interpretation of the prophecy of the return of the Pahaana, or white elder brother.

After the Hopi emergence as a people, Hopi traditional religion teaches, the Pahaana, or white elder brother went east.[11] The Hopi emergence story, as related by anthropologists of the Western tradition, was the essentially the same from clan to clan with the only significant variation being which bird first met Maasaw. The individual birds all represent different clans, thus placing a certain prestige upon the clan that first met Maasaw. The Hopi view time as being divided into different worlds, and humanity was granted temporary residence in the Fourth World by its actual owner, Maasaw. As conditions of this temporary ownership of the Fourth World, Maasaw required that humanity live a frugal way of life and adopt Maasaw's religion.[12] The Hopi have a prophecy that when the Hopi have strayed from the Hopi ways of Maasaw, the Pahaana will return; the Hopi will adopt the ways of the Pahaana; there will be a purification, and Maasaw will reclaim what is his. Over time differing Hopi political groupings have used the variations of this and other Hopi prophecies, as well as interpretation of prophecy, to assist with achieving their political ends.[13]

With regards to Nuvatukyaovi, or the San Francisco Peaks, the importance of the purity of the water on the Peaks, and the centrality within Hopi religion of the Kachinas, the Hopi revealed five significant points through testimony presented before the Federal District Court for Northern Arizona in 2005:

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[11] Richard O. Clemmer, "'Then Will You Strike My Head From My Neck': Hopi Prophecy and the Discourse of Empowerment," American Indian Quarterly, Vol.19, No.1, (1995): 38.
[12] Geertz, Invention of Prophecy, 73.
[13] Ibid., 46-7, 75-6.

1. The San Francisco Peaks are of central significance to the Hopi religion. The Hopi name for the San Francisco Peaks is Nuvatukyaovi.[14] The Hopi believe the deity Maasaw lives on the Peaks with the Kachinas. Hopi society was based upon matrilineal clans and the clans have a spiritual covenant with Maasaw.[15] Hopi children are introduced to the Kachinas at their naming ceremony.[16] All Hopi are expected to visit the Peaks sometime in their life and the Hopi go to the Peaks when they die.[17]

2. The Kachinas were and continue to be of central importance to the Hopi in the promulgation of the Hopi way of life from generation to generation. There are several religious societies amongst the Hopi. All Hopi belonged to one of the Kachina societies, but all members of Kachina societies do not necessarily belong to another religious society.[18] The Kachinas come from the Peaks to visit Hopi villages around February each year and stay at kivas, underground rooms for religious ceremonies. The kivas are opened by the Kachina each year.[19] The Kachinas perform songs and dances for the Hopi people every year as they live in the villages for a time. These songs and dances are the central method for teaching morals and the Hopi way of life to succeeding generations.[20] During their visits, the Kachinas give gifts to the children.[21] Many Hopi fear that without belief in the Kachinas, the Hopi way of life will pass from this Earth.

3. The Hopi view the water and moisture of the San Francisco Peaks as intricately linked to the identity of the Kachinas. The Hopi live in an arid region and are dependent

[14] Tr. 423.
[15] Tr. 427, 531.
[16] Tr. 439.
[17] Tr. 439.
[18] Tr. 441.
[19] Tr. 430-33.
[20] Tr. 442-44.
[21] Tr. 575.

on natural rainfall for growing corn, which is also of cultural significance to the Hopi.[22] The Kachinas take the prayers of the Hopi for water back to the Peaks after visiting with the Hopi.[23] The Kachinas deliver "good moisture" from the Peaks for farming.[24] Some view the Kachinas themselves as the rain and the clouds.[25]

4. These beliefs place the Kachinas, Nuvatukyaovi, and the purity of the water of the San Francisco Peaks at the center of Hopi religion. The Hopi people have always lived in a desert and were historically dependent upon the rainfall brought by the Kachinas from Nuvatukyaovi to grow their crops. "[T]he Kachinas are very powerful that give us this moisture that gives life to everything that we see over this land and for all the people in the world. It's not only for the Hopi. It's for everyone, everything."[26] Water is central to the Hopi way of life.[27] To the Hopi water was life, and the Kachinas brought this life from the Peaks.[28]

5. Nuvatukyaovi, the home of Maasaw and the Kachinas, the source of water and life for the Hopi, was to be a pure place. Hopi religious practitioners view the artificial making of snow from any source as dirty. Making artificial snow on the Peaks is seen by some as irreversibly contaminating the source of life for the Hopi people.[29]

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[22] Tr. 447.
[23] Tr. 444-45.
[24] Tr. 448.
[25] Tr. 585.
[26] Tr. 129.
[27] Tr. 595.
[28] Tr. 586.
[29] Tr. 564.

Hopi Resistance to Cultural Eradication

As the non-Indian population continued to encroach upon the neighbors of the Hopi, the Navajo in turn encroached upon Hopi lands. In response to the crowding of the Navajo onto Hopi lands, the U.S. Government, by executive order, declared the boundaries of the Hopi "reservation" to be a rectangle on December 16, 1882. The Hopi found themselves surrounded by the Navajo on three sides. The boundary was somewhat arbitrary, more in line with profiting the settler administrators than providing a practical boundary between the Navajo and Hopi. The rectangle excluded approximately one hundred Hopi and included three hundred Navajo within the new Hopi borders.[30]

In 1890 Hopi land was surveyed for the purposes of allotment.[31] Hopi land was held collectively by clan at the time.[32] All Hopi village leaders opposed allotment.[33] The U.S. government's attempts to force individual allotments of land on the Hopis ended in 1912. This program of forced assimilation failed as there was not enough water in the region to support individual allotments; there were continuing unresolved land issues with the Navajo, and the Hopi continued their opposition. Allotment was meant to force Indians to become agricultural settlers, but the Hopi way of life was already grounded in agriculture, particularly the growing of corn, and the practical realities of agriculture in

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30 Clemmer, Roads in the Sky, 88.
31 Ibid., 91.
32 Clemmer, "Strike My Head," 56.
33 Clemmer, Roads in the Sky, 91.

arid Hopi lands was that a flexibility in planting was necessary beyond which individual allotments were capable of meeting.[34]

From the the late nineteenth century and into the 1930s, the Bureau of Indian Affairs actively sought to suppress Hopi religion and in its administration of the Hopi nation it promulgated rules that outlawed the practice of indigenous religion.[35] One component of the U.S. government's continued efforts to eradicate indigenous culture and religion was the adoption of compulsory schooling for Indian children at Christian missionary schools. The U.S. government attempted to implement a policy of forced schooling upon the Hopi beginning in 1892.[36] In the 1920s, the BIA tasked agents with collecting information on Hopi religious ceremonies, dances, and practices that would "prove" the pornographic nature of these religious practices. BIA Superintendent Robert Daniels favored the Navajo in disputes, persecuted conservative Hopis, and, in an attempt to bolster the decontextualized propaganda collected by the agents, actively prevented outsiders from accessing any but his supporters within Hopi lands.[37] During this period Indian Agents would demand the presence of ceremonial leaders when they were needed for traditional religious ceremonies in a deliberate attempt to further disrupt and suppress the religious lives of the Hopi people.[38]

Resistance to Efforts to Eliminate the Hopi Way

[34] Clemmer, Roads in the Sky, 91.
[35] James, Pages, 185.
[36] Clemmer, Roads in the Sky, 108.
[37] Geertz, Invention of Prophecy, 133.
[38] Clemmer, Roads in the Sky, 132.

The Hopi have a tradition of protecting their culture from outside domination that stretches back at least as far as the seventeenth century. The first known reference to the Hopi people in Western European documentation is by the Spanish, from 1539.[39] As the Spanish extended their influence over what became known as the Southwest of the middle of North American, the Spanish spread their influence and control over the various Pueblo peoples, including the Hopi.[40] In 1680, the Hopi participated in the Tewa lead Pueblo Revolt. This indigenous rebellion successfully expelled Spanish rule from the region. Spanish influence slowly crept back in and the Hopi reacted in 1692 by destroying one of their own villages. The village of Awatavi had allowed Spanish missionaries to return. In response the Hopi destroyed the village and scattered the population among other villages.[41] Hopi isolation effectively ended about 1850. From that time to the present, there are records of settler contact with the Hopi no less frequently than once per year.[42]

Hopi opposition to the policy of forced schooling in the late nineteenth and early twentieth centuries was widespread. The U.S. Government arrested many Hopi and had to rely upon military personnel several times while trying to enforce the schooling decrees and forced allotment. Open warfare between the Hopi public and U.S. troops was barely averted.[43] In 1899 the most militant resisters of U.S. policies formed their own new village and maintained a ninety percent boycott rate in opposition to the compulsory

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39 Federick Dockstader, The Kachina and the White Man: Influences of White Culture on the Hopi Kachina Cult, (Albuquerque: University of New Mexico Press, 1985), 162.
40 Ibid., 162-3.
41 Scott Rushforth and Steadman Upham, A Hopi Social History, (Austin: University of Texas Press, 1992), p.16.
42 Dockstader, The Kachina, 172.
43 Clemmer, Roads in the Sky, 108-9.

schooling.[44] The U.S. government Indian Agent at the turn of the century has been described as "violent" and "temperamental." His repressive orders extended to using force against Hopi males to make them comply with his edict prohibiting long hair.[45]

In the face of active religious and cultural repression backed by U.S. military force, the first serious tension between "progressive" and "hostile" Hopi developed, with differing factions vying for control of village leadership posts in 1908.[46] While the "progressive" side of this debate may more accurately be described as "pragmatic," with its leaders biding their time or taking their resistance to forced assimilation in different forms,[47] these divisions reached a head with the split of the village of Oraibi and the advent of the political use of prophecy by those competing for leadership.[48]

In the first decades of the twentieth century, Hopi political factions adapted religious prophecy to serve their ends, often providing innovative interpretations to existing prophecies. The "hostiles" developed the innovative religious concept of two types of whites, "good" and "bad," as differing political groups argued over whether or not the Pahaana had arrived or if the true Pahaana had yet to arrive. These political division led to the splitting of Oriabi, outside the traditional method of village division, and the founding of the "hostile" village of Bacai in 1909. Leaders on both sides of the split separately came to agree that the village split had been prophesied in 1906.[49]

Hopis were able to circumvent the attempts by BIA Superintendent Daniels to cut them off from the outside world and, with the aid of translators and sympathetic settlers,

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[44] Clemmer, Roads in the Sky, 109.
[45] Geertz, Invention of Prophecy, 128.
[46] Clemmer, Roads in the Sky, 109.
[47] Clemmer, "Strike my Head," 54.
[48] Geertz, Invention of Prophecy, 128-9.
[49] Ibid., 128-30.

worked to publicize the extent of BIA repression and the deliberate misrepresentations of Hopi culture to the outside world.[50] The Indian Welfare League, a nongovernmental organization based in the settler community, took up the Hopi cause in the 1920s.[51] This marked the first major use of outsiders as allies by Hopis to protect indigenous cultural practices and their religious freedom.[52] The struggle to protect Hopi religious expression culminated in the 1924 Citizenship Act which granted U.S. citizenship to all Indians in the United States. The hope was that citizenship might extend the religious freedom sections of the Bill of Rights to Indian religious expression, though some Hopi opposed the measure for fear it would lead to their cultural destruction in other less direct ways.[53] By 1927 the Navajo presence had come to surround the entire Hopi reservation.[54]

Hopi Government and the Politicization of Hopi Religion

Complex Hopi traditional governmental forms still existed in Hopi lands in the 1930s. At the time the Hopi had no central government. Each village had a government based upon the Hopi clan structure.[55] Individually, clan identity was prominent in Hopi life. The clans were the holders of particular ceremonial homes, offices of ritual authority, and land. While there were clan leaders, any particular village had several clans with differing ceremonial responsibilities and each clan had its own leaders.[56]

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50 James, Pages, 189.
51 Geertz, Invention of Prophecy, 133.
52 Clemmer, Roads in the Sky, 132.
53 James, Pages, 190-91.
54 Geertz, Invention of Prophecy, 133.
55 James, Pages, 203.
56 Justin B. Richland, "The State of Hopi Exception: When Inheritance is What You Have," Law and Literature, Vol.20 No.2, (2008): 266.

Village leaders, known to the Hopi as Kikmongwi, were the leaders of the clan that founded the village. Kikmongwi were limited in their authority to maintaining the integrity of ceremonies controlled by their clan. Kikmongwi were further limited in the amount of authority they had to deal with family issues outside their own clan or with interclan rivalries.[57]

In 1934, U.S. policy suddenly shifted with the passage of the Indian Reorganization Act, and new Bureau of Indian Affairs Superintendent John Collier tasked anthropologist Oliver Lafarge with implementing a new constitution for the Hopi people. Working for Collier and the Bureau of Indian Affairs, Lafarge wrote the Constitution and Bylaws of the Hopi Tribe.[58] Lafarge, in his thinking, attempted to provide a constitution based upon how power actually worked in Hopi land. There were many difficulties with Lafarge's constitution. [59]

Lafarge's constitution was fraught with difficulties, contributed to growing Hopi political divisions, and ignored the political traditions of the Hopi people, causing political difficulties that continue to the present day. The constitution Lafarge wrote provided for each village to have a great deal of autonomy and called upon the villages to create their own constitutions, but failed to take into consideration the much different form of direct democracy Hopi political decision making took. While Lafarge felt this provision of his constitution for the Hopi reflected the actual political organization of the Hopi life. Unfortunately that portion of the new constitution was vague and did not address how to represent villages that failed to ratify local constitutions. Conflict over

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[57] Richland, "The State of Hopi Exception," 267.
[58] Geertz, Invention of Prophecy, 134.
[59] Clemmer, Roads in the Sky, 151-2.

interpretation of this provision lasts to this day. In addition, those villages without Kikmongwi were to have elections, which was a foreign concept to the Hopi. Traditionally the Hopi engaged in a more participatory form of democratic decision making where matters were discussed and talked out until a general mood dominated and general opinion had been moved overwhelmingly in one direction. Continued opposition would then be expressed by abstention.[60]

Most alien to Hopi organization was the creation of a national Hopi tribal council made up of representatives selected by each village where the representatives had to be certified by the Kikmongwi of the villages. Until that time the Hopi had no overarching national Hopi government and the village had been the largest political unit for the Hopi. The organization for the new national Hopi government relied upon grafting new political and secular powers onto the Kikmongwi who had hitherto only been responsible for the religious and ceremonial stewardship of the villages. Lafarge justified these constitutional powers for the Kikmongwi as he saw the Hopi as "a pure theocracy."[61] Conceptually a national Hopi government was further made difficult as the Hopi tradition considered it morally wrong for any to claim to represent the Hopi people.[62] Hopi sovereignty was practically nonexistent in Lafarge's constitution as every Tribal Council resolution required the approval of the Indian Agent Superintendent from the U.S. government.[63]

The IRA required a thirty percent turnout for the vote to approve the proposed constitution, but Hopi abstention prevented any broad sense of legitimacy from attaching to the new Hopi tribal government. Local BIA officials claimed that there was a fifty

[60] Clemmer, Roads in the Sky, 152.
[61] Ibid., 151-52.
[62] Richland, "Hopi Exception," 268.
[63] Clemmer, Roads in the Sky, 151.

percent participation rate based upon what are now highly disputed population statistics.[64] Hopi tradition was to abstain from that which they viewed as illegitimate and most Hopi abstained from the vote for ratification.[65] Many Hopi made attempts to fully understand the meaning of the words of the proposed constitution, but gave up such efforts and rejected it out of hand when they learned the proposal came from "Washington."[66] Lafarge informed Collier that the vote should be taken as widespread rejection of the constitution as he felt no amount of explaining to conservative Hopis could bring them to understand that boycotting the vote was not the same as voting against the constitution in the eyes of the BIA. The constitution was implemented in 1936.[67]

A significant change the constitution brought to Hopi society was to transform the religious and ceremonial positions of the Kikmongwi into positions of political rivalry. Those Kikmongwi allied with conservatives boycotted the tribal counsel and refused to certify any representatives to the national body.[68] Further tensions developed as members of the general population began to criticize Kikmongwi for stepping outside their traditional roles and interfering in secular affairs. Entire villages boycotted participation in the IRA constitution in the name of Hopi tradition.[69]

While most Hopi boycotted the IRA referendum and other votes involving the IRA government, it was later revealed to the general population that the constitution bound the Hopi Tribal Council to agreements with the U.S. Government and the Navajo regarding highly unpopular land reorganization in disputed territories under Navajo

64 Clemmer, Roads in the Sky, 154-5.
65 James, Pages, 204.
66 Ibid., 205.
67 Clemmer, Roads in the Sky, 160.
68 Ibid., 161.
69 Ibid., 164.

occupation. This revelation ended what little Hopi support for the new tribal government existed. The widespread lack of popular support contributed to the collapse of the Hopi Tribal Council in the early 1940s.[70]

New interpretations and prophecies developed in the late 1930s that were clearly political in orientation and sought to revive Hopi religious life in opposition to settler domination. These prophecies called for resisting acculturation into the dominant settler society and maintaining morality as the main means of averting catastrophe. New interpretations of existing prophecies and new prophecies that related to the emergence of new technologies first appeared at this time, prefiguring the creation of the Traditionalist movement that extensively spoke of such prophecies after its advent in the 1940s.[71]

Rise of the Traditionalist Movement

Throughout the beginning of the twentieth century, opposition to encroachment upon Hopi political and cultural sovereignty took new forms that later became important tools of resistance the Traditionalist movement made use of. In the twenties Hopis first worked with outsiders to publicize the extent of settler government repression. Different Hopi factions developed new interpretations and new prophecies to promote their political agendas. The Hopi Traditionalist movement used the tactics of innovative prophecy and outreach to the larger world community to garner support for both its internal and extra-national political struggles.

The first meeting of those leaders that would come to form the core of the Traditionalist movement was in 1946. Those in attendance gathered to compile clan

[70] Geertz, Invention of Prophecy, 134.
[71] Ibid., 137.

stories. The group continued its activities past that first meeting. They began a determined effort to counter assimilation and stop the destruction of Hopi culture. Initiations into religious societies increased in the following years.[72]

In 1949 the Traditionalists made their first public statement in the form of an open letter to President Truman. The letter brought Hopi prophecy and religion to the greater U.S. public. The letter openly denounced the Hopi IRA government, rejected the authority of the recently formed Indian Claims Commission (set up by the U.S. government to address outstanding land claims of the various Indian peoples), and laid claim to all of North America as Hopi land. The Traditionalists signed the letter as the Hopi Indian Empire.[73]

The Hopi Traditionalists movement was never a formal organization but more of a loose affiliation of Hopis with different backgrounds working together for similar goals. The movement had a diverse leadership that included Christian Hopis, the college educated, as well as low ranking village members who only spoke Hopi. The movement never had any formal organization, budget, or consistent and systematic campaign. People dropped in and out of the Traditionalist movement. In addition to providing new prophecies, new interpretations of prophecies, and bringing their message to a wider world audience, the Traditionalists broke with tradition in claiming that any may prophesy or interpret prophecy. [74]

Ideologically the Traditionalists stood for six broad principles. First, the United States Government has no legal right of authority over Hopis because the Hopi never

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[72] Geertz, Invention of Prophecy, 141-42.
[73] Clemmer, Roads in the Sky, 186.
[74] Clemmer, "Strike My Head," 62.

signed any treaty with the U.S. recognizing its existence. Second, the U.S. Government and missionaries have no right to pressure the Hopi people to assimilate or acculturate to the settler society. Third, the Hopi Tribal Government has no authority beyond that granted by traditional leaders. Fourth, only traditional leaders, including the Kikmongwi, are to be recognized as legitimate Hopi leaders. Fifth, public works, mineral leasing, or other potentially beneficial projects can only be sanctioned in accordance with Prophecy and the prophecy predicting the end of Hopi life if material benefits are accepted by those who have previously rejected them. Finally, the search for Pahaana is imperative.[75]

In the Traditionalist version of the Pahaana prophecy, the time was right for Pahaana to return as recent technological developments were interpreted as fulfilling prophecies heralding the return of Pahaana. The Traditionalists argued that jet airplane travel fulfilled prophecy of roads in the sky and telephone lines were communicating through spider webs that crisscrossed the land. This search for Pahaana was used by the Traditionalists to secure foreign allies in the settler population and larger world community.[76]

In 1951 the IRA government of Hopi land was finally revived. The Bureau of Indian Affairs pushed for the revival of the Hopi Tribal Council to facilitate three of its ends. First, to accept the latest Navajo-Hopi rehabilitation act (an act of the U.S. Congress to provide development aid), second, to hire an attorney to file a claim before the Indian Claims Commission (an action rejected by the Traditionalists), and finally, to

[75] Clemmer, Roads in the Sky, 190.
[76] Ibid..

approve mineral leases on Hopi land.[77] Not surprisingly, the Hopi Tribal Council's legitimacy was still contested by many Hopi in 1951.[78]

Throughout the fifties, the Traditionalist movement became more apocalyptic in its prophecies. The Traditionalists also began a shift of characterizing Maasaw as a more general god like figure, often conflating it with the Great Spirit, and stating Maasaw was a god for more than just the Hopi.[79] In 1955 the Traditionalists opposed a new permitting system for livestock the BIA sought to impose. Traditionalists lead the call to boycott and not comply with the process. The adherence to this boycott forced the BIA to accept the continuation of Hopi traditional practices in the raising of livestock, without the permitting process. In 1958, the Traditionalists made their first public request to address the U.N. General Assembly regarding their apocalyptic prophecies. [80]

The Traditionalists were increasingly better at finding support for their causes outside Hopi land. Hopi tradition has a general dislike of charismatic leaders, condemning such people as un-Hopi.[81] Similarly, there is a strong Hopi tradition of not favoring those who claimed to speak for the Hopi people.[82] Traditionalist spokesmen became more charismatic and took on styles of leadership more in accord with the expectations for leadership found in the wider world audience. As Traditionalist spokesmen played to the non-Hopi audience and acted as the charismatic leaders claiming to speak for the Hopi, this ran contrary to traditional Hopi disdain for those

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77 Richard O. Clemmer, "The Hopi Traditionalist Movement," American Indian Culture and Research Journal, vol.18:3 (1994): 144.
78 James, Pages, 205.
79 Ibid.
80 Clemmer, "The Hopi Traditionalist," 145.
81 Clemmer, Roads in the Sky, 186.
82 Richland, "Hopi Exception," 268.

claiming to speak for the Hopi people. This new world popularity undermined local Hopi support for the traditionalist movement.[83]

The sixties were a time when the Traditionalists increasingly came into conflict with both the Hopi Tribal Council and the U.S. government. During the rise of Pan-Indianism and renewed Indian militancy of the 1960s, the Traditionalists had one of its major successes by achieving conscientious objector status for all Hopi initiated into the Kachina societies.[84] 1963 saw the publication of Frank Water's The Book of Hopi, widely decried as a horribly inaccurate account of Hopi tradition. The publication of this book attracted great numbers of Hippies to Hopi land. The Traditionalist movement welcomed them, but the Tribal Council passed a resolution in 1967 calling for the expulsion of Hippies. While the resolution was never acted upon, Traditionalists denounced it as illegitimate.[85]

Throughout the 1970s the Traditionalists continued to garner support in the world outside Hopi land while continuing to lose support amongst the Hopi.[86] During this time the Traditionalists opposed mineral leasing and took the unpopular stand against bringing public utilities to the Hopi.[87] Traditionalist opposition to utilities was based upon their opposition to economic dependency on the outside world. This opposition ended with the advent of local operated solar power.[88]

In the wake of the Nixon administration's change in Indian policy to one of renewed sovereignty and government to government relations, the Hopi Tribal Council

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83 Clemmer, Roads in the Sky, 186.
84 Geertz, Invention of Prophecy, 150.
85 Ibid., 149-50.
86 Ibid. 151.
87 Clemmer, "The Hopi Traditionalist," 146-47.
88 Clemmer, Roads in the Sky, 272.

took concrete steps to protect the sovereignty and cultural integrity of the Hopi people. In 1972 the Tribal Council established Hopi run courts, displacing those run by the BIA. New Hopi laws required that Hopi tradition be given the weight of precedent before Hopi courts, beginning a distinctly Hopi legal system.[89]

Generally the Hopi people have historically demanded the return of most of Northern Arizona. This claim continued to be pressed, even though the Indian Claims Commission lacked the power to return land.[90] In 1976, when the Claims Commission returned a settlement of five million dollars to compensate the Hopi Nation for the illegal seizure of Northern Arizona, the Traditionalists led a movement to boycott the referendum to accept the settlement. Ninety percent of the Hopi people boycotted the vote. For its part the Tribal Council concurred and voted to not accept the award.[91]

While the 1980s brought in a significant decline in the Hopi Traditionalist movement with the deaths of many of its aging leaders, the vitality of Hopi traditional religion continued to increase. While the movement died out by the middle of the 1990s, there are now more practitioners of the Hopi religion than in 1983.[92] Initiations to Kachina societies have increased since the Second World War and the Hopi have increased the number of Kachina ceremonies performed.[93] This increase in participation is more of a statement of the importance of the indigenous Hopi religion and the Kachinas in Hopi social life than any agreed upon historical place of the Traditionalist movement.

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89 Justin B. Richland, "Pragmatic Paradoxes and Ironies of Indigeneity at the 'Edge' of Hopi Sovereignty," American Ethnologist, Vol.34, No.3, (Jan, 2008): 543-44.
90 Geertz, Invention of Prophecy, 143.
91 Clemmer, Roads in the Sky, 238.
92 Tr. 510, 594.
93 Dockstader, The Kachina, 147-8.

The Kachinas provided the Hopi people and Hopi individuals a buffer against outside forces they cannot control, whether they be forces within Hopi lands or those imposing from outside. As the interpretation of prophecy changed over generations, the Hopi adapted the Kachina ceremonies and dances to their changing circumstances.[94] Many Christian Hopi returned to the Kachina ceremonies partaking in them as social and cultural occasions.[95] The Kachinas are of prehistoric origin and are a central part of continuing Hopi cultural survival.[96]

Hopi political struggles through the twentieth century, especially those involving the place of the Traditionalist movement, have often involved political and religious debates over what is or is not important in Hopi tradition. Partisans on either side of the debate over the Traditionalists have claimed tradition and Hopi sovereignty as their own interests. Though these partisans have often bitterly disagreed on the form and methods of preserving the Hopi way of life, the major Hopi factions have all espoused protection of Hopi culture. Despite these differences, the Hopi have historically been united in near unanimity in the need to keep Nuvatukyaovi pure.

Those opposed to the Traditionalists have claimed they were un-Hopi arrogant braggarts that accomplished nothing.[97] These partisans point to the accomplishments and actions of the Hopi Tribal Council in later years in protecting Hopi sovereignty, cultural resources, tradition, and indigenous religion.[98] One partisan scholar has even argued that the Hopi Tribal Council was the legitimate Hopi government, despite the fact that at any

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94 Dockstader, The Kachina 158-9.
95 Ibid., 147-8.
96 Ibid., 159.
97 Geertz, Invention of Prophecy, 217, 251.
98 Geertz, Invention of Prophecy, 153-6.

time between one half and one quarter of Hopi were not represented on the council due to boycotts.[99] Many Hopi boycotting the Hopi national Tribal Council continues to this day. Two villages refused to certify representatives to the council in 2008.[100]

Partisans for the Traditionalists have argued that the Traditionalists pushed an institutionalization of dissent, a greater respect for Hopi culture, and the Tribal Council took up these issues and had been transformed into the place for debating the methods of cultural protection because of the agitation of the Traditional movement.[101] For the purposes of this study, the place of the Traditionalists in Hopi history is only tangentially important, and coming to a final judgment on the struggles between the Tribal Council and the Traditionalists is not important.

The partisans of the Tribal Council and the Traditionalists each claimed to be representing and protecting Hopi culture and sovereignty. Those supporting the Traditionalists have claimed it was that movement that pushed the Tribal Council to support Hopi sovereignty and culture. Some have claimed that the Traditionalist movement died out in part because of the partial institutionalization of many of its values. One Hopi Mennonite in the 1990s said, "We are all traditionalists out here."[102] With the return of Christian Hopis to the Kachina ceremonies this was surely true to a large extent. Despite their divisions, the Traditionalist movement and the Council agreed upon opposition to the first major Snowbowl expansion proposed in 1977.

The Arizona Snowbowl Resort and its Expansion, 1962-2005

[99] Clemmer, Roads in the Sky, 301.
[100] Richland, "Hopi Exception," 264-5.
[101] Clemmer, Roads in the Sky, 197.
[102] Clemmer, "The Hopi Traditionalist," 157.

The United States government placed the San Francisco Peaks within its national forest system in 1907 and in the 1930s skiers built the first permanent facilities for their recreational use. Indian religions were outlawed when the initial permanent intrusions were built on their sacred Peaks. The first significant Indian protests began with the 1962 expansion of the small facility known as Snowbowl. It was not until 1980 that the Hopi and Navajo launched their first major legal challenge to the continuing development of the Snowbowl ski resort.

At the end of the twentieth century, Arizona Snowbowl Resort Limited Partnership owned and operated the Snowbowl ski resort located in the Coconino National Park located on the San Francisco Peaks, Nuvatukyaovi, the resting place of the Hopi dead, home to the Kachinas, and source of moisture and life to the Hopi people. ASR sought to expand the resort and put in artificial snowmaking with reclaimed sewage effluent. Forest Ranger Gene Waldrip worked with representatives of ASR to craft Forest Service Policy goals calling for the regularizing of the ski season for the Snowbowl resort and improving the safety of the facility. The Forest Service formulated these policy goals before consultation with any representatives of Indian interests.

It cannot be stressed enough, there has never been any debate that the proposed expansion of the Snowbowl ski resort would be an adverse action against Indian cultural and religious resources. The Hopi argued that the complete desecration of their most sacred of places would likely destroy belief in the Kachinas. They argued if that were to occur the Kachina ceremonies would be destroyed and the central Hopi tradition and method of cultural transmission would be lost. The Hopi feared the loss of the entire Hopi

way of life as a result of polluting the moisture of Nuvatukyaovi with artificially created snow (the use of reclaimed sewage water, for the Hopi, merely compounds the desecration). The Forest Service recognized this proposed expansion was an adverse action, yet still approved it. This section examines in detail the historical background for that decision of the Forest Service and the actions of three of the major actors who crafted the Forest Service approval of the expansion of the Snowbowl ski resort, while knowing the extent of the harm this approval would bring the Hopi and other Indian peoples.

When Franciscan missionaries first saw the San Francisco Peaks, located just north of modern day Flagstaff, Arizona, they were so impressed that they named the Peaks for their founder, St. Francis who taught that the beauty of the landscape was a direct manifestation of a higher power.[103] The surrounding Indian peoples recognized the Peaks to be located within the territory of the Havasupai. The Havasupai served as the care takers of the Peaks for those indigenous nations that held them to be culturally and religiously significant.[104] The Peaks are religiously and culturally significant to at least thirteen Native American Tribes and Nations. The Navajo Nation, Havasupai Tribe, White Mountain Apache Nation, Yavapai-Apache Nation, Hualapai Tribe, and Hopi Tribe are among these thirteen and were later plaintiffs in the suit to stop the Forest Service approved expansion on religious freedom grounds.[105] The executive branch of the U.S. government designated the Peaks as the San Francisco Mountain Forest Reserve and in 1907 the reserve was incorporated into the Coconino National Forest.[106]

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[103] Former Interior Secretary Bruce Babbitt, as quoted in Klee Benally, The Snowbowl Effect, DVD, directed by Klee Benally, (Flagstaff: Indigenous Action Media, 2005) 27:00.

[104] Navajo Nation v. Forest Service, Case Nos. CV 05-1824-PCT-PGR, CV 05-1914-PCT-EHC, CV 05-1949-PCT-NVW, CV 05-1966-PCT, Order of January 11, 2006, p.37.

[105] Brown, Religion, Law, 61-2, Benally, Snowbowl, 2:30.

[106] Brown, Religion, Law, 66.

In the 1930s, a Flagstaff skiing club used an old cabin on a lower prairie of the Peaks as a base camp. In 1937 The U.S. Forest Service built a new base camp consisting of a small cabin higher on the mountain.[107] At the time that such recreational use of the Peaks began, the official policy of the Bureau of Indian Affairs was to suppress and prohibit indigenous religions. Expression of Indian religions was punished with criminal penalty at that time.[108]

Over these years of changing Indian policies of the federal government and growing Indian resistance to attempts to destroy Indian cultural identity, the skiing facility in the San Francisco Peaks remained little changed. Until 1958, the only device present to aid skiers was a mechanical tow rope. In 1958 a Poma lift was installed and in 1962 a single chair lift was installed at the small skiing facility.[109] In the context of growing Indian resistance to the policies of termination and the increase in militant resistance to cultural destruction, both the Navajo and Hopi peoples protested the expansion of facilities in 1962.[110]

In April of 1977, the Forest Service granted a permit to run the Snowbowl facility to Northland Recreation Company. In July of that year, the company submitted a "master plan" for expanding the skiing facilities on the San Francisco Peaks. On February 29, 1979 the Forest Supervisor of the Coconino National Forest issued a decision that approved a plan to clear 770 acres on the San Francisco Peaks for skiing, less of an area for skiing than NRC had initially requested.[111]

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[107] Brown, Religion, Law, 62-3, Wilson v. Block, 708 F.2d 735 (D.C. 1983), 738.
[108] Brown, Religion, Law, 66.
[109] Ibid., 63.
[110] Ibid., 66.
[111] Wilson, 708 F.3d 738-39.

The late 1970s and early '80s saw one of the most significant collaborations of the Tribal Council and the Traditionalists. Both vehemently opposed the first major proposed expansion of the Snowbowl ski area on the San Francisco Peaks. So widespread was the opposition to the expansion among Indian peoples of the region, that not only were the Traditionalists and the Hopi government unified in their opposition, the Navajo, who continued to be in a longstanding border dispute with the Hopi, joined the Hopi in their opposition.[112] In April of 1977 the U.S. Forest Service issued a permit to Northland Recreation, Inc., to expand the ski resort area on the San Francisco Peaks. The Snowbowl facility, as the ski resort area had come to be known, would undergo a substantial alteration on the Western shoulder of the Peaks. The facility would be expanded to 777 acres, an increase of 223 percent in the area opened to skiing. The Forest Service plan allowed for five chair lifts, dining facilities for more than nine hundred, eight acres of parking, and expanding the small dirt road to the facility into a paved road.[113]

The Hopi Traditionalists led the charge and with the Navajo and together they took their complaints regarding the proposed expansion to the regional forester in charge of Coconino National Forest.[114] Upon review the regional forester determined that Snowbowl could never be made into an outstanding sports area and reversed the Forest Service decision, maintaining the status quo. In turn, Northland appealed that decision to the chief forester of the U.S. Forest Service. Chief Forester R. Max Peterson reinstated the Snowbowl development plan on December 31, 1980.[115]

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[112] Clemmer, Roads in the Sky, 195.
[113] Brown, Religion, Law, 63.
[114] Clemmer, Roads in the Sky, 194.
[115] Brown, Religion, Law, 67.

On March 2, 1981 the Hopi Indian Tribe and Navajo Medicinemen's Association filed suit in Federal Court to stop the seven hundred and seventy seven acre expansion.[116] The case was one of the first tests of the American Indian Religious Freedom Act, signed into law in 1978. The Hopis argued in the course of the suit and appeals that the expansion would fundamentally change the character of the Peaks. This change would place a fundamental burden on their religion, as the changed character of the mountain would reduce their religious beliefs to nothing more than quaint fairytales. The Hopi argued that either the religious significance of the Peaks would be lost or they would be forced to change their fundamental beliefs in the wake of the changes wrought by the Forest Service.[117] The Court of Appeals for the District of Columbia ultimately ruled that religion was only burdened in a constitutionally impermissible way by government action that either directly or indirectly prevented or penalized religious practices. Characterizing the adverse impact as merely "spiritual disquiet" the Court ruled that while there may indeed be mental and emotional anguish caused by the proposed expansion, there was nevertheless no Constitutional rights infringed upon and the American Indian Religious Freedom Act provided no basis for relief.[118]

Despite their divisions, the Traditionalist movement and the Council agreed upon opposition to the first major Snowbowl expansion proposed in 1977. In the face of the proposed Snowbowl expansion of the new millennium, the Hopi were nearly unanimous in their opposition to the new proposal. As shall be examined in detail below, the expansion of the Snowbowl facility proposed by Arizona Snowbowl Resort was an even

[116] Brown, Religion, Law, 64.
[117] Ibid., 81.
[118] Ibid., 87-88.

greater affront to the Kachinas and a much worse desecration of the most sacred of Hopi religious sites. The Hopi may have disagreed on the exact methods their opposition should have taken, and some likely found those who claim to speak for all the Hopi in federal court to be acting in un-Hopi ways. Ultimately, there was likely only an infinitesimal minority of Hopi, fatalists who viewed the expansion of Snowbowl as the final step in the destruction of Hopi culture, fulfilling the prophecy that would herald the return of Pahaana. Only this minority did not oppose the proposed Snowbowl expansion. In the face of near unanimous Hopi opposition to the proposed expansion of the Snowbowl facilities, this tiny minority did not vocalize their opinions.[119]

Local Indian groups found the proposed expansion offensive. Practitioners of traditional Navajo religion saw the ski resort as a cancer growing on their living God, the Peaks. Hopi practitioners viewed the expansion as an insulting trivialization and commercialization of the sacred home of the Kachinas, spirits of central cultural importance. The Hopi viewed the Peaks as their single most important religious shrine.[120] The Hopi and Navajo took their complaints regarding the proposed expansion to the regional forester in charge of Coconino National Forest. The Traditionalist Hopi and their opponents in the Hopi Tribal Council were united in their opposition to the project.[121] Upon review the regional forester determined that Snowbowl could never be made into an outstanding sports area and reversed the Forest Service decision,

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[119] Justin Richland, e-mail message to the author, June 22, 2009.
[120] Brown, Religion, Law. 63.
[121] Richard O. Clemmer, Roads in the Sky, the Hopi Indians in a Century of Change, (Boulder: Westview Press, 1995), 195.

maintaining the status quo.[122] The Environmental Impact Statement for the projected stated:

> The Snowbowl, while it has been there for many years and is one of the very few ski areas in Arizona, it is not an outstanding winter sports area when measured against national standards, nor can it ever be made into one. At the same time, there is an increasing demand in Arizona for downhill skiing. It is obvious, however, that no amount of development would make the Snowbowl into a topnotch area; nor will the expansion approved by the Forest Supervisor or even the permittee's larger proposal provide for all the demand. Where then is a good place to cut off development? I have concluded that a good cut-off place is somewhere near the present size.[123]

In turn, Northland appealed that decision to the chief forester of the U.S. Forest Service. Chief Forester R. Max Peterson reinstated the Snowbowl development plan on December 31, 1980.[124] On March 2, 1981 the Hopi Indian Tribe and Navajo Medicinemen's Association filed suit in federal court to stop the seven hundred seventy seven acre expansion.[125] Characterizing the adverse impact as merely "spiritual disquiet" the court ruled that while there may indeed be mental and emotional anguish caused by the proposed expansion, there was nevertheless no Constitutional rights infringed upon.[126] The coalition of Navajo and Hopi appealed to the decision on the grounds that the proposed expansion violated the American Indian Religious Freedom Act. The Federal Court of Appeals for the District of Columbia, the highest court to take the case, ruled that the AIRFA merely required consultation and consideration. Federal agencies, the court decided, need not defer to Indian religious interests, and if the decision does not

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[122] Brown, Religion, Law, 67.
[123] Navajo Nation v. Forest Service, Case Nos. CV 05-1824-PCT-PGR, CV 05-1914-PCT-EHC, CV 05-1949-PCT-NVW, CV 05-1966-PCT, trial transcript p. 1096, hereinafter abbreviated Tr.
[124] Brown, Religion, Law, 67.
[125] Ibid., 64.
[126] Ibid., 87-88.

restrict Indian access to a place, Indian religious practices were not burdened in a way protected by the AIRFA.[127] The expansion went forward, though NRC did not expand to the full seven hundred and seventy seven acres approved in the proposal.[128]

The Arizona Snowbowl Resort Limited Partnership purchased the Snowbowl facility in 1992 for four million dollars.[129] Historically the Snowbowl resort was dependent upon natural snowfall and throughout the 1990s and early new millennium the facility found its operable days per season varying wildly from year to year. In the 2001-02 ski season the facility was open only four days; 1995-96, 25 days; while 1992-3, 130 days; 1997-98, 115 days, and 2004-05, 139 days.[130]

In the course of its operation, Forest Service personnel were in daily contact with representatives of the Snowbowl facility.[131] Conversations between Forest Service personnel and Arizona Snowbowl Resort regarding an expansion were underway when lifelong Forest Service employee Gene Waldrip became the District Ranger for the Peaks Ranger District in 1999.[132] Waldrip entered the ongoing discussions regarding what could be done to improve the carrying capacity of the resort when he became District Ranger.[133]

Ranger Waldrip, who personally used the Snowbowl facilities with his family, felt the area lacked the necessary facilities and infrastructure to support the number of skiers that visited the facilities.[134] The infrastructure was twenty years old and had not kept up

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127 Wilson, 708 F.2d 735, 747.
128 Tr. 1024.
129 Navajo Nation v. United States Forest Service, 479 F.3d 1024 (9th Cir. 2007), 1030.
130 Navajo Nation, 479 F.3d 1030.
131 Tr. 1698.
132 Tr. 1022.
133 Tr. 1024.
134 Tr. 1024.

with the increase in demand for the use of the facility.[135] Members of his immediate family had been involved in skiing accidents at the facility, including his wife.[136] Another concern Waldrip had was the lack of snow play areas in the region. Whenever it snowed, the public would use areas along the Snowbowl facility as their own improvised snow play areas to meet this demand.[137]

Normally, when conducting large scale expansion, the Forest Service, like any other governmental agency, was required to create an Environmental Impact Statement, but Ranger Waldrip and ASR contemplated pushing their envisioned expansion through a series of small improvements without public input and an abbreviated consultation with Indian interests. In places where Native American cultural and religious sites were involved the AIRFA, NAGPRA, and other laws and regulations required consultation with Indian peoples that might be adversely impacted by Forest Service action. After consulting with Arizona Snowbowl Resort, District Ranger Waldrip felt that much of what was being proposed by ASR could be accomplished by a series of small piecemeal projects. Waldrip's scheme was to issue a series of categorical exemptions for each stage of the contemplated expansion. Categorical exemptions had a simplified environmental assessment process as well as much more limited requirements for consultation with Indian interests. Most appealing to Waldrip and ASR was the fact that a categorical exemption was not a decision that could be appealed. Ultimately, Waldrip and ASR abandoned this path for expanding Snowbowl as Waldrip felt the political climate required public participation in the EIS process.[138]

[135] Tr. 1041.
[136] Tr. 1126-27.
[137] Tr. 1056-57.
[138] Tr. 1024-45.

Snowbowl publicly claimed that warmer weather and shorter skiing seasons would require the closing of the facility as financially unviable without snowmaking.[139] Snowbowl made a formal request in 2002 to begin artificial snowmaking at the facility using what is categorized as A+ reclaimed water from the City of Flagstaff.[140] Class A+ water was the highest rated purity for treated sewage effluent, consisting of waste discharged by households, businesses, and hospitals.[141] The proposed expansion of Snowbowl included approximately 205 acres of snowmaking coverage with reclaimed sewage water, a 10 million-gallon reservoir for the reclaimed sewage water near the top terminal of the existing chairlift, construction of a pipeline for the reclaimed sewage between Flagstaff and Snowbowl, with booster stations and pump houses, construction of a 3-4,000 square foot snowmaking control building, construction of a new 10,000 square foot guest services facility, an increase in skiable acreage to 205 acres (an approximately 47% increase), 47 acres of thinning the trees, and 87 acres of grading/stumping and smoothing.[142] The initial proposal included the building of night lighting on the Peaks.[143] As part of the negotiations for formulating the expansion ASR agreed to have a snow play area as a quid pro quo for the Forest Service support for artificial snowmaking.[144]

District Ranger Waldrip met with Snowbowl representatives in formulating the proposal. Waldrip met with Former Secretary of the Interior Bruce Babbitt in 2002. At the time Babbitt worked as an attorney for the Arizona Snowbowl Resort Limited

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[139] Benally, Snowbowl, 32:00.
[140] Navajo Nation v. Forest Service, Case Nos. CV 05-1824-PCT-PGR, CV 05-1914-PCT-EHC, CV 05-1949-PCT-NVW, CV 05-1966-PCT, Order, p. 3.
[141] Navajo Nation 535 F.3d 1082.
[142] Navajo Nation v. Forest Service, Case Nos. CV 05-1824-PCT-PGR, CV 05-1914-PCT-EHC, CV 05-1949-PCT-NVW, CV 05-1966-PCT, Order, pp. 3-4.
[143] Tr. 1043.
[144] Navajo Nation, 479 F.3d 1045.

Partnership and would later send Waldrip's superior a memorandum arguing that the courts would uphold any decision to approve the proposed expansion if faced with legal challenges from Indian peoples on religious freedom grounds.[145] Waldrip saw the goals of the proposal as two fold. First the proposed action was to provide a consistent skiing season so that Arizona Snowbowl Resort could remain economically viable. Second, by bringing the terrain in line with demand, safety would be improved.[146] Before any public comment process had even begun and before any other alternatives had been created or considered, Waldrip was in favor of the proposed expansion of the Snowbowl facility.[147]

Ranger Waldrip and those supporting the proposed expansion were aware of the history of opposition to the Snowbowl resort by Indian peoples and hoped to avoid problems similar to the previous Snowbowl expansion by including the Indian Nations in the process.[148] Waldrip was also aware that the National Historic Preservation Act, NAGPRA, and other statutes and regulations required this consultation.[149] The Forest Service opened up government to government discussions with thirteen Indian Nations, including the Hopi and Navajo, by sending notice by letter in June of 2002, three months prior to the beginning of general public notice.[150]

Ranger Waldrip personally met with the Hopi on Hopi land and saw his mission as an opportunity to convey information and personally talk with Hopi people.[151] Waldrip admitted to first learning of the importance of the Peaks and the Kachinas to the Hopi in

[145] Tr. 1070, 1701.
[146] Tr. 1041-42.
[147] Tr. 1171.
[148] Tr. 1092.
[149] Tr. 1023.
[150] Tr. 1042-43.
[151] Tr. 1051.

the consultation process. As he had already decided to support the expansion, Waldrip did not change his opinion regarding the project upon learning of the nature of Hopi concerns. Internal Forest Service memorandum indicated Waldrip's perspective drove the immediate goals of the consultation process with the Hopi and other Indians. The primary concerns were not learning of Indian concerns but fulfilling the letter of the law and blunting the anticipated Indian opposition to a decision that had already been made in the formulation of policy goals.[152]

The Tribal Consultation Plan for the Arizona Snowbowl Upgrade, dated June 5, 2002, lists among the key messages Forest Service representatives were to articulate:

> We think it's [the proposed expansion is] a good idea, and we already know you don't approve of it, but Snowbowl is there & isn't going away.
> * * *
> Is NOT an expansion- is an "upgrade" within the scope of the 1980 court decision.
> * * *
> Upgrade cannot be done without snowmaking.[153]

This internal memorandum also enumerated the Forest Service's objectives for the consultation. Among those reasons included in the June 5, 2002 memorandum:

> Provide basic information about the proposal- what it is, what it is not.
> * * *
> Are there any additional tribal concerns we don't already know about.
> * * *
> Keep the process moving along expeditiously.[154]

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[152] Tr. 1108-09.

[153] Emphasis added, Document 74-5, filed 8/21/2005, Navajo Nation Document Attachment to Motion for Summary Judgment, Navajo Nation v. Forest Service, Case Nos. CV 05-1824-PCT-PGR, CV 05-1914-PCT-EHC, CV 05-1949-PCT-NVW, CV 05-1966-PCT, p. 21.

[154] Ibid.

Despite these plans to inform Indians of the need for the project and keep things moving, Waldrip noted that this particular proposal of the Forest Service generated more Indian opposition than others.[155]

While the ultimate decision for approving the proposal did not reside with District Ranger Waldrip, he had already made up his mind to support the proposed expansion and was involved in the consultation process from the beginning. As shall be seen below, not every member of the Forest Service unreservedly supported the Snowbowl expansion with its inclusion of snowmaking with reclaimed sewage effluent. After consultation with indigenous religious practitioners and receiving comments from the public, District Ranger for the Peaks Ranger District, Gene Waldrip, recognized that the proposed expansion was an adverse action on a traditional cultural property, but reiterated that the Forest Service may take adverse actions, so long as the proper consultation process had been followed.[156] The evidence here strongly suggests that Waldrip and elements of the Forest Service were only interested in following the required consultation process so that they could take the adverse action they had already decided upon, in consultation with Arizona Snowbowl Resort.

Heather Cooper Provencio, the Forest Service Zone Archaeologist for the San Francisco Peaks and Mormon Lake, had a very different opinion of the proposed action, and made an attempt to explain the religious and cultural importance of the Peaks to Forest Supervisor Nora Rasure. Provencio started her position as Zone Archaeologist in January of 2002, years after Waldrip had been in conversation with Arizona Snowbowl

[155] Tr. 1172.
[156] Benally, Snowbowl, 44:50.

Resort. Provencio was the lead person in the Forest Service regarding matters of Tribal consultation.[157]

Prior to becoming Zone Archaeologist, Provencio served as the District Archaeologist for the Black Mesa Ranger District on the Apache-Sitgreaves National Forrest for seven years.[158] With a master's degree in anthropology from Northern Arizona University, Provencio was the lead member of the interdisciplinary team in charge of cultural consultation with Indian governments and tribal members.[159] In her personal life Provencio had visited Hopi land and viewed Kachina dances.[160]

In her position as Zone Archaeologist, Provencio edited a memorandum of understanding that formed a formal agreement between the Forest Service and the Hopi government regarding cultural consultation. The document included a confidentiality agreement regarding Hopi cultural sites. Respecting Hopi religious sensitivities regarding issues of privacy, the Forest Service had agreed to keep confidential locations of Hopi sacred sites and only released the information on a need to know basis. It was among her responsibilities to see that confidential information was kept out of any Environmental Impact Statement regarding Hopi cultural sites.[161] Provencio served as the lead editor on the cultural section of the EIS for the proposed expansion for the Snowbowl resort.[162]

Much like Ranger Waldrip, Provencio was aware of the lawsuit that followed the 1980 Forest Service approval of the first major Snowbowl expansion. She was careful to

[157] Tr. 1181-82.
[158] Tr. 1183.
[159] Tr. 1183, 1190.
[160] Tr. 1185.
[161] Tr. 1188-1189.
[162] Tr. 1191.

document each step in the consultation process with Indian governments because of Forest Service concerns that a similar lawsuit would challenge the decision regarding the proposed expansion of the Snowbowl facilities.[163] When the Forest Service initially informed Indian governments regarding the proposed expansion, Provencio offered to hold meetings with them. These meetings began in September of 2002 and included the Hopi Cultural Resource Advisory Task Force.[164] Provencio personally met with the Hopi people and government officials at public meetings in Hopi land once a month, during the consultation process.[165]

Provencio anticipated Indian opposition to the project.[166] This anticipation was based upon her personal prior knowledge of the proposal's impact on Indian cultural resources combined with her knowledge of the thirty years of history the Forest Service has had consulting with Indians in the area through both submissions of written comments and public meetings.[167] Provencio consulted with the Indian governments before the general public because she wanted them to know they were important to the process and she hoped they would become involved in creating alternatives that might mitigate the adverse impact of the proposed expansion on Indian cultural resources.[168] Throughout the consultation process Provencio found virtual unanimous Indian opposition to the Snowbowl facility.[169]

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[163] Tr. 1192.
[164] Tr. 1194.
[165] Tr. 1196.
[166] Tr. 1269.
[167] Tr. 1199.
[168] Tr. 1237.
[169] Tr. 1268.

In May of 2003 Nora Rasure became the Supervisor for the Coconino National Forest.[170] Forest Supervisor Rasure was the one ultimately responsible for making the decision to approve the expansion of the Snowbowl facility and the use of reclaimed sewage effluent in artificial snowmaking. Rasure received her Bachelor of Science degree in forestry from the University of Illinois, Champagne-Urbana, in 1980.[171] Employed by the Forest Service for more than a quarter of a century, Rasure began as a youth conservation core crew leader in 1980. Over the decades she served as Forester, fire prevention and fuels management officer, staff officer for recreational land minerals programs, district ranger, and finally as Deputy Forest Supervisor in the Coronado National Forest before being promoted to Forest Supervisor in charge of the Coconino National Forest.[172] Though she was not Forest Supervisor before Waldrip had decided to support the project, and had no input in formulating the goals memorandum regarding the necessity of the proposed Snowbowl project, Rasure personally participated in meeting with Hopi people as part of the consultation process, after she became supervisor in May of 2003.[173]

After the initial consultation process, the Forest Service released the draft environmental impact statement in February of 2004, making it available for public comment.[174] The consultation process and other public meetings had brought a few alterations to the proposals of the Forest Service. The DEIS included three alternative

[170] Tr. 1641.
[171] Tr. 1136.
[172] Tr. 1636-40.
[173] Tr. 1164.
[174] Tr. 1198.

proposals, with the Forest Service stating that the second alternative was the preferred alternative.

The Draft Environmental Impact Statement formulated by the Forest Service included three alternative proposals. The first proposal was to do nothing. Including such an alternative was a legal requirement so that the other proposed alternatives could be compared to taking no action. Alternative two, the Forest Service preferred alternative, was the expansion detailed above, including the creation of artificial snow to be made with reclaimed sewage effluent, but with the proposed night lighting removed. The third alternative was identical to the second, but with the artificial snowmaking and snow play areas removed.

In response to the consultation process the Forest Service removed the construction of night lighting from the preferred alternative in response to the public feedback. The Yavapai-Apache had concerns regarding the night lighting, but it was the concerns of the settler population in Flagstaff that served as the primary motivation for Waldrip to support dropping the night lighting from the project.[175] Ranger Waldrip noted that Flagstaff was the first international dark sky city and there was much local sensitivity to the issue of darkness. Thus it was not socially acceptable to have night lighting in the view of the Ranger. The Forest Service was faced with protests by the Dark Skies Coalition and gave into these demands as the night lighting was not necessary to meet the proposal's goals.[176]

[175] Tr. 1240.
[176] Tr. 1044-45.

Alternative three was developed by the Forest Service in response to the consultation process. The Forest Service received many comments in opposition to the artificial snowmaking and the use of reclaimed sewage effluent. This alternative removed both the snowmaking and the snow play area, but was otherwise identical to proposal two, the Forest Service preferred alternative.[177] The snowmaking and snow play were removed as a group because the snow play area would only be supported by Arizona Snowbowl Resort if they received the approval of snowmaking in return.[178]

The Forest Service made the Draft Environmental Impact Statement available for public comment for sixty days, an extension of thirty days over the legally required minimum, and expected heavy Indian opposition.[179] Interdisciplinary team leader Heather Provencio expected Indian comments to be in opposition to the proposed preferred alternative.[180] Provencio met with most of those involved in the ongoing comment and consultation process, including with the Hopi Cultural Preservation Officer.[181] She also met with the Hopi Cultural Advisory Team.[182] Outside of the government to government consultation process, Provencio met with Bucky Preston, a traditional Hopi religious practitioner and future plaintiff in the lawsuit in opposition to the proposed expansion. Provencio met with Preston as an interested person, outside of her official consultation with the Hopi government.[183] Preston later filed suit to stop the expansion and testified extensively at the trial.

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[177] Tr. 1239.
[178] Navajo Nation, 479 F.3d 1024, 1045.
[179] Tr. 1664.
[180] Tr. 1264.
[181] Tr. 1242.
[182] Tr. 1194.
[183] Tr. 1243.

Throughout Provencio found Indian concerns to be consistent.[184] She found the comments on the DEIS to be consistent with what she knew to be Indian opposition to the project.[185] Before the consultation process began, Provencio was well aware that the central importance of the Peaks to the Hopi and Navajo was well documented.[186] The Forest Service carried out this consultation process and comment process despite being well aware of Indian objections to the project because it was required to by law. Provencio had hoped Indian leaders would provide feedback and alternatives to minimize the cultural damages.[187]

Provencio personally assessed for the Forest Service the three proposed alternatives of the DEIS and determined that all had adverse impacts on Indian cultural resources. Not surprisingly, her assessment determined that alternative one had the least impact; the preferred option- alternative two, the greatest impact, and alternative three would be somewhere in between.[188] Many tribal members supported no action.[189] Provencio found virtual unanimity in Indian opposition to the very presence of the Snowbowl resort and tried to communicate this opposition to Ranger Waldrip and Forest Supervisor Rasure.[190] Provencio's experience in the consultation process was that many tribal members supported absolutely no action, option one of the DEIS.[191]

As the deadline approached for a final decision by Forest Supervisor Nora Rasure, Rasure called Provencio in for a meeting to discuss Provencio's perspective. Sometime

[184] Tr. 1250.
[185] Tr. 1272.
[186] Tr. 1279.
[187] Tr. 1273.
[188] Tr. 1250.
[189] Tr. 1273.
[190] Tr. 1268.
[191] Tr. 1273.

in late 2004 or early 2005 the women had a two hour meeting to discuss the potential fallout of whatever decision the Forest Service might ultimately make.[192] In the course of the two hours, Provencio discussed the state of the law with Rasure. Provencio later testified that she felt Rasure was struggling with the decision. Provencio was sensitive to the religious and cultural concerns of the various Indian peoples and informed Rasure that she preferred alternative three, the expansion without snowmaking and snow play.[193] In the course of the conversation, Provencio specifically discussed Hopi beliefs and concerns with Nora Rasure. They discussed the Hopi belief that the Peaks are the source of life, that the Hopi spirits of the dead travel to the Peaks, and that these spirits bring rain from the Peaks to Hopi lands.[194]

Though Provencio felt as if Rasure had really listened to her and she felt valued as an employee and for her perspective,[195] she was ultimately disappointed by the final decision.[196] When Provencio saw the final record of decision, as approved by Rasure, she was "concerned" and "disappointed" that the various Indian concerns had not been "adequately addressed."[197] At trial Provencio was sure to make the distinction between "considered" and "addressed." While she felt the concerns of various Indian religious practitioners had not been addressed in a way Indians would have liked and she "was disappointed with the decision," she felt, "the final decision describes that they [the

[192] Tr. 1232.
[193] Tr. 1233-34.
[194] Tr. 1248-49.
[195] Tr. 1233.
[196] Tr. 1281-2.
[197] Tr. 1281.

concerns of tribal members] were considered. I think the Record of Decision shows that, that those concerns were considered."[198]

While Provencio, in her professional capacity as head of the interdisciplinary team and Forest Service anthropologist, opposed the inclusion of snowmaking in the proposed expansion of the Snowbowl resort, sentiment among Forest Service employees was divided.[199] The final decision fell to Coconino Forest Supervisor Nora Rasure. Rasure was personally involved in the consultation process, once she came on board as Forest Supervisor in May of 2003. As part of the consultation process, Rasure met with Hopi governmental leaders. In addition to meeting with Provencio for two hours, in preparation for her final decision, Rasure personally reviewed all six to eight thousand comments on the Draft Environmental Impact Statement.[200]

Whereas Provencio had a preexisting understanding that the Hopi would view the proposed expansion as having a deeply negative impact on their most sacred of places,[201] Rasure felt she gained a sense of how others viewed the Peaks from her experience with the consultation process.[202] As part of the consultation process, Rasure felt the Hopi people shared their inner most feeling with her and that she came away with a deeper understanding of what the Peaks mean to the Hopi people.[203]

Despite this, Rasure later testified that she became focused on alternative two, the full expansion with snowmaking with reclaimed sewage water, in December of 2004. She

[198] Tr. 1283.
[199] Tr. 1672.
[200] Tr. 1664.
[201] Tr. 1199.
[202] Tr. 1670.
[203] Tr. 1669.

stated she made her ultimate decision with great difficulty.[204] In her review of comments, Rasure found all oral comments from the consultation process to be in opposition to the preferred alternative, based upon Indian cultural and religious concerns.[205] Rasure testified at trial that she tried hard to come up with a decision that could meet the needs of the ski area and skiers while being considerate of the interests of Indian peoples.[206]

> As a Forest Manager, I think I pride myself on being able to manage the natural resources and to also work with people to respect their interest, to manage for their interests, and try to come up with solutions that meet both our needs. And while I mentioned earlier that I shared many values with the Native Americans, and I appreciate that, that we both care about the natural resources, it was very difficult to pick a decision that I knew would, as some of them described, it would hurt them, because that's not my intention.[207]

Despite these professed attempts to find some method of managing the resources under her supervision that could respect the needs of both the Arizona skiing community and the religious interests of tens of thousands of people, Rasure approved alternative two because it was the only alternative that met the needs of the project and was consistent with the Forest Plan and the laws.[208]

The goals of the proposed project Rasure referred to can be found in the Record of Decision.

> The overall Purpose and Need for the proposed action responds to two broad categories: 1) to provide a consistent and reliable operating season, and; 2) to improve safety, skiing conditions, and recreational opportunities by bringing terrain and infrastructure into balance with existing demand.[209]

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[204] Tr. 1673.
[205] Tr. 1715.
[206] Tr. 1684.
[207] Tr. 1683-84.
[208] Tr. 1674-75.
[209] United States Forest Service, Arizona Snowbowl Facilities Improvements Final Environmental Impact Statement Record of Decision and Forest Plan Amendment #21, (February 2005), 4.

> * * *
> The installation and operation of snowmaking infrastructure would provide a reliable and consistent operating season, helping stabilize Snowbowl's investment, increase local employment levels, and boost winter tourism within the community.[210]

While the use of reclaimed sewage water gave Rasure pause in approving the expansion, she felt there needed to be changes to improve safety and maintain the viability of the area as a skiing resort, as described above.[211] Rasure felt the local variable snowfall on the Peaks had been a problem and the snowmaking was necessary to improve skiing in the area and maintain the economic viability of the resort. Rasure recognized that the snowmaking was a concern of the Hopi and others, but that snowmaking was common.[212]

While Rasure admitted that snowmaking with reclaimed sewage water was not a common occurrence on Forest Service land, she reasoned that she could only evaluate the snowmaking in terms of whether or not it was common or uncommon.[213] Ignoring the fact that there was near unanimity among Indian groups that the Peaks were an indivisible whole and a sacred place that would be desecrated by the production of artificial snow anywhere on the Peaks, Rasure reasoned that the Special Use Permit area was but one percent of the forest and that none of the ski area was used for ceremonial purposes.[214]

> I looked at it from the perspective of how common is snowmaking in terms of an activity that occurs. Snowmaking occurs on other mountains. Snowmaking occurs at other ski areas. It is a normal activity. And so it's -- I can only measure things like that that I can -- that I can evaluate. And so I don't -- I can't evaluate the unnatural and natural part of it, but I can tell you it occurs at other places and it felt -- it seemed that that would be a common-type activity that could occur at the ski area also.[215]

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[210] Snowbowl Record of Decision,, 5.
[211] Tr. 1675.
[212] Tr. 1676.
[213] Tr. 1722.
[214] Tr. 1679-80.
[215] Tr. 1678-79.

Rasure has stated that she prided herself on considering the interests of others, including those of Indian religious practitioners. She stated that the details of alternative two gave her pause, particularly the snowmaking and use of reclaimed sewage water. Provencio also testified that this decision appeared to be a difficult one for Rasure. Rasure stated her intent was not to hurt those who viewed the use of reclaimed sewage water and snowmaking on the Peaks as religiously offensive and personally hurtful. But ultimately she felt the stated need, which was formulated by Waldrip and Arizona Snowbowl Resort years before she became Forest Supervisor, could only be met by alternative two and that the means to meet that need, while religiously offensive to a minority of those within the United States, were quite commonly used and "normal."

Nowhere in the process did anyone in Forest Service state that there was a consideration of whether or not the alleged need for a consistent ski season in any way justified the potential harm to the various Indian religious interests. To the contrary, the primary concern appeared to be, whether or not the proposed action was consistent with the law and Forest Plan. The Record of Decision, in its stated reasoning, indicated that so long as it was legal, desecration of Indian sacred sites could not prevent the approval of alternative two because of the way the question was framed.

> Some tribes requested that Alternative 1, the no action alternative, be selected. Alternative 1 does not address the purpose and need for the project. Alternative 1 may still have adverse effects to the cultural resources, even with the implementation of the MOA [Memorandum of Agreement]. In addition, since Alternative 1 does not resolve the significant needs associated with long term operation of the ski area, other proposals could be expected in the future. Alternative 3 was designed to address the most significant issue of using reclaimed water for snowmaking. Alternative 3 addresses some needs of the ski area; however,

> it does not address the critical need of providing for a consistent operating season. Most commenters supported either Alternative 1- no action, or Alternative 2- the selected alternative; there was little support for Alternative 3.[216]

If meeting the goals of providing a consistent ski season was necessary for acceptance of any alternative, the decision was made before the consultation process began by the framing of the need. Forest Supervisor Rasure had no choice to make other than accept alternative two, if any alternative selected must provide for the needs of Arizona Snowbowl Resort to have a consistent ski season. There is no indication in the record that anyone in the Forest Service asked if providing marginally better ski facilities in the Northern Arizona desert in any way outweighed the real pain that would be caused to indigenous religious practitioners or the significant threat to the survival of their religions. The framing of the question by Forest Ranger Waldrip and ASR, in the years before Rasure took over as Supervisor, determined the outcome of the consultation process before it ever began, if Supervisor Rasure insisted upon meeting the policy goals. Nora Rasure signed the Record of Decision, Final Environmental Impact Statement, and amended Forest Plan on February 18, 2005.[217]

Navajo Nation v. Forest Service and the Hopi Challenge to Artificial Snowmaking

The Hopi immediately objected to the proposal of the Forest Service to make artificial snow with reclaimed sewage effluent on Nuvatukyaovi and worked both inside and outside legal avenues to try and prevent the desecration of their most sacred of

[216] Snowbowl Record of Decision, 26.
[217] Tr. 1146.

places. After exhausting the administrative appeals process, the Hopi filed suit in the U.S. District Court for Arizona in 2005 with the first case testing whether or not the Religious Freedom Restoration Act protected places sacred to Indians on public lands. In 2006 the District Court ruled that the harms the Hopi and other Indians would suffer as a result of the Forest Service approval of snowmaking with reclaimed sewage water was not the type of harm that was protected by the RFRA. The Hopi and their allies appealed this decision to the Ninth Circuit Court of Appeals and first met with success in 2007 as a three judge panel of the Ninth Circuit ruled Hopi religion was impermissibly burdened by the approved snowmaking. The full Ninth Circuit reheard the case and overturned the three judge panel decision. In 2008 the full Ninth Circuit determined the harms the Hopi and other Indians would face were not those that fit within the meaning of "substantial burden on religion" as intended by Congress in the RFRA.

Hopi Action

Upon learning of the proposed expansion and the plan to artificially make snow with reclaimed sewage effluent, Hopi government officials and private individuals began to voice their concerns. Public events and protests were coordinated with other Indian peoples as well as local and national activist organizations from the larger community within the United States. Hopi people worked with the Save the Peaks Coalition, Sierra Club, Center for Biological Diversity, and the Flagstaff Activist Network in

demonstrations and other events.[218] The Indian group, Youth for the Peaks, provided information to the public through use of the Internet and Myspace.[219]

Early in the consultation process, the Arizona Daily Sun, an allegedly liberal Flagstaff newspaper, printed a staff editorial that denigrated indigenous religion and fueled local racism against Indians.[220] Indian activists and local allies in Flagstaff flooded the paper with comments and protested the paper's stand. The editors of the paper met with representatives of those complaining of its position and irresponsibility. Nine days later the paper published an apology and pledged a commitment to balanced coverage in the future. The paper admitted its omissions both misled and offended its readers, and noted the experience had shown them "that real racism against native peoples is alive and well in Flagstaff[.]"[221]

On February 2, 2004, the same day as the Forest Service announced that it favored the expansion of the Snowbowl facility with artificial snowmaking in the Draft Environmental Impact Statement, practitioners of indigenous religions founded the Save the Peaks Coalition. This coalition, which included members of the greater settler communities, grew to over two hundred members in the first eight days of its existence. Favoring alternative one, the no action alternative, the coalition organized marches and prayer vigils to raise awareness and encouraged people to produce comments on the DEIS urging the Forest Service to adopt alternative one. Coalition members stressed in

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[218] Benally, Snowbowl, 22:20, 53:20, "Sierra Club and tribes act to protect the Peaks from more development," Navajo-Hopi Observer, June 29, 2005.

[219] S.J. Wilson, "Tribes, activists gather in celebration of the Peaks," Navajo-Hopi Observer, March 27, 2007.

[220] Editorial, "Tribal sovereignty over Peaks a stretch," Arizona Daily Sun, February 22, 2002.

[221] Randy Wilson and Roy Callaway, "An apology on language, a commitment on coverage," Arizona Daily Sun, March 3, 2002.

their public outreach that the "no action" alternative was the best compromise as it allowed skiing, which was already religiously offensive to most local indigenous religions, to remain while preventing further destruction and desecration of sacred places.[222]

Before consultation with indigenous religious practitioners and receiving comments from the public, District Ranger for the Peaks Ranger District, Gene Waldrip, recognized that the proposed expansion was an adverse action on a traditional cultural property, but reiterated that the Forest Service may take adverse actions, so long as the proper consultation process had been followed.[223] In the course of the consultation process, one of the Hopi individuals protesting the proposed expansion, and later plaintiff in the suit against the Forest Service, Bucky Preston, spoke with Forest Service personnel and stated they left him feeling as if they were not listening to anything the Hopi had to say. Preston stated he felt the Forest Service officials had already made up their minds to approve the expansion with artificial snowmaking.[224]

The Forest Service decision issued in February of 2005 approved the expansion of Snowbowl which included approximately 205 acres of snowmaking coverage with reclaimed sewage effluent, a 10 million-gallon reservoir for the reclaimed sewage water near the top terminal of the existing chairlift, construction of a pipeline for the reclaimed sewage between Flagstaff and Snowbowl, with booster stations and pump houses, construction of a 3-4,000 square foot snowmaking control building, construction of a new 10,000 square foot guest services facility, an increase in skiable acreage to 205 acres, 47

[222] Seth Muller, "Coalition formed to oppose Snowbowl report," Arizona Daily Sun, February 10, 2004.
[223] Benally, Snowbowl, 44:50.
[224] Benally, Snowbowl, 44:30.

acres of thinning the trees, and 87 acres of grading/stumping and smoothing.[225] Coconino Forest Service Supervisor Nora Rasure, who was ultimately responsible for the decision, admitted that the decision hurt hundreds of thousands of indigenous religious practitioners and stated regret over the pain her decision caused.[226] On June 8, 2005 the Forest Service issued its final order upholding the decision of Supervisor Rasure in the administrative appeal launched by eleven different Indian Nations and Tribes, as well as individuals.[227]

The Navajo Nation filed its complaint against the Forest Service on June 17, 2005 before the United States District Court of Arizona, in Prescott, Judge Paul G. Rosenblatt presiding. The complaint challenged the Forest Service decision on religious freedom, environmental, and other grounds.[228] On July 8, 2005 the case was consolidated with several others, including the complaints of the Havasupai Tribe, White Mountain Apache Nation, Yavapai-Apache Nation, Hualapai Tribe, Hopi Tribe and various individuals, and designated the lead case.[229] Judge Rosenblatt determined the only issue he could not determine on summary judgment[230] was the religious freedom claims of the indigenous religious practitioners. The district court held an eleven day bench trial before issuing its opinion.[231] Practitioners of indigenous religions and their allies carried on demonstrations

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[225] Navajo Nation v. Forest Service, Case Nos. CV 05-1824-PCT-PGR, CV 05-1914-PCT-EHC, CV 05-1949-PCT-NVW, CV 05-1966-PCT, Order, pp. 3-4.

[226] Klee Benally, "Interview with Nora Rasure and Gene Waldrip, March 8, 2005," The Snowbowl Effect, DVD, directed by Klee Benally, (Flagstaff: Indigenous Action Media, 2005).

[227] Navajo Nation v. Forest Service, Case Nos. CV 05-1824-PCT-PGR, CV 05-1914-PCT-EHC, CV 05-1949-PCT-NVW, CV 05-1966-PCT, Order, p. 4.

[228] Navajo Nation v. Forest Service, Case Nos. CV 05-1824-PCT-PGR, CV 05-1914-PCT-EHC, CV 05-1949-PCT-NVW, CV 05-1966-PCT, Civil Docket, Item Number 1.

[229] Ibid., Item No. 23.

[230] Summary Judgment is judgment by the court without presentation of evidence. Summary judgment is appropriate where no factual matters are in dispute and when an issue can be determined as a matter of law, as opposed to a matter of contested fact.

[231] A bench trial is a trial without a jury. In administrative appeals, a bench trial without a jury is standard

in opposition to the proposed expansion of Snowbowl facilities outside the courthouse in Prescott, Arizona.[232]

The attorneys for the plaintiffs worked for a nonprofit organization dedicated to promoting Indian sovereignty, served as assistant counsel within the Hopi government, and in one case was a member of the settler community with an interest and dedication to Indian concerns. Lynelle K. Hartway, Assistant General Counsel for the Hopi government, was lead counsel for the Hopi government in court. Hartway received her BA from Michigan and her law degree from the University of Wisconsin-Madison. She was admitted to the bar in Arizona in 1999.[233] Howard M. Shanker of Tempe, Arizona, represented the Navajo Nation, White Mountain Apache, Yavapai Apache Nation, Center for Biological Diversity, Flagstaff Activist Network, and Sierra Club.[234] Shanker received his law degree from Georgetown University in 1989. He worked for the Justice Department and attended law classes at Georgetown at night. Shanker served three years on the National Environmental Justice Advisory Council in the Clinton Administration. His specialties included environmental and Indian law.[235] Shanker ran in the Democratic primary for Arizona's First Congressional District in 2008 on a platform that included pledges to move away from a carbon based economy and to provide universal health care. He came in third, behind the National Democratic Party supported Ann Kirkpatrick,

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procedure. Navajo Nation v. Forest Service, Case Nos. CV 05-1824-PCT-PGR, CV 05-1914-PCT-EHC, CV 05-1949-PCT-NVW, CV 05-1966-PCT, Order of the District Court, p. 23.

[232] Tim Wiederaenders, "Native Americans have valid stance on snowmaking for Snowbowl," Navajo-Hopi Observer, November 16, 2005.

[233] Martindale.com, "Lynelle K. Hartway - Lawyer Profile," http://www.martindale.com/Lynelle-K-Hartway/42106-lawyer.htm (accessed July 1, 2010).

[234] Tr.2.

[235] The Shanker Law Firm, "Howard M. Shanker," http://www.shankerlaw.net/index.php?option=com_content&task=view&id=197&Itemid=77 (accessed July 1, 2010).

and former broadcast journalist Mary Kim Titla, who had hoped to be the first Native American women in Congress.[236] DNA-Legal Services, a nonprofit legal services firm for the Hopi and Navajo reservations dedicated to providing legal aid and promoting Indian sovereignty, provided counsel for the Hualapai Tribe, Nora Nez, and Bill Bucky Preston.[237] Though the trial was conducted with each counsel serving their clients, attorney for the Navajo Nation, and later Congressional candidate, Howard Shanker took the lead for the plaintiffs in statements to the press and oral arguments before the various courts the case made its way through.

Hopi Testimony at Trial

The Hopi presented a great deal of testimony at trial as to what impacts religious practitioners and Hopi government officials felt the proposed smowmaking with reclaimed sewage effluent would have on their religious beliefs. The District Court's opinion that nothing in the proposed expansion would prevent the Hopi from carrying out any particular acts or ceremonies was accurate in the short term, but the Hopi religion placed moisture brought from the Peaks by the Kachinas at the center of Hopi life. Hopi leaders predicted that artificial snowmaking with reclaimed sewage water would cause profound mental and spiritual harm to the Hopi people of such significance that both Hopi religion and culture could be destroyed.

Despite prior predictions that the initial expansion of the Snowbowl resort in 1983 would have devastating impacts on their religion, the Hopi admitted that their religion has not changed since 1983 and that there were in fact more practitioners of the Hopi religion

[236] Cindy Cole, "Kirkpatrick wins Dem nod," Arizona Daily Sun, September 2, 2008.
[237] Tr.2.

than in 1983.[238] It was also clearly established in testimony before the District Court that the Hopi were not excluded from going to the Peaks for a wide variety of religious purposes; though one traditional practitioner, Bill Preston, appeared unhappy about the necessary permitting process.[239]

The Hopi viewed their religion as a largely private affair and were uncomfortable talking about it with outsiders. Certain elements of their religion they do not discuss amongst themselves.[240] The District Court and the defendants, the U.S. Forest Service and the Arizona Snowbowl Resort Limited Partnership, appeared to largely respect this reluctance of the Hopi to speak of their religion. There was discussion at trial of an agreement regarding this need for privacy and keeping testimony confidential.[241] Thus while the intent of this paper is to explain some degree of the psychic harm the Hopi expected to be caused by the proposed Snowbowl expansion, often the religious details have been left out in the testimony at trial and only vague explanations will be possible.[242] The information on Hopi religion and culture found below is a synthesis of the testimony of several Hopi religious practitioners, from two different days of the trial. The testimony was delivered by Bill Bucky Preston, Hopi religious leader, Leigh Kuwabusuwma, Director of the Hopi Cultural Preservation Office of the Hopi government, Emory Sekaquaptewa, former Chief Justice of the Hopi Appellate Court, Anthropology Professor at the University of Arizona and Kachina expert, and Antone Honanie, Hopi silversmith and maker of Kachina dolls.

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[238] Tr. 510, 594.
[239] Tr. 127, 128, 138, 494.
[240] Tr. 139, 146.
[241] Tr. 145, 147.
[242] Tr. 156-59.

Antoine Honanie was born in 1973. He lived at Kykotsmovi, Third Mesa, on the Hopi reservation. He was a member of the Whitkema Clan, the Water Clan, and was became a member of a Kachina society at age twelve. Honanie worked as a self employed silversmith and carved Kachina dolls. A speaker of the Hopi language, Honanie lived in a village where residents only belonged to Kachina societies, historically having split from the village of Old Oraibi to avoid the turmoil between the leadership of the other religious societies. The founders of his village, Kykotsmovi, deliberately retained only Kachina societies and left the other religious societies out of their new village.[243]

Little information is recorded regarding Bill Bucky Preston in the legal record. Preston was a native speaker of the Hopi language, and felt more comfortable speaking in Hopi, though he spent some of his education in English language schools. Preston was a Hopi religious figure, but in keeping with the Hopi tradition of not sharing information to the uninitiated, he refused at trial to divulge the identity of his position within Hopi religious societies, other than to say he held a significant position. Preston was initiated into the religious societies as a youth, and was a member of the Bamboo, Eagle, and Sun clans. Preston refused to discus at trial the specific responsibilities of the clans he belonged to. Preston spoke to the Forest Service interdisciplinary team as a concerned individual, and became a plaintiff in the law suit challenging the Forest Service's approval of the proposed expansion with artificial snowmaking.[244]

Leigh Kuwanisiwma represented the Hopi government with his presence throughout the trial. Kuwanisiwma was initiated into the Kachina society at age 11, as

[243] Tr. 555-59.
[244] Tr. 127-26.

part of the Clan of Greasewood of Bavavi, Third Mesa. For fifteen years he served as the Director for the Hopi Cultural Preservation Office. His work included interfacing with outside agencies and working within Hopi land to preserve the Hopi language. He was the chief government official in charge of relations with the United States federal government on cultural matters. His background was in business and he had a nonacademic background in archeology. Kuwanwisiwma also served as the Assistant Director of the Hopi Health Department. As part of his cultural preservation work, he regularly consulted with Hopi elders, including informal meetings with women leaders for their input on cultural affairs.[245]

Emory Sekaquaptewa was known as the Webster of the Hopi language, and had a long and distinguished career both within the Hopi nation and without. The records of his birth are inconsistent. The Hopi records placed his birth as being in 1927 and the U.S. records in 1928. Sekaquaptewa celebrated his birthday on December 28, preferring the Hopi birth year, but reluctantly used the U.S. recorded date for legal purposes. He was raised in Hotevilla, Third Mesa. Sekaquaptewa was the first Indian to attend West Point. He served two years in the United States Air Force and graduated from Brigham Young University in 1953. He was the first Hopi to receive a law degree from the University of Arizona and was the founding Chief Justice of the Hopi Appellate Court. In the last years of his life he worked at the University of Arizona as an applied research anthropologist and taught Hopi language courses. In 1998 he published the first Hopi-English Dictionary, Hopi Dictionary/Hopiikwa Lavaytutuveni: A Hopi-English Dictionary of the Third Mesa Dialect. The dictionary has over thirty thousand entries with pronunciation

[245] Tr. 414-18.

guides. His awards include the 1989 Arizona Indian Living Treasure Award, the 2004 BARA Lifetime Achievement Award, the 2007 Byron S. Cummings Award, and 2007 Heard Museum's Spirit of the Heard Award. An expert on the Kachinas, Sekaquaptewa was a native speaker of the Hopi language and a member of the Eagle Clan. He died on December 14, 2007.[246]

Taken together the testimony of Hopi witnesses Bill Preston, Leigh Kuwabusuwma, Emory Sekaquaptewa, and Antoine Honanie conveyed the critical areas of Hopi faith and belief relevant to their case. They conveyed that Nuvatukyaovi or the San Francisco Peaks are of central importance to the Hopi because it is the home of Maasaw and the Kachians. The Kachinas are of central importance to the survival of the Hopi way of life as the morals taught in the songs of the Kachinas are the central method of transmitting cultural values from one generation to the next. Water is of central cultural importance to the Hopi as they have historically lived in a desert and were dependent on rainfall for their survival. The Hopi believe that the rainfall is brought to them by the Kachinas from Nuvatukyaovi. Practitioners of Hopi traditional religion believe that the artificial creation of snow from any source was unclean. The Hopi believe it is imperative that the water of the Peaks be kept pure as it is the source of life that is brought to the Hopi by the Kachinas. The testimony the Hopi presented went on to explain the devastating cultural, spiritual, and emotional impacts they expected the expansion with artificial snowmaking would reign down upon the Hopi people.

[246] Johnny Cruz, "U of A, Hopi Tribe mourn passing of Sekaquaptewa," Navajo-Hopi Observer, December 27, 2007, Tr. 573-74.

In explaining his objection to the proposed expansion, Leigh Kuwanwisiwma, Director for the Hopi Cultural Preservation Office, said:

> Particularly, the making of artificial snow, which is so adverse to the fundamental beliefs of the Hopi people in relation to Kachina and what the Peaks mean to us; and compounding it is the use of recycled wastewater to make artificial snow. . . . The making of artificial snow is so contrary to what the beliefs of the Hopi people are about, what the Katsina [Kachina] beliefway [sic] is all about, and what the mountain represents to us. And the Hopis depend a lot on how we have a relationship in both tangible and intangible ways with the Katsina spirits and petitioning of the Katsina and our prayers that they act as messengers to take to the Peaks and to bring us moisture, bring us rain.[247]

One Hopi practitioner testified that no person had the power to purify water and use of wastewater on the Peaks would be destruction. As Bill Preston stated:

> The reclaimed water is destruction. It will contaminate all that is there and all the surroundings, because as a Hopi person, I was taught and I believe no matter what it is, you have a spirit. To me they're alive. This is why I can communicate with them. Stillness with myself makes me understand who they are and how much it's destroying them. And by using reclaimed water, that's total destruction. It will never be the same.[248]

On the situation facing the Peaks in general, Preston, at times with the help of an interpreter, said:

> It has already hurt me a lot. Right now sitting here my spirits are very low. My mind is confused. My heart is broken and confused. This is why I chose to come here, because I need to speak for the powerful Nuvatukyaovi. I need to show the mountain that I am doing my job, although it's very hard and difficult for me to express my feelings, because nobody can see. . . how life is at Hopi and all the surrounding world. . . . I am sad. Our life is all broken up. It's already broken up. Nobody cares who we are. No one has respect for us. I guess we're nobody. Nothing is complete. I am very sad.[249]

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[247] Tr. 450-52.
[248] Tr. 136.
[249] Tr. 134-35.

Perhaps a good deal less emotionally, Emory Sekaquaptewa, research anthropologist, former judge and founding Chief Judge of the Hopi Appellate Court, described the impact of the proposed expansion on the Hopi people:

> I think this undermines the faith of the Hopi people in their belief in the Katsinas [Kachinas] and the place where they are seen or– where they are in their belief dwell on these mountains and would tend to diminish the strength of this faith. . . . When that – when young – younger generation of Hopis begin to lose faith, the Kachina religion will soon be a performance for performance sake. . . . it would no longer be a religious effort in behalf of all the people, and thus undermine the integrity of the Hopi religion as we know it today.[250]

Kuwanwisiwma explained that snowmaking on the Peaks would cause a devastating mental harm to the Hopi people. He said of the snowmaking, "It's a defilement. It violates spiritual law as far as our belief into the Peaks and the Katsina."[251] In explaining, Kuwanwisiwma continued:

> It defiles the sanctity of the Peaks. It defiles the spiritual character of the Peaks, of what they stand for. It basically creates an emotional burden for the Hopi people because of this defilement. It affects our psychology. It contributes to the burden of negative emotion, which is part of what the results are when it's defiled in this manner.[252]

The Hopi felt this defilement of the Peaks had a significant possibility of destroying Hopi cultural identity. With the desecration and pollution of the mountain, the sacredness of the Kachinas may be brought into question, or even destroyed. The Kachinas are central to the Hopi in teaching religious and cultural values to their children. The destruction of this central religious belief would possibly destroy the central means of cultural reproduction of the Hopi. As Deloria has stated, in the face of much

[250] Tr. 601-02.
[251] Tr. 530.
[252] Tr. 530-31.

adversity Indian communities have continued to survive, but the active destruction of these religions might finally bring an end to the separate cultural identity of Indians many organized political elements of the dominant non-Indian population have sought for generations.[253]

The Hopi provided no evidence at trial that the proposed action of the Forest Service would sanction or penalize the practice of the Hopi religion, certainly not in the same way the Federal Government did when it sent indigenous religious practitioners to federal prison in the late nineteenth and early twentieth centuries.[254] Throughout the trial when asked by attorneys how their religion would be burdened by the proposed Snowbowl expansion, the Hopi practitioner would reply in the psychological, emotional, spiritual, or other mental terms as quoted above. Given the centrality of water, the Kachinas, and the Peaks to the Hopi religion, the significance of this mental harm has not been exaggerated.

The Forest Service acknowledged that the proposed expansion including the use of snowmaking with reclaimed sewage effluent would have an adverse impact on the cultural concerns of the Hopi and other Indian peoples. The Hopi argued that this particular set of adverse impacts could destroy not only their religion, but their entire culture and way of life. The official policy of the U.S. government was to preserve and protect the religions of Indian peoples, as stated in the American Indian Religious Freedom Act, yet the Forest Service approved the proposed expansion and the courts of

[253] Deloria, For This Land, 228.
[254] Steve Talbot, "Spiritual Genocide: The Denial of American Indian Religious Freedom, from Conquest to 1934," Wizaco Sa Review, Vol. 21, No. 2 (Autumn, 2006): 7.

the U.S. government have found no legal remedy available to the Hopi for the harms of this acknowledged adverse impact.

Relevant Findings of the Trial Court Regarding the Hopi

Judge Rosenblatt of the Arizona Federal District Court concluded that the proper procedures had been followed by the Forest Service and harms the Hopi would suffer as a result of the Forest Service approval of artificial snowmaking was not the kind of harm prohibited by the Religious Freedom Restoration Act. Judge Rosenblatt determined the Hopi had been properly consulted in the decision making process of the Forest Service, and the testimony at trial amply supports this conclusion.[255] The eleven day bench trial was conducted in the United States District Court of Arizona, in Prescott. Judge Rosenblatt acknowledged that the proposed expansion would have a negative impact on the Hopi's "frame of mind" and that the production of artificial snow would impact them "emotionally."[256] Judge Rosenblatt concluded that the Hopi "presented no evidence that Snowbowl upgrades would impact any exercise of religion related to the Kachinas or the Kachina songs. The Kachinas have continued to come to Hopi villages since the establishment of Snowbowl in the late 1930s, and since the Forest Service approved the expansion of Snowbowl in 1979."[257] Judge Rosenblatt found that the "the Hopi Plaintiffs provided no evidence that the decision would impact any religious ceremony, gathering, pilgrimage, or any other religious use of the Peaks."[258] Based on the above factual

[255] Navajo Nation v. Forest Service, Case Nos. CV 05-1824-PCT-PGR, CV 05-1914-PCT-EHC, CV 05-1949-PCT-NVW, CV 05-1966-PCT, Order, p. 19, Tr. 421-23, 463-85, 489.
[256] Navajo Nation v. Forest Service, Case Nos. CV 05-1824-PCT-PGR, CV 05-1914-PCT-EHC, CV 05-1949-PCT-NVW, CV 05-1966-PCT, Order, pp. 41-2.
[257] Ibid., 41.
[258] Ibid., 42.

conclusions, the trial court ultimately decided that "Plaintiffs have failed to demonstrate that the Snowbowl decision coerces them into violating their religious beliefs or activities. . . . Plaintiffs have failed to present any objective evidence that their exercise of religion will be impacted by the Snowbowl upgrades."[259]

The responses to the decision of Judge Rosenblatt were quite predictable. Forest Supervisor Nora Rasure applauded the decision reaffirming her decision as a valid use of a national forest and she expressed her hope that the Forest Service could continue work with Indian interests so that "the Peaks retain as much value to the tribes as possible."[260] Indigenous members of the Save the Peaks Coalition denounced the decision as a miscarriage of justice. Members of the Flagstaff Activist Network pledged to use all legal means necessary to fight the decision, and shifted protest efforts to the Flagstaff City Council in the hope of stopping the sale of reclaimed sewage effluent by the City of Flagstaff to the Snowbowl facility.[261] Jeneda Benally of the Save the Peaks Coalition, the Navajo punk band Blackfire, National Native American Honor Roll Society, and former Flagstaff Indian Days Powow Princess, noted that the Nazi regime was meticulous in its adherence to legal principles while it destroyed religious and ethnic minorities. Northern Arizona University Anthropology Professor Miguel Vasquez commented, "It's OK to screw the Indians. You've just gotta make it sound good."[262]

The Appellate Decisions

[259] Navajo Nation v. Forest Service, Case Nos. CV 05-1824-PCT-PGR, CV 05-1914-PCT-EHC, CV 05-1949-PCT-NVW, CV 05-1966-PCT, Order, p. 56.
[260] Cindy Cole, "Judge OKs snowmaking on Peaks," Arizona Daily Sun, January 11, 2006.
[261] Cindy Cole, "Snowmaking opponents now targeting city council," Arizona Daily Sun, January 12, 2006.
[262] Ibid.

On January 11, 2006 the District Federal Court of Arizona issued its final opinion in the case of Navajo Nation v. U.S. Forest Service. In its findings the Court concluded that there had been no burden placed upon the religious practices of the various indigenous plaintiffs. The plaintiffs appealed to the Ninth Circuit Court of Appeals. Oral arguments were held on September 14, 2006. On March 12, 2007 the three judge panel from the Ninth Circuit, composed of William A. Fletcher, Johnnie B. Rawlinson, and Thelton E. Henderson unanimously reversed the decision of the trial court and found that the Religious Freedom Restoration Act expanded protection for religious freedom in the United States beyond those of the Constitution and the prior standards in Lyng.[263] The Court further found that not only was religion burdened, the Forest Service did not have a compelling reason for doing so.[264] While the Ninth Circuit Court later took the uncommon move of meeting en banc to overturn the three judge decision, the decision of the three judge panel is worth examining because, unlike the Forest Service in formulating the goals to be met by the proposed expansion, the Ninth Circuit considered if the policy goals of the Forest Service were substantial enough to justify the harm to the indigenous religions and their followers.

The decisions of the Ninth Circuit Court of Appeals, at both the three judge panel and the full Ninth Circuit Court, were additionally complicated by the lack of clear Supreme Court precedent on the application of legal protections for Indian religious concerns on public lands. While the Lyng opinion stood as precedent that directly denied any form of constitutional protection to followers of Indian religions when the

[263] Navajo Nation, 479 F.3d 1024, 1032-34.
[264] Ibid., 1044-45.

government acts on land it purports to own as public lands, the Justices of the Supreme Court could not agree upon how to interpret the reasoning behind that opinion. In Smith, Justice Scalia cited Lyng as an example of the Court's departure from the compelling interest test that the Supreme Court finally abandoned with Smith. Justice O'Connor strongly protested this interpretation and replied, in her concurring opinion in Smith, that Lyng did not apply the prior test because the action was on public lands and stood as an exception to the application of the compelling interest test. The Justices of the Supreme Court of the United States had no agreement as to what exactly the Lyng case stood for.

The argument of the full Ninth Circuit Court was incoherent, confused, and unsound, but this does not necessarily mean the ultimate conclusion of the majority was legally "incorrect." The better and more coherent argument was to be found with the opinion of the dissenting judges from the three judge panel. The central issue the court was wrestling with was the definition of the term "substantial burden" as found in the Religious Freedom Restoration Act of 1993. Congress left this term undefined and this left the court to determine what the intent of both houses of Congress was in the use of the words, "substantial burden" as they applied to religion. While there are general rules of statutory construction, it is completely possible to use those rules to formulate a definition of "substantial burden" consistent with either the approach of the majority or the dissent. The majority's presented argument was incoherent and unsupported by the case law, but this is not to say a better argument for their position did not exist, and one likely did.

The outcome of this case was entirely dependent upon interpreting what Congress meant by the term "substantial burden" upon religion. The Forest Service acknowledged that the approved action would be an adverse action on the cultural interests of the Hopi. The testimony at trial revealed that this adverse impact would be significant, and the Hopi argued it would destroy their entire way of life, both religious and cultural. This admission of adverse action by the Forest Service would have been legally significant only if the adverse action was also a substantial burden upon the religion of the Hopi (or other Indian plaintiffs). If the adverse action was indeed a substantial burden upon the religion of Hopi people, then the protections of the RFRA would be implicated. If this adverse action was not a substantial burden on religion, then the action could not violate any legal rights and the analysis would stop there.

After the decision of the three judge panel on March 12, 2007, environmentalists, supporters of Indian interests, and many activists in the Flagstaff area praised Judge Fletcher's opinion, while Eric Borowsky, managing owner of the Arizona Snowbowl Resort Limited Partnership, denounced the position of the Hopi and other Indian nations as hypocritical.[265] Bucky Preston linked many of the ills of the day, including local forest fires and the war in Iraq on the continuing disrespect shown the San Francisco Peaks, and stated these difficulties were but warning signs of what everyone would suffer if sacred places were not respected. Hopi Chairman Ben Nuvamsa noted that even snowmaking with potable water would be a problem for the Hopi.[266]

[265] Howard Fischer, "Snowbowl Fight Rages On," Arizona Daily Sun, March 12, 2007.
[266] Ibid.

Eric Borowsky's denunciation of the Hopi and other Indians was joined by the Flagstaff chamber of commerce, and while the denunciation was logically untenable, it served to increase the level of animosity and conflict between the differing sides of the dispute.[267] Borowsky's claim that the Hopi political position on Snowbowl "is nothing short of hypocritical" completely ignored a simple fact that is true of all cultures and religions- different places have differing significance and value. Borowsky dismissed Hopi protests over the desecration of the Peaks because the Hopi government was concurrently involved in leasing Hopi lands to Peabody Coal for strip mining operations.[268] Many supporters of the Snowbowl ski resort joined Borowsky in these nonsensical and inaccurate denunciations. Borowsky characterized the concerns of the Hopi as environmental, rather than religious or cultural, and made no acknowledgment that Nuvatukyaovi is the most sacred of places to the Hopi. Borowsky's argument did not acknowledge that there are places not necessarily appropriate for every activity. For example, while one may love playing soccer, one can also recognize that plowing over the historic Gettysburg Battlefield to build a soccer pitch was perhaps not the most respectful or culturally sensitive thing to do. Every culture recognized different places as being appropriate for different activities, including that of Borowsky. Yet Borowsky called on the Hopi and their supporters to oddly be against all land development and usage or none, regardless of place.

Positions were reversed in the wake of the decision of the full Ninth Circuit Court of Appeals on August 8, 2008. Eric Borowsky expressed his pleasure with the opinion.

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[267] Randy Wilson, "Snowbowl coverage a moving target," Arizona Daily Sun, April 7, 2007.
[268] Howard Fischer, "Snowbowl Fight Rages On," Arizona Daily Sun, March 12, 2007.

Bucky Preston stated, “It's never going to go our way, no matter what kind of government it is, when there's money involved.”[269] Taking the lead in public statements for the attorneys working for the various plaintiffs, Howard Shanker noted, “As the law stands now, Native Americans have no process in place and no recourse to protect sacred sites.” Dick Wilson, lead plaintiff from the 1980 suit to prevent the first major Snowbowl expansion Wilson v. Block, expressed his regret and resignation at the failure of Court to protect Indian sacred sites. A coalition that included the Anglican Church in the United States, the Presbyterian Church, and Catholic nuns, joined the plaintiffs in urging the United States Supreme Court to review the case, and upon the failure of the Supreme Court to do so, attorney Robert Greene, on behalf of that coalition of Christian religious interests, stated, “[T]his will make it very difficult for all sort of religious people to protect religious rights. The remaining step for the tribes and their supporters is to see whether the Interior Department can or will reconsider their approval[.]”[270]

The Panel Decision of the Ninth Circuit

Judge William A. Fletcher authored both the panel decision and the strident dissent to the opinion of the full Ninth Circuit. The decision of the three judge panel as well as the dissent for the rehearing en banc relied on the same reasoning- dictionary definitions of “substantial” and “burden” would place the harm suffered by the Indian plaintiffs squarely within the coverage of the Religious Freedom Restoration Act. Judge Fletcher was appointed to the Ninth Circuit Court of appeals in 1999 by President Clinton. In 1992, Fletcher ran the Northern California segment of Bill Clinton's

[269] Cindy Cole, “Court sides with Snowbowl,” Arizona Daily Sun, August 8, 2008.
[270] “Responses to news on Snowbowl,” Arizona Daily Sun, June 8, 2009.

successful run for the office of President of the United States. Fletcher, a Rhodes Scholar, worked in the Office of Emergency Preparedness of the Executive branch of the U.S. government from 1970 to 1972. After obtaining a law degree from Yale in 1975, Fletcher clerked for Justice William J. Brennan, Jr. of the United States Supreme Court. He became a law professor at the University of California, Berkley in 1977 and is the coauthor of textbook on Civil Procedure.[271]

In the initial three judge panel opinion, the Ninth Circuit Court of Appeals noted the various religious harms the plaintiffs demonstrated, focusing on the Hopi, Navajo, Havasupai, and Hualapai Indians. Writing the unanimous opinion of the Court, Judge Fletcher noted that the making of artificial snow with reclaimed sewage effluent would render unclean and unusable necessary components for different religious ceremonies of the Hualapai, Havasupai, and Navajo. While unhappy with the mere presence of the ski resort, some Navajo viewed the resort as a scar on the body of their holy place, but the injection of this new poison would completely corrupt the body.[272] Similarly, the Hualapai collected water and plants from the Peaks for use in religious ceremonies. The presence of treated sewage effluent on the Peaks would contaminate these items necessary for religious ceremonies.[273] For the Havasupai, the treated sewage effluent on the Peaks would be a contamination that would undermine the integrity of their sweat lodge purification ceremonies and lead to the end of those ceremonies.[274] Fletcher also noted the concerns of the testimony already examined in detail previously in this essay,

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[271] Berkley Law, University of California, "Faculty Profiles, William A. Fletcher," http://www.law.berkeley.edu/php-programs/faculty/facultyProfile.php?facID=39 (accessed July 1, 2010).
[272] Navajo Nation, 479 F.3d 1040.
[273] Ibid., 1040-41.
[274] Ibid., 1042.

including the fear that "the contamination by effluent would fundamentally undermine their entire system of belief and the associated practices of song, worship, and prayer, that depends on the purity of the Peaks, which is the source of rain and their livelihoods and the home of the Katsinam spirits."[275]

Judge Fletcher ruled that the nature of the burden placed upon the Hopi, and other indigenous religious practitioners, by the proposed making of snow with reclaimed sewage effluent, fit within the expanded protections of the Religious Freedom Restoration Act and the Court found that the religious freedom of the various Indians had been substantially burdened. As the next part of the required analysis, Fletcher examined whether or not the Forest Service had a compelling interest to pursue in approving alternative two, the expansion of the Snowbowl resort with snowmaking from treated sewage effluent.[276]

Judge Fletcher concluded that a substantial burden had been placed upon religion but found this burden did not forward any compelling governmental interests. Judge Fletcher wrote for the Court, "We are unwilling to hold that authorizing the use of artificial snow at an already functioning commercial ski area in order to expand and improve its facilities, as well as to extend its ski season in dry years is a governmental interest 'of the highest order.'"[277] The Court did note that ASR had claimed that the variability of the season had caused it difficulty, but responded that ASR paid four million dollars for the resort in 1992 and had made no showing that it was in any danger of going out of business. Commenting, "But the evidence in the record does not support a

[275] Navajo Nation, 479 F.3d 1043.
[276] Ibid., 1044.
[277] Wisconsin v. Yoder 406 U.S. 205 (1972), 215, quoted in Navajo Nation, 479 F.3d 1043.

conclusion that the Snowbowl will necessarily go out of business if it is required to continue to rely on natural snow and to remain a relatively small, lowkey resort. The current owners may or may not decide to continue their ownership. But a sale by the current owners is not the same thing as the closure of the Snowbowl."[278]

Judge Fletcher went further and noted that even if the Snowbowl facility were to completely close, saving it as a ski resort would not be a compelling governmental interest.

> Even if there is a substantial threat that the Snowbowl will close entirely as a commercial ski area, we are not convinced that there is a compelling governmental interest in allowing the Snowbowl to make artificial snow from treated sewage effluent to avoid that result. We are struck by the obvious fact that the Peaks are located in a desert. It is (and always has been) predictable that some winters will be dry. The then-owners of the Snowbowl knew this when they expanded the Snowbowl in 1979, and the current owners knew this when they purchased it in 1992. . . . Even if the Snowbowl were to close (which we think is highly unlikely), continuing recreational activities on the Peaks would include "motocross, mountain biking, horseback riding, hiking and camping," as well as other snow related activities such as cross-country skiing, snowshoeing, and snowplay.[279]

As to the second need discussed in the Record of Decision, safety, the court found that there had been no showing that skiing in Snowbowl without the expansion was unsafe. Again, even if the area was unsafe, the court determined, "But this safety concern is not a compelling interest that can justify the burden imposed by the Snowbowl's expansion."[280] The court was specifically addressing the alleged safety concerns created by the lack of a snowplay area. As the Forest Service traded support for the snowmaking

[278] Navajo Nation, 479 F.3d 1044.
[279] Second emphasis added, Navajo Nation, 479 F.3d 1044-45.
[280] Navajo Nation, 479 F.3d 1045.

for ASR support of a snowplay area, “Even assuming that the safety concerns motivating the creation of the snowplay area are a compelling interest, we do not agree that inducing a commercial ski resort, which is not the source of the danger, to develop a snowplay area as a quid pro quo for approval of the resort's use of treated sewage effluent is the least restrictive means of furthering that interest.”[281] Thus the court determined that there was no compelling interest, but that even if safety were a compelling interest, there were less restrictive means of protecting those interests other than approving snowmaking with treated sewage effluent.

Against well established precedent, the attorneys for ASR argued that if the Forest Service were to accommodate indigenous religious concerns by not allowing the making of artificial snow with reclaimed sewage effluent, the Forest Service would be engaging in the unconstitutional establishment of religion. Judge Fletcher took a scant few paragraphs to dismiss such an argument and noted that the Supreme Court had repeatedly held that the constitution, "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."[282] Judge Fletcher noted that the Federal government was not required to act with callous indifference towards religion, and accommodation of religion was to be sought.[283] Interestingly, Judge Fletcher made no reference to the American Indian Religious Freedom Act, in stating it was the official policy of the Federal government to protect and preserve indigenous religions. This was likely because the AIRFA had no substantive protections to offer. Finally, the Court noted, again, that even if the Snowbowl resort was removed, this hardly would

[281] Navajo Nation, 479 F.3d 1045.
[282] Lynch v. Donnelly, 465 U.S. 668, (1984), 673 as quoted in Navajo Nation, 479 F.3d 1045.
[283] Navajo Nation, 479 F.3d 1045-46.

establish religion as other activities still religiously offensive to Indian religions would be conducted on the Peaks, just markedly less offensive and burdensome to their religions.[284]

The three judge panel finally noted that the use of treated sewage effluent on the Peaks was a significant and severe burden on the indigenous religious practitioners. It wrote, "To get some sense of equivalence, it may be useful to imagine the effect on Christian beliefs and practices -- and the imposition that Christians would experience -- if the government were to require that baptisms be carried out with 'reclaimed water.'"[285] The full Ninth Circuit Court of Appeals did not agree. It accepted the case for rehearing en banc to clarify the Ninth Circuit's position on what constitutes a substantial burden to religion.[286]

The Decision of the Full Ninth Circuit Court of Appeals

Arizona Snowbowl Resort and the Forest Service appealed the decision of the three judge panel to the Ninth Circuit Court of Appeals for rehearing en banc. A rehearing en banc is a representation of the same case before the same court, but instead of merely being heard by a three judge panel, a hearing en banc was traditionally before all the judges of an appellate court. The Ninth Circuit had twenty-eight judges and, departing from this tradition, eleven judges composed a panel en banc for this district. The Ninth Circuit accepted the case for rehearing en banc and oral arguments were

[284] Navajo Nation, 479 F.3d 1046.
[285] Ibid., 1048.
[286] Navajo Nation, 535 F.3d 1058, 1067.

presented on December 11, 2007. The Court en banc delivered its opinion, overturning the three judge panel, on August 8, 2008.[287]

The majority of the judges on the Ninth Circuit Court of Appeals joined with Judge Carlos T. Bea, author of the opinion. After preliminaries, Judge Bea simply stated that "substantial burden" was a legal term of art chosen by Congress. For the Ninth Circuit this term of art required the government to either prohibit or condition a benefit upon violating a principle of a complainant's religion before there can be a finding that a "substantial burden" had infringed upon religion. Judge Bea wrote, "Where, as here, there is no showing the government has coerced the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions, or conditioned a governmental benefit upon conduct that would violate the Plaintiffs' religious beliefs, there is no 'substantial burden' on the exercise of their religion."[288] As there was no substantial burden upon religion, the substantive analysis of the facts ended with that decision.

Judge Bea then provided a policy argument that was ahistorical, factually muddled, and misrepresented the arguments of those that disagreed with him.

> Were it otherwise, any action the federal government were to take, including action on its own land, would be subject to the personalized oversight of millions of citizens. Each citizen would hold an individual veto to prohibit the government action solely because it offends his religious beliefs, sensibilities, or tastes, or fails to satisfy his religious desires. Further, giving one religious sect a veto over the use of public park land would deprive others of the right to use what is, by definition, land that belongs to everyone.[289]

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[287] Navajo Nation, 535 F.3d 1058, 1067.
[288] Ibid., 1058, 1063.
[289] Ibid., 1063-63.

This policy argument did not address the issues or harms the Indian plaintiffs were seeking to have redressed. In characterizing the harm, Judge Bea did not address the expected inability of Navajo and Hualapai to perform ceremonies in the future because of the loss of key ingredients, nor did he address the potential destruction of the entire Hopi culture, nor the potential loss of Havasupai sweat lodge ceremonies. Instead Judge Bea characterized the expected harm as merely one involving "the Plaintiffs' subjective spiritual experience. That is, the presence of the artificial snow on the Peaks is offensive to the Plaintiffs' feelings about their religion and will decrease the spiritual fulfillment Plaintiffs get from practicing their religion on the mountain." He argued that the use of artificial snow made with reclaimed sewage waste will merely, "decreases the spirituality, the fervor, or the satisfaction" of the complaining Indians.[290]

The dissent, written by Judge Fletcher, in this case was particularly bitter. The dissent went as far as to state the reasoning of the majority "is not just flawed. It is perverse."[291] The dissenting opinion called for the effect on religion to be the important consideration, rather than the particular mechanism religion might be burdened.[292] In disagreeing with the perspective of the Judge Bea and the majority, the dissent stated that the term "substantial burden" was not defined in the Religious Freedom Restoration Act, nor did it ever appear in the case law the majority alleged supported its much narrower definition of "substantial burden." Judge Fletcher suggested that the common dictionary definitions of "substantial" and "burden" be adopted. The facts of this case would then

[290] Navajo Nation, 535 F.3d 1063.
[291] Ibid., 1090.
[292] Ibid., 1086.

support a finding of "substantial burden" upon the religions of the Indians in violation of the RFRA, the dissent reasoned.[293]

The central contention between the dissent and the majority was the definition of "substantial burden" on religion. The dissent reasoned that the term was undefined, and dictionary definitions of "substantial" and "burden" easily included the types of harms being brought to the religious practices of the various Indian plaintiffs by the making or artificial snow with reclaimed sewage effluent. The majority reasoned that references in the RFRA to prior case law implied that Congress intended "substantial burden" to be defined in prior case law, despite the fact that phrase never appeared in the prior cases of the Supreme Court.[294] The majority found Lyng to be directly on point, and denied the plaintiffs any form of claim to have a cognizable burden on their respective religions.[295]

Most problematic in the reasoning of Judge Bea and the majority was their reliance on an interpretation of Lyng that was at odds with both the interpretations of Justices Scalia and O'Connor. Recall that in Smith, Justices Scalia and O'Connor disagreed over the reasoning in Lyng. Scalia, in the majority opinion of Smith, stated that "we declined to apply Sherbert analysis [compelling interest test] to the Government's logging and road construction activities on lands used for religious purposes by several Native American Tribes [in Lyng], even though it was undisputed that the activities 'could have devastating effects on traditional religious practices.'"[296] Implicit in this interpretation of Lyng is the notion the Indian religious would in some way be harmed or

[293] Navajo Nation, 535 F.3d 1086.
[294] Ibid., 1070.
[295] Ibid., 1071-73.
[296] Lying, 485 U.S. 451 as quoted in Smith, 494 U.S. 883.

burdened by the destruction of sacred sites (for if the free exercise of religion was not in any way infringed, the court would not be abandoning the compelling interest test).

Justice O'Connor disputed Justice Scalia's interpretation of her opinion in Lyng, but her interpretation also contains an implicit burden on religion of Indian practitioners. Justice O'Connor insisted that the compelling interest test did not apply to how the government used or disposed of government land, as an exception to the compelling interest test.[297] Thus for neither Justices Scalia nor O'Connor did Lyng stand for the proposition that land use that harms Indian religious practices and sensibilities can never be a burden on religion. To the contrary, implicit in their reasoning was the view that Indian religion was burdened by the proposed road in Lyng.

Each of the contradictory readings of Lyng by Justices of the Supreme Court rendered the position of the majority of the Ninth Circuit Court of Appeals impossible. In Justice Scalia's case, he argued that religion was burdened in Lyng, but the Supreme Court abandoned the compelling interest test. The RFRA later restored the compelling interest test and expanded it. Thus the trial court should have applied the compelling interest test, as required by the RFRA to the burdens placed on Hopi religion. For O'Connor, she argued there was an exception to the compelling interest test when it came to federal land use, but the RFRA clearly stated that the compelling interest test is to be used in all cases. Thus the RFRA directly overturned either interpretation the Supreme Court offered of the Lyng precedent. To carry their argument, the majority of the Ninth Circuit was forced to disagree and Judge Bea in the opinion created a third understanding of Lyng that was directly contrary to both the positions of Justices Scalia and O'Connor.

[297] Smith, 494 U.S. 900.

Judge Bea read Lyng to mean Indian religion cannot be "substantially burdened" by rendering the religion impossible to practice through desecration and destruction of sacred places. Thus, for Judge Bea and the majority of the Ninth Circuit Court of Appeals, the RFRA offered the Hopi and others no protection from the adverse action approved by the Forest Service.

The Hopi and other Indian Plaintiffs appealed the decision of the Ninth Circuit to the Supreme Court of the United States. On June 8, 2009, the United States Supreme Court declined to take the case for consideration.[298] This left the decision of the Ninth Circuit Court of Appeals interpreting "substantial burden" on religion to not include the desecration of holy sites as the relevant precedent, denying the Hopi and others relief on religious freedom grounds. Allies of the Hopi, using the same law firm as the Navajo Nation, filed a challenge to the proposed expansion based upon environmental and health grounds on September 21, 2009.[299]

Was the decision of the majority correct, despite its unsupportable interpretation of case law? The issue before the Court was: what did the United States Congress mean by the phrase, "substantial burden" on religion? With such cases there always can be competing interpretations of what undefined terms in legislation might mean. The Religious Freedom Restoration Act did not define the term, and there certainly existed a better reasoned argument than that of the majority in the Ninth Circuit, one that does not directly contradict both Justices Scalia and O'Connor's interpretations of Supreme Court precedent.

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[298] Navajo Nation v. Forest Service, 129 S. Ct. 2763, 174 L. Ed. 2D 270, 2009 U.S. LEXIS 4206.

[299] Save the Peaks Coalition, "New Lawsuit Filed Against Forest Service," (September 21, 2009), http://www.indigenousaction.org/save-the-peaks-new-lawsuit-filed-against-forest-service/ (accessed July 1, 2010).

Nothing should be read into the refusal of the Supreme Court to rehear the case. While the decision was left to stand by the Supreme Court, there are any number of reasons the Court might not have taken the case, including waiting for a conflict with another jurisdiction in interpretation, or simply hoping Congress might act to clarify matters. Given the natural tendency of the courts to avoid any decision that might increase their caseloads, that decision which narrows the scope of "substantial burden" and keeps litigation over federal land use to a minimum will most likely remain the "correct" understanding as reasoned by the courts, until shown otherwise by an additional act of Congress.

A more philosophical interpretation of the bitterness of the dispute recognizes that the dispute between Judges Fletcher and Bea was at its core about whether or not to include Indians as part of the community. As issues of Congressional intent regarding nuance of meaning are rarely clear cut, any judge faced with this case had two broad options. First, as Judge Fletcher did, one could relate to the Hopi as human beings who were faced with a very real harm that made a mockery of the stated policy of the U.S. government to preserve and protect Indian religions. This human perspective acknowledges that decent people do not desecrate the most holy of places of others to provide a regular ski season to a profitable low-key ski resort that can never be a great ski resort. From this perspective, any plausible interpretation of the definition of substantial burden, such as those found in dictionaries, would have been the correct approach.

Contrary to this perspective was one that denied history and hampers the larger community's ability to heal the wounds of the past.[300] There can be any number of

[300] Burton noted this was the impact of Lyng and writing Indians out of the Religious Freedom Restoration

motivations for such an orientation, but none of them could be to treat the Hopi as decent human beings would. Vine Deloria suggested more than one potential answer: the supremacy of material interests over religious concerns of an increasingly secular society, a general hostility to Indians, or possibly a desire to maintain the supremacy of the state over all matters of conscience. Added to this, as mentioned above, one cannot overlook the natural tendency of the courts to want to reduce their caseloads in the face of an overburdened court system. This provided a natural tendency to interpret legislation in such a way as to reduce one's own work.

What all of these, and other, possible underlying motivations for the decision of the majority had in common was their inability to face and take responsibility for the adverse action against Hopi religious concerns. The majority of the Ninth Circuit never engaged in any examination of the adverse action against the Hopi because the law, as they constructed it, prevented them from doing so. The Ninth Circuit majority used policy and law to provide cover for any responsibility for treating the Hopi indecently in a manner that was quite similar to Forest Supervisor Rasure.

Meaning and Impact of the Peaks Case

The decision of the Forest Service to desecrate the Hopi sacred mountain and the Ninth Circuit's decision to narrowly interpret meaning of burden under the Religious Freedom Restoration Act has had several lasting impacts. First, it has undermined the trust and working relationship between Indian governments and the Forest Service.[301]

Act has the same impact. Burton, Worship, 292.

[301] USDA Office of Tribal Relations and USDA Forest Service, REPORT TO THE SECRETARY OF AGRICULTURE: USDA Policy and Procedures Review and Recommendations: Indian Sacred Sites, December 2012. p. 15.

Second, this interpretation of the law has effectively removed Indian sacred sites from any form of statutory of Constitutional protections. The power to decide the fate of Indian sacred sites on public lands was left to the discretion of federal administrators. This left the Forest Service with the knowledge that it had a great deal of discretion when it comes to management of sacred sites.[302]

The case also stands as a stark example of how Forest Service administrators were able to fully comply with the consultation process and still take an adverse action against a sacred site. The Forest Service managers framed their management goals in such a way that the only possible answer was to engage in actions that adversely impacted an Indian sacred site. Well aware of prior Indian protest, these administrators managed to fully comply with consultation requirements and the decision makers even came to understand Hopi religious concerns in full. This example demonstrates that government officials can desecrate sacred sites as they please, as long as they fully understand that is what they are doing, and Indians are left no recourse to the law.

This is also a case where the administrative decision was driven by the financial interests of a well-connected corporation. The Arizona Snowbowl Resort hired the former Secretary of the Interior as their attorney, and he contacted forest administrators while formulating policy and pressuring the forest supervisor to approve ASR's plans. As shall be seen below, when corporate interests are not driving the proposed policy changes that trigger the consultation process, outcomes more favorable to Indian issues were obtainable. The consultation process in the case of the Peaks was able to teach Supervisor Rasure of the importance of the mountain to the Hopi and others and cross

[302] USDA, REPORT, 30.

any cultural divide. Absent well connected corporate pressures, the outcome may have differed.

Chapter Three

Cave Rock and the Washoe

Much like at Bear's Lodge before it, rock climbing quickly increased in popularity at Cave Rock in the 1980s and the Forest Service found it necessary to develop a climbing management plan to protect the most sacred place of the Washoe Indian nation. Unlike Bear's Lodge, Cave Rock did not have any professional climbing guides that made their living from access to the site. Instead, Cave Rock offered the most challenging climbs in North America with a unique view of neighboring Lake Tahoe. Cave Rock already had been damaged by vehicle tunnels blasted through it in 1931 and again in 1957.

Unlike the management of the San Francisco Peaks, the Forest Service initiated a series of meeting with both climbers and interested Washoe Indians to try and come to some form of mutual agreement and creative compromise for management of Cave Rock. For the Washoe, Cave Rock remained a powerful portal between worlds and that the well being of all the world was put at risk when anyone but Shamans visited the site. The Washoe found the continued intimate contact of climbing to be much more concerning and dangerous than the transit of vehicles or the visits of picnickers.

Unable to come to a compromise, the consultation process had a profound impact on many climbers in attendance. When the climbing organization, the Access Fund, initially moved to portray the Washoe as selfish and privileged, members condemned the organization and prevented it from engaging in any further ethnocentric or racist attacks

on the Washoe people. Some climbers went as far to endorse leaving Cave Rock to the Washoe to enjoy alone.

Though it was a narrow decision, when the Forest Service ultimately moved to ban all climbing at Cave Rock to preserve the physical and cultural integrity of the site, the Access Fund challenged the decision in the courts. Relying on the dicta from the previous cases involving Bear's Lodge and Rainbow Bridge, the Access Fund claimed the decision unconstitutionally established Washoe religion. Ultimately the courts affirmed the decision of the Forest Service, finally clarifying that federal administrators had wide latitude to protect places of cultural and religious significance to Indian nations, including permanently banning certain recreational activities.

The Washoe People

The Washoe Indians of California and Nevada have lived for centuries along Lake Tahoe and the mountain along the eastern shore of the lake, Cave Rock, remains to this day to be of religious and cultural significance to the Washoe people. Historically, the Washoe were a peaceful people, living, between the Paiute of Utah and Indians of California, on the Eastern edge of the Sierra Nevada Mountains in the Great Basin.[1] Traditionally, the Washoe traded with Paiute and Indians of California, with Washoe lands serving as a trade route between the regions.[2]

The traditional economy of the Washoe was based upon seasonal movements to engage in hunting, fishing, and gathering.[3] Gathering pinion nuts and the waju seed was

[1] James F. Downs, The Two Worlds of the Washo: An Indian Tribe of California and Nevada, (New York: Holt, Rinehart and Winston, 1966), 8.
[2] Ibid. 36.
[3] Ibid., 34.

a central part of the Washoe economy. The gathering of the waju seeds differentiated the Wahsoe from their Paiute neighbors, whom they interacted with frequently. The name Washoe was derived from the name of the waju seed.[4] The Washoe fished at Lake Tahoe and the hunting of bears was of religious significance.[5]

The Washoe had no traditional national government, but custom and informal hunting bands served the basis for coordinated military action in the rare times of war with their neighbors.[6] The Washoe were divided among four regional groups and people tended to identify with their regional group.[7] These four groups came together during the fishing season, where custom ruled the fishing and gathering rights. Generally, custom maintained the peace, which included the practice of the wealthy or well off giving to those who were not well off, but occasionally fist fights were used to settle disputes.[8] What leaders that did exist, among hunting parties or at other times, were temporary and based upon merit.[9]

War was not a national affair for the Washoe people. When fighting did occur, usually with Paiute groups, the temporary leaders of the informal hunting groups would have to rally people to support the cause of the fight in question. At times, for larger conflicts, the small hunting groups would form alliances to work in concert to engage in the warfare.[10] The Washoe did not fight at close quarters, but instead used their hunting bows as their primary weapon. Battles rarely lasted as long as one day, and often ended

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4 Edgar E. Siskin, Washoe Shamans and Peyotists: Religious Conflict in An American Indian Tribe, (Salt Lake City, Utah: University of Utah Press, 1983), 3.
5 Ibid., 12.
6 Downs, Two Worlds, 45.
7 Ibid., 49.
8 Ibid., 51.
9 Siskin, Washoe Shamans, 9.
10 Downs, Two Worlds, 54.

when one side or the other ran out of arrows. The Washoe were skilled bowmen and there exists a firsthand report of soldiers regularly hitting a man at five hundred yards.[11]

Washoe Religion

While the Washoe had temporary economic and political leadership based in merit, the Washoe had no religious leaders among their traditional Shaman and Doctors.[12] Traditional Washoe religion holds that certain people are called to be Shaman or Doctors through power acquired in dreams. Spirits use dreams to call members of the community to become Shaman who have supernatural powers. This power is acquired involuntarily and it is not hereditary.[13] Both men and women have been called to become Shaman.[14] Washoe custom held that Shamans were to use their powers for the good of the community, but this was not always the case.[15]

While imbued with supernatural powers, Shamans were viewed with ambivalence in Washoe communities. Washoe Shamans had no political power within Washoe communities as the general populace viewed the Shamans with a certain amount of distrust. The powers of Shamans could be used for both good and bad. Shamans could use their powers to bring misfortune or illness to people.[16] In addition, Shamans served as the traditional source of medical care within Washoe communities. Shamans used their healing powers for trade within the traditional economy and customarily demanded

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[11] Stephen Powers, Don. D. Fowler & Catherin S. Fowler, ed. "Stephen Power's 'The Life and Culture of the Washo and Paiutes,'" Ethnohistory, Vol. 17, No. 3/4 (Summer-Autumn, 1970): 121.
[12] Siskin, Washoe Shamans, 22.
[13] Ibid., 27.
[14] Downs, Two Worlds, 56.
[15] Ibid., 60.
[16] Siskin, Washoe Shamans, 143.

payment before they provided any healing services.[17]

Historically, Cave Rock was a place of great power to practitioners of the traditional Washoe religion and only Shamans were permitted to go to Cave Rock.[18] Those following traditional Washoe religion believe that Cave Rock is used as a portal by otherworldly creatures to enter and travel about Washoe territory.[19] Before the arrival of non-Indians to Washoe territory, only Washoe Shamans were permitted access to Cave Rock. Cave Rock was viewed by the Washoe as a place of great power and Shamans carried out secret rituals there.[20] The power of Cave Rock was considerable. The Washoe only permitted Shamans to visit Cave Rock because misuse of this great power was a threat to the safety of individuals and communities.[21]

Traditional Washoe religious beliefs include common origins for the world and its natural features, while having two contradictory origins for the creation of the Washoe people. In the Washoe religion, the world has passed through five different stages of existence, with each stage of existence serving as a habitation for different creatures. The current world of contemporary Indian peoples was the fifth habitation created in the cycles of the world.[22] Within this fifth habitation, the Washoe have two contradictory origins and traditional practitioners largely found this to be unproblematic. The first creation story for the Washoe people involved Creation Mother. Creation Mother scattered the seeds of a cattail around the Tahoe Lake region. This scattering of seeds

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17 Siskin, Washoe Shamans, 123.
18 Mathew S. Makley & Michael J. Makley, Cave Rock, Climbers, Courts, and A Washoe Indian Sacred Place, (Reno & Las Vegas: University of Nevada Press, 2010), 2.
19 Makley, Cave Rock, 27.
20 Ibid., 10.
21 Ibid., 28.
22 Downs, Two Worlds, 60.

then created the Washoe, Paiutes, and the Indian peoples of California. The second origin for the Washoe has Creation Man as the driving force behind the creation of the Washoe people. In this story, Creation Man creates the Washoe, Paiutes, and Indians of California by separating his three sons to prevent them from quarreling.[23]

While there are multiple stories to explain the presence of the Washoe in the Lake Tahoe region, the origin of significant natural features of the region are tied directly to Cave Rock and the supernatural beings that travel through the portal within Cave Rock. The Water Beings are gray humanoid creatures about one and a half feet tall with long flowing black hair that floats above the ground. The Water Beings are boneless creatures that are cold and damp to the touch.[24] The Water Beings are not of this realm and travel to any part of the Washoe lands through a portal in Cave Rock.[25]

The Water Beings are creatures of great power. Washoe religion holds that once, long ago, Damalali, the short tailed weasel and younger brother to the much wiser long tailed weasel, Pewetsoli, was foolish enough to try to take a Water Being captive. The Water Being then threatened to flood the entire world if Damalali did not free him. Damalali was unconvinced and the Water Being began to flood the world. Damalali let the Water Being go and the flooding stopped, but Lake Tahoe and the other lakes within Washoe lands remained.[26]

Together, the Water Beings and Cave Rock are of central importance to Washoe cosmology. The Water Beings are seen as the source of power for Shamans in this

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[23] Downs, Two Worlds, 60.
[24] James F. Downs, "Washo Religion," Anthropological Records, Vol. 16, No. 9 (1961): 366.
[25] Makley, Cave Rock, 27.
[26] Downs, Two Worlds, 60.

world.[27] The Washoe believe there is a secret cavern within Cave Rock where Shamans go to commune with the spirits. This cavern, and the portal the Water Beings use to travel, are of significant power and it is dangerous for anyone other than Shamans to enter Cave Rock.[28]

The Water Beings continued to be a significant presence in the religious world of traditional Washoe practitioners even after the entry of non-Indians into their lands and disruption of traditional sacred places. Washoe religion has incorporated interactions with non-Indians into their traditions. Not much more than one hundred years ago, a white man fishing in Lake Tahoe accidentally caught a Water Being and was unaware of what he had caught. The Water Being ended up being placed in the San Francisco Aquarium. For those of the Washoe religion, Water Beings are powerful beings and deliberately catching one imperils the safety of the entire world. The Water Being that was captured and placed in the San Francisco Aquarium by an unknowing white man eventually escaped the aquarium, causing the 1906 San Francisco earthquake in the process.[29]

Adaptation and Survival

Just as the Washoe religion grew to include new stories involving the non-Indians that encroached upon Washoe lands, the Washoe people adapted and changed their lives to face the new challenges brought by influx of settlers to their lands. This section will examine the history of these changes and challenges, followed by a look at the challenge the Native American Church brought to the social position of Shamans in Washoe society.

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[27] Downs, "Washo Religion," 366.
[28] Ibid., 370.
[29] Makley, Cave Rock, 97. Downs, "Washo Religion," 367.

The first significant contact the Washoe had with non-Indians was with the Donner party in 1846. The first contact with white people was in the early 1840s, but it was the Donner Party that left the first lasting impression.[30] The ill-fated Donner Party became trapped in the snow inside Washoe territory in 1846. The Washoe observed from a distance and left deer and nuts for the trapped settlers to eat.[31] The Washoe became aware the Donner Party resorted to cannibalism and this shaped Washoe perceptions of white people for generations. Whites were incorporated into the Washoe list of creatures that ate human beings, along with mountain lion, bears, wolves, coyotes, and Bigfoot.[32] White people entered Washoe culture as fearsome man eating creatures to be avoided or tricked, and never directly confronted.[33]

Before 1858 there were maybe one thousand non-Indians that had begun to encroach on Washoe land, but this changed significantly with the discovery of silver.[34] East of Washoe territory, the discovery of the silver of the Comstock Lode brought many more non-Indians to Washoe territory. These new squatters took over Washoe lands as they pleased, expanding farms, ranches, and mines in the area. Whites tended to simply take what they wanted and the Washoe generally offered no violent resistance. Unlike their Paiute neighbors, who went to war with the United States, the Washoe never entered into any treaty with the United States.[35] In the face of this aggressive behavior by incoming settlers, the Washoe word for white people became "mushege," the same word

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30 Downs, Two Worlds, 73.
31 Barrik Van Winkle, "Cannibals in the Mountains, Washoe Teratology and the Donner Party," New Perspectives on Native North America, (Lincoln: University of Nebraska Press, 2006), 398, 400.
32 Winkle, "Cannibals in the Mountains," 406.
33 Ibid.
34 Downs, Two Worlds, 75.
35 Ibid., 77.

for fierce animals or ill-tempered men.[36] The mass influx of non-Indian immigrants to Washoe lands severely disrupted the lives of the Washoe and undermined the traditional Washoe economy.[37]

The expansion of ranching in Washoe territory was largely detrimental to the Washoe economy. Cattle, horses, pigs, and sheep quickly monopolized the best lands for traditional Washoe gathering of food. The Washoe also found that poaching these animals introduced to their lands was met with violent reprisals from the settlers and quickly came to avoid the practice of killing these new animals for food.[38]

The expansion of European agriculture into Washoe territory provided a more mixed results. The non-Indians expanded irrigation into the Washoe lands, and the Washoe found new opportunities to hunt small game at the edges of farms as new habitat grew for rabbits and ducks. In addition, willow and cattail growth increased in some areas providing useful resources. A new type of sunflower began to grow on the edges of farms and their seeds provided a new source of nutrition for Washoe gatherers.[39]

Nearby mining created a growth in need for lumber and charcoal, and had devastating impacts on the Wahsoe economy over the long term. At first the expanded demand for lumber provided short term employment for some Washoe as the pinon trees were harvested. Before long, Chinese laborers replaced the Washoe as workers in the lumber industry. With the quick expansion of the nearby mining industry, the need for lumber was high, and over-logging by companies employing Chinese labor soon eliminated most of the pinion trees. This destruction of a crucial traditional food source

[36] Downs, Two Worlds, 79.
[37] Ibid., 75-76.
[38] Ibid., 76.
[39] Ibid.

created among many Washoe a long standing prejudice against people of Chinese ancestry, as the Washoe blamed the Chinese laborers for the destruction of the pinon forests.[40]

In the face of the destruction of their traditional economy, many Washoe turned to other traditions to try and survive. While some Washoe scavenged through the trash of the non-Indian settlers, others turned to requesting these new wealthy settlers for economic assistance. Washoe culture had no prohibition on asking the wealthy for assistance, and it was traditional for the well-off among the Washoe to provide material assistance to those in need. In the face of the great material wealth of the new settlers, the Washoe thought it was perfectly reasonable to seek assistance. Coming from a much different tradition, the settler population looked down on the Washoe for this behavior and for not fighting for their lands, as their neighbors the Paiute had.[41]

With the development of commercial fishing in Lake Tahoe in 1859, many Washoe moved to enter this new industry. Commercial fishing quickly expanded in the region, spreading to every stream in Washoe territory. The Washoe fought to protect their access to traditional fishing grounds and defended them with fist fights when necessary. For a short time many Washoe were quite successful in this new commercial fishing, but over fishing quickly depleted the stocks. In 1880, regulations outlawed all fishing in streams that fed Lake Tahoe. The Washoe generally ignored these regulations and local settlers tended to not care, as they also hated the fishing regulations. But by the early twentieth-century, most Washoe had given up fishing at Tahoe because there were

[40] Downs, Two Worlds, 76.
[41] Ibid., 77, 79.

insufficient fish to catch.[42]

The nature of leadership in the Washoe communities also began to change after the influx of non-Indian settlers. By the 1850s the Washoe had adopted the habit of calling community leaders Captains, though settlers sometimes referred to them as kings.[43] Leadership claims over Washoe groups evolved over time to come from men claiming to have an ancestor that served as a leader of a rabbit hunt group, marking a departure from the traditional practice of temporary leadership based solely on merit.[44]

With the influx of settlers, no treaty recognizing a Washoe land base, and no reservation, the Washoe almost became a people with no land, but the 1887 Dawes Act, so harmful to other Indian nations, provided the beginning of formal recognition of Washoe land holdings. While the Dawes Act was being used so destructively to force other Indian nations into individual allotments and remove "surplus" land from Indian control, the Dawes Act recognized legal Washoe control over a small amount of land with poor irrigation and little game.[45] In 1893, the Washoe used the terms of the Dawes Act to reacquire 87,000 acres of land. Later the Washoe lobbied Washington, under the leadership of Gumalanga, also called Captain Jim, and regained control of culturally significant land where pine nuts grew.[46] In the 1900s the Washoe moved into permanent settlements for the first time.[47] This poor land returned to the Washoe was not sufficient to support the Washoe people and the United States government provided ten thousand

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42 Downs, Two Worlds, 79.
43 Ibid., 90.
44 Ibid., 83.
45 Ibid., 95-6.
46 Makley, Cave Rock, 13.
47 Downs, Two Worlds, 88.

dollars to purchase more land in 1916.[48] In 1917, a rancher returned 40 acres to the Washoe as a donation, providing the land base for Sagetown.[49] The Washoe were able to purchase another 795 acres in 1938.[50]

New political challenges arose with the creation of an Indian Reorganization Act government in 1937. While the Washoe had land holdings, they had no formal reservation to draw people together and the Washoe lived in scattered communities. The new IRA government officials clashed with traditional leaders for control of Wahsoe communities. With the advent of the termination policy, federal recognition for those portions of the Washoe people living in California ended in 1953.[51]

Washoe Shamans and the Native American Church

While political changes created new challenges for the Washoe to face, the greatest threat to the place of Shamans in Washoe society was the spread of the Native American Church, sometimes called the Peyote Cult by anthropologists of past generations. In 1932, Lone Bear first introduced the ways of the Native American Church to the Washoe.[52] Some trace the spread of the Native American Church among the Washoe people to the efforts of Washoe Ben Lancaster in 1936.[53] Others credit the preaching in 1936 by Franklin York, another Washoe Indian, with the rapid spread of adherents to the new religion introduced to the Washoe.[54]

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48 Makley, Cave Rock, 13.
49 Downs, Two Worlds, 96.
50 Ibid., 96.
51 Ibid., 96, 102.
52 Ibid., 102.
53 Siskin, Washoe Shamans, 102.
54 Downs, Two Worlds, 102.

The Native American Church was well suited to spread among the Washoe as its practices fit well into traditional Washoe cosmology. Use of peyote brought visions to members of the Native American Church. Traditional Washoe believed that power came from dreams and these peyote induced visions tapped into the same source of power as traditional dreams.[55] Native American Church practitioners also claimed to have healing powers similar to those of Washoe Shamans, but adhered to the belief that their powers could only be used for good, as opposed to the Shamans, whose power could be used to both heal and harm.[56] Also appealing, the Native American Church claimed use of peyote as a sacrament prevented Washoe Shaman from harming people.[57]

The Native American Church also took political and economic positions that the Washoe people welcomed. While sacramental use of peyote protected people from the potential harmful uses of power by Shamans, those seeking healing turned to Native American Church healers because they only accepted voluntary donations for their services. Washoe Shaman continued their traditional practice of demanding payment for their services upfront and the need for their services was undercut by the NAC healers.[58] The Native American Church also opposed the use of alcohol, and this was a welcome position as many Washoe viewed alcohol use as deeply harmful to the Washoe people.[59] By 1939 the presence of the Native American Church among the Washoe spread to such a degree disruptions in the Washoe community began to appear.[60]

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55 Downs, Two Worlds, 104.
56 Siskin, Washoe Shamans, 143.
57 Ibid., 116.
58 Ibid., 123.
59 Ibid.,, 122.
60 Ibid., 113.

Unhappy with the undermining of their livelihood, position in society, and spiritual powers, the Shamans rallied and organized to drive out the Native American Church from the Washoe community.[61] While also having economic concerns, the Shamans reported being most alarmed by the claims that peyote use could eliminate their spiritual powers.[62] The Shamans engaged in a campaign of accusing members of the Native American Church of practicing sorcery.[63] The Shamans also publicly claimed peyote use caused madness.[64] By standing united the Shamans were able to largely expel the Native American Church from Washoe communities, but some felt this was their final victory and adherence to Washoe traditional religion and respect for the Shamans was permanently on the decline.[65]

Henry Rupert

While some in the twentieth century have seen traditional Washoe society on nothing but decline and U.S. government officials thought the Washoe were soon to be an extinct people,[66] Henry "Moses" Rupert revitalized declining Shaman practices by merging them with some Western medical practices and a broader cosmological view. Rupert linked the source of the power of Shamans to the sources of spiritual powers of other religions around the world. Rupert also served as the chief informant for the major ethnographic study of the Washoe people and it is his historic connections to Cave Rock

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61 Siskin, Washoe Shamans, 160.
62 Ibid., 158.
63 Ibid.,, 116.
64 Ibid., 127.
65 Ibid., 160.
66 Downs, Two Worlds, 107. United States Fores Service. Cave Rock Management Direction Final Environmental Impact Statement. October 2002, p. 3-55.

that were key in leading the Forest Service to determine that Cave Rock should be restored to the condition it was in 1965, the year of Rupert's death.[67]

Powerful dreams came to Henry Rupert at a young age. Rupert's mother worked as a servant to a white family when he was born in 1885.[68] As a child Rupert dreamed of bears and as a young man dreamed that his powers would come from water, connecting him in the spirit realm to the Water Beings.[69] At an early age his Uncle Welewkushkush served as his mentor. Wekewkushkush was highly regarded for his prowess as a Shaman and Rupert witnessed his uncle cure several people.[70] Rupert gained the nickname, Moses, when he was caught in a flash flood. The water reportedly parted, leaving Rupert unharmed.[71] Moses Street in Casron city was named for Rupert.[72]

In 1894, the U.S. government forced Rupert into the Casron Indian School. The Carson school was part of the system of boarding schools designed to remove Indian children from their families, religions, and languages in an effort to "uplift" the children by forcing them to adopt Western cultural ways, including some form of Christianity and exclusive use of the English language.[73] Rupert ran away his second day at the school. The Nevada Indian Agency retaliated by arresting his parents. The policy at the time was to incarcerate parents until the child returned to school. Rupert returned, but tried to run away two more times before eventually giving up.[74]

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67 Cave Rock FEIS, 2-9.
68 Makley, Cave Rock, 30.
69 Ibid., 29-30.
70 Ibid., 31.
71 Ibid., 31-32.
72 Ibid., 32.
73 Ibid., 32.
74 Ibid., 33.

In 1898, Rupert committed to the path of becoming as Shaman, despite the Bureau of Indian Affairs banning such religious practices. That year Rupert dreamed of the Rain Boss. This dream confirmed to the young man that his primary power source was water and he was to become a Shaman.[75] After graduating from the Carson Indian School, Rupert went to Reno to work at age eighteen. While the boarding school tried to suppress Rupert's Shamanistic destiny, he did learn the skill of typesetting at the school. Rupert moved to Reno to work as a typesetter for the Reno Evening Gazette.[76]

Rupert continued his spiritual evolution. By age twenty Rupert had mastered the skill of hypnotism. After working with his uncle for a time, his uncle sent Rupert to seek guidance from Beleliwe in 1907. Beleliwe was widely known among the Washoe for having great powers.[77] Beleliwe quickly recognized Rupert's power and encouraged him to become a Shaman. The same year as meeting Beleliwe, Rupert healed his first patient. This woman was the mother of a good friend and had been unable to be cured by Western medicine. News spread quickly that Rupert had healed this formerly intractable illness.[78]

During these early years as a healer, Rupert encountered visions that motivated him to expand the Washoe understanding of the sources of spiritual power in the universe. Rupert dreamed of meeting Hindu spirits. After this experience, Rupert believed that all beings drew power from a common pool of energy, regardless of race, culture, or ethnicity. These Hindu spirits drew upon the same power as the Washoe beings and spirits in this new understanding.[79]

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[75] Makley, Cave Rock, 33.
[76] Ibid., 34.
[77] Ibid.
[78] Ibid., 35.
[79] Ibid., 35-36.

Rupert met resistance to his new revelations from more conservative Washoe practitioners. Still a novice Shaman in 1909, a Washoe man suffering from typhoid sought Rupert out as a last resort. The novice practitioner Rupert was able to heal the man. Despite these impressive early successes in using spiritual power, some Washoe Shaman were unhappy with Rupert's expanded perspective. Rupert incorporated a study of Western medicine as part of his expanding knowledge. In 1910 Rupert suffered from persistent joint pain. His uncle, Welewkushkush, warned Rupert this pain was a result of him studying Western medicine and other religious perspectives. Rupert further broke with tradition by marrying a Northern Paiute woman. While such marriages were not unheard of, they were still highly discouraged by more conservative Washoe.[80]

In 1916 the federal government returned land to the Washoe to form the Carson Colony and Rupert moved there in 1924. At the Carson Colony, Rupert and his wife obtained land. They engaged in a profitable business raising strawberries and turkeys. They lived together until her death in 1933.[81]

After the death of his wife, Rupert returned to more concentrated work on expanding Washoe cosmology. He developed a theory of ethereal waves that connect every living thing to the spirit world. The spirit world was in turn part of a three layered cosmology. Humans could access the spirit world through dreams. The healing powers of Shaman and others, according to Rupert's understanding, came from the third layer, the spirit world. This spirit world, that Washoe Shaman could access in dreams, was the same source of miracles and power for other religions, including the healing and miracles

[80] Makley, Cave Rock, 36.
[81] Ibid., 37.

of Jesus, according to Rupert's expanded Washoe cosmology.[82]

Rupert never advertised his healing abilities, but became known by many all over the world.[83] Throughout the 1950s Rupert continued to meld Western healing practices with his expanding understanding of Washoe cosmology that connected the source of Washoe power to powers of other religious traditions.[84] Throughout Rupert's evolving understanding of Washoe cosmology as more inclusively being connected to other religious traditions, and his expansion to include some Western medicine in his practices, Rupert continued to visit the secret places of great power in Cave Rock.[85] By the 1960s people from all over the world were coming to Rupert for healing. One of these visitors was a traditional Hawaiian healer. This healer provided Rupert access to a Hawaiian healing spirit that Rupert also called upon in his later activities.[86]

The Changing Rock

A volcano formed Cave Rock some three million years ago before it became an impediment to non-Indians and then a source of climbing recreation for others.[87] The Washoe people named Cave Rock, De'ek Wadapush, or “Standing Gray Rock” in literal translation.[88] Settlers passing through the area left markings and graffiti in the 1800s that the National Historic Register later considered to be archaeological significance.[89] Originally an aboriginal trail went past Cave Rock along the eastern shore of Lake Tahoe

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82 Ibid.,37-38.
83 Makley, Cave Rock, 30.
84 Ibid., 25.
85 Cave Rock FEIS, 3-10.
86 Makley, Cave Rock, 38.
87 Cave Rock FEIS, 3-2.
88 Ibid., 3-9.
89 Ibid., 3-5.

and as settler travel expanded in the region, this trail was expanded to connect travel between Carson City and Virginia City between the years 1858 and 1863.[90]

The initial road along Cave Rock was steep and proved to be an impediment to the transport of heavier mining loads and this difficulty required a series of improvements to the transport infrastructure.[91] The trestle road constructed along the lake side of Cave Rock was sufficient to accommodate the heavier traffic. The United States government later incorporated this impressive and expensive road into the highway system as part of Highway 50 in 1925.[92]

Traffic increased and expanded as tourism at Lake Tahoe grew and this compelled drastic alterations to Cave Rock. In 1931, the Forest Service highway fund program allocated $86,000 to construct a highway through Cave Rock, including a 151-foot tunnel through the sacred site. No representatives from the Forest Service contacted any Washoe regarding the project. At the time the Washoe people were fragmented and had no government the United States recognized.[93]

As time passed, casinos and ski resorts grew up around Lake Tahoe, requiring further traffic upgrades. As more tourists flocked to the new attractions, expanding the tourist season year-round, planners determined that a second tunnel would be necessary to accommodate tourist traffic. As with the first tunnel, no one consulted the Washoe or their government and construction began on a second tunnel in 1956.[94] The 410-foot tunnel project finished in 1957. Practitioners of traditional Washoe religion believed that

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90 Ibid., 3-12.
91 Cave Rock FEIS, 3-12.
92 Ibid., 3-12.
93 Makley, Cave Rock, 18-9.
94 Ibid., 20.

those who misuse Cave Rock put themselves and others at risk, especially those engaged in prolonged contact with Cave Rock. The construction of the second tunnel was plagued by injuries, mishaps, and accidents.[95]

Initially, many Washoe viewed the blasting of the tunnels through Cave Rock as a serious threat, but the series of roads through the rock now have different meanings to both the Washoe and non-Indian populations. For the Washoe the transportation tunnels came to represent, by the end of the twentieth century, the resilience of Washoe culture and its ability to adapt and survive.[96] The unique proximity of highways from four different engineering periods of United States history made Cave Rock eligible for designation as an Historic Transportation District in 1997.[97]

In 1970 the Washoe people won its claim against the United States in the Indian Claims Commission. As part of the failed push to terminate Indian governments, the United States created the Indian Claims Commission to finally settle land disputes regarding the vast territory it admitted it had no legal claim to. As the Washoe had no treaty relations with the United States government and simply found all of their lands taken from them, the Commission determined the Washoe were entitled to a five million dollar settlement. The Commission based its findings upon the 1862 value of the lands seized.[98]

The Climbing of Rocks

The Second half of the twentieth century saw the rise of a new recreational sport,

[95] Makley, 21.
[96] Cave Rock FEIS, 3-9.
[97] Ibid., 3-12.
[98] Ibid., 3-28.

rock climbing. Sport rock climbing began in the 1950s and grew in popularity, spreading across the United States. About 1988, recreational climbers discovered Cave Rock and began to create climbing paths along the rock face with permanent bolts forced into the rock for safety measures.[99] Rock climbing quickly grew in popularity at Cave Rock and as early as 1993 authorities considered issuing regulations as they feared the proliferation of climbing would lead to permanent destruction of the rock face.[100] The climbing community created their own guides to these climbing paths, including community created names, many of them vulgar and offensive.[101]

Despite the propensity of some to create vulgar names for climbing paths, the climbing community also included a strong contingent known as "leave no trace" climbers. These climbers felt that respect for the environment was part of the quasi-spiritual experiences in their sport. These climbers called for restraint in the sport and respect for the environment. In practical terms, they published guides that urged limiting the expansion of new climbing paths to only those that significantly differed from existing paths and taking extra efforts to preserve the quality of climbing sites.[102] In 1997, the Leave No Trace climbing organization called for climbers to leave sites alone that faced damage or destruction and further called for climbers to leave Indian sacred sites in peace. These climbers noted that climbing sacred sites, "shows disregard for early Americans."[103]

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[99] Cave Rock FEIS, 3-30.
[100] Makley, Cave Rock, 41.
[101] Cave Rock FEIS, 3-31.
[102] Makley, Cave Rock, 41.
[103] Ibid., 41.

Dan Osman was one of the leaders that developed Cave Rock for climbers. Osman himself was of mixed European and Japanese ancestry; he had a Japanese paternal grandparent, and dedicated his life to climbing related activities. A skilled and well-respected climber, Osman survived on a meager income made from climbing related sponsorship deals. Drawn to other dangerous activities such as street racing, Osman often did not have the money to pay fines related to his activities that did not fully comport with the law. One of his closest friends was a doctor and Osman frequently paid his medical bills with free equipment from his sponsors that his doctor accepted in lieu of monetary compensation.[104]

Osman was a daredevil and his quest for greater challenges brought him to Cave Rock in the early 1990s. Osman would engage in such activities as free climbing the most difficult of rock faces. Climbers discovered Cave Rock in 1988 and new routes began to proliferate along the rock face. The steep inclines and the beautiful view of Lake Tahoe attracted many climbers. Osman was attracted to the most difficult climbs in North America. The climbing difficulty rating system rated the most difficult climbs in the world as 5.15. In 1990, Dan Osman spent months creating paths along Cave Rock rated 5.12 and two rated 5.13. Osman took months to do this because he refused to repel down from the peak to put in safety bolts, and instead climbed from the bottom, attaching new bolts as he went. This was his way of respecting climbing traditions. While working to create the most difficult route at Cave Rock, Osman fell and required months of recuperation before he could climb again.[105]

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[104] Makley, Cave Rock, 42-3.
[105] Ibid., 43-4.

During the period of recovery, Osman created the most invasive alterations to Cave Rock since the 1957 highway tunnel. With the quick proliferation of climbing, the floor of Cave Rock had become quite littered. Osman cleaned up the refuse and then began the laborious process of hauling boulders and hundreds of bags of cement to the cave floor. Osman created a floor for Cave Rock paved with flat stones and arranged boulders to serve as benches. Other boulders were arranged to serve as belaying points for those providing safety to climbers. Osman built a low rock wall and steps into the cave. The look was elegant and his efforts had the impact of attracting even more climbers to Cave Rock.[106]

Just as Osman was reaching the pinnacle of climbing celebrity, he changed the focus of his endeavors to thrill seeking jumps from high places. Inspired by the rush he received from falling while attempting to climb, Osman reasoned that greater excitement could be achieved by controlled jumps from high places. Osman shifted the focus of his activities to releasing commercial videos of himself jumping off of scenic areas. He even did such extreme jumps for advertisements. He produced a video of himself cartwheeling off Cave Rock and falling, only to be caught by the rope just before hitting scenic Lake Tahoe.[107]

Concerned with the proliferation of climbing and the unapproved "improvements" at Cave Rock, the Forest Service issued a temporary order closing Cave Rock to all climbing and Dan Osman joined other climbers in meeting to organize a resistance to this closure in February of 1997. The first meeting of the climbers with Osman were

[106] Makley, Cave Rock, 44-5.
[107] Ibid., 45.

dominated by ignorance and misinformation. The climbers repeated unfounded rumors that the Forest Service planned to trade Cave Rock to the Washoe people for some other piece of more valuable land. Some repeated the mistaken belief that the Washoe had long ago sold Cave Rock and the vicinity for a penny an acre and had no legal claims to the lands. Osman for his part claimed Cave Rock was a spiritual place for the climbers as well, and went as far to question the validity of Washoe claims to having any real spiritual connection to the place. Osman said he felt that if the Washoe simply understood the spiritual significance of the place to climbers, some form of accommodation might be reached.[108]

While the discussions regarding how best to manage Cave Rock continued and the temporary closure came to an end, Osman continued his thrill seeking jumps, to deadly effect. In October of 1998, after the end of the temporary closure, Osman planned a jump in Yosemite national park, but was delayed by two weeks in jail, after setting his gear, for failure to pay fines related to several vehicle violations. Fearing the Forest Service might confiscate his equipment, Osman returned to Yosemite upon release and impulsively altered his set-up to push his jump to over one thousand feet. This last minute change caused part of the apparatus to snap and Osman fell to his death in November of 1998. Five days later, two hundred people gathered to spread his ashes over Cave Rock and Lake Tahoe, where he pioneered some of the most difficult climbing routes in North America.[109]

Forest Service Management of Cave Rock

[108] Makley, Cave Rock, 47.
[109] Ibid., 47-8.

Until December of 1994 no one was entirely sure who was in charge of Cave Rock. With the presence of federal and state projects in the area, the Nevada Department of Transportation and the Nevada State Parks system each had management responsibilities in the vicinity.[110] Some thought crucial portions of Cave Rock were privately owned. Though initial inquiries seemed to have indicated that Cave Rock was under Forest Service jurisdiction in December of 1994, this was not confirmed until a title search was completed in 1998.[111]

Partially in response to Executive Orders 13,006 and 13,007, which called for the further protections for historic sites, traditional cultural properties, and sacred sites and for land management by government agencies to avoid adverse impacts on Indian sacred sites, the Forest Service began to develop a plan for managing Cave Rock under its newly discovered managerial duties.[112] Wahsoe Chairman Brian Wallace reiterated the significance of Cave Rock to traditional Washoe religion and ongoing Washoe objections to the continuing adverse impacts to Cave Rock, including but not limited to rock climbing. As part of this process, the Forest Service determined Cave Rock could be nominated to the National Register of Historic Places.[113]

Robert Harris, the outgoing Forest Supervisor for the Lake Tahoe Basin Management Unit, issued an order temporarily closing Cave Rock to climbing that was met with immediate protest. Harris, who began his work at the Forrest Service as an engineer, ordered a temporary closure for 1997. The closure was to be in place for the minimum time necessary to develop a comprehensive plan for managing Cave Rock. In

[110] Makley, Cave Rock, 46.
[111] Cave Rock FEIS, 1-4.
[112] Makley, Cave Rock, 46.
[113] Ibid.

February of that year, Dan Osman met with climbers in their ill-informed meeting to present their case to the Forest Service. The Access Fund, an organization that lobbies and initiates law suits on behalf of maintaining access to public sites for climbers, immediately contacted the new Forest Supervisor Juan Palma. The Access Fund threatened the Forest Service with a lawsuit if the ban was not lifted.[114]

In an effort to step up its campaign to protect climber access to Caver Rock, the Access Fund newsletter tried to attack the Washoe people directly, but the Access Fund met with resistance from its own membership. Attempting to portray climbers as victims, the newsletter piece blamed the Washoe for being selfish and picking on climbers. Powerful selfish Indians were creating false religious claims in order to deny climbers their rights, the Access Fund tried to claim. This ploy by the Access Fund newsletter editors to spread ignorance and hate to further their own political agenda was met head on by resistance from members of the Access Fund itself.[115] The climbing community by 1997 had a strong contingent that subscribed to the values of the Leave No Trace movement that called for not only leaving a minimum impact in climbing, but also called for leaving Indian sacred sites in peace. Like minded members of the Access Fund denounced the editorial in the newsletter, calling claims that climbers are powerless victims of Indian plots to be "ludicrous" and noting that the Indian communities of the United States had been brutally mistreated for centuries by U.S. policies. Some quit the Access Fund over the newsletter editorial. Others condemned the comments as "imperialist garbage."[116]

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[114] Makley, Cave Rock, 46-7.
[115] Ibid., 58.
[116] Ibid.

Despite the opposition from within its own ranks to demonizing the Washoe, the Access Fund was still able to have the climbing ban removed within three months, well before any management plan could be devised. The Access Fund flooded the Forest Service with negative comments and appealed the closure order to the Western Regional Office of the Forest Service.[117] Access Fund attorneys contacted the Forest Service and threatened a lawsuit if the involuntary ban on climbing was not immediately lifted. In their communications, the Access Fund attorneys relied upon dicta from the Bear's Lodge case. Unrelated to that case, the court opined that a hypothetical mandatory closure to protect religious interests might not comport with the establishment clause of the constitution. In an effort to avoid a lawsuit, the Forest Service removed the mandatory climbing ban after a mere three months.[118]

In the meantime, the Washoe continued to press the United States government to improve their economic and cultural conditions. In 1997, President Bill Clinton hosted the Lake Tahoe Summit in an effort to keep Lake Tahoe and the surrounding area environmentally healthy and economically thriving. Washoe Chairman Brian Wallace argued for the inclusion of the Washoe people in this summit as the historic guardians of Lake Tahoe and the surrounding region. At the summit, Wallace pressed President Clinton to return Lake Tahoe to the Washoe people. Clinton denied the request, stating that such a move was outside of executive powers, but the two leaders came to an agreement for the Washoe people to manage the Meeks Bay Resort and Marina under a twenty year special use permit with the Forest Service.[119] Forest Supervisor Palma

[117] Makley Cave Rock, 58.
[118] Ibid., 61-2.
[119] Lynn Armitage, "The Washoe: The First People of Lake Tahoe," Indian Country Today, Aug. 5, 2012, http://indiancountrytodaymedianetwork.com/2012/08/05/washoe-first-people-lake-tahoe-125703,

finalized the order in 1997.[120]

Once the complete climbing ban was lifted, Supervisor Palma had to institute an interim management plan until a final plan could be formulated. Palma's interim plan called for a ban on all new safety bolt placements in Cave Rock. In addition, climbers would be encouraged to voluntarily abstain from climbing out of respect for the Washoe.[121]

Those looking to maintain climbing access to Cave Rock challenged the Forest Service judgment that Cave Rock could be placed on the National Register as a Traditional Cultural Property, but this issue was laid to rest when the National Register ruled that Cave Rock was eligible. Those seeking climbing access both claimed that the tunnels had destroyed the value of Cave Rock as a Traditional Cultural Property and that even if Cave Rock was a Traditional Cultural Property, rock climbing did not adversely impact the TCP. In 1998, the National Register determined that Cave Rock was a Traditional Cultural Property and that rock climbing was adversely impacting that cultural property.[122] In addition, Cave Rock was eligible for listing as an Historic Transportation District as the unique proximity of roadways from four distinct engineering periods of U.S. transportation were present in and about Cave Rock.[123] Crucial to the eligibility of Cave Rock as a Traditional Cultural Property were the historic activities of Henry Rupert and the cultural and religious significance of Cave Rock to the Washoe people.[124]

(accessed Sept. 27, 2015).

120 Makley, Cave Rock, 58.

121 Makley, Cave Rock, 60.

122 Cave Rock FEIS, 3-25.

123 Ibid., 3-12.

124 Ibid., 3-9.

Early in 1998, Supervisor Palma organized the mandatory consultation process as a way to try and bridge the gap between the Washoe people and the climbing community. Juan Palma had a business management degree from Oregon State University and a master's degree in environmental sciences from the University of Nevada. He previously worked as a budget officer, administrative office, district manager, and deputy forest supervisor.[125] The Forest Service organized five meetings for members of the public, including climbers and the religious and political leadership of the Washoe community, from January to May. The Forest Service sought to use the initial meetings as a way to gather information and facilitate discussion as part of the consultation process.[126] Personally, Palma indicated that he felt the climbing community needed to be better educated as to the concerns of the Washoe people.[127] The first of the consultation meetings was held on January 22, 1998, bringing climbers and Washoe people together to begin the search for some form of management compromise for Cave Rock. Twice as many people attended, about evenly split between climbers and Washoe, as planners expected. Jean McNichols, a descendant of Henry Rupert and caretaker of Cave Rock, presented the central Washoe position: the Washoe opposed any recreational use of Cave Rock. Terry Lilienfield spoke for the climbers and tried to stress the respect for Cave Rock that climbers held. She stressed the willingness of the climbers to find common ground with the Washoe.

This first consultative meeting ended in what the Forest Service viewed as a success. While Juan Palma would not be present personally until the third meeting, his

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125 Makley, Cave Rock, 59.
126 Cave Rock FEIS, 4-1.
127 Makley, Cave Rock, 60.

goals for the first meeting were to introduce the participants to the collaborative process and share perspectives among the interested groups. The meeting included small discussion groups where the participants focused on sharing their concerns and expressing their ideal outcome for Cave Rock.[128]

The next meeting was held on March 10 and continued the dialogue among the interested parties, while including a presentation as to the eligibility of Cave Rock for the National Register of Historic Places. The meeting began with a presentation by Forest Service archaeologist John Maher. Maher took the assembled participants through the reasons for Cave Rock's eligibility for inclusion on the National Register as a traditional cultural property and addressed the fact that rock climbing was an ongoing adverse impact that endangered the site's integrity. After Maher's presentation, those assembled broke in to groups to answer certain questions as to why Cave Rock was special to different groups and the problems these groups might face.[129]

The organization of the proceedings began to concern many Washoe at this point. Some participants noted that only one of the five questions addressed Wahoe concerns, while the remaining four either covered understanding concerns of climbers or the perspectives of climbers. The meeting summary delivered to participants did not alleviate these concerns. The summary omitted Maher's assessment of the negative impacts of climbing on the traditional cultural property and emphasized the willingness of climbers to compromise to almost any extent to retain access to Cave Rock. The summary also emphasized that climbers did not understand why they were being singled

[128] Makley. Cave Rock, 63.
[129] Ibid., 63-4.

out for exclusion from the site's many recreational users, while ignoring Maher's own presentation that stated climbing threatened the integrity of Cave Rock.[130]

In the midst of the collaborative process, the climbers met on their own on March 3, 1998, to formulate a proposed compromise that they hoped might alleviate Washoe concerns. The climbers created a plan based upon the Bear's Lodge management plan. Their proposal called for greater climber responsibility in trash management, camouflaging existing safety positions, placing signage about to both explain the importance of the area to the Washoe and asking people to be respectful. The climbers also planned to ask the creators of climbing paths to change the vulgar and offensive names. The plan also called for a program where climbers were urged on a voluntary, but not mandatory, basis to vacate Cave Rock during the most sensitive times. The climbers also agreed to leave if Wahsoe arrived to use places, as long it was less than six times a year, but if the Washoe began asking for privacy every day, the agreement would have to be re-opened.[131]

When presented with this proposed compromise, Washoe Chairman Wallace did not respond positively. Wallace found the Bear's Lodge compromise to not be a good fit for Cave Rock. Wallace noted many groups found Bear Lodge to be a sacred place, while only the Washoe saw Care Rock as the center of their cosmology.[132] Further, the proposed compromise did not acknowledge the crucial differences in Washoe religion and those that found Bear's Lodge to be a sacred place. Many conducted ceremonies at Bear's Lodge that they preferred would be private, while only Shamans were permitted to

[130] Ibid., 64.
[131] Makley, Cave Rock, 64-5.
[132] Ibid., 65.

visit Cave Rock. When confronted with the accusation that the climbers were willing to compromise and the Washoe were not, Wallace replied that 177 years of compromise was enough for the Washoe.[133]

The third collaborative meeting on March 17, 1998, nearly saw the collapse of the process. Already unhappy that the framing of the process appeared to favor the climbers, the Washoe were further distressed when a display was created with the two most extreme positions at opposite ends: full access for the climbers, and full closure for the Washoe. This display was presented as starting points for finding some compromise in between these positions. The Washoe felt that by asking everyone to find a compromise in the middle, the framing of the question presentation was both calling for the Washoe to abandon their position and to present them as obstructionist. Matters took a turn for the worse when the next phase of the meeting was a Forest Service presentation of climbing techniques featuring pictures of climbers active on Cave Rock.[134]

The third collaborative meeting nearly broke up when the event seemed to many Washoe to be organized in such a way to favor the climbers' interests over those of the Washoe. During a break, Washoe conferred as to whether or not they would simply walk out of the meeting. The Washoe requested to have equal time to present their view of matters and though it was not on the agenda, the Forest Service allowed Chairman Wallace to address the participants. With no time to prepare, Wallace was able to speak for twenty minutes. Wallace explained that even talking of these matters was difficult for the Washoe people. He stressed their belief that Cave Rock was sacred and there could

[133] Ibid.
[134] Makley, Cave Rock, 65-66.

be no way to partially honor the holy place. He stated that the Washoe felt it was unfair to ask them to compromise their culture values.[135] At the end of the meeting the Forest Service polled the participants as to their feelings regarding continuing the process. All but one Washoe felt there was no point in meeting again for further discussion, while the climbers were more evenly split in their opinions.[136]

Despite the difficulties with the process, Chairman Wallace and others attended the fourth meeting on April 9, where the Forest Service set out the goal of finding a creative solution. The climbers reiterated their goal of working with the Washoe in an attempt to find some compromise. Chairman Wallace reiterated the Washoe position that they were happy to share ideas but that the importance of Cave Rock was such that no compromise was possible. Wallace gave voice to the emerging Washoe belief that the Washoe were being portrayed as uncompromising when they refused to agree to further destruction.[137]

While the Washoe again presented their position, the final collaborative meeting on May 27, 1998, more highlighted the division within the climbing community. Washoe elder Ruth Abbie spoke of the history of the Great Spirit giving this land to the Washoe and the government of the United States coming along and taking everything and building the tunnels through Cave Rock without even consulting the Washoe. She said she felt as if speaking during this process was as useful as speaking in the wind. Aaron Silverman, a climber from Reno, spoke in support of the Washoe position and stated there were plenty of other climbing opportunities in the area. He had participated in the

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135 Ibid., 66.
136 Makley, Cave Rock, 66.
137 Ibid.

previous meetings and expressed his feeling that it was ridiculous to even consider recreational climbing to be worthy of opposing Washoe cultural concerns. Leaders from the climbing community were quick to disagree with Silverman and noted that the beauty near Lake Tahoe was unlike any other opportunity and the uniquely high difficulty ratings could be found nowhere else.[138] Silverman's position represented the emerging influence of the Leave No Trace movement and other climbers began to call for Cave Rock to be left to the Washoe.[139] Despite the difficulties, Palma declared the process a success as he had gathered a great deal of information regarding all the parties' positions and he would be able to make an informed decision.[140]

The Draft Environmental Impact Statement

After the initial consultation process, interested parties kept lobbying Forest Supervisor Palma. Chairman Wallace wrote to reiterate many of the positions the Washoe had expressed at the collaborative meetings. Wallace added that many Washoe found it offensive that some climbers appeared to presume the right climb Cave Rock, while ignoring the much deeper connection the Washoe had to Cave Rock for a much longer time. He also stated that recreational climbing was not like religion.[141] Attorney for the Access Fund, Paul Minault, argued in a letter that the roads through Cave Rock had already completely desecrated Cave Rock, thus Washoe positions were unsupportable. He accused the Washoe of demonizing climbers and claimed the Washoe

[138] Makley, Cave Rock, 67.
[139] Cave Rock FEIS, 3-42.
[140] Makley, Cave Rock, 68.
[141] Ibid., 70.

were merely claiming Cave Rock as a trophy of their resurgent power.[142]

With the continued input from interested parties, Supervisor Palma issued the Draft Environmental Impact Statement with a preferred alternative that favored the position of the Access Fund in January of 1999.[143] The preferred alternative was nearly identical to the compromise proposal of the climbers that was based upon the voluntary management plan for climbing at Bear's Lodge. The DEIS considered five alternatives that ranged from no action to exclusive Washoe use of Cave Rock, with two different plans to phase out rock climbing over several years.[144] The preferred alternative limited and managed climbing in familiar ways. There was to be no new climbing routes and no new climbing bolts. Existing safety gear was to be camouflaged and a small number of routes were to be eliminated, not for consideration of the Washoe, but for the safety of the traffic through Cave Rock.[145] All proposed alternatives were to include an educational component, including signs and brochures about the cultural significance of Cave Rock.[146]

Early that year, Supervisor Palma conducted further consultation and public comment meetings regarding the proposed action of the DEIS. Palma met with Washoe Chairman Wallace, the Washoe Vice Chair, the Washoe Cultural Resources Coordinator, Tribal Council members, and twenty-five members of the Washoe public, ranging in age from eight to eighty, where the Washoe could express their displeasure with the proposed action. Palma conducted a further public comment meeting in February of 1999 and

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142 Ibid., 69-70.
143 Makley, Cave Rock, 71.
144 Cave Rock FEIS, 2-5.
145 Ibid., 2-10.
146 Ibid., 2-7.

twenty members of the public attended to discuss the preferred action management plan.[147]

The public comment period continued in written form, and while Access Fund attorney wrote to express support for the preferred action of the Forest Service, many prominent commentators expressed their displeasure with the plan to merely limit climbing at Cave Rock.[148] Don Kilma, writing for the Advisory Council on Historic Preservation, noted that the DEIS itself acknowledged that climbing would have continued harmful impacts on the Traditional Cultural Property. Kilma urged the Forest Service to protect the rock face from further damage by climbing, and reminded the Forest Service that protecting a Traditional Cultural Property was a secular purpose and would not be an unconstitutional establishment of religion.[149] The State Historic Preservation Office of Nevada complained the continuation of climbing would damage the Traditional Cultural Property of Cave Rock and expressed concerns for the cumulative effects of continued climbing.[150] Former Forest Supervisor Robert Harris, who had initiated the previous temporary closure to climbing, wrote to object to the preferred action on several grounds. Harris objected that the preferred alternative did not comply with the general Forest Plan's requirement to protect cultural sites nor did it comply with the laws protecting heritage resources. Harris complained the preferred alternative would have significant and cumulative adverse impacts on the cultural site by allowing climbing to continue, and noted that similar climbing opportunities were readily

147 Ibid., 4-3.
148 Cave Rock FEIS, 4-15.
149 Ibid., 4-16 to 17.
150 Ibid., 4-18.

available nearby.[151]

In addition to the written comments from official sources, the Washoe and their allies complained of the proposal to allow the continuation of rock climbing. The Progressive Leadership Alliance of Nevada, a progressive social justice coalition, wrote to complain that continued rock climbing would hurt the religious experience of Washoe people and noted that there were some one hundred-fifty climbing areas in the vicinity of Lake Tahoe, but Cave Rock was the only place of central religious significance to the Washoe.[152] Chairman Wallace reiterated Washoe complaints and added that the DEIS was objectionable because joint management of Cave Rock by the Washoe government and the Forest Service was not considered.[153]

During this period of comments, in July 2000, Maribeth Gustafson became the new supervisor for the Lake Tahoe Basin Management Unit.[154] Juan Palma moved on to a job with the Bureau of Land Management as a ranger in Oregon shortly after he issued the DEIS.[155] Gustafson was a 19 year veteran of the Forest Service. She graduated from San Diego State in 1980 and previously served as a resource officer, a district ranger, and an assistant forest manager.[156]

Final Environmental Impact Statement

Forest Supervisor Gustafson took her decisions regarding the completion of the Final Environmental Impact Statement quite seriously and brought a fresh set of eyes to

151 Ibid., 4-16 to 17.
152 Cave Rock FEIS, 4-17 to 18.
153 Ibid., 4-19 to 20.
154 Makley, Cave Rock, 80.
155 Ibid., 78.
156 Ibid., 80.

the issues involved. Gustafson personally reviewed all the materials involved.[157] In addition, Gustafson met with both Washoe officials as well as religious leaders.[158] She issued the Final Environmental Impact Statement in October of 2002, after considerable revision.

After Supervisor Gustafson made her review, she totally changed direction from the previously preferred alternative and the Final Environmental Impact Statement developed a new preferred alternative that was much more acceptable to the Washoe position. This new sixth alternative specifically focused on the protection of the historical and cultural character of Cave Rock. The FEIS noted the top priorities of the Lake Tahoe Basin Management United Forest Plan were: first, to protect water quality; second, to protect threatened and endangered species; and third, preserve significant cultural resources.[159] The FEIS noted the overall Forest Plan had a goal of enhancing traditional cultural properties and that there was no mention in the Forest Plan regarding climbing (except with regards to limiting climbing to protect falcons).[160] The new preferred alternative was to restore Cave Rock to its conditions at the end of the Historic Period of 1965, well before climbing began.[161]

The Final Environmental Impact Statement explained that Cave Rock would be restored to conditions of 1965 because that was the year Washoe Shaman Henry "Moses" Rupert died. The FEIS identified Rupert's involvement in Cave Rock as being crucial in regarding the area as a Traditional Cultural Property. The FEIS noted Rupert's

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157 Ibid., 80.
158 Ibid., 81.
159 Cave Rock FEIS, 2-2.
160 Ibid., 2-3.
161 Ibid., 2-4.

contributions to synthesizing new Washoe traditions and his significance in working with ethnographers, as well as Rupert's activities at Cave Rock.[162]

The FEIS proposed several immediate changes and management policies to restore Cave Rock to 1965 conditions. The Forest Service expressed the intention to remove the paved floor added by climber Dan Osman. The FEIS called for an immediate closure of Cave Rock to all climbing and the removal of all climbing bolts. The Forest Service would also undertake remedial efforts to restore the rock face and remove all graffiti in the Cave and tunnels made after 1965. There would also be further restrictions on any activities not consistent with 1965.[163]

Appeals Process

While the FEIS called for an immediate ban on climbing and remedial efforts, the implementation of the new preferred alternative was delayed for another five years by appeals. Climber Terry Lilienfield and the Access Fund immediately appealed Forest Supervisor Gustafson's decision. On November 5, 2003, Deputy Regional Forester Kent P. Connaughton upheld the decision.[164] At that point Lilienfield abandoned any further appeals, but the Access Fund took the appeal to the Federal District Court at Reno. On January 8, 2005, Judge Howard McKibben issued his ruling from the bench, stating that while he may have not have made the same decision, all laws and policies had been complied with and the decision by Forest Supervisor Gustafson comported with the First Amendment.[165]

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[162] Ibid., 2-9.
[163] Cave Rock FEIS, 2-16.
[164] Makley, Cave Rock, 86.
[165] Ibid., 87-8.

The Access Fund continued its appeals to the Ninth Circuit Court of Appeals and met with no success at the last court to consider the case. The appeals in this case were based upon motions for summary judgment, with no additional evidence presented at the trial court. The Access Fund challenged the new management plan for Cave Rock on the grounds that the Forest Service was unconstitutionally establishing the Washoe religion by banning all climbing to protect a place of religious importance to the Washoe. The argument of the Access Fund relied heavily on the dicta of the cases from Rainbow Bridge and Bear's Lodge that opined permanent involuntary closures of sites to accommodate religion might not be in compliance with the establishment clause of the First Amendment.[166] In cases involving summary judgment, the court revisits the issue using its own judgment, considering the facts in the best possible light to the losing party, here the Access Fund.[167]

While all three judges of the panel concurred in the outcome, Judge M. Margaret McKeown wrote the opinion for the majority, where she engaged in a detailed analysis of the claim that the management plan established religion. Judge McKeown first noted that the standards of the United States Supreme Court had become muddled in recent years, and that the Supreme Court rarely engaged in any significant entanglement analysis at that time.[168] Despite this lack of coherence by the top court, the Ninth Circuit engaged in a modified Lemon test, examining the purpose and effect of the government action, while giving some consideration to the issue of entanglement of government in religious affairs.[169]

[166] Access Fund v. USDA, 499 F. 3d 1036 (9th Cir. 2007), p. 1046.
[167] Ibid., 1042.
[168] Ibid., 1043.
[169] Ibid., 1043.

Judge McKeown first determined that the climbing ban at Cave Rock had a secular purpose. She noted Cave Rock was a cultural, historical, and archaeological monument, eligible for listing on the National Register of Historic Places. This eligibility, she continued, was not based on religion, but on the historic and ethnographic record, that just also happened to have religious components.[170] Climbing impacts the eligibility of Cave Rock for such listing, and thus there was a secular purpose for the ban.[171] Judge McKeown went on to note there was a long history of government action protecting places of cultural and historic value that were also religious sites, including the National Cathedral in Washington, D.C., the Touro Synagogue in Rhode Island (the oldest standing synagogue in the United States established in 1763), and the Sixteenth Street Baptist Church in Birmingham, Alabama.[172]

Judge McKeown then examined the effect of the management plan and again found no violation of the establishment clause. Here, Judge McKeown examined whether or not the effect of the plan was to send a message of religious endorsement or disapproval. In coming to her conclusion, she noted the final management plan contained a wide range of activities that were religiously offensive to practitioners of traditional Washoe religion and that the Washoe consistently expressed their preferred outcome was to close Cave Rock to all recreational visitors, not merely ban climbing. Judge McKeown found there to be no "specter of favor" and noted that a benefit to a particular religious perspective was not an endorsement of that religion.[173]

Judge McKeown briefly addressed the issue of entanglement, finding none, and

[170] Access Fund, 499 F. 3d 1044.
[171] Ibid., 1043-4.
[172] Ibid., 1044.
[173] Ibid., 1045-6.

spent more of her analysis addressing the arguments of the Access Fund that relied upon the dicta from the Rainbow Bridge and Bear's Lodge cases. As to government entanglement with religion, Judge McKeown commented that the Forest Service simply carrying out its traditional oversight responsibilities did not constitute entanglement.[174]

The Access Fund had stressed the arguments of Judge Downes, from his preliminary injunction against the initial ban on climbing in June at Bear's Lodge, and highlighted the dicta of the Tenth Circuit Court of Appeals with regards to the Navajo desire to ban all tourists from Rainbow Bridge. While noting that these cases were outside of the Ninth Circuit, and having merely persuasive value, and the opinions expressed were contained in nonbinding dicta, further diminishing their relevance, Judge McKewon distinguished the situations. The climbing ban in the case of Cave Rock was to protect a culturally and historically significant site, while the hypothetical bans at Rainbow Bridge and Bear's Lodge would have been to protect the religious solitude of those engaging in worship.[175]

In response to the confusion created by the Supreme Court with Van Orden v. Perry, Judge J. Clifford Wallace concurred in the decision of the majority, but he would have use a different rationale. Van Orden was a confused Supreme Court opinion where a majority of the Supreme Court agreed a monument on the Texas state capitol grounds containing a version of the Ten Commandments, including both Christian and Jewish iconography, did not violate the First Amendment prohibition on the establishment of religion, but a majority could not agree on the analysis to be used.[176] While some in the

[174] Access Fund, 499 F. 3d 1046.
[175] Ibid., 1046.
[176] Van Orden v. Perry, 545 U.S. 677 (2005).

Supreme Court would still use a version of the Lemon test similar to that used by Judge McKeown, Judge Wallace wrote the better course was to use what he felt was the test used by the largest group in the Van Orden plurality. This test considers two separate components or faces. One is the nature of the nation's history and the other the nature of the monument. Judge Wallace found that here that Cave Rock had both historical and religious significance, as some of the Justices had claimed the Ten Commandments had in Texas.[177] As Cave Rock has both cultural and historic value, as well as religious, protecting Cave Rock from the adverse effects of climbing comported with the requirements of the First Amendment.[178]

Rehabilitation

After the United States Supreme Court refused to consider the case, the Forest Service began the rehabilitation of Cave Rock, once it secured the necessary funds in 2009.[179] That year, the recovery began in earnest with the removal of the climbing bolts and their metal sleeves. The repairs then filled in the holes to restore the rock face.[180] One worker noted that some of the bolt holes contained water that would have quickly destroyed the surface of Cave Rock.[181] A six person crew using jackhammers took four and a half days to remove the paved floor that climber Dan Osman put in.[182] They removed thirteen thousand pounds of debris.[183] A worker, who was a former climber

177 Access Fund, 499 F. 3d 1047.
178 Ibid., 1048.
179 Makley, Cave Rock, 97.
180 Ibid.,98.
181 Ibid., 100.
182 Ibid., 99.
183 Ibid., 100.

himself, noted that about eighty percent of the climbers he encountered were happy for the Washoe.[184]

Meaning and Impact

The case of Cave Rock and the Washoe demonstrates both the strengths and weaknesses of a consultation process when used by administrators without a preconceived agenda. The Forest Service became aware of the dangers rock climbing posed to the integrity of Cave Rock and brought the Washoe together with climbers to learn from each other and try and formulate a compromise. The process adopted by Forest Supervisor Palma not only educated Forest Service officials as to the interests and feelings of the Washoe, but also the climbing community. Rather than treating the consultation process as a formality to comply with, the administrators of the Lake Tahoe area purposefully used the process to bring people together and promote understanding. While at times contentious, the process facilitated a great deal of communication and education.

The educated climbing community proved to be an important ally of the Washoe in the public discussions regarding access to Cave Rock. The initial inclination of Access Fund leaders was to play on public ignorance of the history of Indian affairs and concerns and demonize the Washoe as selfish. This was quickly met by opposition within the climbing community, forcing the Access Fund to portray the Forest Service as the enemy

[184] Ibid.

in the case. By the end of the consultation process, other climbers came to side with the Washoe in calling for Cave Rock to be left to them.

The resulting court case again affirmed the wide discretion of federal administrators in formulating policy for the management of Indian sacred sites. Previous cases has considered hypothetical closures of public lands to protect Indian sacred sites. These cases did not engage in full establishment clause analysis, but the judges speculated that mandatory closures of public lands to climbing would establish religion. Here the appellate court identified protecting the integrity of sites of traditional and cultural significance to Indians, that are also sacred sites, was a legitimate secular purpose of government, noting that both Christian and Jewish religious places had been both protected and managed for some time by the federal government.

Most worrisome, the Cave Rock record demonstrates just how narrow the Washoe victory was. Forest Supervisor Juan Palma appeared to indicate that he would have approved the management plan that was based upon the Bear's Lodge ban on new climbing routes. But Palma was replaced by Forest Supervisor Maribeth Gustafson just before the final decision on the climbing management plan needed to be made. Gustafson reviewed the record and decided to alter the proposed plan significantly with a total ban on climbing as the most effective method for protecting and managing the Traditional Cultural Property, while leaving it open to uses such as hiking, that the Washoe were not entirely happy with. In history events only happen once, so it is mere speculation, but had Palma stayed in his position just a little longer, the outcome here

may have been very different. Administrators have wide discretion to protect or desecrate, and as long as there was consultation, they may act as the please.

Chapter Four

Badger-Two Medicine

In the early twenty-first century, Forest Service management of Lewis and Clark National Forest in Montana identified a need for a new travel management plan to manage both off-road and road traveling motor vehicles in the forest. The Forest Service brought the neighboring Blackfeet Nation into the required consultation process and administrators quickly learned they were woefully unaware of existing Blackfeet treaty rights and religious interests in the Badger-Two Medicine portion of the forest. Rather than delay the entire project or rush decision making regarding Badger-Two Medicine, the Forest Service separated the planning process for that portion of the forest for further consultation in 2007.

Initially the Forest Service was inclined to ban all motor vehicle travel from Badger-Two Medicine, but the continued consultation with the Blackfeet further modified the plan. While the Blackfeet wanted to protect the solitude of Badger-Two Medicine, like many hikers and horseback riders, the Blackfeet had other interests beyond religious solitude. When the Blackfeet parted with Badger-Two Medicine, they were not entirely willing sellers. Afraid the land would simply be taken if they did not sell, the Blackfeet made sure to retain hunting, logging, and access rights in the treaty of sale. In 2007, the Blackfeet pushed to have a small number of motor vehicle roads left intact so that members could access the land for hunting, logging, and to provide better access for the elderly and disabled to sacred sites.

This case demonstrates the ability of the consultation process to fully deliver on Indian demands through its educational powers. Faced with the additional complication of Indian treaty rights, the consultation process was able to serve as a mechanism to educate Forest Service administrators who did not have a preconceived agenda and allowed for the full protection of Indian rights and interests in the formulated management plan. The consultation process also allowed for further compromise and the building of intercultural community connections as the Blackfeet agreed to open up parts of their reservation to help provide new recreational opportunities for those snowmobile enthusiasts displaced from the closing of Badger-Two Medicine to off-road motor vehicle travel. There was also a court challenge that again affirmed the wide discretion of federal administrators in crafting policies that protect existing Indian religious concerns and treaty rights.

Blackfeet Religion

Traditional Blackfeet religion places humanity as part of a wider community that includes a myriad of other than human persons, including places. This larger family of persons includes animals, plants, rocks, land, natural processes, powerful deities, and the dead.[1] The Blackfeet do not divide other-than-human persons, or naahks, into supernatural and natural categories. Parts of the ecosystem are found among the family of naahks and thus many places are of sacred character.[2] The Great Spirit, Great Mystery, or Good Power is everywhere and in everything, giving every place some form of sacred

[1] Jay Hansford C. Vest, "Traditional Blackfeet Religion and the Sacred Badger-Two Medicine Wildlands, Journal of Land and Religion, Vol. 6, No. 2 (1998), 461.
[2] Ibid., 462.

character.[3]

Old Man, Na'api, and Old Woman, two of the significant other-than-human persons in the Blackfeet family, partook in many significant religious stories of the Blackfeet, including the creation of humanity and the lands of the Blackfeet.[4] Na'api and Old Woman emerged and then created humanity out of mud.[5] Old Man then set out the boundaries of Blackfeet lands and warned the Blackfeet people that trouble will come to them if they let others gain a footing in their lands.[6] Some Blackfeet believe commercial encroachment can profane the sacred character of lands.[7]

The Blackfeet are a people of the Sun Dance and the Sun Dance is central to Blackfeet religious practices.[8] Poia, the son of Feather Woman and Morning Star was first known as Star Boy. Exiled to Earth for a transgression of his mother's, Star Boy's face was scarred and he was then known as Poia. On Earth, the girl Poia loved rejected him because of his scared face. Poia then did the first Sun Dance and healed his body and ultimately won the affection of the lady he loved. Poia shared the Sun Dance with the Blackfeet to restore health to the people. The Blackfeet do the Sun Dance once a year to honor Poia.[9]

The Sun Dance, together with the medicine lodge, are key religious practices of the Blackfeet, requiring seclusion in the wilderness. Central to these practices are dreams induced after days of fasting. For the most religiously observant, the fasting and

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3 Vest, "Traditional Blackfeet," 462.
4 Ibid., 464.
5 John C. Jackson, The Piikani Blackfeet, A Culture Under Siege, (Missoula, MT: Mountain Press Publishing Co., 2000), 4.
6 Vest, "Traditional Blackfeet," 469.
7 Ibid., 462.
8 Ibid., 466.
9 Ibid., 466.

subsequent dreams induced by the ceremonies of the Sun Dance and medicine lodge must be performed in secluded wilderness settings.[10]

Many places of religious significance to the Blackfeet are found in and around their traditional homelands, which the contemporary Blackfeet reservation only makes up a small portion. The Blackfeet call the Rocky Mountains the Backbone of the World.[11] The Backbone of the World once was the western edge of Blackfeet territory, and the wilderness area on the edge of the mountains, Badger-Two Medicine, is the home to many deities, including Cold Maker, Wind Maker, Medicine Elk, Medicine Wolf, and Medicine Grizzly. Today, the territory of Badger-Two Medicine, seen as one by the Blackfeet, is controlled by the United States Forest Service and the National Park Service, arbitrarily divided between the two agencies by a highway. Much of the land remained wilderness into the early twenty-first century and was the location of many significant religious happenings involving naahks.[12] The Blackfeet named the places of the region after Poia, Morning Star, Sett Pine, and other non-human persons. These places and their names were of such significance to the Blackfeet that they took their protest against the renaming of sacred places to officials in Washington, D.C. in 1915.[13]

One of the religious stories of Badger-Two Medicine involves the religious origins of the birch tree. In this story, Na'pi was careless and his food was stolen by Bobcat. Na'api was angry and blamed his own nose for failing to warn him about the presence of Bobcat, so Na'pi burned his nose. This hurt Na'pi immensely and he called upon Cold Wind to sooth his pain, but the wind was so strong Na'pi was almost blown away. Na'pi

[10] Vest, "Traditional Blackfeet," 468-9.
[11] Ibid., 470.
[12] Ibid.
[13] Ibid., 479.

was finally saved by a birch tree. Grateful for the tree's assistance, Na'pi gave the birch tree adornments and made it the most beautiful of the trees.[14]

Another tale of Badger-Two Medicine explains why the area is a sanctuary for bears for the Blackfeet.[15] The Blackfeet hero Nistae was gravely wounded and in terrible need. In his need, Nistae was saved by Mother Grizzly. In response, Nistae offered Mother Grizzly a home with him among the Blackfeet, but Mother Grizzly said she needed to return home to Badger-Two Medicine and instead insisted Nistae promise the Blackfeet would kill no sleeping grizzlies in Badger-Two Medicine.[16]

A similar tale of assistance by other-than-human persons explains why Badger-Two Medicine is a sanctuary for wolves. The Crow Indian nation captured a Blackfeet woman by the name of Itsapichpaupe. The Crow took her some two hundred miles away, but a kindly Crow woman helped Itsapichkaupe escape so she could return home. Exhausted after the long journey, Itsapichkaupe met Wolf in Badger-Two Medicine and asked that Wolf take pity on her. Moved by the Blackfeet woman's plight, Wolf helped carry Itsapichpaupe home. The Blackfeet have since had a prohibition against killing wolves and believe that any gun used to shoot a wolf will never shoot straight again.[17]

Perhaps of even more consequence to the survival of the Blackfeet people, Badger-Two Medicine is the source of all romance among the Blackfeet. Long ago camps of women and men lived apart but visited for the purposes of mating. On one occasion the Chief of Women was not looking her best. She chose Na'pi, but he rejected her because other more comely ladies were still available. The Chief of Women, quite

[14] Vest, "Traditional Blackfeet," 471-2.
[15] Ibid., 473.
[16] Ibid.
[17] Ibid., 474.

angry, told the other women what happened and they agreed no one would with go with Na'pi. Chief of Women then returned, after cleaning up and setting out to look her best. Now looking quite beautiful, Na'pi became quite interested in the Chief of Women, but she and all the other women rejected Na'pi. Na'pi became quite angry because no one would mate with him. Chief of Women then turned Na'pi in to a pine tree at the edge of the planes where the mountains begin. The Blackfeet believe the undisturbed natural beauty of this place, located in Badger-Two Medicine, keeps all Blackfeet romance alive.[18]

History of the Blackfeet Nation

The Blackfeet Nation is composed of three bands, once united by a common language and religion, but now divided by the border between the United States and Canada. The three bands are the Kianaa, Piikani, and the Siksika, alternatively known as by the English versions of their names: the Blood, the Muddy River Indians, and the Black Footed People.[19] The entire nation came to be known by the name of the Siksika band, the Black Footed People. After the permanent division of the Black Footed People into Canadian and United States segments, the northern group came to be called the Blackfoot nation, while the segment in the United States became the Blackfeet nation.[20]

Blessed with a land in a favorable strategic position, the Black Footed People hunted buffalo over a large territory reaching from contemporary Canada to the middle of the contemporary United States. The Backbone of the World, the Rocky Mountains,

[18] Vest, "Traditional Blackfeet," 478.
[19] Jackson, The Piikani Blackfeet, x.
[20] Clark Wissler and Alice Beck Kehoe, Amskapi Pikuni, The Blackfeet People, (Albany, New York: SUNY Press, 2012), xiii.

served as the Western boundary of Blackfeet territory. To the east the Blackfeet were bordered by several Indian nations that were deeply hostile to European expansion, providing the Blackfeet with a buffer to non-Indian incursions.[21] The Blackfeet freely traveled from the central U.S. to Canada as one nation until after 1870, when the Blackfeet-Blackfoot, U.S.-Canadian division became permanent.[22]

As French traders moved into the Hudson Bay region, the Blackfeet experienced their first taste of globalization in the 1670s. Trading with their neighbors, the Blackfeet quickly obtained European manufactured tools and weapons in this period of indirect trade.[23] Obtaining horses in trade with the Nez Perce Indian Nation, the Nez Perce convinced the Blackfeet that horses were creatures that had emerged from the water.[24] The Blackfeet fully integrated horses, guns, European tools, and other goods obtained in trade with their Indian neighbors before 1750. Horses and European weapons were key tools in buffalo hunting and war.[25] By 1750, the Blackfeet were dependent on the international trade of European goods for their economy to function. The Blackfeet used European pots, kettles, and other manufactured metal goods in daily life. Their military was dependent on the international arms trade to maintain its effectiveness.[26]

After 1750, the Blackfeet began to engage in direct trade with European powers and the next hundred years tended to be a prosperous time for the Blackfeet nation.[27] From 1750 to 1850 the Blackfeet had no formal diplomatic relations with any European

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21 Wissler & Kehoe, Amskapi Pikuni, 72.
22 Ibid., 38.
23 Ibid., 2-3.
24 Jackson, The Piikani Blackfeet, 10.
25 Wissler & Kehoe, Amskapi Pikuni, 3-5.
26 Ibid., 24.
27 Ibid., 25.

powers (or their successor states). No missionaries or settlers tried to penetrate Blackfeet territory and the Blackfeet had no treaties with any European power.[28] Fur traders actively discouraged both missionaries and settlers as, in their experience, the groups hurt continued fur trading with Indian nations.[29]

European demand for beaver pelts increased, and while some of the nations neighboring the Blackfeet altered their economic patterns to accommodate this demand, the Blackfeet largely did not alter their economy. The Blackfeet economy remained centered on the buffalo hunt and their society remained much more stable than that of their neighbors. The Cree and Assiniboine neighbors of the Blackfeet altered their economies to produce more beaver pelts for trade with the French. This proved to be highly disruptive of Cree and Assiniboine social life. By contrast, the Blackfeet did not alter their own economy to meet the growing European demand for beaver pelts. Instead the Blackfeet allowed the Cree and Assiniboine to hunt beaver in Blackfeet territory.[30] In this period of direct trade with European powers, the Blackfeet exported buffalo coats, pemmican, and, to a lesser extent, wolf skins. In return, the Blackfeet imported kettles, guns, ammunition, and other metal tools.[31]

During the period of direct trade, the Blackfeet largely remained healthy and prosperous. The Blackfeet expertly managed the buffalo hunt. They never engaged in over hunting and could have maintained their economy indefinitely, if not for European encroachment and the reduction of their hunting lands by settler demands.[32] As buffalo

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[28] Wissler & Kehoe, Amskapi Pikuni, 5.
[29] Ibid., 6.
[30] Ibid., 8.
[31] Ibid., 9.
[32] Ibid., 28.

hunters, their ample diet largely consisted of meat. With their economy centered on the buffalo hunt, the Blackfeet were able to avoid the worst impacts on European diseases as they would quickly scatter into small groups at the first sign of disease.[33] Even with this practice that usually mitigated the impacts of the new plagues, the Blackfeet were still devastated by a smallpox epidemic in 1781.[34]

The Blackfeet were often at war with their neighbors and were intolerant of whites that tried to make claims on their lands. The Blackfeet raided their neighbors for horses, first the neighboring Indian nations and later Canadian and American towns.[35] The Blackfeet would also take female captives as part of their warfare. Due to a mix of losses suffered in war and the taking of female captives, Blackfeet society tended to have a ratio of four women to every three men.[36]

Conditions changed quickly for the Blackfeet in the decades after establishing diplomatic contact with the United States and Canada in 1850. The Blackfeet entered into the Fort Laramie treaty with the United States in 1851.[37] Policymakers in the United States used the treaty to push the Blackfeet and their neighbors to become farmers, despite the region not being conducive to farming.[38] The 1855 treaty with the United States formally defined the extent of Blackfeet territory and allowed the United States to place forts in these lands and cross the Blackfeet nation with roads.[39] The northern section of the Black Footed people did not enter into a formal treaty with the Canadian

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33 Wissler & Kehoe, Amskapi Pikuni, 17-18.
34 Jackson, The Piikani Blackfeet, 15.
35 Wissler & Kehoe, Amskapi Pikuni, 30-31.
36 Ibid., 22.
37 Ibid., 33.
38 Ibid., 36.
39 Ibid., 37.

government until 1877.[40]

The continuing encroachment of Canadian and American immigrants quickly tore apart traditional Blackfeet society. Bootleggers illegally exported alcohol to the Black Footed people in both Canada and the United States. These criminals encouraged Blackfeet people to steal horses to trade for alcohol. In January of 1870, when Blackfeet society was already torn apart by alcoholism, settlers, angered by the constant horse theft, retaliated violently. Compounding the series of misfortunes, the Blackfeet were hit by another smallpox outbreak.[41] Though the Blackfeet tried to peacefully reconcile, the U.S. military killed 173 Blackfeet, mostly women and children, at the January 23, 1870 Baker Massacre.[42] In the face of this series of difficulties, the traditional government and council of the Blackfeet nation collapsed.[43]

John Wood, the Indian Agent for the U.S. government, unlike many of his contemporaries, took effective steps to try and help the Blackfeet recover from their difficulties. Wood supported the reconstitution of the Blackfeet council and encouraged them to draw up laws to govern their shrinking territory. Wood also oversaw a significant reduction in crime on Blackfeet lands when he was finally able to suppress the illegal trade in alcohol in 1876.[44]

In the face of continuing encroachment from settlers, the Blackfeet sent diplomats to the 1874 Cypress Hill Conference called by the Sioux Nation. The Sioux called the conference to try and put together a coalition of nations for a coordinated military

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40 Wissler & Kehoe, Amskapi Pikuni, 33.
41 Ibid., 40.
42 Ibid., 86.
43 Ibid., 41.
44 Ibid.

resistance to U.S. expansion. At the conference, the Sioux called for wiping out the whites.[45] In response to the call for unified military action, the Blackfeet withdrew from the conference.[46]

After the conference, the Sioux and their allies engaged a military campaign against the United States without the Blackfeet nation, but the United States made no differentiation between allies and enemies in its responses to the war. After the Sioux and their allies destroyed U.S. General Custer's forces at the Battle of Little Bighorn, the United States uniformly banned breach loading weapons, even for those Indian nations that had remained at peace with the United States. Recognizing that the Blackfeet had remained at peace with the United States, Agent Wood deliberately did not enforce the ban in Blackfeet territory and a steady supply of illegally imported rifles continued through Canada.[47]

With the ability to keep their weapons, the Blackfeet were able to continue hunting through the 1870s, but cattle ranchers began to aggressively encroach on Blackfeet territory, further disrupting their already crippled economy. In 1864, gold fever hit Montana and this drew miners.[48] Throughout the 1860s and 70s, settlers regularly attacked and killed Blackfeet without repercussions. As the settlements supporting miners became more developed, settler cattle ranching expanded heavily in the 1870s.[49] Blackfeet hunting was further curtailed by the presence of settler ranching that now invaded even reservation territory.[50] Canadian settler encroachment permanently

[45] Wissler & Kehoe, Amskapi Pikuni, 96.
[46] Ibid., 42.
[47] Ibid., 42.
[48] Ibid., 81.
[49] Ibid.
[50] Ibid, 46.

separated the northern and southern portions of the Black Footed people in 1877.[51]

In the face of pressure from ranchers and the constant conflict the Blackfeet were having with them, the United States unilaterally expelled the Blackfeet from half of their lands guaranteed by treaty, further endangering the economic conditions of the Blackfeet people.[52] The Blackfeet economy was in shambles. Exports dwindled.[53] Lands available to hunting were insufficient to support the people.[54] Some Blackfeet had successfully transitioned to becoming cattle ranchers themselves, despite the U.S government's insistence the Blackfeet try to become farmers.[55] In 1882, the U.S. Congress cut funding for food support to the Blackfeet reservation and as a result, food rationing for the Blackfeet reservation was entirely inadequate. Contemporary prisoners of the Russian Czar were allotted twice as much food as the Blackfeet were required to live on. Major Young, the new Indian Agent for the Blackfeet reservation, resorted to appeals to private charity to try and meet the food needs of the Blackfeet people.[56]

The winter of 1883 to 1884 was horrific for the Blackfeet. With their economy destroyed, the Blackfeet faced massive hunger.[57] Conditions worsened as the Cree Indian Nation raided the Blackfeet.[58] Despite pleas to Washington for assistance, the winter was marked by famine and starvation.[59] The few successful Blackfeet ranchers had their enterprises wiped out as all the cattle were eaten to hold off starvation.[60] Even with such

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51 Wissler & Kehoe, Amskapi Pikuni, 98.
52 Ibid., 46.
53 Ibid., 48.
54 Ibid., 47.
55 Ibid., 49.
56 Ibid., 103.
57 Ibid., 87.
58 Ibid., 47.
59 Ibid.
60 Ibid., 49.

drastic measures, five hundred Blackfeet starved to death before the end of the winter.[61] Major Young resigned as Indian Agent for the U.S. government in protest over the continuing horrific conditions the Blackfeet suffered.[62] The U.S. government delivered emergency rations to prevent further starvation in 1885.[63]

With Blackfeet society shattered, the U.S. government moved to push further changes on the Blackfeet. As part of the policy of aggressive forced assimilation, the U.S. granted the Methodist church jurisdiction over the Blackfeet reservation for religious conversion and schools, but the Methodists made no efforts to establish missions or schools on the Blackfeet reservation. Some Blackfeet children were removed to Catholic boarding schools, but there were several deaths in the first class. Fearing their children would die at boarding schools, the Blackfeet successfully kept their children from the schools. As part of the related policy of allotment, the U.S. government, under pressure from ranchers, determined that seventeen and a half million acres of the Blackfeet reservation was surplus land. The U.S. sold the land for twenty-nine cents an acre. The Indian Claims Court would later rule that the land was worth eighty cents an acre.[64] In 1891, 83% of Blackfeet were dependent on government rations for survival and that same year the railroad cut through the reduced Blackfeet reservation.[65]

Throughout all these difficulties, the Backbone of the World and Badger-Two Medicine remained part of recognized Blackfeet territory, but in 1895, with the Blackfeet

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61 Wissler & Kehoe, Amskapi Pikuni, 107.
62 Ibid., 106.
63 Ibid., 47.
64 Ibid., 109.
65 Ibid., 121-2.

again on the verge of starvation, the Bureau of Indian Affairs, working on behalf of miners convinced there was gold to be found in the lands, demanded further land concessions from the Blackfeet. Miners named a large portion of the Blackfeet reservation that included Badger-Two Medicine, Mineral Strip. Prospectors had convinced themselves that this area must be filled with gold.[66] The Bureau of Indian Affairs made common cause with the covetous miners and pushed the Blackfeet to sell the western portion of their reservation. At the time Blackfeet funds were running out.[67] The Blackfeet were again on the verge of starvation in 1895.[68]

Even though the Blackfeet feared another famine, the negotiations over the latest demands for land by the United States were contentious and the Blackfeet secured several conditions as part of the sale of their western lands. Backed into a corner, the Blackfeet felt it would be impossible for them to keep the miners off of their lands with the U.S. government demanding a sale on behalf of the miners. Many Blackfeet also feared another deadly famine without additional funds to obtain food. Still, the Blackfeet were reluctant to give up their rights to the religiously significant land. When the U.S. negotiators complained of the Blackfeet reluctance to sell lands, Little Dog replied that the Blackfeet did not approach the United States to sell their lands. Many were bitter and wary of the repeated U.S. violations of previous treaties. Ultimately the Blackfeet agreed to the sale on the conditions that they retained the right to hunt, fish, harvest lumber, and have continual access to the lands so long as they remained public lands of the United

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66 Wissler & Kehoe, Amskapi Pikuni, 124.

67 Mark David Spence, "Crown of the Continent, Backbone of the World, The American Wilderness Ideal and Blackfeet Exclusion from Glacier National Park," Environmental History, Vol.1, No.3 (Jul., 1996), 34.

68 Robert H. Keller & Michael F. Turek, American Indians & National Parks, (Tucson, Arizona: The University of Arizona Press, 1998), 46.

States.[69]

Not long after the contentious land sale, the United States government turned the area into the Lewis and Clark Forest Reserve. Prospectors quickly determined there was no mineral wealth to be had in what had been the western portion of the Blackfeet reservations. Rather than return the land, the U.S. government combined the land with lands taken from the Flathead Indian nation and in 1897 created the Lewis and Clark Forest Reserve.[70]

Before the beginning of the twentieth-century, Blackfeet economy revived some as the U.S. government ended its insistence that the Blackfeet become farmers. Perhaps because all of the non-Indians surrounding the Blackfeet reservation had opted to create cattle ranches rather than farms, the United States government relented in its demands the Blackfeet adopt farming as a necessary change to their national economy. As a result, some Blackfeet were able to begin to make a living as cattle ranchers on the Blackfeet reservation.[71]

In 1910, the United States violated the terms of the sale of the western Blackfeet lands when it began to deny the Blackfeet access to portions of Badger-Two Medicine. That year, the U.S. delivered portions of Badger-Two Medicine and the Lewis & Clark Forest Reserve to the National Park Service, creating Glacier National Park.[72] The new park banned all hunting, except for a limited number of permits for some whites. Park administrators also prevented all access to the land by the Blackfeet. The Blackfeet immediately protested that they only gave up the mineral rights to the lands and retained

[69] Spence, "Crown of the Continent," 35, Keller & Turek, American Indians & National Parks, 49-50.
[70] Spence, "Crown of the Continent," 35.
[71] Wissler & Kehoe, Amskapi Pikuni, 126.
[72] Spence, "Crown of the Continent," 35.

access for hunting and other purposes.[73] The Blackfeet ignored the orders of the National Park Service and continued to exercise their reserved rights. The Park Service began arresting Blackfeet exercising their treaty rights in 1912.[74]

While considerable Blackfeet lands had previously been sold as surplus, the government did not begin full scale allotment of Blackfeet lands until 1911.[75] As the land was parceled out to individual members of the Blackfeet nation, the government declared another 156,000 acres to be surplus lands. This new found surplus was the best grazing land in the remaining Blackfeet holdings, connected to an expensive irrigation system the Bureaus of Indian Affairs had required the Blackfeet pay for, and was connected to the considerable Blackfeet water rights. The Blackfeet immediately began to organize against the plans to sell off the most valuable portions of their remaining lands.[76]

With allotment, new political and economic divisions developed on the Blackfeet reservation between full blooded Blackfeet and mixed bloods. While technically referring to the relative racial mixture of Blackfeet genetic heritage, the distinction became more political and economic over time. Mixed bloods were those more oriented towards European ways and more willing to leave behind Blackfeet traditions. More traditional, or full blooded Blackfeet, often faced intimidation at the hands of whites and mixed bloods willing to work with them. Some mixed bloods worked with whites to help obtain private sales of the best allotted lands.[77] Full bloods were the first to oppose the

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73 Wissler & Kehoe, Amskapi Pikuni, 124.
74 Keller & Turek, American Indians & National Parks, 52.
75 Wissler & Kehoe, Amskapi Pikuni, 153.
76 Ibid., 154.
77 Paul C. Rosier, Rebirth of the Blackfeet Nation, 1912-1954, (Lincoln, Nebraska: University of Nebraska Press, 2001), 17-19.

sale of the lands designated as surplus.[78]

The divisions between the mixed and full blooded Blackfeet also represented growing economic divisions. With the continued growth of the Blackfeet cattle industry, a small number of mixed Blackfeet were able to become quite wealthy. This new found wealth excluded many. By 1915, less than 2% of the Blackfeet nation owned more than 85% of all cattle owned by Blackfeet tribal members.[79] By contrast, the leading cause of death among the full blood Blackfeet in 1914 was starvation. Full blooded or traditional Blackfeet became the political voice of those left out of the economic development that was possible in the changing reservation economy.[80]

With their traditional government gone, a new Blackfeet organization emerged to become the de facto government of the Blackfeet nation: the Blackfeet Tribal Business Council. Members of the Blackfeet Nation founded the BTBC in 1915 to lobby on behalf of the growing Blackfeet business interests. The group pressed the Bureau of Indian Affairs for higher grazing lease rates on communally held lands.[81] In December of 1915, the BTBC came to agree with the full bloods that the sale of the lands designated as surplus would be a further economic blow to the already struggling economy of the Blackfeet. The BTBC leadership voted to oppose the sale of the lands.[82] In 1922 the BTBC adopted a charter that provided every enrolled member of the Blackfeet tribe voting rights in selecting council members. [83] The political and economic conflicts continued between the full and mixed blood segments of the Blackfeet people, but these

78 Rosier, Rebirth, 16.
79 Ibid., 21.
80 Ibid., 18.
81 Ibid., 3.
82 Ibid., 21.
83 Ibid., 3.

conflicts played out in contested elections for representation on the BTBC.[84]

Throughout the teens and twenties, the Blackfeet Tribal Business Council was in constant conflict with the Bureau of Indian Affairs, which held considerable power over the economic affairs on the Blackfeet reservation. Oil exploration and development quickly became a lucrative business venture in Montana and the BTCB pressed for oil leases as a means to obtain new revenues for tribal members, but the BIA favored providing leases to individual allottees, at the expense of collective tribal economic interests. The BIA then renewed its push for agricultural development, despite the repeated failure of such attempts in the past. The BTBC pressed to have higher grazing rates on tribal owned lands and a tribal herd for collective income. The BIA generally opposed all attempts at collective industry, even preventing the opening of a store owned by the Blackfeet that the BTBC hoped would eliminate the price gouging members faced at white owned businesses. The BIA also prevented the BTBC from borrowing on Blackfeet assets in an attempt to gain credit to create their own oil well. The most significant success of the BTBC of their first decade was the opposition to the sale of those lands the government had designated as surplus.[85]

As the Blackfeet clashed with the BIA over economic affairs, the Blackfeet continued to clash with the National Park Service over treaty and land rights. In 1919, after a particularly harsh winter that was a significant setback to the growing Blackfeet cattle industry, the National Park Service pressed to expand its holdings and take more land from the Blackfeet.[86] The Park Service went as fall to press the BIA to end parceling

[84] Rosier, Rebirth, 31-45.
[85] Ibid., 31-45.
[86] Keller & Turek, American Indians & National Parks, 53.

out individual allotments so that it might buy Blackfeet lands on the border with Glacier National Park in one purchase from the BIA. The National Park Service sought to push the growing Blackfeet cattle industry further from the Glacier Park, where the cattle occasionally wandered.[87] For their part, the Blackfeet exercised their treaty rights, in violation of Park Service regulations, and continued to hunt and fish as they pleased, even as they faced continued arrest by Park Service officials. The Blackfeet presented petitions to officials demanding recognition of their reserved rights.[88] Little Chief explained the Blackfeet position, "We sold to the U.S. government nothing but rocks only. We still control the timber, grass, water, and all the big or small game or all the animals living in this [*sic.*] mountains."[89] When the National Park Service asked the BIA the extent of the rights retained by the Blackfeet, the BIA reported that the Blackfeet had no retained rights to lands of Glacier National Park.[90]

Expanding tourism at Glacier National Park offered no relief to the Blackfeet. Glacier National Park began leasing lands to the Great Northern Hotel in 1929. The hotel hired a small number of Blackfeet to use as props in the tourist attraction as an exhibit of the soon to be extinct Blackfeet Indians, but otherwise relegated Blackfeet to menial, out of sight jobs.[91] The Blackfeet continued to exercise their rights in Glacier National Park, and the Park service continued to arrest the Blackfeet for violating their rules into the 1930s.[92]

In the two decades before the Great Depression, the Bureau of Indian Affairs

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87 Keller & Turek, American Indians & National Parks, 53.
88 Ibid., 54-5.
89 Ibid., 55.
90 Ibid., 55.
91 Ibid., 56-7.
92 Ibid., 59.

management of the Blackfeet Reservation was nothing short of a parade of corruption, incompetence, and malfeasance. Completely betraying any pretense to managing Blackfeet property for the improvement of the Blackfeet people, the Blackfeet agency managed affairs for the benefit of local whites and the bureaucrats themselves. Two hundred thousand acres of the best allotted Blackfeet lands were lost to whites before 1929 by deliberate manipulation. Blackfeet were at times forced to take private title against their will and then pressured to sell the land to whites. Collusion between Indian Agents, clerks, and whites coveting Blackfeet land engaged in practices such as fraud and debt manipulation to force allottees into selling their lands.[93] The land the Blackfeet retained in collective ownership was also managed for the benefit of local white business interests. Retained Blackfeet lands were among the best for grazing cattle in Montana and the Agency charged well below market rates for grazing leases to white ranchers.[94] What funds the Blackfeet had, the Bureau rarely used for the benefit of the Blackfeet. The Blackfeet agency spent a large portion Blackfeet assets on buildings and Agency automobiles.[95] The Agency payed local white businesses over a million dollars for overpriced shoddy workmanship for an irrigation project on land not suited for farming. The agent in charge of the Blackfeet reservation personified both the incompetence and corruption of this management when he could not tell Congressional investigators how many of his own sheep he had been grazing on Blackfeet lands. He was only able to identify that the number was somewhere between 1,500 and 8,000.[96]

In the face of Agency mismanagement and corruption, Joseph Brown emerged as

[93] Rosier, Rebirth, 59.
[94] Ibid., 63.
[95] Ibid., 60.
[96] Ibid., 61.

the Blackfeet Tribal Business Council leader that pushed for greater Blackfeet control and involvement in managing Blackfeet economic resources. Joe Brown was a successful Blackfeet rancher and politician. Brown's formal education ended in eighth grade, but he hired tutors once he was a successful businessman.[97] As part of his interests in continued education, Brown was an elected member of the Glacier County School board.[98] The Blackfeet, bitter over the constant mismanagement and the irrigation project specifically, pushed for greater control over their financial resources. The Blackfeet Tribal Business Council tried to negotiate oil leases in the 1930s, but the Agency refused to approve them, favoring leases for individual allottees.[99] The BTBC tried to push for better terms on what oil leases they could get approved, but this was then met by collusion among oil companies that refused to do business with the Blackfeet.[100] Brown pushed for Blackfeet management of the irrigation project, the use of Blackfeet workers in the project, and the hiring of Blackfeet to do the jobs that existed at the Blackfeet Agency. The BTBC continued the push to own its own oil company and herd.[101] While the local Indian Agent preferred pushing allotment in the early 1930s, as opposed to collective Blackfeet projects, the Blackfeet obtained greater input in business issues.[102]

The Indian Reorganization Act

When John Collier promoted the Indian Reorganization Act in 1934, the Blackfeet were among to most active in debating the provisions and making recommendations for

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97 Rosier, Rebirth, 107.
98 Ibid., 89.
99 Ibid., 69.
100 Ibid., 70.
101 Ibid., 73.
102 Ibid., 74.

modifications. The Blackfeet leaders participated in hearings and discussions on the proposed law in Rapid City.[103] The suggestion that the Blackfeet could take over Bureau of Indian Affairs functions was highly popular among all Blackfeet, as long as the reservation remained protected from state laws and taxes. The Blackfeet split over the proposal of re-collectivization of allotted lands, as some Blackfeet businessmen wanted to keep their private holdings. It was due to these Blackfeet complaints that Collier made the re-collectivization portions of the act voluntary.[104]

Most Blackfeet were highly supportive of the Indian Reorganization Act and Blackfeet leaders pressed Congress to support the proposed law.[105] Blackfeet leaders spoke before Congressional committees on the incompetence and corruption they faced with BIA mismanagement and argued in favor of the bill.[106] Joe Brown confronted the ugly racism of arrogant members of Congress that accused him of not understanding the proposed law.[107]

The final version of the IRA disappointed Blackfeet leaders, but even with its deficiencies, the Blackfeet overwhelmingly supported the law. Collier's proposed law had language supporting Indian self-determination, provisions for Indian courts, and support for Indians entering higher education. Congress stripped all these provisions from the bill and changed the educational focus to vocational training. Congress also eliminated the proposal for development grants, changing those to loans, but it did increase the proposed revolving credit fund that was intended for promoting Indian

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103 Wissler & Kehoe, Amskapi Pikuni, 160.
104 Rosier, Rebirth, 82.
105 Ibid., 84.
106 Ibid., 91.
107 Ibid., 92.

businesses.[108] Eager to end decades of mismanagement with more control over their own economic and political affairs, and having a strong desire to access credit for business development, the Blackfeet supported the weakened version of the bill.[109]

Before and after the passage of the Indian Reorganization Act, the Blackfeet Tribal Business Council, serving as the de facto government of the Blackfeet for more than a decade, was the focal point for Blackfeet debate. Of key concern to many Blackfeet was the IRA provision that provided for the Unites States government to recognize Indian governments organized under the new law. These new governments could then access the development assistance of the other parts of the act. Traditionally Blackfeet society had been much more decentralized, and some distrusted the central authority of the BTBC.[110] Most aligned with full blooded Blackfeet wanted the restoration of the traditional tribal council. In the course of the debates, a consensus emerged that favored a centralized government based upon the Blackfeet Tribal Business Council.[111]

Immediately the Blackfeet began to push the limits of how much sovereignty they might be able to exercise under the new reorganized relations with the Bureau of Indian Affairs. The Blackfeet proposed a constitution that had clear provisions that the BIA and Department of Interior had no power to supervise BTBC decisions. The Blackfeet BIA agent protested these provisions without results. The Blackfeet also retained the right to determine their own membership standards in the new constitution.[112] The new

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108 Rosier, Rebirth, 93.
109 Ibid., 96-7.
110 Ibid., 85.
111 Ibid., 86.
112 Rosier, Rebirth, 92.

constitution also contained provisions that would allow the Blackfeet to end supervision of their affairs.[113] During the debates over adoption of the IRA and the new Blackfeet constitution, Glacier National Park pressed the BIA to deliver more Blackfeet lands to the park. Reorganized relations with Indian nations required Blackfeet consent and Joe Brown rejected the sale, stating, "I would rather be a respected citizen of my people than to be a dog in the Indian service."[114]

With the implementation of the Indian Reorganization Act, the Blackfeet nation was able to better direct its economic direction and provided much needed economic growth to the Blackfeet reservation. The first Blackfeet Tribal Business Counsel elections under the new constitution tool place in 1936 with 85% turnout.[115] The BTBC quickly took over many governmental functions, including resource management, appointing game wardens, and creating courts.[116] BTBC management revitalized Blackfeet ranching.[117] Many Blackfeet took advantage of the new IRA revolving credit fund. Traditional women organized sewing groups, with IRA credit, to create homemade goods for the tourist trade.[118] The Blackfeet Tribal Business Council started several construction projects, including a sawmill in 1937.[119]

Even with these initial economic successes, the Blackfeet nation continued to be divided along economic class lines and the struggle to find a balance between long term investment and the short term survival needs of the poorest among the Blackfeet. The

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113 Ibid., 128.
114 Wissler & Kehoe, Amskapi Pikuni, 161.
115 Rosier, Rebirth, 117-7
116 Ibid., 143.
117 Wissler & Kehoe, Amskapi Pikuni, 161.
118 Ibid., 163.
119 Rosier, Rebirth, 144.

continuing full blood against mixed blood divisions among the Blackfeet remained largely an economic class division.[120] Unlike other reservations, the Blackfeet reservation was not marred by mixed blood driven cultural repression targeting more traditional Indians.[121] Those most economically suffering, and their traditional allies, participated in the BTBC electoral process. The Blackfeet Indian Welfare Association, a political organization primarily concerned with the short term survival of the poorest of the Blackfeet, put forward a slate of candidates in 1938 and largely swept the elections. Mae Aubrey was among the BIWA candidates and was the first woman elected to the BTBC.[122]

As the political fortunes shifted in Washington, the Blackfeet pushed for greater autonomy just as Congress sought to meddle more in Indian affairs. In 1945 the Blackfeet were the first Indian group to point out the needless administrative duplication of the Bureau of Indian affairs and called for a full withdrawal of the BIA from their affairs.[123] By contrast, Congress put in place statutory limitations in 1949 on the amount of funds IRA governments could withdraw from their own accounts, hindering BTBC development plans for the Blackfeet reservation. In 1950 the BTBC hired Felix Cohen, author of the Handbook of Federal Indian Law, as their legal adviser in their continuing struggles with the BIA.[124]

Washington signaled the changing policy direction of Indian affairs by naming Dillon Myer Indian Affairs Commissioner in 1950. Myer oversaw Japanese interment

[120] Rosier, Rebirth, 169.
[121] Ibid., 207.
[122] Ibid., 151-2.
[123] Ibid., 222.
[124] Ibid., 246.

during the Second World War and brought the same respect for Indian rights as he had those of U.S. citizens of Japanese ancestry to his administration of Indian affairs. Myer encouraged placing Indian children in white foster homes.[125] Myer was the most interventionist and repressive Indian Commission since the nineteenth-century and he moved against Blackfeet expressions of national sovereignty.[126]

Myer directly intervened to try and undermine the authority of the Blackfeet Tribal Business Council. In 1950, Myer turned to a group of traditional Blackfeet that felt the current BTBC policies were hurting their economic well-being. Myer had them propose, on his behalf, a series of amendments to the BTBC constitution that would have expanded the powers and oversight of the BIA over the BTCB. Myer continued to push for a referendum on these proposed amendments even after the same traditional leaders entered into dialogue with the BTBC and asked for their proposal to be dropped.[127]

Working with Cohen, the mixed and full blood factions of the Blackfeet people united in their opposition to the Bureau of Indian Affairs shift in policy to a renewed program of forced Americanization and termination of tribal existence.[128] Myer accused Cohen of being a Communist, but an FBI investigation of Cohen turned up nothing. While the U.S. government moved to terminate Indian governments in the 1950s, the Blackfeet and Cohen's other clients were never scheduled for governmental termination.[129] In the midst of this growing conflict between the BIA and the BTBC, the courts awarded the Blackfeet nation funds based on outstanding claims against the United

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125 Wissler & Kehoe, Amskapi Pikuni, 167-8.
126 Rosier, Rebirth, 250.
127 Ibid., 252-3, 258-9.
128 Ibid., 274-5.
129 Ibid., 170.

States government, but the U.S. deducted the costs of several BIA buildings on the reservation from their payment to the Blackfeet. In retaliation, the BTBC seized the BIA buildings and expelled the BIA officials.[130] In the meantime, the BTBC, in conversation with the full blood opposition, created their own set of proposed amendments to the BTBC constitution. On May 9, 1952 the BIA and BTBC each organized competing referendums. The BIA and BTBC each denounced the other for conducting an illegal and unconstitutional referendum. In the face of the confusion, neither referendum garnered enough votes to be meet the turnout requirements to validly amend the Blackfeet constitution.[131]

As government policies moved away from Indian self-determination, government and business interests increased their discrimination against the Blackfeet. Glacier National Park moved to eliminate all visible presence of the Blackfeet people from the Park outside of Blackfeet themed tourist attractions. Glacier Park also reduced the number of Blackfeet employed in its tourist attractions.[132] Locally, the Blackfeet commonly faced businesses with signs proclaiming dogs and Indians would not be admitted or that Indians would not be served by the businesses.[133]

Into the sixties and seventies, the Blackfeet continued to be engaged in promoting their economic and political interests, both locally and on a national level. In 1969 Blackfeet member Chief Old Person was elected President of the National Congress for American Indians, a leading Indian rights organization.[134] In 1972 the Blackfeet opened

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130 Rosier, Rebirth, 250.
131 Ibid., 262.
132 Keller & Turek, American Indians & National Parks, 62-3.
133 Wissler & Kehoe, Amskapi Pikuni, 177.
134 Wissler & Kehoe, Amskapi Pikuni, 179.

the first pencil factory in the United States west of the Mississippi river and saw a shift as young people began to return to the reservation.[135] That same year, Chief Old Person initiated discussions with Arizona State University to make arrangement to open up a Blackfeet community college.[136] Also in 1972, the Montana state constitution was amended to include Article X that stated it was an educational goal of the state of Montana to maintain Indian cultural integrity.[137]

While attempts to exercise the rights reserved in Badger-Two Medicine and other lands sold in 1895 had dropped off in the fifties and sixties, the Blackfeet renewed their efforts to protect their reserved rights in the seventies. In 1973, Blackfeet member Woodrow L. Kipp refused to pay the entrance fee to Glacier National Park. The Park Service cited him for this violation. Kipp challenged the citation in federal court. Referring to the rights reserved by the Blackfeet people in the 1895 sale agreement, Kipp won his challenge and the reserved rights of the Blackfeet were finally recognized by the United States government.[138]

Into the late seventies and eighties, the Blackfeet continued to take the lead in improving opportunities of the Blackfeet and all Indians. The Blackfeet founded the National Tribal Employment Rights Organization in 1977. This organization was created to help Indians find training opportunities and employment across the United States.[139] In the eighties, the Blackfeet Community College grew and Blackfeet managed the

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135 Ibid., 180.
136 Ibid.
137 James J. Lopach, Margery Hunter Brown, and Richmond L. Clow, Tribal Government Today, Politics on Montana Indian Reservations, (Niwor, Colorado: University of Colorado Press, 1998), p. 36.
138 Kellers & Turek, American Indians & National Parks, 60-1.
139 Wissler & Kehoe, Amskapi Pikuni, 180.

expansion of Headstart programs on the reservation.[140]

Throughout the later part of the twentieth century the Blackfeet Tribal Business Council came to several cooperative agreements with the state of Montana. In 1965, the state of Montana decided to negotiate a settlement to contentious water rights, rather than litigate with their Indian neighbors as other states had done. In 1981 Montana passed the State-Tribal Cooperative Act that paved the way for government to government agreements on collection of taxes and delivery of social services. By 1988 the Blackfeet Tribal Business Council had more than forty separate agreements with the state of Montana covering social service, taxes, and more.[141]

Despite improving relations with the state of Montana in the 1980s, the federal government moved to exploit oil resources in the sacred lands of Badger-Two Medicine. The Forest Service conducted an environmental assessment in 1981 that paved the way for the Bureau of Land Management to issue oil and gas leases the following year.[142] The Environmental Assessment declared that the proposed oil drilling would have no impact on the quiet and solitude necessary for Blackfeet religious practices as a schedule for drilling would be posted and those performing religious ceremonies could move further up the mountains to be away from any disturbing sounds.[143] The federal government

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[140] Wissler & Kehoe, Amskapi Pikuni, 173.

[141] Lopach, Brown, & Clow, Tribal Government Today, 38-9.

[142] Timothy J. Preso, attorney for American Rivers, American Whitewater, Blackfeet Headwaters Alliance, Vlacier-Two Medicine Alliance, Montana Environmental Information Center, Montana Wilderness Association, National Parks Conservation Association, National Wildlife Federation, Sierra Club, Sustainable Obtainable Solutions, The Wilderness Society, and the Upper Missouri Breaks Audubon Society, to Sally Jewell, Secretary of the U.S. Department of the Interior, and Tom Vilsack, Secretary of the U.S. Department of Agriculture, October 28, 2014. p. 3 http://earthjustice.org/sites/default/files/files/B2M%20lease%20cancellation%20letter%20--%20final.pdf (accessed April 14, 2016).

[143] Terri Lee Nelson, "Legal Protection for Native American Sacred Landscapes Involving Forest Service Lands," M.S. Thesis, (University of Montana, 1991).

issued several leases to energy companies and drilling was approved to start in 1985.[144]

Public reaction to the leases put a hold on the drilling permits. The Blackfeet Nation and the public protested the issuance of the drilling permits.[145] The Blackfeet and others appealed the administrative decision to issue the drilling permits and these appeals delayed the beginning of drilling until 1993. In 1993 the Secretary of Interior suspended the drilling permits, pending Congressional action.[146] In 2004 the Blackfeet Nation and Blackfoot Nation of Canada issues a joint statement reiterating the central importance of Badger-Two Medicine to practitioners of traditional Blackfeet region.[147]

In response to the public outcry, Congress passed legislation to partially protect Badger-Two Medicine. Senator Max Baucus of Montana proposed legislation that would prohibit issuing any new oil or gas drilling leases for Badger-Two Medicine.[148] The legislation also provided tax incentives for companies to give up existing leases.[149] Congress passed the proposed legislation as part of the Tax Relief and Health Care Act of 2006.[150] Five companies took the offer and gave up their drilling permits in 2010, while several others did not.[151]

The Solenex Company instead pressed its claims to one of the outstanding leases in the face of continuing opposition by the Blackfeet and environmental groups. In 2013, Solenex sued the Interior Department to revive the stalled appeals process and act on

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144 Preso, 3.
145 Solenex, LLC, v. Sally Jewell, Secretary of Interior, Case No. 13-993-RJL, U.S. District Court for the District of Columbia, Memorandum of Points and Authorities in Support of Motion To Intervene as Defendants, September 26, 2013, 4.
146 Preso, 3.
147 Memorandum of Points, 3.
148 Ibid., 5.
149 Preso, 4.
150 Memorandum, 5.
151 Preso, 4.

their outstanding application for a drilling permit from 1985. Many Blackfeet, in alliance with several environmental groups, petitioned to intervene in the case as interested parties.[152] In 2014, the Blackfeet and environmental groups called for the Interior Department to simply cancel the lease, based in part on the faulty conclusions of the original Environmental Assessment.[153] In July of 2015 Judge Richard Leon issued an order commanding the Department of Interior to produce a timeline for all remaining portions of the administrative process.[154] In response, the Secretary of the Interior, Sally Jewell, canceled the Solenex leases. The Mountain States Legal Foundation appealed on behalf of Solenex, but on March 17, 2016 the Bureau of Land Management also canceled the leases, determining that the Solenex lease had been improperly issued in violation of the National Environmental Policy and the National Historic Preservation Act.[155]

Blackfeet leader Elouise Pepion Codell, 1945-2011, provided national leadership on a host of Indian economic issues, including the largest settlement of Indian claims by the U.S. government. Codell revived the Blackfeet National bank and expanded it into the Native American Bank Corporation. She helped to create the Native American Community Development Corporation to facilitate the creation of new Indian businesses. In 1996, Codel filed the lawsuit against the United States for failure to sufficiently manage and account for BIA trust accounts. This case was ultimately settled for $3.4

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[152] Memorandum.

[153] Preso, 6.

[154] Solenex v. Jewell, Case No. 13-993-RJL, United States District Court for the District of Columbia, July, 27, 2015.

[155] Terri Hansen, "Sacred Blackfoot Land Saved! BLM Cancels Oil and Gas Leases in Badger-Two Medicine Region," Indian Country Today, March 18, 2016. http://indiancountrytodaymedianetwork.com/2016/03/18/sacred-blackfoot-land-saved-blm-cancels-oil-and-gas-lease-badger-two-medicine-region (accessed April 14, 2016).

billion in 2010.[156]

In the twenty-first century the Blackfeet have taken significant steps to protect and preserve the survival of their culture. In 2000 there were 27,104 enrolled members of the Blackfeet nation. There were 85,750 people of Blackfeet ancestry. 1,356 people were known to speak the Blackfeet language that same year. In 2010, the Blackfeet language was taught in Browning Public School, the Blackfeet Community College, and in lessons found at private immersion language schools.[157]

Emergence of Recreational Off-Road Motorized Travel

When the United States government created Lewis and Clark National Forest out of portions of the Blackfeet and Flathead reservations, including the sacred places of Badger-Two Medicine, there was no need for consideration of regulations regarding a motorized travel plan, but as motor vehicle technology changed and advanced, the new challenges required management plans to protect forests around the country. Up to the 1960s the Forest Service placed no restrictions on motorized travel in Lewis and Clark National Forest. This changed in 1964 with the Wilderness Act. The Forest Service designated parts of Lewis and Clark National Forest as wilderness at that time, limiting some forms of travel. Badger-Two Medicine was never designated as wilderness because of the reserved rights of the Blackfeet to hunt and harvest lumber in the area. In 1972, President Nixon ordered the Forest Service to develop the first travel plan for the Rocky Mountain Ranger District of Lewis and Clark National Forest. The Forest Service Completed the plan in 1976 with 620 miles of roads and trails in the Rocky Mountain

[156] Wissler & Kehoe, Amskapi Pikuni, 175.
[157] Ibid.

Ranger District, including those in Badger-Two Medicine. The Forest Service updated the travel plan in 1984 and the coverage of roads and trails had reduced as more of the district was designated as wilderness in 1977. The plan was again updated in 1988, at the same time all-terrain vehicles increased in popularity and use on Forest Service lands. [158]

By the twenty-first century the existing travel plan for the Rocky Mountain Ranger District and the included area of Badger-Two Medicine had several problems. The 1988 plan was complex and confusing, with twenty-four different types of restrictions. Maps created in 1988 delineating the regulatory areas had errors and this created a great deal of confusion in visitors. Inadvertent violations became common and visitors were understandably angry. The 1988 plan had not contemplated ATV traffic and regulations and the management plan needed to be altered to account for the impacts of these newer forms of motor transport on the land.[159] In 2001, the Forest Service issued the Three State Order, that encompassed all of the Lewis and Clark National Forest, ending all off-road travel for wheeled motorized vehicles, such as ATVs. This order did not impact the much more limited snowmobiling.[160] The Three State Order limited wheeled motorized traffic to existing roads and trails.[161] Adding to the existing confusion and conflict was the significant increase in public demand for non-motorized recreation such as hiking and skiing.[162] Many seeking non-motorized travel alternatives preferred their recreation not to be disrupted by the sounds of motorized recreation.[163] In 2005, the

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[158] United States Forest Service, Final Environmental Impact Statement Rocky Mountain Ranger District Travel Management Plan, (October 2007), p. 156.
[159] Ibid., 3.
[160] Ibid., 4. Snowmobiling was limited to creek bottoms, ridge-lines, and open bowls due to the performance limitations of the vehicles, as compared to wheeled vehicles.
[161] Ibid., 156.
[162] Ibid., 4.
[163] Ibid., xiv.

Forest Service issued a service wide rule limiting all motorized travel to specific designated roads, with local flexibility to allow for some snowmobile traffic in designated areas.[164]

In response to the Three State Order, the Rocky Mountain Ranger District of the Lewis and Clark National Forest created an Interdisciplinary Team to conduct a study and formulate a new travel management plan for the district, including Badger-Two Medicine. The study investigated how to ensure the long term protection of forest natural resources and recreation. The study examined how best to protect fish and wildlife, provide erosion controls, protect resources, promote safety, and reduce conflicts between those who came to use the forest. The Interdisciplinary Team developed a preliminary proposal and issued their proposed plan in August of 2002.[165] The team evaluated the impacts of ATV and snowmobile use in the district and formulated a proposal that sought to simplify and clarify travel and vehicle access rules while reducing conflict between users and reducing the negative impacts of motorized vehicle use in the forest.[166]

After issuing the proposed travel management plan for all of the Rocky Mountain District, including Badger-Two Medicine, the Forest Service embarked upon the required consultation process. The proposed travel plan significantly reduced motorized travel in Badger-Two Medicine, but made provisions for continued ATV use on one trail loop and some snowmobile use in that area.[167] While the interdisciplinary team had held ten open houses to scope the views of the public in formulating the proposed plan, formal

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[164] FEIS RMRD, 5.
[165] Ibid.
[166] United States Forest Service, Rocky Mountain Ranger District Travel Management Plan Record of Decision for Badger-Two Medicine, (March, 2009), p. 7-9.
[167] FEIS RMRD, 6.

consultation with the Blackfeet Nation did not begin until October. On October 10, 2002 Forest Service officials met with the Blackfeet Tribal Business Council and the Blackfeet Cultural Committee to schedule three open houses on the Blackfeet reservation. Four additional open house meetings were conducted outside Blackfeet territory.[168] The Forest Service extended the comment period beyond the statutory minimum to January of 2003 to allow interested Blackfeet members to comment on the proposed plan.[169]

Through the course of the initial consultation process, the Interdisciplinary Team and the Forest Service became aware of the significant concerns of Blackfeet tribal members as well as other public concerns and adjusted the proposal for the Draft Environmental Impact Statement considerably. The growing interest of vocal elements of the public in non-motorized travel, including horseback riding, hiking, and biking, pushed the Forest Service to consider closing all trails to motorized traffic.[170] A large portion of the public comments called for the closing of all but a few roads to motorized traffic.[171] Consultation with the Blackfeet educated the Forest Service as to the extent of the reserved rights of the Blackfeet in Badger-Two Medicine and the necessity for solitude. This led to the consideration of a plan that would close all roads and trails to motorized travel and end snowmobiling in Badger-Two Medicine.[172]

Despite the input from Blackfeet tribal members as to their treaty rights and the need for solitude in religious practices, the proposed preference of the 2005 Draft Environmental Impact Statement merely reduced ATV and snowmobile use in Badger-

168 FEIS RMRD, 7.
169 Ibid., 12.
170 Ibid., xiii.
171 BTM ROD, 23.
172 FEIS RMRD, xiv.

Two Medicine. All proposed alternatives in the 2005 DEIS called for the elimination of all motorized wheeled cross-country travel, in compliance with the 2001 Three State Order. As far as Badger-Two Medicine was concerned, the preferred alternative included areas available for motorcycle travel, ATV travel, and seasonal snowmobile use.[173]

The Forest Service issued the Draft Environmental Impact Statement in 2005 and again modified plans after the period of public comment. The Forest Service held eight open houses and received some thirty-five thousand comments on the DEIS.[174] Ultimately the Forest Service abandoned the preferred alternative from the DEIS and issued no single preferred alternative for the Rocky Mountain Ranger District as a whole. The final proposal of the 2007 Final Environmental Impact Statement was a mix of the alternatives, with the final decision for some areas delayed.[175] After consideration of continued concerns of Blackfeet members, the Forest Service deferred a final decision for Badger-Two Medicine after further consultation with Blackfeet interests.[176]

Further consultation with the Blackfeet brought more alterations to the travel management plans and it would be another two years before the Forest Service issued a Record of Decision for a travel management plan for Badger-Two Medicine. Comments from the general public overwhelmingly supported further separation of motorized and non-motorized recreational travel in the forest. A "vast majority" of comments stressed the need for quiet trails and supported full closure to any motorized travel.[177] In response to the public desire for quiet trials the Forest Service considered closing all of Badger-

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173 FEIS RMRD, xii-xiii.
174 BTM ROD, 22.
175 FEIS RMRD, xiv.
176 BTM ROD, 9.
177 Ibid., 16.

Two Medicine to all motorized traffic whether on or off-road, including a ban on all snowmobiling, but ongoing talks with Blackfeet interests modified the plan as the Blackfeet did not favor a total closure to motorized traffic.[178] Further consultation brought small but significant changes to the management plan.

Through continued consultation, the Blackfeet stressed their opposition to all snowmobile travel in Badger-Two Medicine, but urged limited motor vehicle access to facilitate their treaty rights. While religious ceremonies require solitude for their effectiveness in the view of practitioners of traditional Blackfeet religion, the Blackfeet nation retained access to Badger-Two Medicine for both hunting and harvesting lumber. The Blackfeet requested a small number of roads remain opened to provide access for all of their treaty rights. The Blackfeet argued motor vehicle access would also allow elders to reach trail heads for access to sacred sites and others could more easily engage in hunting and lumber harvesting.[179] Throughout, Blackfeet members consistently opposed motorized travel on trails and snowmobiling in Badger-Two Medicine, but offered to open up nearby portions of the Blackfeet reservation to recreational snowmobile travel to offset the lost recreational area.[180]

The final travel management plan for Badger-Two Medicine reflected the desired outcome for practitioners of traditional Blackfeet religion, even in the face of strong public support for closing the entire area to all motorized travel. Faced with only a small number of comments from locals in favor of continued snowmobile access to Badger-Two Medicine, the primary alternative proposal opposing Blackfeet treaty interests were

[178] BTM ROD, 4.
[179] Ibid., 4-5.
[180] Ibid., 14.

those wishing to close the area to all motor travel.[181] The final plan increased the non-motorized areas of Badger-Two Medicine from 51% to 92%.[182] The plan left 182 miles of trails motor free.[183] A small number of roads would remain open to licensed motorized vehicles (cars and trucks) for a limited season each year, from July 1 to November 1, to allow public access to trail heads, including Blackfeet exercising their treaty rights.[184]

Despite the small number of comments in favor of continued snowmobile access and motor trail access, twenty-six people filed appeals challenging the record of decision for the Badger-Two Medicine Travel Management Plan.[185] While some of these appeals included members of the Blackfeet Nation expressing concerns for their continued treaty rights,[186] several challenges suggested that the travel management plan violated the constitutional prohibition against the establishment of religion.[187] After reviewing the relevant materials, Appeal Deciding Officer Jane L. Cottrell followed the recommendation of the Appeal Reviewing Officer and dismissed the internal appeal on June, 18, 2009.[188] Ten of the appellants, including the Montana Trail Vehicle Riders Association, the Capital Trail Vehicle Riders Association, and Montanan's for Multiple Use, took their appeal to the United States District Court for the District of Montana, Great Falls Division.[189]

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[181] BTM ROD, 9.
[182] Ibid., 12.
[183] Ibid., 16.
[184] Ibid., 4-5.
[185] Appeal Reviewing Officer's Review and Recommendation- Badger-Two Medicine Travel Management ROD- Lewis & Clark NF – Appeal ## 09-01-00-0022, 0023, 0025, 0027, 0029, 0030, 0031, 0033, 0036, 0037, 0039, 0040, 0041, 0042, and 0043, June 13, 2009.
[186] Ibid., 45-51.
[187] Ibid., 6.
[188] Jane L. Cottrell, Final Administrative Determination, Department of Agriculture, Appeal ## 09-01-00-0022, 0023, 0025, 0027, 0029, 0030, 0031, 0033, 0036, 0037, 0039, 0040, 0041, 0042, and 0043, June 18, 2009.
[189] Fortune v. Thomson, 2011U.S. Dist. Lexis 5343.

Judge Sam E. Haddon for the Great Falls Division of the Montana Federal District Court disposed of the remaining issues on January 20, 2011, finding, in part, that the travel management plan for Badger-Two Medicine did not violate the constitution of the United Stated by improperly establishing religion. The Glacier-Two Medicine Alliance, Montana Wilderness Society, and the Wilderness Society joined the United States Forest Service as Defendant-Intervenors in the case. Judge Haddon applied the three part Lemon test in his decision and relied heavily upon the Access Fund decision involving Cave Rock from 2007.[190] Judge Haddon found there were a host of secular purposes in banning off-road travel, including benefits to air quality, water quality, soil quality, and fish and wildlife habitat.[191] With regards to effect, Judge Haddon determined that "an informed and reasonable person" could not perceive the government action here was endorsing a traditional Blackfeet religious perspective.[192] As to entanglement, Judge Haddon found the government was merely involved in its traditional management role for public lands.[193]

After some small consideration of further action by those interested in off-road vehicular recreation, the District Court opinion of Judge Haddon was the final legal opinion in the case. An appeal was initially filed with the Ninth Circuit Court of Appeals. This appeal was voluntarily dismissed in late October of 2011.[194]

Impact and Meaning

[190] Fortune, 6-7.
[191] Ibid., 8.
[192] Ibid., 9.
[193] Fortune, 10.
[194] Order of the Ninth Circuit Court of Appeals, Fortune v. Thompson, Case No. 11-35242, October 28, 2011.

There are several superficial similarities between the case of the Badger-Two Medicine travel management plan and that of the Cave Rock management and rehabilitation plan, but it is their differences that make the Badger-Two Medicine plan significant. Both involved situations where administrators did not come to the consultation process with preconceived plans. Rather administrators were faced with new administrative needs or mandates. The administrative changes were not being pushed by a for-profit enterprise that stood to increase its financial reward while desecrating Indian sacred sites. The consultation processes, for both Cave Rock and Badger-Two Medicine, were used to formulate plans and search for compromises, instead of being seen by administrators as a necessary hurdle to carrying out a preconceived policy. Thus administrators were open to looking for solutions that would meet Indian interests.

The differences in the cases stem from the differences in the history of the Blackfeet and Washoe nations. For the Blackfeet Indians, Badger-Two Medicine was a place of religious significance, visited for religious ceremonies and solitude. In addition, the Blackfeet retained significant treaty rights to access, hunt, and harvest lumber in the treaty with which they not quite willingly parted with the land. It is also worth noting that Blackfeet interests did not fully coincide with the maximal objectives of environmental concerns and those seeking solitude. The Blackfeet wanted some roads to remain so the elderly and disabled could better access sacred sites, and to facilitate other treaty rights to make use of the land. So while the Washoe obtained significant protection of Cave Rock (they remain unhappy with the hiking and picnicking), the Blackfeet obtained all they could possibly obtain, within the limits of the administrative purview of

the Forest Service. The Blackfeet Nation also showed its willingness to work with their neighbors by opening up parts of their reservation to recreational snowmobiling to offset the recreational use excluded from Badger-Two Medicine.

Chapter Five

Indian Religious Self-Determination and the Bane of Federal Rules and Procedures: Four Controversies

This chapter provides an examination of four cases that do not quite follow the administrative pattern of previous chapters. None of these cases involve decisions of the Forest Service, but all are relevant to the federal administrative and consultation process as it developed in the early twenty-first century. All four cases directly involve Indian religious self-determination and complications related to federal administrative procedures. Two involve the Bureau of Land Management and the Quechan Indian nation of Southern California. One involves sites sacred to the Western Apache of the San Carlos reservation in Arizona unilaterally removed from Forest Service and consultation protections. One involves treaty rights protecting off reservation religious practices of the Makah nation and the demands of racist environmentalists, outside of the mainstream of the environmental movement, insisting these treaty rights be subjected to federal administrative analysis and approval, even as federal officials supported Makah treaty and religious rights.

The first of these cases is that of the Makah nation of Washington and their attempts in the late twentieth and early twenty-first centuries to revive their religious and cultural practice of killing and eating whales. Whaling was so important to the Makah that they made sure to explicitly retain the right to do so in the Neah Bay Treaty of 1855 when they ceded the bulk of their interior lands to the United States. After voluntarily

giving up whaling due to the risk of extinction, well before the United States government banned whaling, the Makah approached the federal government for assistance in obtaining a quota of whales to hunt in 1997, well after the whale population had rebounded. After engaging in a successful whale hunt in 1999, the Makah were confronted by a small number of environmentalists who made common cause with politicians hostile to Indian rights. These opposing forces engaged in a shameless campaign against the Makah based in lies and counting on the ignorance of the public that culminated in demanding that Makah religious and treaty rights be subject to the administrative procedures of the Marine Mammal Protection Act of 1972.

The second and third cases examined here regard the Quechan nation and its struggles to protect sacred places in lands adjacent to their reservation managed by the Bureau of Land Management. In both of these cases the Quechan succeeded, but in one they were welcome allies of environmentalists, and, in the other, environmentalists soundly condemned the Quechan as opponents of progress for seeking to protect their rights and cultural heritage. In the first chase the Quechan worked with environmentalists to challenge a proposal by a Canadian corporation to mine for gold among their sacred places. Once the BLM and the state of California placed significant regulations on mining operations so as to mitigate damages, the Canadian corporation challenged these actions as violating its rights under the North American Free Trade Agreement. The Quechan appealed to the NAFTA mediation tribunal for leave to file briefs as an interested third party and in 2009 the Quechan nation became the first indigenous nation permitted to submit briefs to a NAFTA tribunal. In the other case, the BLM simply

refused to conduct any consultation with the Quechan before approving a solar power project and as the Quechan challenged the failure to engage in the required consultation, many condemned the Quechan for standing in the way of environmental progress.

The final case examined here also involves lands managed by the Forest Service, but the case demonstrates one of the key weaknesses with the current administrative regime regarding Indian sacred sites on public lands. Apache Leap and Oak Flats are of deep cultural, historic, and religious significance to the San Carlos Reservation Apache people, with religious ceremonies still carried out there as of this writing. The federal government had placed these Apache lands in the Tonto National Forest and protected them from mining, but in 2014, Congressmen from Arizona slipped a rider into a must-pass military appropriations bill at the last moment, giving Oak Flats and Apache Leap to an Anglo-Australian mining corporation. A former lobbyist for the corporation circumvented any protection a consultation process might have provided Apache interests by giving title to the land to said corporation (in exchange for land elsewhere).

The Makah and Whaling

The Makah Indian Nation is located on the Pacific Coast of the United States and whaling was a central part of their economic and religious existence for centuries. Archaeological studies of Ozzette Village reveal that the area near the Makah capital of Neah Bay has been continuously inhabited for over two thousand years.[1] Since time immemorial, the Makah hunted whales for sustenance.[2] Whales were also central to

[1] Robert J. Miller, "Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling," American Indian Law Review, Vol. 25, No. 2, (2000/2001): 187.
[2] Ibid., 183.

Makah culture and religion. Makah religion taught of instances where humans had transformed into whales.[3] When engaged in whale hunting, Makah hunters would offer prayers to the whale to both flatter and cajole it to turning towards the beach.[4] When the Makah successfully hunted and killed whales, the whale was recognized as an honored guest that sustained the village and entire villages would sing the praises of the whale that had given itself to the community.[5]

After meeting representatives of the United States, the Makah sought to protect the place of whaling in their society as it was both an economic necessity and of central cultural importance to them. Pressed by the United States to give up vast portions of their inland holdings, the Makah agreed to do so in exchange for goods and supplies, including the advanced whaling equipment and technology of the United States.[6] The Makah were confident they could continue to survive on a reduced land base, as the ocean was the source of their sustenance.[7] In the 1855 Treaty of Neah Bay, the Makah agreed to abandon the practice of slavery and freed their slaves.[8] So important was whaling to the Makah that they insisted on the explicit statement that they retained their whaling rights in the treat with the United States.[9] The Makah were the only Indian nation to specifically reserve the right to hunt whales in a treaty with the United States.[10] The United States never delivered the promised whaling equipment and shorted the Makah on

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3 Miller, "Exercising Cultural Self-Determination," 185-6.
4 Ibid., 185.
5 Ibid., 183.
6 Ibid., 198.
7 Ibid., 196.
8 Ibid., 174.
9 Ibid., 189.
10 Ibid., 190.

the other promised supplies.[11]

The Makah faced similar hardships to other Indian nations when the United States government turned to the policy of forced assimilation. The United States government disrupted the traditional Makah government, forcibly rearranged property rights, and suppressed the Makah language.[12] The federal government supported the removal of Makah children to distant boarding schools.[13] In the face of government suppression of their religious and cultural life, the Makah resisted by shifting their holidays and ceremonies to coincide with the political and religious holidays of the Christians trying to eliminate their religion, as other Indian peoples had.[14]

Through these difficult decades the Makah continued their practice of whaling, until commercial whaling threatened the existence of the gray whale. As stocks of the large water mammal dropped precariously low, the Makah voluntarily stopped whaling in 1927.[15] Facing the potential extinction of the many species of whale, the United States banned whaling in 1937.[16] The United States joined the International Whaling Commission when it was created in 1946, retaining a quota for subsistence whale hunts for indigenous peoples of Alaska.[17]

The international program to preserve whales was highly successful, at least for the gray whales the Makah hunted. In 1993, the United States government removed gray

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11 Miller, "Exercising Cultural Self-Determination," 199.
12 Ibid., 202-3.
13 Ibid., 204.
14 Ibid., 203.
15 Christina Roberts, "Treaty Rights Ignored: Neocolonialism and the Makah Whale Hunt," The Kenyon Review, Vol. 3, No. 1, (2010): 82.
16 Ibid.
17 Miller, "Exercising Cultural Self-Determination," 226.

whales from the list of endangered species.[18] In 1994, gray whales were at carrying capacity with some 26,000 in existence. Gray whales began to die because they lacked sufficient food for their populations.[19] In the face of this rebounded gray whale population, the Makah approached the United States government about obtaining a quota for hunting from the International Whaling Commission for sustenance and cultural purposes.[20]

With the tradition of whaling still within living memory, the Makah had kept their traditional alive into the 1990s.[21] In July of 1995, a whale landed on shore in Makah territory. One hundred and fifty Makah descended upon the creature and under directions of elders quickly butchered the whale. The Makah used old recipes to cook the meat.[22]

The United States government, in part because of retained Makah rights in the Treaty of Neah Bay, made arrangements to obtain a whaling quota for the Makah with the International Whaling Commission. U.S. negotiators encountered difficulties at the International Whaling Commission and opted to make arrangements with Russia to share the existing whaling quota of Siberian Natives with the Makah, rather than seek an entirely new quota with the IWC. By 1997 the United States had secured international permission for the Makah to harvest up to twenty gray whales over a five year period. Under this agreement, no new whales would be killed, the Makah simply obtained a share of the existing quotas.[23]

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[18] Zachary Tomlinson, "Abrogation or Regulation? How Anderson v. Evans Discards the Makah's Treaty Whaling Rights in the Name of Conservation Necessity," Washington Law Review, Vol. 78 (2003): 1116.
[19] Miller, "Exercising Cultural Self-Determination," 254.
[20] Ibid., 255.
[21] Ibid., 248.
[22] Ibid.
[23] Ibid., 258.

Makah leaders had hoped that the revival of the whale hunt would help revitalize the Makah nation. Faced with high unemployment, poverty, and drug use, Makah leaders hoped this cultural revival would bring the community together.[24] While some elders objected that a truly traditional hunt could not be revived, some eight-five percent of the Makah people supported the hunt.[25] The Makah consulted with Inuit whaling experts in putting together their hunt.[26] Traditional hunts had been conducted by specific whaling families, but the Makah created the Makah Whaling Commission to select the team for the hunt.[27] Family and political rivalries continued and the animosity between hunting team captain Wayne Johnson, and harpooner Theron Parker initially caused difficulty in preparations.[28] The eight man team led by Johnson set out with a traditional boar, handmade paddles, and a hand held harpoon wielded by Parker set out to hunt whale in 1999.[29] The U.S. government required the whale be killed mercifully with a shotgun blast to the head, once the beast was landed.[30] While the Makah had considered using parts of the hunt for traditional economic purposes, the U.S. required they only use the whale for food.[31]

Once the general public of the United States learned of the intentions of the Makah, the reaction was vile, violent, and grotesque in the extreme. While no major international environmental groups protested the Makah whale hunt,[32] smaller attention

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[24] Rob van Ginkel, "The Makah Whale Hunt and Leviathan's Death: Reinventing Tradition and Disputing Authenticity in the Age of Modernity," Etnofoor, Vol. 17, No. 1/2, (2004): 65.
[25] Ibid., 69.
[26] Ibid., 65.
[27] Ibid., 66.
[28] Ibid.
[29] Miller, "Exercising Cultural Self-Determination," 262.
[30] Ibid., 263.
[31] Ibid., 239.
[32] Ibid., 265.

seeking groups with dubious connections to racist causes rushed to condemn and attack the Makah.[33] While the Makah were supported in their efforts by other indigenous nations,[34] the response of the non-Indian community was violent. Indian children received death threats.[35] Non-Indians sold and displayed bumper stickers that read, "Save a Whale, Kill an Indian."[36] Activists opposed to whaling tried to physically disrupt Makah training and practice, causing collisions, and finally requiring the United States Coast Guard to impose and enforce a five hundred foot exclusion zone around the Makah hunting team.[37]

Most vile of those seeking to undermine Makah sovereignty was Paul Watson, acting for the cameras nearly a decade before becoming central subject on the Animal Planet Reality television program Whale Wars. Greenpeace expelled Watson in the 1970s and he went on to found the Sea Shepherd organization. Described by Trey Parker as "an unorganized incompetent media whore who thought lying to everyone was okay as long as it served his cause," and "a smug, narcoleptic liar with no credibility,"[38] Watson made alliances with politicians with no interests in whale preservation that hoped to use the issue of Makah whaling to undermine legal recognition for Indian treaty rights.[39] Watson publicly endorsed the position that misleading the public was acceptable to promote his political agenda, and repeatedly pushed the lie the Makah intend to sell whale meat to the

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33 Mark Lee, "You Talkin' to Me?: Racism Sells: The Anti-Whaling Movement and Japan," Northwest Asian Weekly, Vol. 30, No. 13, March 26, 2011.
34 Ginkel, "The Makah Whale Hunt," 80.
35 Miller, "Exercising Cultural Self-Determination," 262.
36 Ginkel, "The Makah Whale Hunt," 76.
37 Miller, "Exercising Cultural Self-Determination," 266.
38 Trey Parker, "Whale Whores," South Park, Season 13, Episode 11, (October 28, 2009).
39 Lee, "You Talkin' to Me?"

Japanese.[40] Once the Makah succeeded in their 1999 whale hunt, Watson commented, "American whalers managed to blast a whale out of existence in American waters on the pretext of cultural privilege."[41]

Success in overcoming opposition to the hunt, and success in the hunt itself had beneficial outcomes for the Makah nation. Most felt the vile racist opposition helped unite the Makah people.[42] Some Makah noted that the whale fed both the stomachs and the spirits of the Makah people. The Makah placed the skeleton of the whale killed on display in the Makah Culture and Research Center in Neah Bay.[43] The Makah also learned that many of their so-called "liberal friends" were not really committed to political and cultural self-determination. As Tribal Council Chairman Ben Johnson said the next year in the face of continued protests,

> "Liberals" seem always to want to fit Indians into a safe, acceptable ideal of the noble savage, and are uncomfortable when modern methods can be adopted to achieve ancient aims. Times change and we have to change with the times. They want us to be back in the primitive times. We just want to practice our culture.[44]

While the Makah were able to succeed in their 1999 hunt and tried, but failed, in 2000, whale preservation groups and activists turned to the courts in their attempts to deny the Makah their cultural and political self-determination, as well as their freedom to exercise religion. Initially animal rights activists challenged the legitimacy of the whale

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40 Paul Lee Watson, "Makah Whaling- Whales Must Be Protected in U.S. Waters," Commentary, March 11, 2015. http://www.seashepherd.org/commentary-and-editorials/2015/03/11/makah-whaling-whales-must-be-protected-in-us-waters-692 (accessed April 14, 2016).

41 Ginkel, "The Makah Whale Hunt," 68.

42 Ibid., 67.

43 Frank Hopper, "Whale Wars Groups vs. Makah: Who Decides If Traditions Are Authentic?" Indian Country Today, June 23, 2015. http://indiancountrytodaymedianetwork.com/2015/06/23/whale-wars-group-vs-makah-who-decides-if-traditions-are-authentic-160741 (accessed December 12, 2015).

44 Ibid.

hunt on the grounds the United States government did not issue an Environmental Impact Statement before obtaining the Makah quota. The courts agreed and prevented the Makah from conducting another hunt until an environmental assessment was conducted. Once the Makah and the United States government overcame this hurdle, the animal rights activists then put forward the argument that the rights retained by the Makah from the 1855 Neah Bay Treaty were subject to the Marine Mammal Protection Act of 1972 and thus a more extensive environmental assessment must be carried out by the National Oceanic and Atmospheric Administration's National Marine Fisheries Service.[45]

The Ninth Circuit Court of Appeals, in a confused opinion, decided Makah treaty rights were subject to the Marine Mammal Protection Act in 2002.[46] Under the United States Constitution, treaties are the supreme law of the land, and Congress amended MMPA to specifically include a statement that the MMPA did not abrogate any Indian treaty rights.[47] Unfortunately Indian legal issues can be complicated, with many competing tests, and courts have been known to apply the wrong test in order to obtain the desired results. In the Makah whaling case, rather than examine whether or not Congress had intended to abrogate Makah treaty rights, the court applied a test used by the U.S. Supreme Court for determining whether or not Indian hunting and fishing treaty rights might be subject to state, not federal, regulations for the narrow purpose of preventing the extinction of the resource.[48]

To reach the conclusion that Makah treaty rights were subject to the MMPA, the Ninth Circuit Court of Appeals had to engage in some fanciful speculation. For Indian

[45] Tomlinson, "Abrogation or Regulation?" 1103.
[46] Anderson v. Evans, 314 F. 3d 1006 (9th Cir. 2002).
[47] Tomlinson, "Abrogation or Regulation?" 1127.
[48] Ibid., 1113.

hunting and fishing treaty rights to be subject to state (again, not federal) regulations, the regulations must be necessary to prevent extinction, not merely conserve the resource.[49] The court opined that if the Makah were not subject to the MMPA, despite all the evidence to the contrary, the Makah could possibly decide to hunt the gray whale to the brink of extinction.[50] The court also worried that if the Makah were allowed to hunt whale without being subject to the MMPA, other Indian nations might try to exert the right to hunt whales as well, despite the Makah being the only nation holding such reserved treaty rights.[51] As there were some 26,000 gray whales in the world, the court's claimed worries of extinction are particularly fantastical. Only under such absurd hypothetical situations would it be necessary to protect a species that was then at its carrying capacity with the additional regulatory scrutiny of an environmental impact statement crafted by the National Marine Fisheries Service.

After more than a century of much greater adversity than simply working with more government bureaucrats, Makah leaders refused to give up and immediately began working with National Oceanic and Atmospheric Administration officials to create a new request for a permit to harvest gray whales.[52] In 2005, the Makah Indian Nation formally submitted a proposal for harvesting gray whales to the NOAA.[53] Unhappy with delays, in September of 2007, five Makah citizens killed a gray whale without regard to the laws, regulations, or traditions of the Makah nation.[54] The NOAA issued an initial draft

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[49] Tomlinson, "Abrogation or Regulation?" 1113.
[50] Ibid., 1125.
[51] Ibid., 1119.
[52] Ibid., 1116.
[53] U.S. Department of Commerce, National Oceanic & Atmospheric Administration National Marine Fisheries Service, West Coast Region, Draft Environmental Impact Statement on the Makah Tribe Request to Hunt Gray Whales. February, 2015, p. ES-1.
[54] Roberts, "Treaty Rights Ignored," 83.

environmental impact statement in 2008, but withdrew it in 2012 as additional scientific data became available.[55] After another three years of consideration, another Draft Environmental Impact Statement was issued in February of 2015.[56]

The current proposal of the Makah takes into consideration the many regulations of the MMPA. The proposal limits the hunting season to five months, from December to the end of May, and provides for an average of four gray whales harvested a year, with no more than five in any given year, in a six year period. The proposal would limit the number of whales the Makah might unsuccessfully attack and makes provisions for actions to be taken if whales outside the large gray whale population might suffer attack instead.[57] The NOAA analysis covered several variants on the plan to thoroughly explore options, but offers no preferred alternative, waiting instead for comments to combine with their analysis before making a final decision.[58]

Significance of the Makah Whaling Struggle

In giving up their lands the Makah felt whaling was so significant to their culture and economy that they specifically reserved the right by treaty, and had federal administrators as allies in their quest to exercise their religion, but even this could not prevent liberal imperialists from infringing on their religious and economic freedoms. While major environmentalist organizations did not oppose the Makah, racist environmentalists made common cause with those looking to undermine Indian sovereignty and self-determination. The lies of Watson were able to take hold because of

[55] Makah DEIS, ES-1.
[56] Ibid.
[57] Ibid., ES-1 to 2.
[58] Ibid., ES-1 to 3.

the deep ignorance of the non-Indian public as to the foundational history of their own country. Unaware of the range in diversity in Indians cultures had always been greater than the range of cultural diversity in Europe, the general American public often can become outraged when Indians do not live up to their liberal environmentalist fantasies and prejudices. In addition, non-Indian education has failed to teach even the basic notions of freedom to its people, as religious freedom must exist for things that others do that you do not like. Otherwise, as these racist environmentalists demonstrated, one does not believe in religious freedom.

The Quechan Nation as Environmental Heroes and Villains

The Quechan people place the origin of humanity as part of the unfolding of the potential of an infinite universe. For the Quechan time is infinite and without beginning.[59] Kwikumat and Blind Old Man were the first creatures to actualize the potential of reality and emerged from primordial waters. Kwikumat went on to create the first Quechan, Marxokuvek, and several non-human people including Coyote, Raven, and Cougar. Kwikumat and Blind Old Man then had sexual intercourse to create Kumastamxo. Kumastamxo was also quite powerful and then created the sun, stars, and vegetation of the world.[60] All Yuma speaking people were created in historic Quechan territory at Avikwaame or Spirit Mountain.[61]

Traditional Quechan religion is a religion of dreams, visions, and the potential for

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[59] Jack D. Forbes, Warriors of the Colorado, The Yumas of the Quechan Nation and Their Neighbors, (Norman, OK: University of Oklahoma Press, 1965), 63.

[60] Ibid., 63.

[61] United States Bureau of Land Management, Environmental Assessment, CA-760-EA2000-34, For The Indian Pass Withdrawal, CACA-39853, April 25, 2000, p. 12.

the accumulation of spiritual power. Spiritual power could be obtained by contacting Kumstamxo in dreams.[62] The spirits of the dead, including Kwikumat and Kumastamxo, dwell in Indian Pass at Anaimtapoi, located in traditional Quechan territory.[63] Kwoxot, or the traditional national political leaders of the Quechan, were called to public service by visions in dreams that delivered spiritual power to them.[64]

While the Quechan had no formal church structure or hierarchy in traditional life, the political leaders, Kwoxot, obtained their prominence through a mix of public service and spiritual power. Once a person was called to service by powerful spiritual visions, the person had to choose to act on that call by volunteering to take on the responsibilities and duties of leadership.[65] These leaders only held sway as long as they had the confidence of the people. Competence was their real source of authority, and if they lost the support of the people, they were no longer leaders.[66]

Unlike their neighbors, the Quechan had a national identity with a unitary leadership as early as 1604, but the actual political power resided in the people as decision making was based in consensus.[67] At times in Quechan history there was more than one Kwoxot at a time. Often they publicly struggled with each other for leadership, but on occasion they worked cooperatively.[68] The Kwoxot had no authoritarian power to command obedience. Their power originated in their spiritual power, wisdom, and generosity.[69] Villages had their own leaders known as Pipa Taxa, or "good for the

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62 Forbes, Warriors of the Colorado, 65.
63 Ibid., 64.
64 Ibid., 68.
65 Ibid.
66 Ibid., 69.
67 Ibid., 67.
68 Ibid., 69.
69 Robert L. Bee, Crosscurrents Along the Colorado, The Impact of Government Policy on the Quechan

people."[70] These local leaders tended to have less spiritual power than Kwoxot, but some could heal, while others were nice, generous, wise, and gave good advice to people.[71] The Quechan military leadership was separate from the political leaders, and the top military commander was known as Kawanami. This distinction was again based in competence, but also bravery.[72]

Perhaps because the Quechan had a central national leadership, unlike their neighbors, the Quechan led a powerful alliance of eight nations. The Quechan League formed in response to the dislocations caused by the Spanish slave trade in Indian peoples.[73] The Quechan League successfully protected the freedom of the Quechan people and lands for three hundred years from Spanish and later Mexican military forces.[74] The United States militarily defeated the Quechan in 1852. In 1853 the local U.S. military commander deposed the traditional leadership of the Quechan nation and imposed a new Kwoxot over public protests by the Quechan people.[75]

Now incorporated by force into the expansionist United States, the Quechan nation faced a series of dislocations similar to those of hundreds of other Indian nations. The President of the United States declared the Quechan territory to be limited to lands on the eastern shore of the Colorado River, but in response to vocal Quechan protests, the President changed the location to the western shore of the Colorado River, leaving the Quechan some 45,000 acres of land in the southeastern corner of the State of California.[76]

Indians, (Tuscon, AZ: The University of Arizona Press, 1981), 9.

70 Forbes, Warriors of the Colorado, 70.

71 Ibid.

72 Bee, Crosscurrents Along the Colorado, 9.

73 Forbes, Warriors of the Colorado, 80.

74 Ibid., 81

75 Bee, Crosscurrents Along the Colorado, 28.

76 Ibid., 20.

Once the United States began the process of altering indigenous land holdings to reflect their own economic ideology, in the policy of allotment, local government agents forged paperwork that made it appear that the Quechan people approved to the plan to parcel out their land into private holdings and sell the "surplus."[77] While the Quechan were fortunate enough to never have any of their retained lands leave the period of government "trust," and thus had none of their remaining lands lost, the United States sold off some eighty percent of the 1884 reservation land as "surplus."[78] The Quechan were already unhappy by being forcibly separated from their children by the U.S. policy of forced assimilation through boarding schools, and Quechan leaders urged widespread resistance to the policy as the Quechan learned of the physical abuse their children suffered at the schools.[79]

With the change in policy by the United States government during the Great Depression, Quechan cooperation with U.S. policies did not markedly increase. The Indian Reorganization Act provided for indigenous nations to form European style governments with elected officials. Many Quechan resisted efforts to produce an IRA government and the Bureau of Indian Affairs' constitutional committee made up of younger Quechan representatives merely adopted the model BIA constitution with little alteration. After losing the first referendum to adopt the IRA constitution, the BIA held a second election in 1936 where the constitution was approved by merely thirteen votes in face of low voter turnout.[80] Even with indications the BIA may have wanted the formation of the new Quechan government more than the Quechan people, the first Tribal

[77] Bee, Crosscurrents Along the Colorado, 37.
[78] Ibid., 50.
[79] Ibid., 40.
[80] Ibid., 92-3.

council took office in 1937 and immediately clashed with BIA over attempts to exercise its authority. The Quechan IRA government attempted to pursue policies designed to promote Quechan economic interests, but the BIA opposed them at every turn.[81] As the BIA strong-armed the Quechan Tribal Council, public participation in the electoral process dropped off and voter turnout fell further in the 1940s.[82]

In the early 1970s the Quechan Council pressed the United States government for the return of all lands from the 1884 reservation that were then in the legal possession of the federal government. As part of its ongoing Indian Claims Commission complaint, the Quechan government demanded that land be returned to them, rather than obtain monetary compensation for the taken lands. The Nixon administration was receptive to the proposal and drew up plans to return twenty-five thousand acres. The proposed land transfer fell apart as the Watergate scandal consumed the Nixon administration.[83]

Without returning Quechan land, the United States federal government continued to manage Quechan sacred sites on federal property in Indian Pass and much of Imperial country California through the Bureau of Land Management. While parts of the land had been mined, and there remained outstanding claims to mineral rights, most of the land remained undisturbed.[84] The lands contained numerous sites of religious, cultural, and historic significance to the Quechan that were eligible for designation as Traditional Cultural Properties.[85] There were archaeological sites dating back more than 1,200

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81 Bee, Crosscurrents Along the Colorado, 96.
82 Ibid., 97.
83 Ibid., 152.
84 Indian Pass Environmental Assessment, 13.
85 Ibid., 2.

years.[86] These sites include dance circles created by historical leaders of the Quechan.[87] The land contained archaeological sites, petroglyphs, and the Running Man geoglyph. Indian Pass was the spiritual resting place for the Quechan dead.[88] Several sacred mountains were also found in the area, including Avikwaame, also known as Spirit Mountain, where Quechan leaders and healers obtained spiritual power in dream travel.[89]

The Quechan Nation as Environmental Heroes

In 1994, the Canadian corporation, Glamis Imperial submitted a proposal with the Bureau of Land Management so it could act on its mining claims. The proposal called for an open-pit gold mining operation using heap leach processing that would disturb some 1,400 acres of Imperial County, including Indian Pass.[90] The proposal called for several shafts to be dug. The deepest of these would have been 850 feet deep. The proposal of Glamis did not provide for refilling the open-pits once mining was completed. The proposal planned leaving a thirty story high debris pile instead.[91]

The Glamis Imperial Corporation did not have the best record as an international corporate actor. Glamis had no public environmental or human rights policies. Glamis was not a member of the Mining Association of Canada, nor a member of the International Council on Mining and Metals. Both organizations had standards for sustainable mining and relations with indigenous peoples. At the time Glamis brought

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86 Indian Pass Environmental Assessment, 13.
87 Ibid., 8.
88 Ibid., 3, 12.
89 Ibid., 12.
90 Ibid., 1.
91 Non-Party Submission of the Quechan Indian Nation, Glamis Gold v. United States of America, International Center for Settlement of Investment Disputes, North American Free Trade Agreement Arbitral Tribunal, August 19, 2005, p. 5.

litigation regarding mining regulations before the North American Free Trade Agreement Arbitral Tribunal, communities in Central America were complaining of the environmental harms and human rights violations of Glamis operations.[92]

In preparing the Draft Environmental Impact Statement and Environmental Impact Statement for the Glamis mining proposal, the Bureau of Land Management first became aware of the extend of Quechan interest in Indian Pass and the surrounding lands, and took measures to protect places culturally and religiously significant to the Quechan Nation.[93] In 2000, the Bureau of Land Management conducted a study and removed the Indian Pass area from eligibility for any future mining claims.[94] In January of 2001, the Bureau of Land Management rejected the mining proposal of Glamis as causing irreparable harm to Quechan sacred and cultural sites.[95] When the new presidential administration took over, the new Secretary of the Interior, Gale Norton, reversed the Bureau of Land Management decision and approved the mining proposal in November of 2001.[96]

The Quechan Nation and their many allies protested the approval of the mining project and took steps to hinder the damage the mine would have on Quechan cultural sites. The National Congress of American Indians, California Governor Gray Davis, both California Senators, the California Congressional Delegation of twenty-nine House members, the California State legislature and others protested the reversal of the BLM

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92 Non-Party Supplemental Submission of the Quechan Indian Nation, Glamis Gold v. United States of America, International Center for Settlement of Investment Disputes, North American Free Trade Agreement Arbitral Tribunal, October, 16, 2006, p. 13.
93 Indian Pass Environmental Assessment, 1.
94 Ibid.
95 Non-Party Submission, Glamis, 2.
96 Ibid., 3.

decision to reject the mining proposal.[97] In response, the California state legislature passed a law requiring the backfilling of any mines to mitigate environmental damage, in 2003.[98]

Unhappy with the new California regulations requiring the rehabilitation of the landscape, Glamis filed a complaint against the United States under chapter 11 of the North American Free Trade Agreement. This provision of NAFTA allowed for foreign corporations to file claims against member governments for unfair or unequal treatment. While Glamis complained of excessive federal delays in approving the gold mine proposal in considering Quechan cultural concerns, the central argument of the Glamis case rested on the argument that the new California regulations were directed specifically at Glamis as a Canadian corporation and were a regulatory taking as the mining project would cost considerably more to conduct.[99] The Quechan Nation requested the NAFTA tribunal accept their non-party submissions for consideration in the arbitration in 2005.[100] The Quechan Nation was the first nation to ever have their briefs accept for consideration by a claims dispute tribunal authorized under the North American Free Trade Agreement.[101]

In 2009, the NAFTA claims tribunal denied any claim to damages by Glamis and considered the importance of protecting indigenous sacred sites in its opinion. With

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97 Non-Party Submission, Glamis, 3-4.
98 Ibid., 5.
99 Glamis Gold v. United States of America, 48 ILM 1038 (2009), 1042.
100 Application for Leave to File a Non-Party Submission of the Quechan Indian Nation, Glamis Gold v. United States of America, International Center for Settlement of Investment Disputes, North American Free Trade Agreement Arbitral Tribunal, August 19, 2005, p. 1.
101 Indian Law Resource Center, "NAFTA Tribunal recognizes sacred place of Quechan Tribe – denies Glamis Gold's claim in full," Press Release, Fort Yuma, CA/AZ, June 9, 2009. http://indianlaw.org/Quechan_Glamis_NAFTA_Tribunal (accessed April 14, 2016).

regards to the alleged regulatory delays, the tribunal found consideration for indigenous sacred places was a legitimate and predictable operation of government. With regards to the claim the California regulations were a taking, the tribunal found the mining project could still be profitable, only less so, and that mitigating the damage to indigenous sacred and cultural sites was a legitimate purpose. With regards to the claim that Glamis was targeted for regulation as a Canadian corporation, the tribunal found that the California regulation may have been triggered by the approval of the Glaimis mine proposal, but the law was generally applicable, and could potentially apply to other future mining operations.[102] Glamis had been defeated and the Quechan nation stood as heroes alongside their environmentalist allies. Worthy of note was the tribunal's reliance on emerging standards of international law regarding the rights of indigenous peoples, including the United Nations Declaration on the Rights of Indigenous Peoples of 2007.

The Quechan Nation as Environmental Villains

In 2008, Tessera Solar Limited Liability Company approached the Bureau of Land Management to produce a solar complex on federal lands near the Quechan reservation. This proposal required leasing 6,500 acres of land upon which to build thirty thousand solar collectors.[103] This land contained hundreds of archaeological and religious sites, some containing human remains, of significance to the Quechan people, and many would be potentially destroyed by the proposed solar project.[104] These were the days of the 2008 economic meltdown and the Tessera Company hoped to qualify for federal funds

[102] Glamis v. USA, 48 ILM 1066-67.
[103] Quechan Indian Tribe v. United States Department of the Interior, 755 F. Supp. 2d 1104 (S.D. Cal. 2010), 1107.
[104] Ibid., 1120.

under the American Recovery and Reinvestment Act. The Bureau of Land Management began an expedited process to complete approval of the project, as the project would lose its eligibility for federal stimulus funds if the project did not begin before the end of 2010.[105]

The leaders of the Quechan nation became aware of the project and the Quechan notified the Bureau of Land Management of the requirement to consult with them on a government to government basis. The Quechan Historical Preservation Office initiated first contact between the Quechan nation and the Bureau of Land Management by sending the BLM a letter in February of 2008. This letter informed the BLM that the solar project endangered cultural, religious, and historical sites of significance to the Quechan people and requested a meeting.[106] The BLM did not reply and the office resent the letter the next month.[107] The Quechan repeatedly requested government to government consultation, private meetings, and informed the Bureau of Land Management that the project plan had not identified what historic and cultural sites might be impacted.[108] In response the Bureau of Land Management merely invited Quechan leaders to come to meetings designed for general public comments and bring their information with them.[109]

The planning process of the Bureau of Land Management in no way included consideration of Quechan sacred and cultural sites. In June of 2010, the BLM admitted it had no maps inventorying sites that might be impacted by the proposed solar complex.[110]

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105 Quechan, 755 F. Supp. 2d 1119.
106 Ibid.
107 Ibid.
108 Ibid.
109 Ibid.
110 Ibid.

The BLM went ahead and issued the Final Environmental Impact Statement in July of 2010 without yet meeting with any representatives of the Quechan government. The Quechan nation objected to the completion of the FEIS without any consultation with their representatives. On October 4, 2010 the BLM director signed the Imperial Valley Solar Project Record of Decision approving the plan.[111] On October 13, 2010, Secretary of Interior Ken Salazar signed off-on the project.[112] The first meeting between Quechan leaders and the Bureau of Land Management took place on October 16, 2010, three days after the final approval of the project.[113]

The record left by the Bureau of Land Management clearly indicated no consideration for efforts to mitigate any damage to sacred sites and archaeological treasures, in addition to the total lack of consultation with the Quechan Nation. The project threatened hundreds of archaeological sites and the BLM did not even have a map of these sites.[114] The Environmental Impact Statement when so far as to admit that the project could wholly or partially destroy all archaeological sites in the project area.[115]

Faced with a total disregard by the Bureau of Land Management for the legal requirements of consultation when projects might impact places of cultural or religious significance to Indian nations, the Quechan nation turned to the federal courts and received the sought relief. On October 29, 2010, the Quechan nation filed a complaint with the federal court for the Southern District of California demanding a preliminary injunction.[116] On December 13, the district court heard oral arguments and two days later

111 Quechan, 755 F. Supp. 2d 1107.
112 Ibid.
113 Ibid., 1118.
114 Ibid., 1120.
115 Ibid., 1107.
116 Ibid., 1106.

the court delivered a written opinion issuing a preliminary injunction as the Quechan would likely win on a full consideration of the merits on the issue of consultation.[117]

Judge Larry Ann Burns explained in his opinion that the law and regulations clearly required government to government consultation when a proposed action may impact Indian cultural and religious sites and that the government had in so substantive way engaged in such consultation.[118] The court noted that government to government consultation was required at the earliest possible time in the planning stages and required much more than merely inviting the Quechan to collect their own information and bring it to a meeting designed for general comments on the draft environmental impact statement.[119] Judge Burns also noted that the Quechan had put the Bureau of Land Management on notice that this consultation was required as early as February, 2008.[120] The court went on to also take to task the government's pleading practice, complaining that it was not good form to simply file page after page of documents without explaining the significance of any particular document and expecting that "the court will sift through them."[121]

While the Quechan nation was able to prevent the destruction of their sacred sites by a poorly planned project, the press was largely incapable of understanding the subtleties of the issues and portrayed the Quechan as blocking progress. A "storm of media criticism" against the Quechan followed their victory.[122] Unable to grasp the

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[117] Quechan, 755 F. Supp. 2d 1106.
[118] Ibid., 1119.
[119] Ibid.
[120] Ibid., 1121.
[121] Ibid., 1112,
[122] Ryan D. Dreveskracht, "Alternative Energy in American Indian Country: Catering to Both Sides of the Coin," Energy Law Journal, Vol. 33, No. 2 (2012): 431, 434.

subtleties of the issue, the liberal press denounced the Quechan as opposing progress and environmental protection. The press seemed incapable of grasping the notion that the Quechan objections were to the lack of consultation and the lack of consideration for any effort to be made to mitigate damage or destruction to archaeological, cultural, and religious sites. Had the consultation taken place the Quechan could have helped identify the most significant sites and a plan may have been designed that could have either protected or minimized the damage to those sites. Instead the press condemned the Quechan for not being stewards of the environment and placing their traditions over the environmental well-being of all. Some condemned the Quechan for building a casino to deal with their economic needs but only being traditional when it came to the proposed solar project.[123]

Significance of the Quechan Struggles

The Quechan cases illustrate several important points. First, it is easier to be heroes to ignorant liberal environmentalists when your political goals match their ill-informed opinions. Second, the court in the solar complex case has demonstrated the consultation process must involve something more than an invitation to bring concerns to a public meeting, and must take place at a government to government level. Third, people are deeply ignorant to Indian concerns and were easily misled into conflating complaints about lack of consultation with opposition to the solar project as such. Fourth, non-Indians continue into the twenty-first century to feel it is their place to tell Indians what their traditions should be.

[123] Dreveskracht, "Alternative Energy in American Indian Country," 434.

Finally, the Quechan involvement in the NAFTA arbitration tribunal demonstrates several disturbing trends in American law. The Quechan, in their brief, brought up the emerging international consensus regarding protecting the rights of indigenous peoples, including the United Nations Declaration on the Rights of Indigenous Peoples. While the tribunal accepting the protection and preservation of indigenous cultural and sacred sites as a legitimate concern of government and a predictable cost of business, the acceptance of the tribunal of such emerging international law standards only serves to highlight to move against such standards by the United States Supreme Court and the lower courts in the U.S. following the lead of the high court. In addition, the tribunal's decision serves to highlight that foreign corporations have more avenues for seeking protection of their financial interests than the indigenous people of the United States have in protecting their cultural and religious interests. The NAFTA tribunal permissively allowed the Quechan nation to file a brief as an interested third party. Alone, the Quechan would have had no standing to protect their interests before the international arbitration body. In U.S. courts, Quechan arguments regarding the emerging international consensus regarding the rights of indigenous peoples would almost certainly have been ignored.

Apache Leap and Oak Flats

While managing public lands, federal managers of these public lands have a series of requirements they must meet when operating with Indian sacred sites. The federal government cannot prevent Indian access to such places. When carrying out decisions, such as assessing the impacts of proposed mines or massive solar farms, Indian nations and religious leaders must be substantively consulted on how the proposed actions will

impact those sacred sites. While the Forest Service has never been under any obligation to protect sacred places consistent with Indian desires, the service has become quite skilled at conducting substantive meetings at the earliest stages of planning, in a manner consistent with U.S. laws and regulations.

Alternatively, if the United States Congress simply privatizes public lands encumbered with executive prohibitions against mining, Indian rights to consultation and access have no legal protections.

The Western Apache History and Religion

The traditional religion of the Western Apache is in many ways similar to other Indian peoples. The Western Apache view the universe as a living entity. They view bars, snakes, and lightening as creatures of spiritual power. The Apache view the yellow pollen of cattails as charged with benevolent energy and many would carry some with them. The Western Apache believe in mountain dwelling spirits, the Gaan, that come to visit their lands during ceremony times. Much like the Hopi and the Kachina, the Western Apache have people dress up as the Gaan in hoods and masks for religious ceremonies.[124]

Unlike many of their neighbors, the Western Apache placed the celebration of female power in a position of prominence in their ceremonial life. The Western Apache did not have a fear of abstract female power. They did not require women to leave camps while menstruating. Celebrating when young women achieved puberty was a major public ceremony before contact with European powers. Among extended family groups

[124] Richard J. Perry, Apache Reservation, Indigenous Peoples and the American State, (Austin: University of Texas Press, 1993), 77-78.

the puberty ceremony was the central ceremony and ritual.[125] After the years of the suppression of religion, the Western Apache enthusiastically revived the female puberty ceremony[126] and carried them out in the most sacred of their places, Oak Flats, located in the southeastern part of Arizona, in the Tonto National Forest, not far from the San Carlos Reservation, where most Western Apache now live.[127]

The Western Apache were and continue to be one of several Apache groups with similar languages and organized in matrilineal clans.[128] Men would move to join the wife's clan and his wife was considered to the owner of their dwelling.[129] These different Apache groups did not form a single cohesive nation, in the minds of the Apache, but were groups with their own interests and traditions.[130]

The Western Apache developed a slightly different economy, after the introduction of horses, and made few changes in their political traditions. Eastern Apache groups expanded their buffalo hunting with the introduction of horses, while the Western Apache remained agricultural, but significantly supplemented their hunting and farming with raiding their neighbors.[131] The Western Apache had a strong tradition of distributing wealth among extended family members, including the tradition that the sister of the wife of the assistant to the hunter who killed a deer had first pick of the meat. Status was obtained through generosity and sharing.[132] The Apache generally did not

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[125] Perry, Apache Reservation, 77.
[126] Ibid., 176.
[127] Lydia Millet, "Selling Off Apache Holy Land," The New York Times, The Opinion Pages, May 29, 2015.
[128] Perry, Apache Reservation, 51.
[129] Ibid., 70.
[130] Ibid., 47.
[131] Ibid.
[132] Ibid.

have lasting formal political leadership. What leaders did exist, the Apache elected to lead for specific short term tasks.[133]

As the Spanish expanded their invasion of Mexico, they came into contact with the various Apache peoples and sought to extend their sovereignty over the Apache. The Spanish were never able to commit the military resources necessary to subdue the Apache, and wiping them out was impossible. The Spanish turned to the strategy of trying to contain the Apache by building a northern string of military garrisons, but containment proved impossible. Apache raiding parties moved quickly and easily outmaneuvered the Spanish military to raid Spanish villages within their reach.[134]

Access to Spanish technology, resources, and equipment altered the economy of the Western Apache, but not their resistance to Spanish authority. As Western Apache raided Spanish villages for supplies, they found those villages were a better source for the necessities of life. While never completely abandoning agriculture, the Western Apache economy became dependent on raiding Spanish villages for materials.[135] Sometimes the Western Apache would negotiate peace with some Spanish villages and even traded with them. Never did any Apache group recognize the sovereignty of the Spanish Empire or the later Mexican Republic over their territory and lives.[136]

The ongoing conflict between Mexico and the Apache became considerably more violent when Mexican officials adopted policies intended to exterminate the Apache. The governors of the Mexican states of Chihuahua and Sonora each offered bounties for the

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[133] Perry, Apache Reservation, 89.
[134] Ibid., 55.
[135] Ibid., 63-4.
[136] Ibid., 84.

scalps of any Apache, man, woman, or child.[137] Anglo-American bounty hunters entered Apache lands in the 1830s and 40s and regularly attacked Apache villages while men were away. Finding large numbers of women and children massacred, Apache raiding parties retaliated by increasing the ferocity and violence of their attacks on Mexican villages. The Apache killed more often in raids and took more captives, including children, to forcibly integrate into their families.[138]

When the European power claiming sovereignty over Apache lands shifted from Mexico to the United States, Apache relations with the United States were initially peaceful.[139] Cochise, a leader among the Chiricahua Apache, negotiated a peace treaty with the United States. This treaty offered the generous concession of allowing U.S. mail transports safe passage through Apache territory. By 1860 the U.S. had largely withdrawn any presence from Apache territory.[140]

Apache-U.S. relations quickly deteriorated into war at the beginning of the U.S. Civil War. In 1861, with regards to a Mexican captive, U.S. Lt. George Bascom called upon Cochise and other leaders to negotiate a solution to the situation. Acting in bad faith, Bascom seized Cochise and the other diplomats. Cochise quickly escaped and the Chiricahua Apache declared war on the United States, pulling the Western Apache into the war as part of an alliance of several Indian nations.[141]

The United States had other concerns in the region as well. Both the United States and the separatist Confederate States claimed the New Mexico territory as their sovereign

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[137] Perry, Apache Reservation, 84.
[138] Ibid., 87.
[139] Ibid., 89.
[140] Ibid., 97.
[141] Ibid.

territory. U.S. leaders suspected that the local Anglo-American populations sympathized with the separatists and sent a large military contingent to establish U.S. sovereignty over the territory in 1862.[142] This military presence quickly ran afoul of the Apache looking to protect their territory and sovereignty.

While the United States intended this military presence to impress separatist sympathizers, the Apache found the military presence in their sovereign territory to be an affront and attacked. In the ensuing battle, the Apache encountered artillery for the first time. Up to this point Apache forces had not encountered a fully supplied European military with the latest artillery technology. After this encounter, many Apache leaders acknowledged that military defeat was inevitable, but they decided to fight on, preferring liberty and death over slavery.[143]

While the Apache fought on, many preferring death over slavery, the invaders from the United States sought to speed the Apache people to the end of their existence. In 1863 President Lincoln carved out a portion of the New Mexico territory and created Arizona. The Arizona Territorial Legislature met for the first time in 1864 and among their first resolutions was a call to exterminate the Apache people.[144]

Determined to fight to the bitter end, Apache forces conducted a guerrilla struggle, raiding Anglo-American settlements for supplies and retreating to mountains they knew much better than the invaders. Though Apache soldiers had long ago incorporated firearms into their military and hunting operations, they remained proficient in usage of the bow and arrow. By judicious use of the bow as a stealth weapon, the Apache

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[142] Perry, Apache Reservation, 99.
[143] Ibid.
[144] Ibid., 102.

continued the fight for liberty through the decade, and some struggled on into the 1880s.[145]

The U.S. military was only able to defeat the various Apache resistance groups by employing Apache scouts. After the subduing of the separatist forces, the United States military returned to Apache lands in force. Even then, the U.S. Army relied upon Apache scouts to hunt down Apache hiding places. Here the lack of national identity hurt Apache groups. The various Apache groups still had their own rivalries and jealousies and the United States would hire scouts from one Apache group to hunt down resistance fighters from other Apache groups. Scouts would often take the U.S. military past their own kin and provide the locations of other Apache peoples.[146]

As the United States military subdued the region by force, many Western Apache preferred death to capture and threw themselves from a cliff in the 1870s. This cliff located near Oak Flats was later named Apache Leap Cliff and incorporated into the Tonto National Forest.[147] By 1871 the United States had forced all Apache groups onto five separate reservations. U.S. forces confined the Western Apache to the San Carlos Reservation, which was composed of the worst of the formerly expansive Western Apache territory.[148] At first, the reservation was run as a prisoner of war camp with regular roll call.[149] The occupiers required everyone to have tags about their necks identifying which group they were with and their number in the group.[150]

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[145] Perry, Apache Reservation, 99.
[146] Ibid., 106.
[147] Lacy Johnson, "At U.S. Capitol, Arizona Apache protest planned copper mine," Reuters News Service, Washington, D.C., July 21, 2015.
[148] Perry, Apache Reservation, 118.
[149] Ibid., 129.
[150] Ibid., 134.

Initially, Oak Flats was part of the San Carlos reservation, but the government separated it in 1886. In 1905 Oak Flats was turned into public lands. Later it was part of Tonto National Forest. Throughout it remained a place of religious significance to the Western Apache and a place where the Apache conducted puberty ceremonies.[151]

The Western Apache continued to resist military occupation and U.S. attempts to force them to conform to Anglo-American culture. In 1881, Noche-do-Klinne started a religious revival that, while preaching peace, prophesied the return of great military leaders, such as Cochise.[152] The U.S. military killed Noche-do-Klinne in a botched arrest attempt. In order to prevent a general uprising, the local military commander exercised considerable restraint in the face of the violent Apache reaction to the killing.[153] Some Chiricahua and Mimbres Apache were located in the San Carlos Reservation and in 1886 the great Chiricahua leader Geronimo led a breakout from the reservation.[154] By the end of the decade most attempts at military resistance to the occupation had come to an end.[155] But even with the relative peace, the Western Apache remained so resistant to U.S. policies that in the decades that followed, U.S. officials found it necessary to place Apache children in chains to prevent them from escaping as the government forcibly removed them to boarding schools.[156]

In the early 1920s, Arizona farm and mining interests pressed for the creation of the Coolidge Dam, a project that would flood the best farmlands of the San Carlos

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[151] Gale Courey Toensing, "Grijalva's Save Oak Flat Bill Boosted by Historic Preservation Listing," Indian Country Today, July, 20, 2015. http://indiancountrytodaymedianetwork.com/2015/07/20/grijalvas-save-oak-flat-bill-boosted-historic-preservation-listing-161136 (accessed April 14, 2016).
[152] Perry, Apache Reservation, 134.
[153] Ibid., 136.
[154] Ibid., 134.
[155] Ibid., 136.
[156] Ibid., 147.

Reservation. While the U.S. was engaging in a policy of religious suppression and forced acculturation at the time, theoretically policymakers imagined such cultural repression as for the benefit of the Western Apache. In order to gain approval for the dam designed to benefit the Anglo-American interests in Arizona at the expense of Apache farmlands, Arizona farmers claimed the dam would provide much needed jobs to Western Apache as well as provide irrigation for poor Pima Indian farmers.[157]

In 1935 the Western Apache adopted an Indian Reorganization Act government and this new government pressed their claims to lands on the eastern edge of the reservation the Apache had been removed from in 1896. Federal authorities took the land for gold mining, but never legally transferred title. By 1941, ranchers were squatting on the land, and rather than remove the ranchers, the Bureau of Indian Affairs approved leases.[158] It took until the 1980s before the Western Apache regained full control of the land.[159]

The 1980s were a period of revival for the Western Apache. Their recalcitrance to forced assimilation had left the Western Apache with seventy-five percent of their population retaining fluency in their language with some 12,000 speakers living on the San Carlos Reservation. Female Puberty Ceremonies had nearly been wiped out in decades past, but returned in the 1980s as they were enthusiastically embraced by the Western Apache population.[160] Western Apache performances of Gaan Dances returned to festivals that lasted for days.[161] Many found a new synthesis of traditional religion and

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157 Perry, Apache Reservation, 191.
158 Ibid., 155.
159 Ibid., 158.
160 Ibid., 176.
161 Ibid., 177.

Evangelical Christianity as their preferred religious life. Owls are symbols of death for practitioners of traditional Western Apache religion and are well known to speak Apache fluently (but incapable of speaking English). One woman in the 1960s reported an owl that spoke to her in Apache. The owl advocated on behalf of the Christian religion.[162]

Western Apache difficulties with the Anglo-American immigrant communities continued. The concentrated Apache population of the San Carlos Reservation was a concern of political leaders in Arizona. In 1980 Arizona politicians decided to split the reservation among three different congressional districts, each with a majority non-Indian population.[163] Only after an action brought by Indians under the Voting Rights Act were the district borders altered and Arizona redistricting and voter access regulations placed under the supervision of the federal government.[164]

The Oak Flats region of the Tonto National Forest had been coveted by mining corporations doing business in Arizona since as early as 2005. Oak Flats, throughout the history of the San Carlos Reservation, remained a place of religious significance to the Western Apache and an important location for puberty ceremonies. Never-the-less, the Australian-British company Resolution Copper, a subsidiary of Rio Tinto, wanted access to the copper beneath the ground.[165] Problematic for mining access, President Eisenhower closed Oak Flats to mining in 1955. The Nixon Administration reaffirmed the closure of that part of the Tonto National Forest in 1971.[166] Resolution Copper lobbied

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[162] Perry, Apache Reservation, 174.
[163] Ibid., 193.
[164] Ibid., 194.
[165] Christina Rose, "From Neil Young to a Flash Mob: Apache Stronghold Blazes Through Country," Indian Country Today, July 22, 2015. http://indiancountrytodaymedianetwork.com/2015/07/22/neil-young-flash-mob-apache-stronghold-blazes-through-country-161156 (accessed April 14, 2016).
[166] Millet, "Selling Off Apache Holy Land."

Arizona legislators to sell the corporation the Oak Flats area, but attempts dating back to 2005 failed as Congress did not support transferring the public lands to a private foreign corporation for copper mining.[167]

Resolution Copper continued to press the issue, and its investment in politicians finally paid off in December of 2014. Former Rio Tinto Lobbyist, Jeff Flake, as the Senator for Arizona and Resolution Copper, introduced a rider to the Defense Authorization Act, a must-pass military spending bill, at the last moment. Supported in this move by the other Arizona Senator and recipient of Rio Tinto campaign contributions, John McCain, the rider authorized the transfer of full title to Apache Leap, Oak Flats, and the surrounding 2,400 acres of the Tonto National Forest to Resolution Copper in exchange for 5,300 acres of land Resolution Copper was done with.[168] Senator McCain defended the act as necessary for national security.[169] The rider required an environmental impact statement be completed before the land transfer, but also included provisions stating that no matter what the EIS might report, the transfer of title will go through sixty days after completion of the environmental assessment.[170]

The Western Apache were outraged by this privatization of their historical, cultural, and religious sites inside the Tonto National Forrest and quickly gathered allies in their opposition to this land transfer conducted without any public debate. Before the end of 2014, seventy Indian nations denounced the proposed land transfer.[171] Western

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[167] Millet, "Selling Off Apache Holy Land."

[168] Millet, "Selling Off Apache Holy Land," Joseph Huff-Hannon, "Meet the Apache Activists Opening for Niel Young," Rolling Stone, July 21, 2015. http://www.rollingstone.com/politics/news/meet-the-apache-activists-opening-for-neil-young-20150721 (accessed April 14, 2016).

[169] Huff-Hannon, "Meet the Apache Activists."

[170] Millet, "Selling Off Apache Holy Land."

[171] Gale Courey Toensing, "57 Affiliated Tribes of Northwest Indians Urge Senate to Nix Sacred Land Giveaway," Indian Country Today, December 12, 2014.

Apache began an occupation of Oak Flats, stating they would not move until the land transfer was undone.[172] Activists from the group Apache Stronghold began a caravan across the country and members toured with rock legend Neil Young. Nizhoni Pike, a young Apache woman who had her puberty ceremony at Oak Flats, would open Young's concerts with other activists and explained to concert attendees the importance of Oak Flats and what the U.S. government had done with it. By July 2015, six hundred thousand people had signed a petition calling for the return of Oak Flats to public ownership and an apology to the Apache people.[173]

Resolution Copper made efforts to reach out to the residents of the San Carlos Reservation. The company sent representatives to speak with the public on the reservation and held an open house meeting. Company representatives claim to be willing to work with the Apache to protect culturally and religiously significant places. The company explained that the underground mining would cause massive surface subsidence, creating a two-mile long crater that would be one thousand feet deep, but will have no impact on ground or surface water, as was required by law. Company representatives stated they plan to protect Apache Leap, and provide access to Oak Flats, "as long as it is safe to do so, and we expect access will continue for a number of decades."[174]

Not satisfied with merely having access to one of their most sacred and culturally

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http://indiancountrytodaymedianetwork.com/2015/07/20/grijalvas-save-oak-flat-bill-boosted-historic-preservation-listing-161136 (accessed April 14, 2016).

172 Millet, "Selling Off Apache Holy Land."

173 Huff-Hoffman, "Meet the Apache Activists."

174 Lee Allen, "We Want to Talk: Resolution Copper Breaks Silence Over Land Swap," Indian Country Today, June 17, 2015. http://indiancountrytodaymedianetwork.com/2015/06/17/we-want-talk-resolution-copper-breaks-silence-over-land-swap-160750 (accessed April 14, 2016).

important places for some unspecified number of years as determined by a distant foreign corporation, the Western Apache of San Carlos Reservation continue their quest for more allies. Arizona Representative Raul Grijalva introduced a bill in the summer of 2015 that would overturn the proposed land transfer.[175] With growing bi-partisan support for the repeal, Senators Bernie Sanders of Vermont and Tammy Baldwin of Wisconsin introduced a companion bill in November of 2015.[176]

Significance of Oak Flat and Apache Leap

The consultation process, regarding the management of public lands mandated by the Indian Religious Freedom Act and strengthened by later executive orders, offers no protection to Indian sacred sites when Congress gives sacred sites to private corporations to destroy as they please. It should also be noted that unilateral privatization by the United States government of indigenous sacred sites without consultation likely violated the provisions of the United Nations Declaration on the Rights of Indigenous Peoples requiring consultation with indigenous peoples as to the disposition of their traditional sacred sites.

[175] Huff-Hoffman. "Meet the Apache Activists"
[176] Pr Newswise, "Senators Bernie Sanders and Tammy Baldwin Introduce the Save Oak Flat Act in the Senate," Yahoo Finance, Nov. 5, 2015. https://finance.yahoo.com/news/senators-bernie-sanders-tammy-baldwin-010700428.html (accessed December 17, 2015).

Chapter Six

Improving Protection of Indian Sacred Sites and the Need for a New Conception of Indian Sovereignty

There are several recommendations of how to approach the wide range of discretion that the courts have created for the administrators in managing Indian sacred sites on public lands. It should be clear by now that the government can do whatever it likes and there are currently neither constitutional nor statutory protections for Indian religions. Joshua A. Edwards has argued that the Ninth Circuit Court of Appeals clearly misinterpreted the new standard of "substantial burden" and the Religious Freedom Restoration Act should provide protection to the Hopi and other peoples concerned about the expansive desecration of the San Francisco Peaks.[1] Kristen A. Carpenter has suggested that lawyers should craft arguments based in property rights as the First Amendment and the RFRA offer no protection to sacred sites.[2] Carpenter has provided a series of clever arguments based in third party property rights of easements, where indigenous religious practitioners may be able to claim enforcement of existing easements or monetary damages for the destruction of such easements.[3]

While the idea of using the laws easements to protect sacred sites is ingenious, it would likely run up against what Mike Myers has called the "just cuz" doctrine of Indian Law. The "just cuz" doctrine is simply a more colloquial version of the damning

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1 Joshua A. Edwards, "Yellow Snow on Sacred Sires: A Failed Application of the Religious Freedom Restoration Act," American Indian Law Review, Vol. 34, No. 1 (2009-2010). p. 151, 168-69.

2 Kristen A. Carpenter, "A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners," UCLA Law Review, Vol. 32 (2004-2005). p. 1061, 1063-64.

3 Ibid., 1094-99.

assessment of David E. Wilkins, discussed at length below, where the Supreme Court twists logic and reason, while engaging in fear mongering hypotheticals about cannibal Indians ruling large parts of the Americas to deny Indian rights. These methods would then insure claimants would lose an otherwise excellent case "just cuz" they were Indians.[4]

In face of the reality of the "Just Cuz" doctrine of a hostile Supreme Court, other Indian Law commentators have urged pursuing political lobbying alternatives to constant losses in litigation. Louis Fischer makes this recommendation, noting that Indians have had more success in lobbying both Congress and the executive branch.[5] Lobbying would be necessary in any effort to correct what Edwards sees as the failure of the courts to properly identify the intent of Congress with the RFRA. Indian groups can lobby with regards to specific land issues as Congress has full power over the final disposition of federal lands. The case of Oak Flats is a clear demonstration of Congress' ultimate power and how that power can be misused. The San Carlos Apache may yet find success with their protest and lobbying efforts, but the Hopi and others appear to have completely failed in lobbying efforts regarding the San Francisco Peaks.

Beyond lobbying to protect individual sacred sites, there are legislative proposals to generally expand protection of Indian sacred sites. One method would be for Congress to clarify the meaning of "substantial burden" and explicitly include management of Indian sacred sites. Alex Tallchief Skibine has called for an amendment to the American

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[4] Mike Myers, "The Supreme Court's 'Just Cuz' Doctrine for Cheating Natives," Indian Country Today, January 18, 2016. http://indiancountrytodaymedianetwork.com/2016/01/18/supreme-courts-just-cuz-doctrine-cheating-natives (accessed April 14, 2016).

[5] Louis Fisher, "Indian Religious Freedom: To Litigate or Legislate?" American Indian Law Review, Vol. 26, No. 1 (2001-2002), p. 1, 39.

Indian Religious Freedom Act to offer more explicit protections.[6] His three part proposed law calls for a more precise definition of sacred sites modeled on a synthesis of the definition of E.O. 13,007, that of Traditional Cultural Properties, and other relevant approaches (he remained unspecific).[7] Second, he argued for expanding the threshold for burdening religions beyond the scope of coercion or denial of a benefit to include such burdens as those suffered by the desecration or destruction of sacred sites.[8] Finally, Skibine called for the same type of intermediate scrutiny that has been used for free speech in public places, rather than the strict scrutiny test.[9] Under this proposed intermediate scrutiny test, when religion was burdened, the government would have to come up with "an important or substantial interest. . . unrelated to the suppression of religion, and the burden posed on religious freedom could be no greater than those essential to protect that governmental interest."[10] Presumably, under such a test, complete desecration of the most sacred site of the Hopi would be a greater burden than the burden on the government of only having a profitable low-key ski resort available in the middle of a desert.

Indian Sovereignty

A more innovative solution to the problem lies in possibility of formulating a new understanding of Native American sovereignty. The legal history of Indian sovereignty has seen many changes. Initially, European nations, when they were not invading

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6 Alex Tallchief Skibine, "Towards A Balanced Approach for the Protection of Native American Sacred Sites," Michigan Journal of Race & Law, Vol. 17 (2011-2012). p. 269.
7 Ibid., 299-300.
8 Ibid., 288.
9 Ibid., 288.
10 Ibid., 291.

indigenous lands, made treaties with Indian nations, including military and political alliances, as fully sovereign partners. In North America, once the English immigrant presence was more secure, European styled nations began to claim sovereignty over indigenous nations that they had never met, let alone conquered in battle. Making some sense of this anomalous state of affairs, the Marshall trilogy declared Indian nations to not be fully foreign sovereigns, but instead to be domestic dependent nations that did not have the full sovereign right to sell their lands to anyone they pleased. The rights of Christian Discovery divested Indian nations of this power, so when Thomas Jefferson purchased the lands of hundreds of Indian nations from France with the Louisiana purchase, he merely purchased the French claims of discovery to have the exclusive right to obtain land from the Indian nations that retained their rights to occupy the lands. In the final part of his famed trilogy, Marshall made it quite clear that Indian nations retained full internal sovereignty beyond the power of the states to interfere.

While Marshall's legal framework went unenforced and ethnic cleansing of the east was largely completed, the legal framework of the Marshall trilogy remained largely in place for decades for the Indian nations forcibly removed to the west. It was not until 1886 that the Supreme Court recognized that the plenary power of Congress over Indian affairs was not full in the sense of at the exclusion of the states, but full in the sense of unchecked by the power of the constitution, Bill of Rights, or international law. What followed was a systematic attempt to eliminate Indian cultures, languages, and religions from the face of the Earth. This policy ended with the Indian Reorganization Act of 1934 and the theory that Indian nations retained those sovereign powers not explicitly removed

by Congress emerged in this legal era. Plenary power remained a specter stalking Indian nations and the framework Marshall created with Indian nations having full internal sovereignty deteriorated with further Congressional and judicial power grabs.

The Nixon administration reversed these Congressional assaults on Indian sovereignty and denounced the renewed efforts to eliminate Indian nations. Government to government relations slowly took over the Indian policy of the federal government. By the 1980 many laws had been promulgated to provide new avenues for the protection of Indian national and cultural interests. The consultation process of the Indian Religious Freedom Act was one important component of this new, but imperfect, respect for indigenous rights.

While the elected branches of the United States government had done much to reverse course, so too did the once benign Supreme Court. While the high Court had played its part in undermining constitutional protections for Indian nations and Indian peoples, the Supreme Court had been more like a benign tumor that slowly ate away at Indian sovereignty and rights, while leaving the rest of the body of indigenous sovereignty intact. But starting in 1978 the United States Supreme Court became a malignant tumor on the political scene of United States Indian law and began an aggressive attack on the sovereignty and rights of indigenous peoples.

Indian religious and cultural freedoms are an important part of the larger context of Indian self-determination and sovereignty. The first chapter set out the legal framework regarding the First Amendment protections for individual Indians regarding sacred sites and religious freedom, and the discretion federal administrators had with

regards to establishment concerns in the 1980s and 90s. This section will examine the changing context of sovereignty as it was under assault by the Supreme Court in the same decades and the need to reformulate Indian sovereignty in the United States federal system.

Charles F. Wilkinson presents an optimistic view of the emerging respect for indigenous national sovereignty with his 1987 book, American Indians, Time, and the Law: Native Sovereignty in a Modern Constitutional Democracy.[11] Wilkinson views the latest changes in Indian policy starting not with the bold new direction established by President Nixon, but instead to a change in direction my the United States Supreme Court. Wilkinson marks the change in direction with the 1959 Supreme Court decision in Williams v. Lee.[12] This case arose from a dispute over unpaid bills between a trading post operating on the Navajo reservation and a Navajo man, Williams, living on the reservation. The non-Indian creditor sought payment through a court order from a county court in Arizona, rather than the Navajo court system. The Supreme Court determined that the Navajo courts had exclusive jurisdiction over the matter.[13] Wilkinson notes that this case began a string of Supreme Court decisions that protected indigenous water rights, Indian control of Indian education, off reservation fish and game rights, as well as reaffirming the protection of indigenous national assets from state taxation.[14] Perhaps over optimistically, Wilkinson concludes that Indian Law had stabilized by 1987 and perhaps Indian peoples might then have the space to focus on their own internal issues.[15]

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[11] Charles F. Wilkinson, American Indians, Time, and the Law, Native Sovereignty in a Modern Constitutional Democracy, (New Haven, Connecticut: Yale University Press, 1987).
[12] Williams v. Lee, 358 U.S. 217 (1959).
[13] Wilkinson, American Indians, 7.
[14] Ibid., 121.
[15] Ibid., 122.

Examining the issue of indigenous sovereignty from the perspective of the history of the 1975 Indian Self-Determination Act, and its 1994 amendments, Todd Johnson and James Hamilton, also identify reasons to be optimistic with regards to improved conditions of Indian sovereignty.[16] This 1994 perspective examines the process enabled by the Self-Determination Act that provided for Indian government to take over and mange Bureau of Indian Affairs programs at their own pace. What emerged from this law was a process of BIA downsizing as Indian governments gained confidence and experience and took on additional management and government responsibilities. Johnson and Hamilton concluded that "tribal self-government was the preeminent end of federal Indian policy[.]"[17]

While scholars at the end of the twentieth century had cause for optimism in the area of indigenous sovereignty in the United States, Patrick Macklem produced a largely theoretical examination of indigenous sovereignty in an attempt to clarify some of the confused arguments existing in the context of indigenous sovereignty in Canada and the United States.[18] Macklem identifies an existing argument in favor of sovereignty tangled in notions of prior occupancy and cultural relativism.[19] Within a constitutional context these seem like relevant issues, but Macklem notes indigenous sovereignty exists outside of the constitutional frameworks of the United States and Canada.[20] Macklem concludes that indigenous self-government and sovereignty should rest on notions of distributive

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16 Todd M. Johnson & James Hamilton, "Self-Government for Indian Tribes: From Paternalism to Empowerment," Connecticut Law Review, Vol. 27 (1994-95), 1251.
17 Ibid., 1278.
18 Patrick Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples," Stanford Law Review, Vol. 45 (1993), 1211.
19 Ibid., 1327, 1335.
20 Ibid., 1367.

justice and the equality of peoples (as opposed to the equality of individuals before the law) to forward individual and collective protection of indigenous sovereignty.[21]

Another theoretically grounded approach to indigenous sovereignty is the work of Thomas Biolsi, "Imagined Geographies," where Biolsi identifies four modular components of sovereignty that complicate the traditional territorial based theories.[22] Biolsi contemplated four types of political space where indigenous sovereignty existed inside the United States. The first was the traditional territorial space of Indian nations. The second was indigenous co-management of resources with state and federal agencies and governments, such as fish, wildlife, water, religious sites, and cultural properties.[23] The third sovereign space was that of individual portable rights that existed beyond reservation boundaries, including such things as possession of eagle feathers for religious and ceremonial purposes or religious use and possession of peyote.[24] The final indigenous space identified is that where Indian peoples act also as citizens of the United States, while retaining Indian cultural identity. This final space is where Indian peoples fight and struggle to be included in family of peoples that are part of the community in the United States. One example Biolsi presented of struggle in this space was the ongoing conflict over the use of insulting and derogatory mascots by national sports franchises.[25] Biolsi identified one of the greatest threats to the exercise of indigenous sovereignty in these spaces as the refusal to recognize indigenous peoples as political communities with the right of self-determination and an insistence on having a "colorblind" society with no

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21 Macklem, "Distributing Sovereignty," 1366-67.
22 Thomas Biolsi, "Imagined Geographies: Sovereignty, indigenous space, and American Indian struggle," American Ethnologist, Vol. 32, No. 2 (May 2005), 239.
23 Ibid.
24 Ibid., 248.
25 Ibid., 250.

"special cases" and every individual is treated the same, regardless of circumstances.[26]

David E. Wilkins brought the analysis of the trajectory of Indian sovereignty forward with three separate books, each from a slightly different perspective, but with a consistent recommendation for improving Indian sovereignty across these books. In his 2007 book, American Indian Politics and the American Political System, Wilkins examines the history of federal Indian policy and the peculiarities of the existing system, with a look at several case studies. Here Wilkins concludes that Indian nations are still in the long process of recovering from contact with Europeans which placed devastating constrains on the once fully sovereign Indian nations.[27] Here he recommends, as he does in other his other books, that the United States Congress renounce plenary power over Indian affairs. Here he adds additional recommendations, including Congress reaffirming its supremacy in Indian affairs over the states and judicial branch, Congress reaffirming the powerlessness of states over Indian territory, and a return to the treaty making process as the appropriate expression of sovereign government to government relations.[28]

In his 2001 book, written with K. Tsianina Lomawaima, Uneven Ground, American Indian Sovereignty and Federal Law, Wilkins directly confronts the fundamental contradiction between the concept of Indian sovereignty and the contemporary Supreme Court interpretation of plenary power.[29] Here Wilkins and Lomawaima identify indigenous sovereignty as predating the United States constitution.[30]

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[26] Biolsi, "Imagined Geographies," 255.
[27] David E. Wilkins, American Indian Politics and the American Political System, 2nd Ed. (New York: Rowman & Littlefield Publishers, Inc., 2007), 256.
[28] Ibid., 261.
[29] David E. Wilkins and K. Tsianina Lomawaima, Uneven Ground, American Indian Sovereignty and Federal Law, (Norman: University of Oklahoma Press, 2001).
[30] Ibid., 5.

The United States recognized Indian sovereignty in the Indian Commerce Clause of the constitution and set Congress as the exclusive power to define and manage Indian affairs.[31] Wilkins & Lomawaima argue that the initial meaning of "plenary power" was that the United States Congress had the exclusive and preemptive power governing Indian affairs as opposed to the other branches of government and the states, not that Congress had absolute power over Indian peoples.[32] The United States Supreme Court later redefined this term.[33]

The Supreme Court had long recognized exclusive Indian sovereignty over internal affairs, but Wilkins & Lomawaima noted the high court changed this position in redefining plenary power in the late nineteenth and twentieth-centuries. As late as 1883, in Ex Parte Crow Dog, 109 U.S. 556, the Supreme Court recognized Indian societies as separate and with their own criminal justice systems.[34] But liberal outrage over indigenous justice not being inline with Europe's vindictive notions of justice, Congress passed the Major Crimes Act, taking felony criminal jurisdiction away from Indian societies and unilaterally extending federal criminal jurisdiction over Indian nations. While not yet mentioning plenary power, the Supreme Court upheld the Major Crimes Act as being a proper exercise of power of Congress over Indian affairs in 1886 with U.S. v. Kagama, 118 U.S. 375.[35] The same year the Supreme Court eliminated all constitutional limits on the exercise of Congressional powers over Indian peoples, the Court also decided corporations had the same legal standing as persons, and thus afforded

[31] Wilkins & Lomawaima, Uneven Ground, 9.
[32] Ibid., 99.
[33] Ibid., 107.
[34] Ibid., 112.
[35] Ibid., 108.

constitutional protections from the excesses of Congress.[36]

Wilkins & Lomawaima argue that the expansive interpretation of plenary power has no basis in the constitution and nullified the constitutionally recognized concept of indigenous sovereignty, recognized in the Indian Commerce Clause.[37] While Kagama effectively established unlimited Congressional power over Indian affairs, the Supreme Court first used the term plenary power in Lone Wolf v. Hitchcock, 187 U.S. 553, (1903). In this case, the taking of Indian lands was challenged as explicitly violating treaty terms. The Supreme Court alluded to early opinions by John Marshall, describing the relationship between Indian nations and the United States as a ward to their guardian. From this premise the Supreme Court disregarded the Supremacy Clause of the constitution, where all treaties are said to be the supreme law of the land (and therefor on par in power with the requirements of the constitution itself), and claimed that the power of Congress over the affairs of Indian peoples was without limit, and always had been.[38] For Wilkins & Lomawaima this was a deliberate twisting of the meaning of the phrase "plenary power" from an exclusive power of Congress to govern Indian relations to one of absolute and unchecked power.[39]

While Wilkins' work with Lomawaima focuses on the dubious legal notion of Congressional plenary power over Indian peoples, his earlier 1997 book, American Indian Sovereignty and the United States Supreme Court, the Masking of Justice, focuses on fifteen cases that were devastating to Indian sovereignty, noting that while the political branches of the U.S. government began to make tentative first steps in recognizing and

[36] Wilkins & Lomawaima, Uneven Ground, 109.
[37] Ibid., 256.
[38] Ibid., 111.
[39] Ibid., 99.

respecting Indian sovereignty, the United States Supreme Court began moving in the opposite direction.[40] Wilkins notes that initially the United States Supreme Court had a better record on Indian sovereignty than the other branches of the government.[41] Wilkins states that theoretically people are to prostrate themselves before the law, but the contemporary rulings of the Supreme Court on Indian issues have nothing to do with logic, sound reasoning, or legal ideals.[42] Wilkins identifies the new direction of the court as ignoring the trust responsibility to Indian peoples and ignoring collective Indian rights.[43] Over the fifteen cases, Wilkins finds the Supreme Court justices, "individually and collectively, have engaged in the manufacturing, redefining, and burying of 'principles,' 'doctrines,' and legal 'tests' to excuse and legitimize constitutional, treaty, and civil rights violations" of Indian individuals and nations.[44] Wilkins identifies places where the Supreme Court used such tactics as taking selected phrases out of context and creating unreasonable and exaggerated hypotheticals designed to generate fear of Indian sovereignty in order to obtain their desired outcomes.[45] In this book Wilkins notes that Indian nations existed before the U.S. constitution and that treaties merely reserved these rights explicitly. The United States Supreme Court used to acknowledge that treaty rights were reserved rights and sovereignty predated the constitution.[46] As a remedy, Wilkins called for Congress to disavow the legitimacy of the expansive definition of "plenary

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40 David E. Wilkins, American Indian Sovereignty and the United States Supreme Court, the Masking of Justice, (Austin: University of Texas Press, 1997), 256.
41 Ibid., xi.
42 Ibid., 3-4.
43 Ibid., 257.
44 Ibid., 297.
45 Ibid., 300-301.
46 Ibid., 307.

power."[47]

Frank Pommershiem updates the ongoing examinations of Indian sovereignty with his 2009 book, Broken Landscapes, Indians, Indian Tribes, and the Constitution, by analyzing the trajectory of Indian law, placing it in the changing international context, and examining several options for making corrections to the alarming trajectory.[48] As to the constitutional basis of Indian law, Pommersheim identifies three basic schools of thought, tied to different historical eras. The first was Indian relations based in the Marshall trilogy of cases. The second was the era of congressional plenary power that emerged in the late nineteenth century. The third was the Felix Cohen era of retained sovereignty that emerged with the Indian Reorganization Act.[49] Pommersheim identified the current fourth era as one of Supreme Court plenary power that emerged with Oliphant v. Suquamish, 435 U.S. 191 (1978). Pommersheim concludes that with this case the United States Supreme Court began down a path of making common law decisions that more and more reduced the sovereignty of Indian nations.[50] The final theoretical era, Pommersheim hopes, would be some form of treaty based federation for the future.[51]

While Pommersheim traces a similar history of doctrinal confusion in federal Indian policy that exacerbated the the Supreme Court's creation of what he identifies as a newly created common law plenary power of the Supreme Court,[52] Pommersheim expands the understanding the changing disposition of the Supreme Court by placing the

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47 Wilkins, Supreme Court, 309.
48 Frank Pommersheim, Broken Landscapes, Indians, Indian Tribes, and the Constitution, (New York: Oxford University Press, 2009).
49 Ibid., 5.
50 Ibid., 256.
51 Ibid., 5.
52 Ibid., 297.

Court's decisions in a context of developments in international law. With increased indigenous non-novernmental organization activity in international affairs, international legal standards have changed considerably from the days when Marshall stripped Indian nations of full national sovereignty by invoking the Eurocentric doctrine of discovery. In 2007 the United Nations General Assembly adopted the Declaration of the Rights of Indigenous Peoples. The emerging international consensus protects the self-determination of indigenous peoples in the areas of cultural integrity, land and natural resources, social welfare and development, self-government, and the freedom from discrimination.[53] Pommersheim also notes that while indigenous people had won a victory over the government of Nicaragua in the Inter-American Court of Human Rights with regards to land occupation rights, the United States simply denied the legitimacy of that court's jurisdiction when faced with a similar challenge to removing an indigenous family from continuously occupied lands.[54]

While the United States has ignored developments in indigenous international law in respecting the rights of indigenous peoples, Pommersheim compares recent developments in three other settler-common law nations and found these nations have adjusted their law to conform to these emerging standards that recognize the humanity of indigenous peoples. In 1982, Canada amended its constitution to respect the continuing rights and treaties of indigenous peoples. The Supreme Court of Canada later placed indigenous oral history and tradition on the same level as other historical documents in determining land title.[55] New Zealand entered into a single treaty with nearly all the

[53] Pommersheim, Broken Landscapes, 274.
[54] Ibid., 277, 284.
[55] Ibid., 285.

indigenous peoples of the land in the 1840 Treaty of Waitangi. To deal with later violations and difficulties, New Zealand authorized the Waitangi Tribunal to hear indigenous complaints. While the findings of the tribunal are not binding, they are official recommendations the courts and parliament are to give attention to.[56] In 1997, Australia changed its understanding of indigenous land title by recognizing it for the first time with Mabo v. Queensland. This case referenced the Marshall Trilogy and adopted many of the positions on retained indigenous rights. There the High Court stated contemporary common law must keep abreast of current international law.[57] Pommersheim noted that the United States Supreme Court has, by contrast, repeatedly been unable or afraid to confront the reality of the past.[58]

Pommersheim states the advent of judicial plenary power over Indian sovereignty is a most alarming development and examined several suggestions for improving Indian sovereignty. These recommendations, including those of Pommersheim himself, are all highly relevant to how to best protect indigenous cultural sovereignty and survival with regards to sacred sites and public lands management. Thus these recommendations will be examined at length after the case studies of the current work in the conclusion.

In 2004, Raymond Cross, a professor at the University of Montana School of Law, called for a second American founding to address ongoing problems with both indigenous development and sovereignty.[59] In his argument, Cross notes the initial founding principles of American Indian law created a separation of societies that was in part based

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[56] Pommersheim, Broken Landscapes, 288.
[57] Ibid., 290.
[58] Ibid., 293.
[59] Raymond Cross, "Reconsidering the Original Founding of Indian and Non-Indian America: Why a Second American Founding Based on Principles of Deep Diversity is Needed," Public Land and Resource Law Review, Vol. 25 (2004): 61.

upon fear.[60] While Cross acknowledges that there are significant differences in Indian and non-Indian communities that often cause difficulties in communications, total understanding is not necessary for living together, only mutual respect will be needed.[61] In identifying the need for a second American founding, Cross explains the failures of government policy in finding solutions to issues of social participation and development.

Cross condemns both the policies of 1960s and the later neo-liberal approach as doomed to failure. Cross characterizes the 1960s Great Society programs as trying to recast Indians as ethnic minorities. In the past voluntary minorities traveled to the United States and, by shedding much of their ethnic identity, these former outsiders would be integrated into the larger community.[62] The programs of the sixties, in Cross' assessment, attempted to recreate this process with involuntary minorities, including Indian peoples. Indians, by and large, had little interest in shedding their cultural heritage.[63] Cross acknowledges there has been a great deal of progress made in regaining indigenous self-determination, but he characterized the Supreme Court's trajectory as refusing to allow Indians to participate in a greater American community as Indians.[64] Cross identifies this approach of the United States Supreme Court as foisting a neo-liberal form of agentialism on Indians, mirroring the neo-liberal approach to African American poverty in the political realm. This approach refused to acknowledge the actual circumstances of individuals and peoples, while leaving them to act as agents on their own.[65]

An example Cross provides, for this neo-liberal approach to Indians, was the case

[60] Cross, “Reconsidering,” 63.
[61] Ibid., 63-4.
[62] Ibid., 69.
[63] Ibid., 80.
[64] Ibid., 75.
[65] Ibid., 81-3.

of The U.S. v. Navajo Nation, 537 U.S. 488 (2003).[66] In this case, the Navajo Nation negotiated a lease for coal development on reservations lands. The Interior Department conducted its own study of the situation and determined that a fair market rate for the lease would be 20%. As part of its trust responsibility the Interior Department must sign off on any such leases. Navajo officials negotiated a rate with Peabody Coal for 12.5% and the Secretary of the Interior both approved the lease and, at the request of Peabody Coal, never informed Navajo officials that their analysis placed a fair market rate at 20%. The difference in rates cost the Navajo Nation some $600 million and the Navajo Nation sued the federal government for failure to live up to its trust responsibility.[67] The Supreme Court found the Navajo Nation was responsible for negotiating the lease and there was no basis for finding the Secretary of Interior's approval duty included an enforceable action for money damages in court.[68] Cross finds this approach to treating Indian nations as agents to appear merely vindictive, in the absence of any sustained programmatic assistance to provide the knowledge, skills, and training to act as effective agents.[69]

While not rejecting the notion of Indian nations and individuals as agents, Cross condemns the neo-liberal approach, while calling for the development of Indian peoples and nations as agents. In doing so, Cross looks to Amartya Sen's notion of development as freedom.[70] Sen's approach to development is not to focus solely on economic indicators as a measure of development, but to instead measure development in terms of

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66 Cross, "Reconsidering," 81.
67 Ibid.
68 Ibid., 82.
69 Ibid., 83.
70 Ibid., 84, referring to Amartya Sen, Development as Freedom, (New York: Alfred A. Knopf, 1999).

expanding substantive freedom by eliminating poverty and tyranny.[71] For Sen, economic growth was not an end in itself, but a means to the end of enhancing the lives of people.[72] For Sen, people must then be at the center of any development program. People must be actively involved in their own destiny. Thus freedom is both a means and an end in development.[73] Sen also noted that freedom is inherently diverse.[74] For Cross, this freedom requires a new covenant between Indian and non-Indian peoples based upon mutual respect and a commitment to deep diversity. Deep diversity, here, is an acceptance of a plurality of ways of being with localized political institutions and practices.[75] For Cross, the development of freedom required the expanding of the capabilities of Indian peoples to act as agents by providing education that allowed people to express their opinions meaningfully, exercise economic freedom, and participate in a larger community with respect and equality.[76]

Cross calls for Indian people to take the lead in promoting this new relationship with non-Indian peoples.[77] Cross notes many of the limited successes in the area of public education in Montana. Montana is the only state with a constitutional provision recognizing protecting Indian heritage as an important part of the state's educational duty. Cross also demonstrates there was still a great deal of fear of meaningful Indian participation in the larger political community in the United States.[78] In 1992, the State of Montana sought to redistrict in a way as to disenfranchise Indian voters. Ultimately

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[71] Sen, Development, 3.
[72] Ibid., 14.
[73] Ibid., 53.
[74] Ibid., 298.
[75] Cross, "Reconsidering," 65.
[76] Ibid., 84.
[77] Ibid., 91.
[78] Ibid., 86.

Montana was placed under the federal supervision provisions of the 1965 Voting Rights Act.[79] Cross calls for improvements in communication and education to overcome the remaining fear in non-Indian communities as a necessary step in negotiating new arrangements based in deep diversity.[80]

Other studies similarly conclude that Indian development works better when Indian nations have sovereign control over resources to fit development needs to the specific local conditions. James Huffman and Robert Miller, as part of a series of studies on property rights and economic development in indigenous lands in Canada and the United States, conclude a diversity of property arrangements controlled by sovereign Indian nations with state like powers would best provide for indigenous economic development.[81] Manley A. Begay, Jr, Stephen Cornell, Miriam Jorgenson, and Joseph P. Kalt find that Indian development projects have been most successful when driven by Indian interests and needs in ways that account for local Indian culture.[82] These authors argue local indigenous institutions must work well with the local Indian cultures and note that those Indian nations that largely adopted Bureau of Indian Affairs proposed Indian Reorganization Act constitutions without significant amendment have not done terribly well with these alien systems.[83] These authors also note that institutions do not necessarily have to strictly follow traditional patterns, but if they are developed by the

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79 Cross, "Reconsidering," 87-8.

80 Ibid., 92.

81 James Huffman and Robert Miller, "Indian Property Rights and American Federalism," Terry L. Anderson, Bruce L. Benson, Thomas E. Flanagan, Ed. Self-Determination, The Other Path for Native Americans, (Stanford: Stanford University Press, 2006), 293.

82 Manley A. Begay, Jr, Stephen Cornell, Miriam Jorgenson, and Joseph P. Kalt, "Development, Governance, Culture: What Are They and What Do They Have to Do with Rebuilding Native Nations?" Miriam Jorgensen, ed., Rebuilding Native Nations, Strategies for Governance and Development, (Tucson: University of Arizona Press, 2007), 22.

83 Wilkins, Rebuilding, 48.

cultures themselves, they have a much greater chance of success. In support of this position, the authors present the example of the reservation government of the Confederated Salish and Kootenai Tribes. This reservation in Northwestern Montana forced together three different Indian peoples with no shared history or culture, the Salish, Pend d'Orelle, and Kootenai. Together these groups crafted a parliamentary government with a legislatively chosen council chair. With a self created government designed to meet the collective needs of their different traditions, the Confederated Salish and Kootenai reservation has been the first Indian nation to take over every government program available for self-management by Indian nations in 2003.[84]

Christine K. Gray reiterates a most troubling problem regarding indigenous sovereignty. Borrowing from Philip J. Deloria, Gray states that the right of Indian nations to exist, and thereby exercise their collective rights to self-determination and sovereignty, should be obvious, but in the American system, this right to exist is not obvious. Instead Indian peoples must fight and struggle for every bit of sovereignty.[85] This difficulty is in part due to the lack of public understanding of the issues.[86]

The Challenge Posed by a United States Supreme Court Disinclined to Recognize Indian Sovereignty

To address the recent historical animosity of the United States Supreme Court towards indigenous sovereignty and rights, Skibine also suggests that Congress might enter into a compact of incorporation with each Indian nation. This measure would be

[84] Wilkins, Rebuilding, 52.
[85] Gray, The Tribal Moment, 198.
[86] Ibid., 24.

similar to the compact of incorporation with Puerto Rico that recognized the home rule of that territory. Skibine's plan calls for the compact to be approved by the members of the various nations and the compact could only be altered by mutual consent of the compacting parties.[87] As opposed to some of the proposed constitutional amendments designed to protect Indian sovereignty from a hostile Supreme Court, discussed below, individually negotiated compacts would leave the possibility of Indian nations securing rights to access to sacred sites and encumbrances on federal lands requiring the preservation of these places in the compacts themselves.

Another legislative alternative proposed by Michael Eitner calls for uniform statutory guidelines for the consultation process, with a right of action by Indian interests if the government has no good reason to ignore indigenous concerns.[88] This legislative proposal merely addresses those instances where administrative agencies clearly do not give any substantive consideration of indigenous concerns and would provide for regularity and substance to consultation procedures on a government to government basis. The first part of the law would require agencies to treat Indian claims regarding the sacredness of sites as true. This would be a rebuttable presumption (presumably to address the concerns created by fear mongering courts that false claims of sacredness would then appear everywhere). If the government disagreed with the Indian claims of sacred places being impacted, this law would provide for the government to overcome Indian claims by presenting evidence that might convince a neutral third party. If the agency, in its action, did not sufficiently address Indian concerns, Indian interests would

[87] Pommersheim, Broken Landscapes, 302.

[88] Miachael Eitner, "Meaningful Consultation with Tribal Governments: A Uniform Standard to Guarantee that Federal Agencies Properly Consider Their Concerns," University of Colorado Law Review, Vol. 86 (2014): 867.

have a cause of action where the burden would shift to the government to convince the court the agency properly ignored Indian claims regarding the action.[89] Further the proposed law would call for de novo review by the courts to determine whether or not the agency provided adequate consideration of Indian concerns.[90] This would be a departure from the current situation where the courts merely examine decisions for illegal or arbitrary or capricious reasoning. Eitner argued this is necessary to guarantee administrative decisions are actually based on facts in the record.[91]

The main difficulty with the proposed uniform consultation statute is that determined administrators would be able to craft their environmental impact statements to comply with the review standards that would emerge from the anti-Indian Supreme Court, but this problem would be substantively avoided by the expansion of co-management agreements. Martin Nie calls for the expansion of co-management of resources to protect Indian cultural resources, including sacred sites.[92] Nie notes that co-management agreements already exist for fish, game, and wildlife management with interested Indian nations in the Pacific Northwest and the Great Lakes.[93] Alaskan natives have a longstanding co-management agreement under the Marine Mammal Protection Act through the Alaska Eskimo Whaling Commission.[94] The Confederated Salish and Kootenai Tribes co-manage the National Bison Range in western Montana with the Fish

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89 Eitner, "Meaningful Consultation," 896.
90 Ibid., 897.
91 Ibid.
92 Matrin Nie, "The Use of Co-Management and Protected Land-Use Designations to Protect Cultural Resources and Reserved Treaty Rights on Federal Lands," Natural Resources Journal, Vol. 48 (2008): 585.
93 Ibid., 603.
94 Ibid., 606.

and Wildlife Service and National Park Service.[95] As Nie as points out, co-management elevates the interests of Indian nations beyond that of mere stake holder to active participant in management and planning decisions.[96] Expansion of co-management programs to include Indian sacred sites has a multitude of advantages and these shall be addressed below in the assessment of just such a proposal from late 2015 by a consortium of Indian governments.

Several constitutional amendments and legislative fixes have been proposed to address the widespread concerns regarding the United States Supreme Court recent history of dismantling Indian constitutional rights. These proposed amendments focus on sovereignty in a traditional territorial manner and largely overlook Indian cultural concerns regarding the protection of sacred sites on federal lands. While these proposed amendments provide for indigenous peoples to be citizens of both their Indian nation and the United States, they do not contemplate collective religious rights for indigenous peoples and would leave the protection of indigenous religious freedoms outside Indian territory in the hands of a hostile United States Supreme Court.

The National Congress of American Indians proposed the Tribal Sovereignty and Economic Enhancement Act that has three provisions, largely directed at the integrity of territoriality based sovereignty.[97] This proposed law would directly abrogate recent Supreme Court decisions designed to undermine Indian sovereignty. There is some reason to believe this law would not require a constitutional amendment. The Supreme Court had expanded its opinion for Oliphant in Duro v. Reina and declared that Indian

[95] Nie, "Co-Management and Protected Land-Use Designations," 609.
[96] Ibid., 595.
[97] Pommersheim, Broken Landscapes, 300.

courts not only did not have jurisdiction over non-Indians, but Indian courts did not have jurisdiction over non-members.[98] In 1991, Congress responded by amending the Indian Civil Rights Act to recognize the inherent jurisdictional power of Indian nations over members of other Indian nations and the Supreme Court upheld this amendment in 2004 in United States v. Lara.[99] Though some have interpreted dicta in the opinion to indicate the Supreme Court might not accept a similar recognition of inherent sovereignty when it comes to jurisdiction over non-Indians.[100] The three points of the NCAI proposed legislation are: (1) restoration of full inherent sovereignty, except as expressly divested by treaty or Congressional act, (2) return to the impenetrable barrier to state authority found in the Marshall trilogy, and (3) enhanced federal review of Indian court cases, especially to matters related to the 1968 Indian Civil Rights Act.[101] The last part was seen as a necessary trade-off to extending jurisdiction to non-Indians on reservations. While this was a proposal of the NCAI, Indian governments have only partially supported the proposal, preferring the first two provisions and not caring much for the third.[102]

Russell Lawrence Barsh and James Youngblood Henderson have proposed a constitutional amendment designed to more formally recognize the incorporation of Indian nations into the United States as a federation created by treaties with Indian nations. This proposed amendment would formally recognize a third sovereign entity in U.S. federalism, Indian nations. This proposed amendment would, for the purposes of the law and U.S. Constitution, recognize Indian nations as states, with a few exceptions.

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98 495 U.S. 676 (1991).
99 541 U.S. 193 (2004).
100 Pommersheim, Broken Landscapes, 300.
101 Ibid.
102 Ibid., 301.

Indian nations would retain all powers of state governments and no powers could be removed by Congress, except with approval of a three quarters vote of the national population. Indian nations would have the ability to set criteria for membership, regardless of the provisions of the Fourteenth Amendment, and would have a modified form of representation in Congress. The proposed amendment calls for an election of Senate and House Indian Caucuses. The House Caucus would selected representatives from each Indian nation based on population, and each Indian nation would have one representative in the Senate Caucus. Members would serve for four year terms and the Caucuses would then elect two members each to serve in the House of Representatives and United States Senate as full members with voting privileges of those bodies. States would have no power over Indian lands, except by compact agreed to by all parties, and Indian members residing in Indian territory would have no vote in state elections. This proposal also calls for five hundred million dollars in development funds to be delivered to Indian governments, apportioned by population, with no strings attached.[103]

The proposed amendment would address several outstanding problems Indian peoples have with the current arrangements imposed upon them by the U.S. federal system, but there remain difficulties. First the proposed amendment provides for its application to Indian nations only if their members consent by a two-thirds vote.[104] The proposal also makes no provisions for Indian peoples currently not recognized by the federal government.[105] With regards to collective Indian rights to sacred sites on public lands, such an arrangement would provide Indians with a greater voice in formulating

[103] Pommersheim, Broken Landscapes, 304-5.
[104] Ibid., 305.
[105] Ibid., 306.

federal policies, but the territorial nature of the expansion of sovereignty does not address the protection of rights and interests outside of the territorial jurisdiction of Indian governments. While this proposed amendment would address many concerns, further measures would have to be taken to protect religious concerns off reservation.

Frank Pommersheim has also proposed a much simpler amendment, but this proposal is also limited to the erosion of sovereignty in the face of Supreme Court hostility. Pommersheim's proposed amendment states that the inherent sovereignty of Indian nations shall not be infringed, except by those powers expressly delegated to the United States by the Constitution. Pommersheim has argued that this proposed amendment would not displace existing treaties and it would stabilize sovereignty in the face of the assault by the United States Supreme Court.[106] This amendment would leave in place all retained off-reservation rights of Indian peoples, and leave room for compacts and other future agreements to incorporate substantive protections for Indian sacred sites outside of Indian territory.

Co-Management

When I started researching this project, I began to consider the possibilities of unconventional approaches to Indian sovereignty that might provide extraterritorial control or influence over Indian sacred sites as a possible solution to the ongoing problem of sacred site desecration. Any sensible analysis will recognize that the core problem is the lack of recognized Indian political authority, or sovereignty, over sacred sites. Of course most theoretically simple, yet politically difficult, method for guaranteeing

[106] Pommersheim, Broken Landscapes, 307.

protection of Indian sacred places on public lands is to return sufficient public lands to Indian nations to provide Indian peoples with a viable land base to operate as fully sovereign nations, and leave the management of sacred sites up to sovereign Indian governments. An estimated 45 million acres of additional land is what would be necessary to provide Indian peoples with a sufficient land base to have sustainable nations. The United States government holds in excess of 650 million acres as public lands, many of which contain Indian sacred sites.[107] A return of Indian lands and recognition of full the sovereignty of Indian nations over those lands would likely provide the form of protection for Indian sacred sites that practitioners of traditional Indian religions would find most acceptable. But while the international consensus is moving towards recognizing indigenous peoples as "peoples" under international law, and thus entitled to self-determination as any other people, the government of the United States is not moving in that direction. One branch is hostile to respecting the fundamental human rights of Indian peoples, and the public is woefully uninformed about Indian issues. So, while it would be nice to live in a society free of domination, submission, and alienation, in the short term, sacred sites are being destroyed and Indian rights are being trampled. This this where co-management comes in and in the fall of 2015 several Indian nations for put forth a proposal for the most ambitious collaborative-management plan of Indian sacred sites.

The ongoing policy of government to government relations has led to an increase in Indian management of many federal programs serving Indian reservations. With the

[107] H.D. Rosenthal, Their Day in Court: A History of the Indian Claims Commission, (Garland Publishing, Inc., New York: 1990), 253-54.

change in policy initiated by the Nixon administration, the federal government has been willing to share more and more management responsibilities with Indian governments. Beyond this, Indian governments have entered compacts with surrounding states for agreements regarding the management of social services and law enforcement jurisdiction, as the Blackfeet Nation has. Co-management agreements have succeeded maintaining limited resources in game, fish, and whales.[108] A similar model could be expanded where Indian interests are not mere stakeholders but have a deciding interest, but there is the ongoing problem of the deeply uninformed public. A consortium of Indian governments has put forward a proposal for joint federal and Indian management of sacred sites designed to promote Indian self-determination and education of the general public as to Indian cultures and values.

Bears Ears

In the southeast corner of Utah there is a remote, ecologically intact, area bounded by the eastern shore of the Colorado River that is a place of historical, cultural, and religious importance to the Hopi, Navajo, Ute Mountain Ute, Uintah and Ouray Ute, and Zuni nations.[109] Bordered on the south by the Navajo Nation and on the east stretching from White Mesa to the Colorado River near Moab, this area of 1.9 million acres is mostly Bureau of Land Management lands. Bordered by national parks, Natural Bridges National Monument is within the region. A coalition of the above mentioned Indian nations calls the region Bears Ears.[110] All coalition members have some history with

[108] Nie, "Co-Management and Protected Land-Use Designations," 603, 606.
[109] The Bears Ears Inter-Tribal Coalition, Proposal to President Barack Obama for the Creation of Bears Ears National Monument, October 15, 2015, p. 5, 8.
[110] Ibid., 4-6.

Bears Ears and until the nineteenth century Bears Ears was part of the Navajo Nation. Bears Ears contains more than one hundred thousand cultural sites, including granaries and complex villages.[111]

The Utah Congressional delegation has had concern for how exactly to manage the Bears Ears region for some time. Senator Robert Bennett initiated the Public Lands Initiative as a process to address outstanding concerns regarding eastern Utah public lands management. When Bennett lost election in 2010, Representatives Rob Bishop and Jason Chaffetz took over the project. The non-profit group Utah Diné Bikeyah formed to press for management of Bears Ears in a manner that would protect the cultural and religious sites. The Representatives designed the Public Lands Initiative as a way to put together a legislative proposal with public input that largely worked through county commissions. While the Congressmen held several meetings on the PLI, Indian leaders were never invited.[112]

Despite feeling shut out of the Public Lands Initiative process, UDB leaders and members made efforts to participate in the process through San Carlos County, Utah, where about half the population was Navajo.[113] By 2014, UDB had created a draft of a cooperative-management plan and was presenting it to both Utah Representatives and the San Carlos County Commissioners. The San Carlos County Commission became increasingly hostile to UDB participation in the process. At first Commissioners assured UDB their proposal would be among those polled for public response, but the co-management proposal was not included in the poll. Despite this, a write-in campaign

[111] Bears Ears Coalition, Proposal, 8-9.
[112] Ibid., 15.
[113] Ibid.

returned 64% of the votes being in favor of the UDB proposal. County Commissioners ultimately recommended a plan for aggressively developing energy resources in the area.[114] In December of 2014, the San Juan County Commissioners informed UDB by letter that the organization was no longer welcome to participate in the Public Lands Initiative process.[115]

Feeling ignored and shut out of the Public Lands Initiative process, the Utah Diné Bikeyah took their collaborative-management proposal to the governments of local Indian nations for action. In 2015 the Hopi, Navajo, Uintah and Ouray Ute, the Ute Mountain Ute, and Zuni governments entered into a formal alliance and created the Bears Ears Inter-Tribal Coalition.[116] The Bears Ears Coalition then crafted a detailed proposal. The Coalition then submitted this proposal for collaborative management of Bears Ears to President Obama and the Utah Representatives working on the Public Lands Initiative on October 15, 2015.[117]

The response to the proposal has been mixed. Former Secretary of the Interior Bruce Babbitt, taking time off from efforts to expand ski resorts on Indian sacred sites, called for President Obama to adopt the Bears Ears joint management proposal.[118] Congressman Bishop publicly opposed the proposal and put forth an alternative plan that would instead forbid consideration of Indian concerns not approved by county commissioners or the state of Utah.[119] Congressman Bishop went further and

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[114] Bears Ears Coalition, Proposal, 16.
[115] The Bears Ears Inter-Tribal Coalition, Exhibit One, A Timeline: The Relationship of the Public Lands Initiative with the Tribes and Their Members, October 15, 2015.
[116] Bears Ears Coalition, Proposal, 18.
[117] Ibid., 19.
[118] Bruce Babbitt, "It's time of Obama to make Bear Ears in Utah a national monument," Los Angeles Times, Op-Ed, January 21, 2016.
[119] Ibid.

demonstrated his fundamental ignorance of Indian affairs by describing the Bears Ears coalition member nations as a "self-appointed coalition."[120] The members of the coalition are the legally elected governments of the neighboring Indian nations. Navajo Nation Council Delegate Davis Filfred, representing tribal members from Utah found the statement offensive and pointed out the Navajo Nation Council unanimously passed the bill of support for the project and the Council was unified with the executive in their support for the Bears Ears national monument.[121]

The Bears Ears Coalition proposal urged President Obama to create a 1.9 million acre National Monument by executive order with collaborative management between the Coalition member nations and the various agencies that manage the different parts of Bears Ears.[122] The proposal recommended creating a management commission made up of eight members, one from each Indian nation in the coalition, and one from each responsible federal agency.[123] The commission would be responsible for management and crafting policies that would be reviewed by the Secretary of Agriculture. From beginning to end of commission decisions, Indian officials would be directly involved. If the commission reached an impasse, they would first attempt mediation, but if that failed the Secretary of Agriculture would retain ultimate authority and would be required to issue a written opinion explaining the decision.[124] While the commission would set policy and create management plans, the day to day operations would be overseen by a

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[120] Anne Minard, "Bears Ears Coalition Splits From 'Disrespectful' Congressional Reps," Indian Country Today, January 22, 1016. http://indiancountrytodaymedianetwork.com/2016/01/22/bears-ears-coalition-splits-disrespectful-congressional-reps-163127 (accessed April 14, 2016).
[121] Ibid.
[122] Bears Ears Coalition, Proposal, 20-21.
[123] Ibid., 29.
[124] Ibid., 22.

single manager answering to the commission.[125]

The Coalition proposal also had several goals and operational directives to be set out in the executive order creating the National Monument. First, they recommend Indian hiring preferences for staffing.[126] The Bears Ears National Monument would be closed to mining, have regulated and reasonable off-road motor-vehicle travel, continue the state of Utah's hunting regulations and laws, and keep the monument area open to public use.[127] The Coalition suggested the order contain a directive to the Secretary of Agriculture to enter into agreements with the State of Utah to make exchanges for State land located in the interior of the monument's proposed borders.[128] The proposal called for maintaining existing grazing permits and current firewood removal management plans. There would also be a directive for the commission to create a management plan designed to protect Indian sacred sites, traditional cultural properties, and items, including plants, used for religious purposes, to the fullest extent under the law.[129]

The Antiquities Act of 1906 offers the president wide discretion in creating National Monuments. The courts have never overturned a presidential designation as of this writing.[130] The Antiquities Act authorized the president to create national monuments with the smallest area necessary to protect the monument, but in 1996 President Clinton designated 1.7 million acres in Utah as the Grand-Staircase Escalante Nation Monument.

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[125] Bears Ears Coalition, Proposal, 29, 31.
[126] Ibid., 29. Hiring preferences for Indians is not racial discrimination, but a political preference akin to preferring city residents for city jobs, according to the United States Supreme Court. Morton v. Mancari, 417 U.S. 535 (1974).
[127] Bears Ears Coalition, Proposal, 31, 35-6.
[128] Ibid., 36.
[129] Ibid., 37.
[130] Ibid., 23.

This expansive national monument survived challenges in federal court.[131] Presidents have also been increasing the management directives they include in such orders, and these directives have also withstood court challenges.[132] The proposal of the Coalition would be the largest monument declaration and the first to have a collaborative directive with Indian nations and the Coalition stated the proposed management would be infused with indigenous values.[133]

Collaborative management of public lands in agreement with Indian governments has several advantages. First, this would be a continuation of the historic trend begun in the Nixon years of turning over greater amounts of federal operations to the day to day management and implementation by Indian officials. While such arrangements would not provide Indian interests with a veto, Indians would have strong influence over the entire decision making procedure. In addition, moral suasion would have an exponentially higher impact on non-Indian decision makers as they would have ongoing professional and personal contacts with Indian staff and commissioners. It is harder to destroy someone's sacred places when you have to see them again at work on Monday. Further, the Bears Ears proposal called for using the co-management project as a method for expanding non-Indian understanding of Indian values, cultures, and perspectives. In the short term, the national monument designation is the most promising legal option for substantive improvements in the protection of Indian sacred sites that may be carried out without constitutional amendments or social revolution.

There are also several weaknesses to the collaborative management arrangements.

[131] Utah Association of Counties v. Bush, 316 F. Supp. 2d 1172 (2004), appeal dismissed, 455 F.3d 1094 (10th Cir. 2006).
[132] Tulware Country v. Bush, 306 F. 3d 1138 (D.C. Cir. 2002), 1142, cert. denied, 540 U.S. 813.
[133] Bears Ears Coalition, Proposal, 33.

First, the Secretary of Agriculture would still have ultimate management authority. While the Bears Ears proposal would require the secretary to publish a written explanation for decisions, nothing prevents the secretary from ignoring Indian concerns, and there would be no avenue for judicial review. In addition, Congress would retain the ultimate authority for the disposition of public lands, regardless of the delegated authority within the Antiquities Act. Congress may pass laws dismantling the collaborative management arrangement, or a member of Congress could slip a rider on to another must-pass appropriations bill and simply give the land to commercial interests. Another potential weakness is that some lawmakers or judges may characterize the minimal respect for indigenous cultural, religious, and sovereign interests as extending "special rights" to a "privileged minority" – or even a breach of the establishment clause of the First Amendment. Non-Indian communities will continue to be highly susceptible to such political lies for the foreseeable future as their education systems have by and large failed to provide them with even the most basic facts about their own history and the legal foundations of their own society to make informed and meaningful choices on Indian issues.

Lack of Education

Lack of respect and empathy are among the prime causes of decisions that destroy both Indian sacred sites and sovereignty. This lack of empathy and respect stems from a lack of information about U.S. history as it relates to the theoretical and practical origins of non-Indian America. Even today indigenous people in the United States regularly face

overt racial hostility that has been long socially unacceptable for other groups.[134] Indian girls experience being sexualized and harassed at younger ages and with greater frequency than their peers.[135] This is in part because images of Indians from films and mascots have deep roots in the non-Indian culture and consciousness of the United States.[136] To exacerbate matters, many members of the general public has little to no knowledge of actual Indian lives, history, or experiences. For these people, there is little understanding of retained indigenous rights, sovereignty, or treaty obligations.[137] Many non-Indians are under the mistaken impression that all Indians receive money from casinos and/or handouts from the government.[138] Even in academic fields, such as critical race theory, Indians are largely ignored.[139] Much ignorance about Native Americans has been perpetuated by the inadequate treatment of Indians and Indian issues in schools.[140] While some states with larger Indian populations, such as Montana, have made progress, there is still a widespread lack of accurate Indian history presented in public education.[141]

The lack of accurate information about Indians in education not only promotes a lack of respect and empathy for indigenous peoples in the United States, it creates a reserve of ill-informed people for anti-Indian organizing across the country.[142] Property owners and those with business interests impacted by efforts to protect sacred sites have

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134 Dwanna L. Robertson, "Invisibility in the Color-Blind Era, Examining Legitimized Racism against Indigenous Peoples," American Indian Quarterly, Vol. 39, No. 2, (Spring 2015), p. 113, 114, 120.
135 Ibid., 132.
136 Ibid., 140.
137 Ibid., 131.
138 Ibid., 30.
139 Ibid., 141-42.
140 Ibid., 143.
141 Raymond Cross, "American Indian Education: The Terror of History and the Nation's Debt to the Indian Peoples," UALR Law Review, Vol. 21 (1999): 941.
142 Zoltan Grossman, "Treaty Rights and Responding to Anti-Indian Activity," Roberd Odawi Porter, ed., Sovereignty, Colonialism and the Indigenous Nations, a Reader, (Durham, North Carolina: Carolina Academic Press, 2005), 304.

tended to form the membership basis of groups opposed to Indian self-determination. Some of these groups find additional support from large corporate interests and others find additional support in white supremacist circles.[143] Anti-Indian groups take advantage of misinformation about the legal and historical origins of Indian reservations. Even non-Indians living on private lands within the borders of reservations that have been checker-boarded by allotment do not understand the basics of Indian sovereignty.[144]

The consultation process has been shown to address some of this ignorance. In the case of the Snowbowl expansion, Forest Service Zone Archaeologist Heather Cooper Provencio was well acquainted with Indian concerns and history regarding the San Francisco Peaks and she made sure to explain the religious and cultural importance of the Peaks to Forest Supervisor Nora Rasure. While Supervisor Rasure ultimately decided to desecrate the Hopi holy site, the appearances are that she did not do so gleefully as an expression of her right to do so, but as a reluctant necessary conclusion, given how the project proposal was framed by the Arizona Snowbowl Resort.

The Blackfeet Indians had the greatest success in explaining their position to Forest managers through the consultation process. After initial discussions, the Forest Service decided it needed to separate the Record of Decision for Badger-Two Medicine to better investigate Blackfeet retained rights and religious interests. Even then, the initial inclination of agency planners was to designate the entire area as roadless, but continued consultation revealed the Blackfeet wanted the area to maintain a small portion of existing roads to facilitate the exercise of treaty rights and access to sacred sites for the

[143] Grossman, "Treaty Rights and Responding," 307.
[144] Ibid., 320.

disabled and elderly.

While the Washoe did not obtain their maximum objectives with regards to Cave Rock, they may have obtained the most important victory. The consultation process for the climbing management plan for Cave Rock run by Supervisor Palma's subordinates provided the Washoe the opportunity to educate the climbing public about the importance of Cave Rock to them. While climbers have a particular reverence for the landscape that is more amenable to Indian perspectives than that of Australian mining corporations, the consultation process turned some climbers against the idea of permitting continued climbing at Cave Rock. More importantly this educational effort turned climbers against their own lobbying organization when it tried to portray the Washoe as privileged and selfish. While the Access Fund continued to press for climbers to have access, the complaints of informed climbers prevented the Access Fund from engaging in anti-Indian rhetoric and promoting ignorant and racist views of Indians.

The differences in outcomes for Bear's Lodge, Cave Rock, Badger-Two Medicine, and the San Francisco Peaks can largely be explained by the different economic situations. With the Peaks the entire process was driven by the economic interests of the Snowbowl ski resort and their well-connected lawyer, former Interior Secretary Bruce Babbit. Portions of the Forest Service viewed the consultation process as an unfortunate obstacle to promoting a project planners decided was necessary. So in that case economic interests predetermined the outcome. Cave Rock and Bear's Lodge both involved rock climbing, but at Cave Rock the routes were the most difficult in the country, providing a unique and difficult climbing experience. This did not lend itself to

the growth of a professional tourist climbing business, as developed at Bear's Lodge. With fewer climbers impacted and no businesses jeopardized, the Washoe were able to narrowly gain significant protection for a highly important cultural site. Similarly, at Badger-Two Medicine, the impact on recreational snowmobile use was minimal and expected to be merely displaced to other areas, including areas of the Blackfeet reservation opened up to accommodate the need for recreational use.

In their brief opposing the Bear's Lodge Climbing Management Plan, the Mountain States Legal Foundation demonstrated the central tension that has caused and will continue to cause difficulties for expressing empathy and respect for indigenous peoples in land management policies. In their brief opposing the National Park Service Climbing Management Plan for Bear's Lodge, the Mountain States Legal Foundation objected to the educational aspect of the management plan and the proposed goal of full voluntary compliance with abstaining from climbing in June.[145] Those offering climbing tours had a direct financial interest in preventing the education necessary for cross-cultural empathy, consideration, and respect. Had the Access Fund membership not already been educated as to Washoe concerns, that membership would have been more susceptible to the hate based propaganda the Access Fund initially began to engage in. Instead, informed members of the Access Fund called out the leadership for their unconscionable actions. Those with financial interests that may be jeopardized by offering empathy and respect to Indians have looked to and will continue to look to prevent education and exploit the ignorance of the public.

The collaborative management proposal for Bears Ears would directly address

[145] Burton & Ruppert, "Bear's Lodge," 241.

problematic non-Indian ignorance of Indian cultures and concerns. While the coalition proposal calls for the inclusion of extensive educational opportunities, it would also maintain existing federal regulatory limitations for management. Management decisions would still be subjected to the Environmental Impact Statement process with its layers of consultation requirements and opportunities for public scoping, collaborative meetings, brainstorming, and comments on draft proposals. Assuming the Indian collaborative management leadership would take the opportunity to engage in cross-cultural communications, as happened with the Cave Rock consultations, important work in improving non-Indian education may be accomplished, increasing the opportunities for meaningful expression of freedom by non-Indians who will now have a greater understanding of the world they live in.

The lack of understanding of the history and conditions of Native Americans in the United States is staggering. For Sen and Cross, development requires education that allows people to express their opinions meaningfully, exercise economic freedom, and participate in a larger community with respect and equality. Under these measures of development, the non-Indian population of the United States is largely ill-prepared to discuss the relations of non-Indians and indigenous peoples through United States history. As Paul Chaat Smith has stated:

> no reasonably sentient person of whatever background could seriously dispute the overwhelmingly evidence that Indians are at the very center of everything that happened in the Western Hemisphere (which, technically speaking, is half the world) over the past five centuries, and so that history is at the heart of everyone who lives here.
> * * *
> Yet that can't possibly be true, because everything you learn teaches you that the Indian experience is a joke, a cartoon, a minor sideshow. The

> overwhelming message from schools, mass media, and conventional wisdom says Indians might be interesting, even profound, but never important.[146]

Indians and Indian law have so little in importance in non-Indian education that Justice Breyer could not remember the legal designation of Indian nations. Even though he was one of the better Justices on understanding the implications of Indian issues, Justice Breyer had to ask, at oral arguments for a recent case where a corporation was challenging the ability of Indian nations to ever have civil jurisdiction over U.S. corporations doing business on reservations (after having singed an explicit agreement recognizing said jurisdiction), "Now, is there any—and—and what is the word in Cherokee? I forget. It's 'something dependent nation.' What kind of—it was—there are two words--"[147]

Not only are those alleged to have the top legal minds commonly uninformed of the legal foundations of the nation they sit in judgment over, college professors are sometimes completely unaware of major events in the history of the Western Hemisphere. In the fall of 2015, Professor of History Maury Wiseman of Sacramento State University stated indigenous populations of the Americas did not face genocide. When Chiitaanibah Johnson, a nineteen year old woman of Navajo and Maidu ancestry, objected to the professor's denial, he ended class early and characterized Johnson's reaction as a disruption.[148] A university investigation later determined neither Johnson nor Wiseman

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[146] Paul Chaat Smith, Everything You Know About Indians is Wrong, (Minneapolis: University of Minnesota Press, 2009), 71.

[147] Justice Stephen Breyer, Dollar General v. Mississippi Band of Choctaw Indians, United States Supreme Court Case No. 13-1496, Transcript of Oral Arguments, December 7, 2015, p. 40.

[148] Vincent Schilling, "History Professor Denies Native Genocide: Native Student Disagreed, Then Says Professor Expelled Her From Course," Indian Country Today, September 6, 2015. http://indiancountrytodaymedianetwork.com/2015/09/06/history-professor-denies-native-genocide-native-student-disagrees-gets-expelled-course (accessed April 14, 2016).

violated any university policies.[149] What appears to have been at issue here was that the professor took the view that, because no one deliberately targeted the entire indigenous population of the Americas for extermination, there was no genocide in the Americas. What Wiseman appears to have misunderstood is that the term "Indian" is a term akin to "European." No one would argue that the Nazis did not commit genocide because it was not their deliberate policy to eliminate all Europeans. Any educated person in the United States should be aware that the Plymouth colony sought to exterminate the Pequot people, the territorial governor of Colorado during the U.S. Civil War called for the extermination of the Cheyenne, and Columbus instituted slave labor policies that led to the complete elimination of the Arawak Indians from the face of the Earth. All of these are examples of genocide that require no specific knowledge of the Convention on the Prevention and Punishment of the Crime of Genocide (though all teachers of twentieth-century United States History should be aware of the provisions of this legal definition of genocide).

Indian peoples have taken the initiative in promoting development and freedom by providing greater understanding and education in the United States, but the time has come for non-Indians to take responsibility for their own education. Non-Indian peoples of the United States have created a multicultural society. Cross and Sun have argued that sufficient education for meaningfully expressing opinions, with dignity and respect, and participating in society as part of human freedom should be both a measure and an end of development. A person's abilities increases her or his freedom. Of critical importance,

[149] Vincent Schilling, "Native Genocide issue at Sac State, 'No University Policies Violated,' says President," Indian Country Today, October 13, 2015. http://indiancountrytodaymedianetwork.com/2015/10/13/native-genocide-issue-sac-state-no-university-policies-violated-says-president-162070 (accessed April 14, 2016).

federal administrators, lawmakers, judges, and educators have commonly lacked sufficient understanding of Native Americans and their experiences with non-Indian peoples and, thus, have not been prepared to meaningfully engage Native leaders on issues of Indian sovereignty and sacred sites or render informed opinions regarding these issues. Indians can only do so much with their limited resources to educate the non-Indian community. It is necessary for the long term healing of society for non-Indians to take responsibility for their education regarding their own history.

Conclusions

The consultation process has been part of a growing respect for Indian cultural and religious concerns in the management of public lands by the federal government. Starting with the formal reversal of U.S. policy regarding the continued survival of Indian religions and cultures, the Indian Religious Freedom Act of 1978 initiated the requirement for federal administrators to consult with Indian governments and religious leaders when making decisions that impacted Indian sacred sites. The potential for federal protection of sacred sites improved with the 1992 amendments to the National Historic Preservation Act, with the creation of the category of Traditional Cultural Properties, places of cultural or religious significance to indigenous peoples, eligible for inclusion on the National Register of Historic Places. These amendments expanded the Congressional recognition of the United States as a multicultural society. The consultation process was further strengthened by executive orders 13,007 (1996), 13,084 (1998) and 13,175 (2000). E.O. 13,007 called upon administrators to avoid adverse impacts on sites of religious or cultural significance to indigenous peoples. The later orders called upon federal agencies to regularize and formalize their government to government consultation procedures.

While Congress and the executive made small but significant steps towards honestly addressing the reality of the United States as a multicultural society, the Supreme Court acted to curtail and eliminate constitutional protections for religious freedom that would hurt indigenous religions the most. While the late twentieth-century demonstrated a fairly consistent pattern of Supreme Court hostility to Indian national

sovereignty, the rights of practitioners of Indian religions were the first to discover the United States Supreme Court no longer respected constitutional protections for religious freedom. With the 1988 Lyng decision, the Court announced the free exercise clause of the First Amendment provided no protection for religious expression on public lands, even when the government destruction of sacred sites would make the exercise of religious ceremonies impossible. The potential for the government to achieve its ends with less destructive means was not even considered, as the government, as property owner, had absolute dominion over lands it owned. Going further in 1990 with the Smith case, the United States Supreme Court declared that all generally applicable laws were constitutional, even if they curtailed the exercise of religion. Though the Smith case originated in the practices of Indian religious traditions, the broad nature of the ruling negatively impacted the religious freedom of all living in the United States.

Reflecting public outrage, Congress acted to restore legal protections for religious freedom and the Supreme Court again acted to limit religious freedom. The 1993 Religious Freedom Restoration Act sought to restore and expand previous protections for religious freedom, calling on the courts to review laws that burdened religious freedom to determine whether or not the law in question fostered a compelling governmental interest in the least restrictive means possible. The next year Congress amended the Indian Religious Freedom Act to specifically nullify the holding in Smith by specifically protecting Indian use and possession of peyote for religious purposes. In 1997, the Supreme Court found the RFRA could not apply to state actions with City of Boerne v. Flores, 521 U.S. 507. Following the lead of the Supreme Court in Lyng, the Ninth

Circuit Court of Appeals ruled the RFRA did not apply to the management of public lands in the case of the Snowbowl expansion in the Coconino National Forest.

Writing in the wake of the Lyng case, Marcia Yablon predicted leaving discretionary authority with administrators, after the mandatory consultation process, would provide the best and most practical protections for Indian sacred sites. Yablon argued that administrative discretion combined with the consultation process would provide federal administrative agencies the opportunity to find creative and flexible solutions to find compromises with competing interests. Courts do not like to take the time to educate themselves on anything and are bound by a long string of racist precedents emanating from a hostile Supreme Court, as Robert Williams has noted.[1] With another decade of consultation after Yablon made her optimistic predictions, the strengths and weaknesses of the evolving consultation process can more fully be assessed.

The greatest strength of the consultation process in practice was its ability to open communications and bridge cultural gaps, bringing greater understanding to non-Indian communities of Indian rights and concerns. As discussed in the introduction and throughout the case studies, many Indian religions have specific places of deep significance (with the notable exception in the present study being the Makah interest in whaling). While the notion of specific places retaining cultural or religious significance was not completely alien to non-Indians (U.S.S. Arizona, Gettysburg), the near total lack of accurate information as to Indian culture in non-Indian communities left a great chasm

[1] Robert A. Williams, Jr., Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America, (Minneapolis: University of Minnesota Press, 2005).

to be bridged. The consultation process brought non-Indian administrators to understand Blackfeet treaty and religious interests in Badger-Two Medicine. At Cave Rock, the Washoe communicated their concerns to both administrators and the climbing community, turning significant portions of the climbing community against their own lobbying organization. The Quechan obtained greater protections for their sacred sites from the Glamis mining operations, and new state requirements for remedial measures. Even with the San Francisco Peaks, where administrators decided to desecrate the mountain, the Hopi and others successfully communicated their concerns to the Forest Supervisor, making her decision to disregard Indian concerns much more difficult, psychically speaking.

The cross-cultural communications of the consultation process have also been successful in communicating concerns of non-Indians to Indian community leaders, leading to creative solutions. At Bear's Lodge, after Indian leaders took the feelings of climbers back to the communities, many Indians decided a voluntary ban on climbing would be more meaningful to them as it provided people the opportunity to show their respect for Indian concerns by choosing to abstain from climbing in June. Additionally, the Blackfeet, through the consultation process, decided to open up parts of their territory to recreational snowmobile use to provide recreational opportunities once Badger-Two Medicine was closed to all snowmobile use.

When administrators did not have preconceived goals, Indians were able to at least partially vindicate their interests. While the Blackfeet obtained their maximal objectives, the retained rights for hunting, fishing, logging, and religious access to

Badger-Two Medicine facilitated this outcome. The consultation process provided the Blackfeet the opportunity to educate administrators of their ongoing interests in the formulation of a new travel management plan. Similarly, the Washoe obtained significant protections for Cave Rock with the permanent total ban on climbing when the purpose of the Forest Service was to protect the integrity of the site through a new management plan. By contrast, the Forest Service set as their goal improving the financial viability and safety of the Snowbowl ski resort with the San Francisco Peaks.

When administrative agencies have a determined plan, but refuse to engage in consultation, the courts have shown they will enforce the Indian right to consultation. The Quechan nation was good enough to inform the Bureau of Land Management of the need for consultation with regards to the placement of the Imperial Valley Solar Project, but the BLM ignored this courtesy notice. Two years later the BLM approved the project without ever consulting on a government to government level with the Quechan. A preliminary injunction derailed the project as the start of the project had a hard deadline for matching federal funds. Had the BLM engaged in consultation as required they likely could have pushed through the project, but if consultation had occurred, the BLM might have been able to tailor the solar complex to avoid or minimize damage to Quechan cultural and religious sites.

When the consultation process occurs, it does not necessarily educate the general public. While there was no consultation in the Imperial Valley Solar Project case, an ignorant public denounced the Quechan as being backwards and opposed to environmental progress, rather than understanding the Quechan were acting to protect a

vital legal right necessary for the continued protection of cultural and religious sites. Similarly, the Makah engaged in extensive consultations with different administrative agencies of the federal government, but this did not prevent unscrupulous animal rights activists making common cause with anti-Indian groups in promoting racist hatred toward the Makah. Unaware that the Makah had a deeper respect for whales than non-Indians, with the Makah viewing whales as part of the same community, the public was susceptible to the vile the lies of the Sea Shepherd founder Paul Watson. The consultation process has only been able to provide much needed education to small segments of the non-Indian populations.

Federal administrators also had total discretion in their decisions. So long as the consultation process was engaged in, regardless of the outcome, the courts will support the administrative decision. In the case of the Snowbowl expansion, there was never any question the decision burdened Hopi and other Indian religions, but the Ninth Circuit ultimately refused to weigh this burden against the government's interest in protecting the profits of a mediocre ski resort in a desert. Administrative decisions have not been limited by either the First Amendment (now nonexistent) protection of the free exercise of religion or the Religious Freedom Restoration Act. Similarly, no establishment concerns remain as the courts have affirmed mandatory total bans on climbing and snowmobiling that were designed, in part, to protect the cultural and religious interests of Indians. While international law will not penetrate U.S. courts anytime soon, even a North American Free Trade arbitration tribunal has recognized the protection of indigenous cultural and religious sites as a legitimate function of government. So long as administrators consult

Indian interests, they may manage sacred and cultural sites with complete discretion, with no court review.

Behind the minimal protections of the consultation process, there has always remained the danger of the power of Congress as landowner of record for Indian sacred sites. While international law has called for consultation in all cases, the power of Congress to dispose of public lands has the ability to eliminate any protections the consultation process might provide Indian sacred sites. Nowhere has this been more starkly demonstrated than in the case of Apache Leap and Oak Flats. Slipped into a must pass appropriations bill, Congress simply traded these culturally significant places to an Anglo-Australian mining company. Even the minimal protections of consultation have been circumvented by determined politicians. Of course this act merely served as a reminder that the plenary power of Congress over Indian affairs has remained unchecked by any legal limitations.

Admittedly there have been significant improvements in relations between federal officials and Indian peoples, in part because of the improved use of the consultation process, but there are outstanding concerns. Most significant of these concerns is the ongoing hostility of the United States Supreme Court to the growing international consensus on indigenous rights. While the international community now recognized the inherent right of indigenous peoples to self-determination and calls for the respect for indigenous religions and their relationship to the land, the Supreme Court undermined Indian sovereignty and strips religious freedom protections from the Constitution, placing indigenous peoples at a distinct disadvantage in protecting what are generally considered,

outside of the Supreme Court, fundamental human rights. In December of 2012, the Forest Service Office of Tribal Relations prepared a report for the Secretary of Agriculture that reviewed the policies and procedures regarding Indian sacred sites.[2] In preparing this review the Forest Service communicated with indigenous leaders and accepted public comments. This section will briefly examine some of the outstanding Indian concerns regarding sacred sites before looking at several proposals for addressing Indian concerns regarding sacred sites and sovereignty.

Many Indian concerns demonstrated a lack of faith in both the Forest Service and the United States legal system in general. Generally Indians did not believe the system was designed to protect Indian interests and the law was not capable of protecting Indian sacred places. There was also a great deal of skepticism as to the Forest Service's ability to protect sacred sites.[3] Many felt economic concerns "held greater weight" than cultural or traditional values.[4] More specifically, Indians felt the definition of sacred sites in Executive Order 13,007 was too limited by being focused on religion and did not adequately represent the scope of what was sacred.[5] Some were concerned that confidential information presented to the Forest Service as to the location of sacred sites would not remain confidential.[6] Some felt the Forest Service lacked sufficient law enforcement capacity to protect historical sites, sacred places, and other areas of concern from disturbance, vandalism, and destruction.[7] Many brought up their ongoing

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2 USDA Office of Tribal Relations and USDA Forest Service, REPORT TO THE SECRETARY OF AGRICULTURE: USDA Policy and Procedures Review and Recommendations: Indian Sacred Sites, December 2012.
3 Ibid., 30.
4 Ibid., 15.
5 Ibid., 18.
6 Ibid., 27.
7 Ibid., 21.

unhappiness with the decision regarding the San Francisco Peaks and asked that the Forest Service reverse the decision regarding the Snowbowl expansion.[8] Some complained of difficulties regarding wilderness and roadless designations creating obstacles for the elderly or disabled in accessing sacred sites.[9]

With regards to the consultation, Indian interests identified problematic areas and offered suggestions for improvement. The Forest Service concurred with Indian complaints that personnel turnover impeded ongoing communication efforts, adding that Indian government turnover exacerbated this ongoing difficulty.[10] Others noted the system provided no regular avenue of communication for non-federally recognized tribes, hurting their access to sacred sites as well as protection of those places.[11] Indians also expressed concerns over sufficient consultation when it came to traditional cultural properties and consultation under the National Historic Preservation Act.[12] Indians requested the Forest Service coordinate efforts to protect sacred sites with other agencies.[13] Indian interests freely recommended to the Forest Service the expansion of co-management arrangements. Some expressed a desire to have a veto over Forest Service actions. Some wanted greater Indian decision making authority working with the Forest Service. Some proposed entering more mutually beneficial management agreements with the Forest Service.[14] Others complained the Forest Service needed better training in consultation procedures, Indian Law, and cultural competency.[15]

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[8] REPORT, 15.
[9] Ibid., 19, 22.
[10] Ibid., 16.
[11] Ibid., 19.
[12] Ibid., 20.
[13] Ibid.
[14] Ibid., 16.
[15] Ibid., 23.

The Forest Service, by and large, addressed these concerns and offered recommendations to the Secretary of Agriculture. The Forest Service admitted that it needed to improve its competency in consultation procedures, Indian Law, and cultural sensitivity.[16] The Forest Service also agreed its resources were stretched thin in areas such as enforcement, but that it could also do a better job with what resources it had.[17] As to ongoing confidentiality concerns, the Forest Service hoped provisions within the 2008 Farm Bill that exempt confidential information about Indian sacred sites from Freedom of Information Act requests would help alleviate these concerns.[18] To improve consultation and ongoing communication difficulties, the Forest Service recommended expanding written agreements with Indian governments and formal annual meetings on a government to government basis.[19] As to indigenous officials proposing greater co-management, the Forest Service noted that it was not authorized to divest itself of decision making authority, but that it could enter into more co-management arrangements on a case by case basis.[20]

The report concluded that administrators had broad discretion, backed by recent court decisions, to do whatever they wanted, but these decisions had significant consequences for the Forest Service and local administrators.[21] Many forest administrators commented that they understood they had broad discretion in protecting Indian sacred sites, but many Forest Service personnel feared repercussions from other

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16 REPORT, 23.
17 Ibid., 24.
18 Ibid., 20.
19 Ibid., 16.
20 Ibid.
21 Ibid., 30.

local constituencies, Congress, or the Administration.[22] The report concluded that even with the legal authority to act with broad discretion, vindication in court against Indian claims not only injures relations with the particular Indian groups involved in the litigation, but undermines cooperation and relations with all Indian groups as they believe that the law does not protect Indian interests and the Forest Service is either not concerned with or incapable of respecting Indian concerns.[23]

The consultation process required in the administration of Indian sacred sites on public lands has grown into a powerful tool for education. In the hands of conscientious administrators, the consultation process has provided avenues for cross-cultural communications and education. At Bear's Lodge (Devils Tower), local Indian communities and climbers cobbled together a fragile compromise that severely curtailed climbing access (though this compromise remains endangered by commercial climbing guide companies that have a direct financial interest in undermining cooperation). The Washoe succeeded in educating climbers at Cave Rock and some climbers turned against their own lobbying group as it flirted with demonizing the Washoe by playing on the general ignorance of the public. The consultation process has been instrumental in educating federal administrators. This happened with the Quechan in their struggles against new gold mining in their former lands, and again with the Blackfeet protecting their religious and treaty interests in Badger-Two Medicine. Even in the most disastrous case for Indian interests, the San Francisco Peaks, the Hopi and other Indian interests communicated their concerns to the forest supervisor in such a way that the supervisor

[22] REPORT, 28.
[23] Ibid., 30.

made the horrible decision fully understanding how she was harming the various Indian religious communities.

While the consultation process can educate some, there remains a staggering amount of ignorance that can not be overcome by the consultation process alone. Much of the ignorant non-Indian press and politicians demonized the Quechan when they turned to the courts to enforce their right to consultation, derailing a solar project. The Makah, even when working with sympathetic federal administrators, found themselves attacked by racist anti-whaling activists that knowingly preyed upon the general public ignorance while making common cause with politicians seeking to destroy what little recognition of Indian sovereignty remained.

There are numerous possible solutions to the difficulties surrounding the lack of recognition by the United States legal system of Indian sovereignty and Indian interests in sacred sites on public lands. Collaborative management with a robust consultation process is perhaps the best solution for both short term implementation and long term stability. An active consultation process will be able to educate non-Indian interests as to the concerns of Indian cultural and religious communities and provide avenues for creative compromises that can bring communities together. Unfortunately there will remain economic interests and opportunistic politicians that will try to prey upon the ignorance of non-Indians outside of the consultation process. By exploiting this lack of information, these interests would promote the growth of anti-Indian hostility, as was tried by the Access Fund, the Mountain States Legal Foundation, and the Sea Shepherd Conservation Society. As the prominence of white supremacist attitudes in non-Indian

society has ebbed and peaked over time, it is not hard to imagine a future where the United States government sweeps away any pretense of cooperation with Indian peoples in a multicultural society and completely rejects the emerging norms of the international community on the rights of indigenous peoples.

The United States created a multicultural society. As Europeans invaded the Western Hemisphere, they failed in their efforts to wipe out indigenous languages, religions, cultures, and peoples. While the United States had been a racial dictatorship for centuries, European-Americans finally started to acknowledge, in part, that it is a crime against humanity to try and wipe other peoples from the face of the Earth. No one is suggesting the descendants of the invaders return to their lands of origin. Unless the European-American community intends to reject the norms of international law on the rights of indigenous peoples, the lands of the United States must be a multicultural society. The sooner this fact of history is admitted, the sooner real healing and society building can begin.

The omission of many university and high school history programs to provide a thorough assessment of the historic reality of an inadvertent multicultural society in the middle of North America fuels the ignorance that facilitates groups such as the Mountain States Legal Foundation and the Sea Shepherd Society, who employ anti-Indian bigotry to promote their agendas. Jurists, congressmen, college professors, and myriad other Americans in all walks of life are commonly ill-informed about the difficult historical experiences of and challenges facing Native Americans. As such, those who assume positions of responsibility in the Forest Service and other agencies of the federal

government lack the means to participate meaningfully in concert with Native Americans eager to protect their tribal lands or otherwise promote their own cultural interests effectively. The consultation process can only reach a fraction of these decision makers.

History education needs to improve significantly non-Indian understanding of American society by including basic knowledge about the history of the United States and the highly significant place Indian societies have played in the creation of this unintended multicultural society. Four basic ideas should be understood by any person that successfully completes a U.S. history course as it relates to Indian nations. First, there was in 1492 (and in many cases remains) more cultural, political, and religious diversity among Indian nations than the nations of Europe. Second, everyone should understand the argument that indigenous peoples of the Americas were the victims of genocide. Third, everyone should understand the U.S. claim to title to Indian lands and how this relates to Indian sovereignty. Fourth, more than five hundred and sixty Indian nations remain within the United States alone, and Indian religions, cultures, languages, and governments exist today with Indian people as a demographic being the poorest people in all the United States, even with a small number of nations making a windfall with casino revenues. Without knowing these simple truths, one does not know the history of the United States. Each of these points will be examined in turn, with examples of how to quickly introduce the information to a survey course.

First, there was (and largely remains) greater cultural, economic, and political diversity in Indian societies than European societies. First, students need to learn that "Indian," as a term, is similar in scope to "European." In 1492, the Americas and Europe

were each covered with hundreds of nations with different languages. In the Americas there were about as many religions and political organizations ran the entire spectrum from the European like monarchy of the Aztecs with its feudal type economic system to the participatory democracies of the Crow and Hopi that lacked any coercive state structure. Economically many Indian nations participated in collective ownership and prestige was gained by sharing with others. In European terms, American communities ranged from extreme leftist anarcho-socialist communes all the way to absolutist feudal monarchies, while Europeans had different variants of absolutist monarchies. Nominally, all Europeans were Catholics in 1492, while the Americas had hundreds, if not thousands, of different religions with different teachings. Each American community has its own history, culture, and outlook, just as the Europeans do. Indians just also happen to have more diversity. Presenting the extreme differences in Aztec and Hopi culture, economics, and politics is a simple way of presenting this truth. More relevant to U.S. History, addressing some of the difficulties Tecumseh faced in trying to unite all Indian nations in standing together against U.S. expansion is another way to quickly address this issue.

The common misunderstandings regarding the genocide of indigenous Americans seems to stem from two common misconceptions. The first was addressed above. There has never been a single Indian nation, culture, ethnicity, group, or identity. Thus it is completely irrelevant that no one ever attempted to engage in a systematic extermination of Indians as a whole. Claiming that there was no genocide because no one deliberately targeted all Indians for extermination is like denying the genocide of the Roma by the Nazis because there was no systematic attempt to exterminate all Europeans. The second

mistake seems to come from attempts to address the straw-man argument that the high mortality rate Indian nations suffered because of exposure to new diseases due to sustained contact with Europeans is some form of metaphorical genocide. The issue of disease is largely irrelevant to the crime of genocide. The arguments that indigenous peoples suffered genocide are two-fold and use both the common and legal definitions of genocide.

The common usage definition of genocide is the murder or the attempt to murder all members of a racial, religious, ethnic, national, or cultural group. This undeniably happened numerous times, beginning with Columbus. By instituting a brutal slave labor regime on the Arawak Indians, Columbus set in motion policies that led to the extermination of the Arawak by 1555.[24] While one can quibble over whether or not genocide is a crime of specific intent, the argument is that Columbus intended a brutal regime of slave labor and it killed everyone. While it is arguable that Columbus may have merely had the specific intent of enslaving and massacring people, there are other examples from American history that do not have any ambiguity in intent. The Plymouth Colony tried to exterminate the Pequot people.[25] In the 1860s the appointed governor of Colorado, John Evans, called for the extermination of the Cheyenne and Colonel John Chivington sought to carry out this policy in such places as Sand Creek.[26] The Arizona Territorial Legislature called for the extermination of the Apache people in 1864.[27] These are but four examples of common-place genocide within American history, but there is a

[24] James W. Loewen, Lies My Teacher Told Me: Everything Your American History Textbook Got Wrong, (New York: The New press, 1995), 55.
[25] Leowen, Lies, 55.
[26] Robert W. Venables, American Indian History: Five Centuries of Conflict & Coexistence, Vol. II, (Santa Fe, New Mexico: Clear Light Publishers, 2004), 200.
[27] Perry, Apache Reservation, 102.

much broader, more overlooked, and systematic case of legal genocide that every person who went to school in the United States should know about, if they are to have even the most basic understanding of the history of the U.S. government.

Understanding the second argument that genocide occurred in the Americas requires an understanding of the legal definition of genocide. The Convention on the Prevention and Punishment of the Crime of Genocide, Article II section (e), includes in the definition of genocide the transfer of children from one group to another with the intent to destroy a national, ethnic, or religious group.[28] From the late 1880s to the 1930s the United States engaged upon an aggressive policy of "assimilation" designed to eliminate all Indian communities as separate political, religious, lingual, cultural, and ethnic groups. To facilitate this policy, the United States forced European property ownership on Indian nations, outlawed the use of Indian languages, outlawed Indian religious practices, and transferred Indian children to Christian run boarding schools where children were forced to abandon all aspects of their culture, including languages and religions. Under this less well known definition of genocide that every professor should have at least a passing familiarity with, many argue that the forced removal of Indian children to boarding schools, combined with the intent to eliminate the various indigenous peoples of the United States as separate national, ethnic, and religious groups, is a pretty clear case of a crime against humanity. The widespread use of boarding schools designed to destroy Indian religious life is not merely one example of genocide, by hundreds of cases of genocide as hundreds of different religious groups suffered under

[28] United Nations General Assembly, Convention on the Prevention and Prohibition of the Crime of Genocide, December 9, 1948.

this policy.

This twentieth-century genocide against religious minorities in the United States is perhaps the most glaring omission of significant national policies in U.S. history survey courses, but it is easily remedied. While one should lecture on the topics, the fifth episode of the PBS series We Shall Remain, "Wounded Knee," provides an excellent introduction to twentieth-century Indian issues, including moving accounts by survivors of boarding schools. This highly recommended documentary also ties later attempts to destroy Indian societies through urban relocation programs of the termination policy to the unrest of the 1970s. While perhaps not necessarily reaching the level of genocide, the Eisenhower policy of termination is another overlooked attempt to destroy Indian communities of the twentieth-century. With its non-linear presentation, this ninety minute documentary can serve as a simple way for U.S. survey courses to introduce more recent Indian history that shows Indians to be a part of contemporary society.[29]

The third item of the history of U.S. Indian relations everyone should know is the legal basis for the claims of the United States government to the land it occupies and how that relates to Indian sovereignty. While some presentation of the nineteenth century policy of ethnic cleansing, euphemistically called "Indian removal," is common in many survey courses, such a presentation is insufficient if it does not teach the central holdings of the Marshall trilogy. The Marshall trilogy serves as the theoretical basis for federal sovereignty over land of the entire United States. This is the entire legal foundation of the nation that is more basic and fundamental than the U.S. constitution and theoretically

[29] Stanley Nelson, "Wounded Knee," We Shall Remain, Episode 5, (Brighton, Massachusetts: PBS Distribution, 2009).

predates the U.S. constitution. As this foundation is based in the ethnocentric and racist doctrine of Christian discovery, it is understandable why non-Indians might find the topic embarrassing, but if the present is to be understood, embarrassing truths must be confronted when they have to do with the foundations of government. The holdings of the Marshall trilogy are not difficult to explain. First, discovering European powers, by virtue of being Christian and therefore better than indigenous peoples, obtained underlying title to indigenous lands by being the first Christians to stumble upon the people in question. Indigenous peoples retained their right of occupancy, but were limited in selling the occupied land to the discovering Christian power.[30] Second, as indigenous nations have had their national sovereignty limited by this doctrine of Christian discovery, Indian nations are not foreign nations under international law, but domestic dependent nations, with the United States serving as the "guardian" of Indian nations.[31] Third, though domestic dependent nations, Indian nations remain sovereign in their internal affairs and the states have no power over Indian nations.[32] While Andrew Jackson's subsequent lawlessness in the face of the Marshall trilogy would be considered an important episode in U.S. constitutional history, those events are relatively minor when it comes to understanding the foundations of the U.S. claim to sovereignty over any part of the Americas.

The fourth simple fact every person educated in the United States needs to know to understand the United States is that Indian peoples are still here, changing, and they are not going anywhere. Before I mentioned this more in terms of how I teach it to my

[30] Johnson v. McIntosh, 21 U.S. 543 (1823).
[31] Cherokee Nation v. Georgia, 30 U.S. 1 (1831).
[32] Worcester v. Georgia, 31 U.S. 515 (1832).

students: that there are more than five hundred and sixty Indian nations recognized by the United States government and today Indian people, as a whole, remain the financially poorest people in the United States with the lowest life expectancy. One way I like to emphasize that Indian cultures continue to survive, making the United States a multicultural society, is to note that the film Star Wars: a New Hope, a product of Anglo-American culture of worldwide impact and significance, was dubbed into the Navajo language in 2013.

When more non-Indians know the basics of U.S. history and the significant Indian place in that history, more non-Indians will understand how offensive it is to desecrate cultural or sacred sites for profits. When faced with a public outraged at the prospect of economically developing part of the Gettysburg battlefield, the federal government moved to protect it with eminent domain.[33] Today, supposedly educated opinion leaders are unaware of the basics of the foundational principles of the United States, and the general non-Indian population knows little of the multicultural society it lives in. Greater understanding among non-Indians is necessary for the non-Indian populations of the United States to make meaningful decisions regarding how to live together with others in a multicultural society. Despite the best efforts of the non-Indian political leadership, Indians will remain part of their homelands and try and protect places of cultural and religious significance to them. While there are many good suggestions as how to better allocate power to protect Indian cultural and sacred sites, increasing respect for Indian sovereignty and protecting Indian self-determination, including self-determination in cultural and religious matters, will require concerted efforts by non-Indian communities

[33] U.S. v. Gettysburg Electric Rail Co., 160 U.S. 668 (1896).

to educate themselves about their own history and the world their ancestors created. When non-Indians have some basic understanding of reality, then they can begin to act in meaningful ways, with some dignity, to move forward with others and improve their own freedom.

To sum up, the consultation process implemented by the 1978 Indian Religious Freedom Act has proved effective in offering Native Americans some means to educate non-Indians about their cultures and sacred sites and to garner protection of them. As has been show, however, a more innovative and better solution to the problems posed by federal land management of public lands encompassing Indian sacred sites lies in the possibility of formulating a new understanding of Native American sovereignty. This solution would necessarily recognize Indian political authority over sacred sites. Such a change in the fundamental law of the United States undoubtedly presents a mammoth challenge to those wedded to hidebound understandings of United States Constitution provisions concerning the "Indian Tribes" and hundreds of years of judicial interpretation thereof. Even so, the best solution would be to return sufficient public lands to Indian nations to provide Indian peoples with a viable land base to operate as fully sovereign nations, and leave the management of sacred sites up to sovereign Indian governments. Raymond Cross and other legal thinkers agree that Indian people should take the lead in promoting this new compact. Native American development will proceed more quickly when Indian nations have sovereign control over resources to fit development needs to specific local conditions. Equally important, educators can improve the prospects for Native American sovereignty and stewardship of their own sacred sites by conveying

accurate and complete information to non-Indians about the relationships of Indian and non-Indian peoples from “first contact” to the present.

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VITA

Todd Allin Morman was born in North Eastern Ohio to the decendents of European immigrants that moved to the region a century and a half prior. He attended the Hawken college preparatory school where his soccer coach and history teacher, John Tottenham, helped him understand the place of history in understanding the human condition.

As a young adult, Morman studied History, Political Science, and Mathematics at Indiana University and Ohio University. As an adult he took some years off of school to help provide child care to his cousins, the Cromers. During these years he learned some of the dire human rights situation many indigenous peoples around the world face. This would lead him to study Indian law at the University of Montana, where he obtained his law degree.

After five years as a general practice attorney in Ohio, with work in constitutional and criminal law, Morman found himself at a crossroads. While visiting his high school mentor, John Tottenham urged him to return to school to obtain his doctorate in history. These new studies at the University of Missouri combined both legal and historical approaches.

At the University of Missouri, Morman completed both his thesis and dissertation on the history of Indian religious freedom and the challenges of public lands management and engaged in innovative teaching methods where he created simulation games for the classroom. Morman has shared both his work in Indian legal history and simulation games in the classroom with other academics across the world.