KACHINAS ARE SNOWMAKERS: UNITED STATES PUBLIC LAND MANAGEMENT AND THE HOPI QUEST FOR RELIGIOUS FREEDOM, 1962-2008

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by
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The undersigned, appointed by the Dean of the Graduate School, have examined the thesis entitled

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Though many have provided insight and assistance, any errors in judgment, reasoning, or fact, and all conclusions, especially those the reader does not care for, in this study are entirely those of the author.

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Introduction

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 park system in 1907. In the early twentieth century, the U.S. government allowed a ski resort to be built on Nuvatukyaovi. Over a century of uneven progress and struggle, the dominant culture of the United States made great strides in accepting the cultural and religious differences of others. Though it has not always lived up to the pledge, in 1978 the United States went so far as to declare official policy to be to preserve and protect Indian religions. Despite this relative progress, 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. In 2005 the Forest Service decided this could only be accomplished by making artificial snow with reclaimed sewage effluent.

The Hopi, along with 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. The decades-long train of events that gave rise to this outcome, which might well be reversed in future, calls for serious inquiry.

Existing historical 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 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.[1] Yablon's study has shown that despite the lack of legal protections for sites sacred to practitioners of Indian

[1] Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1989).

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.[2]

It is the contention of this study that the ordeal of the Hopi from 1962-2008 with the Snowbowl Resort reveals how a system of law and administrative regulation of public land, theoretically designed to harmonize relations between Native Americans and the needs of public lands management of the United States, was easily subverted by those with no interest in taking into account the differing sensibilities and spiritual concerns of the Native Americans whom their decisions affected. The United States regulatory apparatus for public land use provided what seemed to be an extraordinarily progressive requirement for consultation with Indian governments and religious leaders. While fulfilling the letter of the law, those ultimately responsible for approving the adverse action against Hopi religious interests were able to use the legal framework to deny the reality of their involvement in the decision by claiming they had no choice in the matter. Enforcement of rules and procedures that concentrated on objective standards of land management and objective measures of religious practice among the dominant settler population did not take into account the distinctive spiritual needs of the Hopi. Their religion entailed much more than ritual practices that could be contained in walled places of worship disconnected from the natural terrain in which their religious faith was invested. Rational laws and regulatory processes, including the requirement of

[2] 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.

consultation with the Hopi concerning public land use, thus permitted Forest Service officials who discounted these differing meanings of spirituality the luxury of thinking themselves rational, just, fundamentally decent, and continuing to work with Hopi interests in an area of shared values. By the same token, the Hopi ordeal with the Snowbowl Resort also demonstrates that the actual protections of religious freedom that have existed in the settler community have been found in the choices of some individuals within the government bureaucracy to consider the actual spiritual concerns and needs of Native Americans -- not in the objective requirements of the law.

There are 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[.]"[3]

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

In 1942 the first major work in Federal Indian Law was published. Prior to 1940 most Indian histories focused on the warfare between the settler and indigenous populations, with a focus on the alleged savagery of the indigenous population.[4] The Handbook of Federal Indian Law by Felix Cohen, a Bureau of Indian Affairs attorney, first set out in one collected volume the basics of Federal Indian Law. This served as the basis for the legal concepts of Indian Rights as they have come to be understood in contemporary United States. Fully grounded in the Anglo-American legal traditions, the U.S. Constitution and legal precedent, legal Indian Rights have developed from a distinctly Eurocentric core.[5] Similarly, most historical studies have focused on the Indian policies of the U.S. Federal government, often ignoring the actual impact on the indigenous populations, revealing more about bureaucrats and government officials than indigenous peoples.[6]

The current study is another study of Federal policy, but differs in that it is an examination of the implementation of policy at the local level by Forest Service personnel and the legal resistance to that policy by the Hopi government and Hopi individuals (in cooperation with other Indian nations, individuals, and non-Indian allies). As is more typical of examinations of Federal Indian legal history, the intricacies of the legal complexities surrounding indigenous religious freedom and the management of U.S.

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4 James Riding In, "Scholars and Twentieth-Century Indians: Reassessing the Recent Past," in New Directions in American Indian History, ed. Colin G. Calloway (Norman: University of Oklahoma Press, 1988), 128.

5 Sidney L. Harring, "Indian Law, Sovereignty, and State Law: Native People and the Law," in A Companion to American Indian History, ed. Philip J. Deloria & Neal Salisbury (Malden: Blackwell Publishing, Ltd., 2004), 443.

6 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), 391.

Public lands will be examined in detail. Thus, while this study will examine bureaucrats and policy, it will present an account of the voices of those Hopi who chose to participate in the resistance to the policy implementation through the federal courts of the settler government.

Sharply departing from other studies of American Indian legal history, this study engages in an existentialist-humanist analysis of the decision making processes of the Forest Service administrators and the Ninth Circuit Court of Appeals. Legal analysis is based upon precedent and a systematic narrowing of issues those facts deemed relevant within the legal framework. The proponents of any legal system, and every legal system throughout history has had its proponents, have argued that their particular legal system provided the most proper and just of outcomes. Rarely is this argument made in Indian legal history. There are many detailed examinations of the ideological and structural failings of the Anglo-American legal system with regards to U.S. relations with Indian peoples. While these studies are of the utmost importance, a clear understanding of what exactly has gone on can be lost in the details of the legal arguments. This is where an existentialist-humanist analysis can serve to clear away the clutter and bring the core tragedy of Navajo Nation into focus.

From an existentialist perspective, the primary avenue of judgment of humanity is whether or not there is an error of logic in choice or choice based upon a faulty or dishonest premise.[7] For the existentialist, the human condition is choice. In choosing, the individual is constantly constructing oneself and is responsible for the creation of self.[8]

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[7] Jean-Paul Sartre, "Existentialism is a Humanism," in Existentialism: from Dostoevsky to Sartre, ed. Walter Kaufmann, (New York: Meridian Books, 1956), 307.

[8] Ibid., 292.

Existentialism affirms the dignity of humanity by admitting of the human ability to choose and create, rather than reducing people to machines carrying out actions predetermined by circumstance.[9] The primary fault or falsehood identified by existentialism is the denial of choice and responsibility through self-deception. This false denial of choice and responsibility is a rejection of liberty and avoids the central humanity of the one gripped by self-deception.[10] Many have used the legal system to claim they had no choice. But as shall be shown below, many involved in the choice of permitting the making of artificial snow with reclaimed sewage effluent on the most sacred of places to the Hopi people, for merely the purpose of regularizing the skiing season, had other options within the legal system, yet used the system to claim they had no choice in the matter.

This study is largely about how the individuals within the settler government responsible for making administrative decisions have been capable, both legally and existentially, of taking the most indecent of actions against the Hopi people. But it is also important to be clear as to what this study is not about. This study is not going to examine land claim disputes, and there are a number that are significant to Hopi history. Contemporary legal and humanitarian norms do not legally recognize the acquisition of land by force and coercion. The history of federal title to lands managed by the Forest Service has remained invisible to courts outside of the Indian Claims Commission, and that body only had the power to pay compensation for lands taken unconscionably, not

[9] Sartre, "Existentialism," 302-03.
[10] Ibid., 307.

return land title. The history of how the Forest Service came to acquire the San Francisco Peaks is not examined here.

This study is not a complete examination of the history of the Hopi people, their religion, their culture, or their struggles to keep their religion and culture in the face of adversity. Such a study would require more than one book length examination to provide the topic the detailed study it deserves. The Hopi play a prominent role in this study, but that role was determined somewhat arbitrarily. Four Indian peoples presented extensive testimony at trial as they challenged the decision of the Forest Service through litigation in Navajo Nation v. Forest Service. The Havasupai, Hualapai, Navajo, and Hopi each find the making of artificial snow with reclaimed sewage effluent on the San Francisco Peaks to be deeply offensive and hurtful to practitioners of their traditional religions for very different reasons. The nature of the religious complaints of each of these traditional Indian religions is worthy of examination and explanation. While the complaints of each of the four Indian religions are presented, only the Hopi testimony and historical context is examined in greater detail.

The particulars of the Hopi religious objections to the making of artificial snow with reclaimed sewage effluent are perhaps the most illuminating to examine in a study of Navajo Nation v. Forest Service because of the centrality of the Peaks within Hopi culture and religion and that the Hopi find merely the making of artificial snow, regardless of water source, to be sufficient to completely desecrate Nuvatukyaovi. The Hopi were initially drawn to my attention because of the Hopi request to the Arizona Federal Court for privacy. The Hopi, among the most studied and written of Indian

peoples, have nevertheless cherished and sought their privacy on religious matters. Secrecy and initiation have been key components of their religious practice, and many Hopi do not discuss their religion even with other Hopis. The records of the Arizona Federal Court indicate the Court and the respondents in Navajo Nation largely respected this request for privacy. The Hopi in many respects were the ideal choice for the focus of this examination as the San Francisco Peaks is the most sacred of places to the Hopi and the particulars of their religious beliefs require the purity of the Peaks to be maintained or the Hopi risk the loss of the central method of cultural transmission of the Hopi way of life from one generation to the next. The discussions of Hopi religion here are limited to a cursory examination of the role of religious prophecy in the history of the political struggles between the two main rival Hopi political tendencies for much of the twentieth century and the significance of moisture and the Kachinas, as revealed through the testimony at trial.

In presenting a look at the Hopi testimony from the trial in section IV, the goal is to present several representatives of the Hopi as people trying to explain the nature of the harm and pain expected to be experienced by thousands. Part of the failure of the statutorily required consultation process in this case was the refusal of many Forest Service officials to acknowledge on a human level this real suffering of the Hopis. If more can understand why this adverse action is so particularly hurtful to the Hopi, the hope is that the settler society will take fewer such actions in the future.

Finally, this study is not about litigating the legal controversies of Navajo Nation v. Forest Service yet another time. The litigation that ensued as a consequence of the

Hopi challenge to the decision of the Forest Service to permit the making of artificial snow with reclaimed sewage effluent on their sacred mountain was never about whether or not the Indian plaintiffs suffered any harm by this decision. The Forest Service clearly acknowledged the granting of the permit was an adverse action against Indian religious and cultural interests in the final Environmental Impact Statement of 2005 (had the Forest Service not acknowledged this adverse impact, the consultation process would have clearly been legally deficient). There were several issues contested in the appeals process of Navajo Nation v. Forest Service. The two primary issues were 1) the sufficiency of the examination of the environmental impact regarding the use of reclaimed sewage effluent in snowmaking and 2) whether or not the adverse actions of the Forest Service were indeed a substantial burden on religion, under the meaning of the Religious Freedom Restoration Act. This study in no way examines the environmental claims. These were dismissed by the Ninth Circuit Court of Appeals for technical reasons. The environmental questions have recently resurfaced in a new law suit by environmentalists who were allied with the Indian plaintiffs in Navajo Nation v. Forest Service.[11]

This study takes no definitive position on the legal "correctness" of the final decision of the Ninth Circuit Court of Appeals. While there are rules of construction for determining the meaning of statutory language that is ambiguous, plausible arguments exist for wide ranges of nuance in meaning when a court is attempting to determine what Congress meant in unclear legislation. In the absence of clarifying legislation from Congress, there are no clear and definitive legal answers when trying to determine the

[11] 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).

intent of the legislature. A well written opinion can convey any number of potentially legitimate interpretations. It should be noted, though, that the opinion of the Ninth Circuit Court of Appeals was not a well written opinion. The opinion of the Ninth Circuit, as presented, was filled will poor arguments and logical flaws, but this does not necessarily mean particular interpretation of the Court was "wrong."

The first section of this study is a review of United States Indian policy from about 1830 through 2005. This section combines a discussion of critical institutional developments and relevant key scholarship. Its prime purpose is to identify the broad patterns of government Indian policy that ultimately helped shape the response of the Hopi to the construction and expansion of the Snowbowl Resort beginning in 1962. The bulk of the literature is about the legal and policy structures of the settler government and society.

The second section examines the historical development of United States law and policy on Indian religious freedom from 1978 through 2005. The second half of this section identifies and discusses the key legal history scholarship relevant to those developments. This section provides the necessary institutional and regulatory context for understanding the legal issues involved in the Hopi challenge to the Snowbowl expansion. It presents the scholarly debate over the propriety of the Supreme Court precedents seen by most as so harmful to the religious freedom of Indians. It also identifies the scholarly interpretations of law and policy that this study challenges and augments.

The third section provides a history of the Snowbowl ski resort, federal management of the Peaks, and the actions of the Forest Service that ultimately prompted militant reaction among the Hopi and other tribes. This section examines the particular process by which Forest Ranger Gene Waldrip determined there was a need to stabilize the ski season in consultation with the Arizona Snowbowl Resort Limited Partnership. It explores the diversity of opinion within the Forest Service on the proposed expansion. It also examines carefully the decision-making process that Forest Supervisor Nora Rasure used in coming to her final decision.

The fourth section provides a discussion of the intertwined religious and political sources of Hopi opposition to the Snowbowl expansion. It describes the relevant contours of the Hopi religion, the historic efforts of the settler government to eradicate traditional Hopi culture and religion, and Hopi resistance to such efforts. It also examines the structure of Hopi government, the early twentieth-century politicization of tribal religion, and the rise of the traditionalist movement in the 1940s. The related emergence and development of two major Hopi political factions, despite their often bitter relations, help explain tribal unity in opposition to development of the Snowbowl ski resort on the San Francisco Peaks. The specifics of Hopi history here are necessary to present the complexity of changing Hopi relations to the settler government, the improved policies of the settler community, the struggles of the Hopi and other Indians, the context of the legal battle that ultimately ensued over the development of the Peaks, and the significance of Hopi unity on the subject.

The fifth section examines the forceful Hopi resistance to the making of artificial snow on the Peaks, from first learning of the issue in 2002 through the litigation in Navajo Nation vs. United States Forest Service (2005). It describes how the Hopi worked extensively with other Indian peoples, settler activists, and environmental groups to thwart the defilement of their sacred peaks. The focus of this section is on the religious complaints that the Hopi advanced in Navajo Nation. The purpose here is to present the human dimensions of the harms expected to be brought by the adverse action approved by the Forest Service. This section also examines the testimony of Hopi traditional religious practitioners, including private individuals, government individuals, and the late Emory Sekaquaptewa, founding chief justice of the Hopi Appellate Court and author of the first Hopi-English dictionary. Also examined are the failures and successes of the Indian appellants, which will demonstrate the attempts of some judges to relate to the Hopi as human beings worthy of respect through their interpretation of the law.

Section six includes a discussion of how Navajo Nation and the official decisions regarding the Snowbowl Resort dating back decades presents a prime example of how, despite centuries of uneven progress by the settler population in relating to their Native American neighbors as human beings, a system theoretically designed to insist upon harmonizing human relations could be easily subverted by those with no interest in acting decently. Central to this proposition is a discussion of how law and government policy provided the intellectual means for United States officials to engage in existential self-deception. This deception permitted those officials to think of themselves as rational and just while they supported government action that was potentially devastating to the

religious and spiritual life of Native Americans. Last, this section makes the case that the protections for religious freedom that have existed in the settler community have been found in human decency and the decisions of individuals with authority to treat others well, not in the objective requirements of the law.

I. United States Indian Policy, 1830-1978

To fully understand the context of the decisions of the Forest Service and the Ninth Circuit Court of Appeals, it is necessary to have at least a broad sense of the history of how the settlers of the United States chose to relate to their indigenous neighbors. Millions of people with hundreds of different nations populated the middle portion of North America when European settlers first came to the western hemisphere. Since the earliest days of this contact there were those that argued that the peoples of the western hemisphere belonged to the community of nations and the family of humanity as any other people did. Those Europeans and settlers arguing this position did not carry the day, at least not completely, and the European settlers and their successor governments often did not comport themselves within the standards of the laws of allegedly civilized peoples. Over the centuries the conduct of the Europeans and the settler governments changed with time.

One of these successor settler states, the United States of America, came to dominate the central portion of North America. For a time, a driving cultural attitude of the settler population was that their God willed that the United States rule the continent from Atlantic to Pacific. This belief was so clear to the settler population that they felt it was a Manifest Destiny. In militarily and politically subduing the hundreds of independent nations that once covered the continent, the U.S. government implemented various policies over the centuries.

The Hopi nation first encountered the Europeans in the sixteenth century, long before there was a United States with any Indian policies. For a time the European nation

of Spain attempted to exert authority over the Hopi people, but working together with their neighbors, the Hopi were able for a time to expel the aliens that sought to compel them to give up their way of life. During this time when the Hopi were relatively free of European contact, the international political context changed around the Hopi.

In the seventeenth and eighteenth centuries, the European powers entered into numerous treaties and alliances with Indian nations along the eastern seaboard of North America. In the late eighteenth century American colonies seceded from the British Empire and formed the United States of America. This successor settler government continued what is now recognized as the international law phase of Indian relations into the 1830s. At this time the United States was limited to the eastern seaboard and had not yet laid claim the lands of the Hopi and their neighbors. Under European and settler notions, the Hopi and their neighbors were under the jurisdiction of the territorial claims of the Spanish and later Mexican governments, before the United States acquired these claims by conquest.

The History of American Indians is generally broken into six broad periods directly linked to the changing policies regarding the legal status of the indigenous populations of North America and how the various settler entities related to this population. The current United States government and its predecessor settler 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.[12]

The major eras of policy and history of American Indians are (1) the international relations phase; (2) dependent domestic 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.

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 settlers. Beginning in the seventeenth century, the various settler and European governments entered into trade treaties as well 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 continued this European practice of treaty making and military alliances with Indian nations and continued this practice through the young nation's formative years. The foreign relations or international law era is considered to last until 1830.[13] The later part of this period is marked by expansion by war on the part of the U.S. government,

[12] Deloria, "Historiography," 6.
[13] Fixico, "Federal and State Policies," 380.

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).[14]

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 and the Cherokee Nation brought 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 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 "dependent domestic nation" thus denying the Court jurisdiction as the action was not between a foreign nation and a state.

[14] Fixico, "Federal and State Policies," 381.

Chief Justice Marshall, while denying Indian Nations status as foreign nations, established the unenforced right under U.S. law of Indian Nations to occupy, as dependent domestic 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."[15] 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 sovereignty and land rights.[16] 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 dependent domestic nations with merely the right to occupy their lands (while

[15] Fixico, "Federal and State Policies," 381-82.
[16] Jill Norgren, "The Cherokee Nation Cases of the 1830s," Journal of Supreme Court History, (1994): 81.

ultimate title rested with the Federal government) and he failed in protecting Indian sovereignty and land tenure.

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.[17] 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.[18]

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 U.S. administrative law began with the 1887 Interstate Commerce Commission, Davis 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

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[17] 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.

[18] Ibid., 449-450.

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.[19]

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.[20] 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.[21]

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.[22] 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 Lands.[23] This work examines in detail the case of Johnson v. McIntosh. Robertson

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19 Ethan David, "An Administrative Trail of Tears," The American Journal of Legal History, Vol. 50, Issue I (2008): 49-50.

20 Ibid., 74-5.

21 Ibid., 99-100.

22 Stuart Banner, How the Indians Lost Their Land: Law and Power on the Frontier, (Cambridge: Belknap Press of Harvard University, 2005).

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

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.

The era of dependent domestic nations involved a long period of transition and for the initial decades of this period the Indians of the southwest, including the Hopi, were not even under claim of United States jurisdiction. The treaty making process remained in place until 1871.[24] 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 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.[25] Initially intended by many of the settler population as places for the indigenous populations 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 settler population.[26] 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

[24] John H. Vinzant, The Supreme Court's Role in American Indian Policy, (El Paso: LFB Scholarly Publishing LLC, 2009), p. 50.
[25] Fixico, "Federal and State Policies," 383.
[26] Vinzant, The Supreme Court's Role, 48-9.

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.[27]

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 settler 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 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).[28]

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

[27] Fixico, "Federal and State Policies," 382-83.
[28] Ibid., 383-84.

acres of land and expected to become a farmer.[29] 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.[30] 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.[31] 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 settler, grew to these repressive policies. 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 settler population.[32]

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

[29] Fixico, "Federal and State Policies," 384.
[30] Vinzant, The Supreme Court's Role, 53.
[31] Fixico, "Federal and State Policies," 385.
[32] Ibid.

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.[33] 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.[34]

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 Tribal 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.[35] While many indigenous groups who were on the brink of cultural extinction were able to restructure and revive under IRA governments, other indigenous peoples, such as the Hopi, found the IRA government to be in direct competition with their traditional forms of governance, and adoption of IRA

[33] Riding In, "Scholars and Twentieth-Century Indians," 133.
[34] Ibid., 134.
[35] Fixico, "Federal and State Policies," 385.

governments caused new political divisions within Indian societies. As shall be examined below with the Hopi, some of these divisions and controversies last to this day.

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 Deal (1981).[36] 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.[37] 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.[38]

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

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[36] Fixico, "Federal and State Policies," 386.

[37] George S. Grossman, "Indians and the Law," New Directions in American Indian History, in New Directions in American Indian History, ed. Colin G. Calloway (Norman: University of Oklahoma Press, 1988), 110.

[38] James Riding In, "Scholars and Twentieth-Century Indians," 125.

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 but a decade and was not concluded until the late 1970s. A 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.[39]

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

[39] Fixico, "Federal and State Policies," 386-87.

Experience in America (2002).[40] An account of termination and indigenous resistance is to be found in Menominee Drums: Tribal Termination and Restoration: 1954-1974 (1982) by Nicholas Peroff.[41] Donald Fixico has provided another useful overview of termination with Termination and Relocation: Federal Indian Policy 1945-1960 (1986).[42]

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.[43] 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. In 1968 the American Indian Movement was founded. In 1969 the AIM seized Alcatraz Island justifying their actions on treaty provisions that stated unused Federal installations were to be returned to local Indians. In 1972 AIM participated in the larger cross country march known as the Trail of Broken Treaties. This event ended with an unplanned occupation of the Bureau of Indian Affairs head quarters 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

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40 Fixico, "Federal and State Policies," 386-87.
41 Ibid., 388.
42 William T. Hagan, "The New Indian History," in Rethinking American Indian History, ed. Donald L. Fixico, (Albuquerque: University of New Mexico Press, 1997), 37.
43 Ibid., 30.

Wounded Knee in what has come to be known as Second Wounded Knee.[44] 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.[45] Dee Brown provided another treatment sympathetic to Indian positions with Bury My Heart at Wounded Knee (1971).[46]

The Hopi were not without allies, dissidents in the settler community, that did not support the policies of their government, and after many decades of struggle, settler society changed in many ways. In the early 1970s, the President of the settler government admitted, "The American Indians have been oppressed and brutalized, deprived of their ancestral lands, and denied the opportunity to control their own destiny."[47] 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.

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44 Fixico, "Federal and State Policies," 388.
45 Ibid.
46 Ibid.
47 Paul Vandevelder, "What do We Owe the Indians?" American History, Vol. 44 Issue 2 (June 2009): 36.

Among the less deadly actions of his administration, President Nixon renounced termination and ushered in what is known amongst scholars as the era of renewed Indian sovereignty. The Nixon administration 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.[48]

The US Congress passed the Indian Child Welfare Act in 1978 in part to address the widespread abuses by settler children services agencies taking Indian children and placing them in non-Indian homes, for both foster care and adoption.[49] that same year saw the United States Congress pass the American Indian Religious Freedom Act. This law changed the official stated policy of the settler government to one of preserving and protecting the religions of the indigenous peoples of the land it now occupied.

The various eras of changing U.S. Indian policy put into place many of the pieces that led to the conflict over the expansion of the ski resort on the San Francisco Peaks and shaped the forms the Hopi legal resistance to the proposed desecration of that sacred place took. While not observed in practice, the polices of John Marshall established in the Cherokee cases set out a basis for recognition within the U.S. legal system of the

[48] Fixico, "Federal and State Policies," 389.
[49] Ibid.

rights of Indian peoples to occupy lands and exert political sovereignty. The expansionist aggression of the U.S. government reduced Indian land holdings during the dependent domestic nation and allotment phases placed the San Francisco Peaks within the national park system. Also during this later phase the Hopi made their first foray into working with members of the settler population to resist religious repression.

As the policies of the US government continued to shift, additional pieces of the later struggles for the integrity of the Peaks fell into place. The IRA put into place a Hopi government whose legitimacy has been constantly challenged by many Hopi people, but nonetheless served as one of the lead plaintiffs in the legal action designed to prevent the expansion of the Snowbowl facility. At first resisting the IRA government and termination, the Traditionalist movement participated in a Hopi religious revival and pressed for the full recognition of Hopi sovereignty. These efforts, in conjunction with efforts throughout the U.S., brought about another shift in U.S. policy and government to government relations mandated changes in Forest Service administration that required consultation with Indian governmental and traditional cultural representatives. This process, as modified by later legislation and narrowed in some respects by judicial interpretation, served as the initial legally recognized avenue for Hopi opposition to the proposed desecration of their most sacred of places. These judicial and legislative developments of the late twentieth century will be examined in detail in the following section.

II. Indian Religious Freedom 1978-2005: Policy and Scholarship

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 in these areas. 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.[50] 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 0f 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 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 presented 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

[50] Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1989), Employment Division v. Smith, 494 U.S. 872 (1990).

American Indian Religious Freedom."[51] 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 argued 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.[52] Marcia Yablon argued 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.[53] Each of these perspectives will be examined in more detail below.

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 settler scientists treating ancient Indian grave sites as places where human remains could be dug up and used as specimens for their experiments.[54] NAGPRA, along with the American Indian Religious Freedom Act, was another law passed by Congress requiring

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[51] David Wilkins, "Who's in Charge of U.S. Indian Policy? Congress and the Supreme Court at Loggerheads Over American Indian Religious Freedom," Wa Sa Review, Vol. 8, No. 1 (Spring 1992): 40-60.

[52] 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): 773-852.

[53] Yablon, "Property Rights," 1623-62.

[54] Fixico, "Federal and State Policies," 391.

administrative consultation when Indian religious and cultural concerns were implicated in administrative actions.

Policy Patterns

Legal questions regarding American Indian religious beliefs, practices, and cultural rights often involve a complex interaction between administrative law, Constitutional law, and Congressional statutes. Many sites of religious and cultural significance to Native Americans are located on land operated by the Forest Service, a division of the executive branch. 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 park system. As the executive branch of the federal government acts that impacted the religious concerns of American Indians, deeper First Amendment and religious freedom concerns became implicated with the new statutory requirements for consultation and what was for a short time the open question of the extent of the protections offered by the American Indian Religious Freedom Act.

In the last decades of the twentieth century, the general trend has been for the legislative and executive branches of the US Federal government, in the face of growing Indian protest, to end the more overtly destructive Indian policies and more and more support 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.[55] As shall be shown below, the U.S. Supreme Court has recently refused to recognize any Constitutionally protected religious freedom rights of Native Americans when those rights might interfere with how the U.S. Forest Service manages U.S. public lands.

The U.S. Forest Service has been and continues to be an administrative agency within the executive branch of federal government. 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 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.

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

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

aside.[56] 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, either statutory or Constitutional, would be a claim that the decision was not in accordance with the law. When the first skiing facilities were put into place on the San Francisco Peaks, the official policy of the U.S. Government was to suppress the practice of indigenous religion with criminal penalties.[57] This policy changed, and Congress passed the American Indian Religious Freedom Act in 1978.[58] 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.[59]

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,

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[56] 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.

[57] Brian Edward Brown, Religion, Law, and the Land: Native Americans and the Judicial Interpretations of Sacred Lands, (Westport Connecticut: Greenwood Press, 1999), 66.

[58] Ibid., 67.

[59] Ibid., 73-4.

and refrain from prohibiting possession and use of religious objects or the performance of religious ceremonies.[60] The Hopi and Navajo brought the first challenge to a Forest Service decision on religious freedom 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, found these consultation requirements had been met, and that no burden was placed on the religious freedom of the Indian plaintiffs.[61]

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.[62] Subsequent litigation has plainly established that the AIRFA provides merely a procedural requirement for consultation.[63] The courts ruled that the AIRFA did not provide a basis for review of the decisions of administrative agencies, even if those decisions could 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.[64]

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

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60 Brown, Religion, Law, 73-4.
61 Ibid., 87.
62 Deloria, For This Land, 223.
63 Brown, Religion, Law, 73, 136.
64 Ibid., 172.

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 Tribes.[65] The Forest Service approved a plan to expand two roads through the most sacred of these areas, dividing sacred sites viewed as indivisible by Indian religious practitioners.[66] 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.[67]

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."[68] 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.[69] 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'

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65 Brown, Religion, Law, 119, 123-4.
66 Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1989), referenced in Brown, Religion, Law, 124.
67 Brown, Religion, Law, 150.
68 Lyng, 485 U.S. at 451 quoted in Brown, Religion, Law, 150.
69 Brown, Religion, Law, 151.

> ability to practice religion," the Constitution simply does not provide a principle that could justify upholding respondents' legal claims.[70]

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.[71]

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 claims 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

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[70] Lyng, 485 U.S. at 451-52 quoted in Brown, Religion, Law, 160.
[71] Lyng, 486 U.S. at 476-77 quoted in Brown, Religion, Law, 164.

indigenous religion and the Court encouraged accommodation that would minimize the disruptions that concerned Indian peoples.[72] 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.[73]

In Employment Division v. Smith (1990), the United States Supreme Court explicitly abandoned its long held standards regarding the free exercise of religion.[74] 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.[75]

In his opinion, Justice Scalia noted, by making reference to the Lyng case, that the Supreme Court had previously 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.[76] Justice O'Connor, author of the Lyng decision, agreed with

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[72] Lyng, 485 U.S. at 453, 454 quoted in Yablon, "Property Rights," 1630.
[73] Wilkins, "Who's in Charge," 58.
[74] 494 U.S. 872 (1990).
[75] Wilkins, "Who's in Charge," 57.
[76] 494 U.S. 883.

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.[77] Justice O'Connor was quite disturbed that the majority endorsed an opinion that had as an unavoidable consequence the disfavoring of minority religions.[78] 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."[79]

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." [80]

The reaction to Justice Scalia's opinion, which offended many beyond those who traditionally supported Native American 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 Native

[77] 494 U.S. 894-95.
[78] 494 U.S. 902.
[79] 494 U.S. 890.
[80] 494 U.S. 908-09.

Americans. 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.[81] For its part, the State of Oregon moved to settle the case with the members of the Native American Church and altered its laws to accommodate the religious use of peyote.[82]

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.[83] Politicians acted quickly to introduce a bill into Congress to reverse Scalia's decision.[84] Though the bill was held up for a couple of years, by 1993, the Religious Freedom Restoration Act had broad support. Supporters of the law included the American Jewish Congress, the Mormon Church, the Southern Baptist Convention, the National Council of Churches, the

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81 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.

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

83 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.

84 Hentoff, "Is Religious Freedom a Luxury?" The Washington Post, September 15, 1990, p.A23.

National Conferences of Catholic Bishops, People for the American Way, the Traditional Values Coalition, and the American Civil Liberties Union.[85]

The Congress of the United States passed the Religious Freedom Restoration Act of 1993 in direct response to the Smith case.[86] 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 have 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.[87]

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.[88] Some commentators have argued that Lyng did not properly apply the substantial burden on religion test as applied in these

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85 Hentoff, "Is Religious Freedom a Luxury?" The Washington Post, September 15, 1990, p.A23., Peter Steinfels, "Clinton Signs Boost for Religious Freedom; Liberals, Conservatives Back New Law," The Houston Chronicle, November 17, 1993, p. A6.

86 42 U.S.C. § 2000bb.

87 Dussias, "Ghost Dance," 844-845.

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

precedents, as Justice Scalia claimed in Smith.[89] 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.[90] 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 Native American religion, short of coercing a party to act contrary to one's religious beliefs, was a legally proper act under the laws and Constitution of the United States.[91] The Ninth Circuit opinion in Navajo Nation v. Forest Service will be examined in detail below.

Scholarship

Vine Deloria, Jr. has not been optimistic about the U.S. Supreme Court's general trend regarding the broad range of Indian issues. Deloria has stated, "The Supreme Court is decidedly anti-Indian. That much is clear."[92] Placing the Smith decision 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

89 Wilkins, "Who's in Charge," 57-8, Brown, Religion, Law, 151.
90 Navajo Nation, 535 F.3d 1085-87.
91 Ibid., 1085.
92 Vine Deloria, Jr., For This Land: Writings on Religion in America, (New York: Routlidge, 1999), p. 218.

> discarded and laws and ordinances are allowed primacy over religious obligations.[93]

Deloria contended the Smith and Lyng decisions as part of a greater secularization of the United States, including the secularization of mainstream Christian religions. While Deloria's analysis of the deeper spiritual problem of the dominant settler population are outside the scope of this work, he 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."[94]

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, to an assault on the idea of religious freedom. Much like much of the general population, 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

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[93] Deloria, For This Land, 228.
[94] Ibid., 268.

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.[95]

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 settler 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.[96]

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 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.[97]

Professor of Law Allison M. Dussias identified three main difficulties Indian religious freedom cases face. First the courts regularly were unable to recognize religious

[95] Wilkins, "Who's in Charge," 56.
[96] Ibid., 56-7.
[97] Ibid., 58.

claims as such and re-categorized them as cultural concerns.[98] Second, courts have often been reluctant to recognize Indian beliefs as being religious in character, largely because of the significant structural differences between Native American religions and settler religions.[99] 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 Native Americans.[100]

Legal scholar Marcia 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.[101] 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 standard would be difficult and further stated that continual judicial or legislative acts would be too cumbersome to work practically.[102] 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.[103] She noted that the courts have repeatedly enforced the required consultation process with Indian groups over culturally and religiously

98 Dussias, "Ghost Dance," 806-07.
99 Ibid., 810-15.
100 Ibid., 850-51.
101 Yablon, "Property Rights," 1658-59.
102 Ibid., 1636, 1658-59.
103 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.

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.[104] Yablon argued that if the administrative process failed to protect religious sites, Congressional protection could be sought.[105]

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 wester 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 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.[106]

Regardless of the deeper motivations, as the settler population has become more civilized and its representatives in the executive and legislative branches have become

[104] Yablon, "Property Rights," 1642-43.
[105] Ibid., 1661.
[106] Ibid., 1633-34.

more receptive to the ideas of respecting indigenous sovereignty, cultures, and religions, the most aristocratic branch of the settler 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 settler 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 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. In the wake of the Lyng case 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.[107] 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 the Forest Service and other agencies to be in compliance with the federal government's

[107] Yablon, "Property Rights," 1646.

special trust responsibility to American Indians and furthering the policy goals of the American Indian Religious Freedom Act.[108] 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.[109]

The Lyng and Smith cases have show that the United States Supreme Court did not feel such respect for indigenous religion was in any way protected by the Constitution. Yablon has argued that Lyng provided a practical method for mediating conflicts between maintaining Indian holy sites and management of federal lands. While Yablon was optimistic, she recognized that the lack of recognized Constitutional protections for Indian sacred sites could lead to significant failures. Her primary example of such a situation was the first major expansion of the Snowbowl Resort in the 1980s. What follows is an examination of how the Forest Service can observe all of the legal requirements for consultation with interested Indian cultural and governmental representatives, yet again fail to respect the beliefs and feelings of indigenous religious practitioners in the policy it approved.

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[108] Yablon, "Property Rights," 1648-49.
[109] Ibid., 1657-58.

III. The Arizona Snowbowl Resort and its Expansion, 1962-2005

The United States government placed the San Francisco Peaks within its national park system in 1907 and in the 1930s the initially slow growth of permanent facilities for skiers began. Their religions 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.[110] 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.[111] 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.[112] The executive branch of the U.S.

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[110] 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.

[111] 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.

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

government designated the Peaks as the San Francisco Mountain Forest Reserve and in 1907 the reserve was incorporated into the Coconino National Forest.[113]

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.[114] 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.[115]

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.[116] 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.[117]

In April of 1977 the Forest Service granted a permit to run the Snowbowl facility to Northland Recreation Company. In July of that year NRC 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

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113 Brown, Religion, Law, 66.
114 Brown, Religion, Law, 62-3, Wilson v. Block, 708 F.2d 735 (D.C. 1983), 738.
115 Brown, Religion, Law, 66.
116 Ibid., 63.
117 Ibid., 66.

to clear 770 acres on the San Francisco Peaks for skiing, less of an area for skiing than NRC had initially requested.[118]

Practitioners of the 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.[119] 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.[120] 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.[121] 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.[122]

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[118] Wilson, 708 F.3d 738-39.
[119] Brown, Religion, Law. 63.
[120] Richard O. Clemmer, Roads in the Sky, the Hopi Indians in a Century of Change, (Boulder: Westview Press, 1995), 195.
[121] Brown, Religion, Law, 67.
[122] 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.

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.[123] 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.[124] 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.[125] 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 restrict Indian access to a place, Indian religious practices were not burdened in a way protected by the AIRFA.[126] The expansion went forward, though NRC did not expand to the full seven hundred and seventy seven acres approved in the proposal.[127]

The Arizona Snowbowl Resort Limited Partnership purchased the Snowbowl facility in 1992 for four million dollars.[128] 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-

123 Brown, Religion, Law, 67.
124 Ibid., 64.
125 Ibid., 87-88.
126 Wilson, 708 F.2d 735, 747.
127 Tr. 1024.
128 Navajo Nation v. United States Forest Service, 479 F.3d 1024 (9th Cir. 2007), 1030.

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.[129]

In the course of its operation, Forest Service personnel were in daily contact with representatives of the Snowbowl facility.[130] 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.[131] Waldrip entered the ongoing discussions regarding what could be done to improve the carrying capacity of the resort when he became District Ranger.[132]

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.[133] The infrastructure was twenty years old and had not kept up with the increase in demand for the use of the facility.[134] Members of his immediate family had been involved in skiing accidents at the facility, including his wife.[135] 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.[136]

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

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[129] Navajo Nation, 479 F.3d 1030.
[130] Tr. 1698.
[131] Tr. 1022.
[132] Tr. 1024.
[133] Tr. 1024.
[134] Tr. 1041.
[135] Tr. 1126-27.
[136] Tr. 1056-57.

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.[137]

Snowbowl publicly claimed that warmer weather and shorter skiing seasons would require the closing of the facility as financially unviable without snowmaking.[138] 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.[139] Class A+ water was the highest rated purity for treated sewage effluent, consisting of waste discharged by households, businesses, and hospitals.[140] 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

[137] Tr. 1024-45.
[138] Benally, Snowbowl, 32:00.
[139] 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.
[140] Navajo Nation 535 F.3d 1082.

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.[141] The initial proposal included the building of night lighting on the Peaks.[142] As part of the negotiations for formulating the expansion ASR agreed to have a snowplay area as a quid pro quo for the Forest Service support for artificial snowmaking.[143]

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 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.[144] 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.[145] 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.[146]

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[141] 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.
[142] Tr. 1043.
[143] Navajo Nation, 479 F.3d 1045.
[144] Tr. 1070, 1701.
[145] Tr. 1041-42.
[146] Tr. 1171.

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.[147] Waldrip was also aware that the National Historic Preservation Act, NAGPRA, and other statutes and regulations required this consultation.[148] 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.[149]

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.[150] Waldrip admitted to first learning of the importance of the Peaks and the Kachinas to the Hopi in 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.[151]

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

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147 Tr. 1092.
148 Tr. 1023.
149 Tr. 1042-43.
150 Tr. 1051.
151 Tr. 1108-09.

> 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.[152]

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.[153]

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.[154]

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

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[152] 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.
[153] Ibid.
[154] Tr. 1172.

Forest Service may take adverse actions, so long as the proper consultation process had been followed.[155] 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 Resort. Provencio was the lead person in the Forest Service regarding matters of Tribal consultation.[156]

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.[157] 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.[158] In her personal life Provencio had visited Hopi land and viewed Kachina dances.[159]

In her position as Zone Archaeologist, Provencio edited a memorandum of understanding that formed a formal agreement between the Forest Service and the Hopi

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[155] Benally, Snowbowl, 44:50.
[156] Tr. 1181-82.
[157] Tr. 1183.
[158] Tr. 1183, 1190.
[159] Tr. 1185.

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.[160] Provencio served as the lead editor on the cultural section of the EIS for the proposed expansion for the Snowbowl resort.[161]

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 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.[162] 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.[163] Provencio personally met with the Hopi people and government officials at public meetings in Hopi land once a month, during the consultation process.[164]

Provencio anticipated Indian opposition to the project.[165] This anticipation was based upon her personal prior knowledge of the proposal's impact on Indian cultural

[160] Tr. 1188-1189.
[161] Tr. 1191.
[162] Tr. 1192.
[163] Tr. 1194.
[164] Tr. 1196.
[165] Tr. 1269.

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.[166] 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.[167] Throughout the consultation process Provencio found virtual unanimous Indian opposition to the Snowbowl facility.[168]

In May of 2003 Nora Rasure became the Supervisor for the Coconino National Forest.[169] 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.[170] 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.[171] 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

[166] Tr. 1199.
[167] Tr. 1237.
[168] Tr. 1268.
[169] Tr. 1641.
[170] Tr. 1136.
[171] Tr. 1636-40.

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.[172]

After the initial consultation process, the Forest Service released the draft environmental impact statement in February of 2004, making it available for public comment.[173] The consultation process and other public meetings had brought a few alterations to the proposals of the Forest Service. The DEIS included three alternative 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 snowplay 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

[172] Tr. 1164.
[173] Tr. 1198.

Waldrip to support dropping the night lighting from the project.[174] 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.[175]

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 snowplay area, but was otherwise identical to proposal two, the Forest Service preferred alternative.[176] The snowmaking and snowplay were removed as a group because the snowplay area would only be supported by Arizona Snowbowl Resort if they received the approval of snowmaking in return.[177]

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.[178] Interdisciplinary team leader Heather Provencio expected Indian comments to be in opposition to the proposed preferred alternative.[179] Provencio met with most of those involved in the ongoing comment and consultation process, including with the Hopi Cultural Preservation Officer.

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174 Tr. 1240.
175 Tr. 1044-45.
176 Tr. 1239.
177 Navajo Nation, 479 F.3d 1024, 1045.
178 Tr. 1664.
179 Tr. 1264.
180 Tr. 1242.

She also met with the Hopi Cultural Advisory Team.[181] 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.[182] Preston later filed suit to stop the expansion and testified extensively at the trial.

Throughout Provencio found Indian concerns to be consistent.[183] She found the comments on the DEIS to be consistent with what she knew to be Indian opposition to the project.[184] Before the consultation process began, Provencio was well aware that the central importance of the Peaks to the Hopi and Navajo was well documented.[185] 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.[186]

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.[187] Many tribal members supported no action.[188]

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[181] Tr. 1194.
[182] Tr. 1243.
[183] Tr. 1250.
[184] Tr. 1272.
[185] Tr. 1279.
[186] Tr. 1273.
[187] Tr. 1250.
[188] Tr. 1273.

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.[189] Provencio's experience in the consultation process was that many tribal members supported absolutely no action, option one of the DEIS.[190]

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 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.[191] 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 snowplay.[192] 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.[193]

Though Provencio felt as if Rasure had really listened to her and she felt valued as an employee and for her perspective,[194] she was ultimately disappointed by the final decision.[195] When Provencio saw the final record of decision, as approved by Rasure, she

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189 Tr. 1268.
190 Tr. 1273.
191 Tr. 1232.
192 Tr. 1233-34.
193 Tr. 1248-49.
194 Tr. 1233.
195 Tr. 1281-2.

was "concerned" and "disappointed" that the various Indian concerns had not been "adequately addressed."[196] 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 concerns of tribal members] were considered. I think the Record of Decision shows that, that those concerns were considered."[197]

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.[198] 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.[199]

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,[200] Rasure felt she gained a sense of how others viewed the Peaks from her experience with the consultation process.[201] As part of the consultation process, Rasure felt the Hopi

[196] Tr. 1281.
[197] Tr. 1283.
[198] Tr. 1672.
[199] Tr. 1664.
[200] Tr. 1199.
[201] Tr. 1670.

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.[202]

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 stated she made her ultimate decision with great difficulty.[203] 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.[204] 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.[205]

> 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.[206]

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.[207]

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202 Tr. 1669.
203 Tr. 1673.
204 Tr. 1715.
205 Tr. 1684.
206 Tr. 1683-84.
207 Tr. 1674-75.

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.[208]
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> * * *
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> 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.[209]

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.[210] 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.[211]

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.[212] 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

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[208] United States Forest Service, Arizona Snowbowl Facilities Improvements Final Environmental Impact Statement Record of Decision and Forest Plan Amendment #21, (February 2005), 4.
[209] Ibid., 5.
[210] Tr. 1675.
[211] Tr. 1676.
[212] Tr. 1722.

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.[213]

> 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.[214]

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

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[213] Tr. 1679-80.
[214] Tr. 1678-79.

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.[215]

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.

[215] U.S. Forest Service, Record of Decision, 26.

Nora Rasure signed the Record of Decision, Final Environmental Impact Statement, and amended Forest Plan on February 18, 2005.[216]

[216] Tr. 1146.

IV. Religious and Political Sources of Hopi Opposition to the Snowbowl Expansion

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."[217] 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 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

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

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.[218] 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.[219] Without a written language to create definitive sacred texts, traditional Hopi religion and prophecies were transmitted 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.[220]

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.[221] The Hopi term for sacred, "utihi'i"

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[218] James, Pages, xiii
[219] Tr. 427, 531.
[220] James, Pages, xiii.
[221] 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.

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.[222] 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.[223] Some Hopi have expressed the desire to prevent all publications on Hopi culture, even those based on secondary sources.[224]

Prophecy has been a central part of Hopi religion and interpretation of the various prophecies are linked to the clan structure.[225] Generally the Hopi view Maasaw (the central Hopi god), ancestors, or an elder uncle all as legitimate sources of prophecy.[226] One central prophecy that has been the source of much differentiation and disagreement 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.[227] 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

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222 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.

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

224 Geertz, "Contemporary Problems," 409.

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

226 Geertz, Invention of Prophecy, 52.

227 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.

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.[228] 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.[229]

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:

1. The San Francisco Peaks are of central significance to the Hopi religion. The Hopi name for the San Francisco Peaks is Nuvatukyaovi.[230] 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.[231] Hopi children are introduced to the Kachinas at their naming ceremony.[232] All Hopi are expected to visit the Peaks sometime in their life and the Hopi go to the Peaks when they die.[233]

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

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228 Geertz, Invention of Prophecy, 73.
229 Ibid., 46-7, 75-6.
230 Tr. 423.
231 Tr. 427, 531.
232 Tr. 439.
233 Tr. 439.

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.[234] 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.[235] 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.[236] During their visits, the Kachinas give gifts to the children.[237] 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 on natural rainfall for growing corn, which is also of cultural significance to the Hopi.[238] The Kachinas take the prayers of the Hopi for water back to the Peaks after visiting with the Hopi.[239] The Kachinas deliver "good moisture" from the Peaks for farming.[240] Some view the Kachinas themselves as the rain and the clouds.[241]

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

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234 Tr. 441.
235 Tr. 430-33.
236 Tr. 442-44.
237 Tr. 575.
238 Tr. 447.
239 Tr. 444-45.
240 Tr. 448.
241 Tr. 585.

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."[242] Water is central to the Hopi way of life.[243] To the Hopi water was life, and the Kachinas brought this life from the Peaks.[244]

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.[245]

Efforts by the Settler Government to Eradicate Traditional Hopi Culture and Religion

As the settler 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 settler declared Hopi lands.[246]

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[242] Tr. 129.
[243] Tr. 595.
[244] Tr. 586.
[245] Tr. 564.
[246] Clemmer, Roads in the Sky, 88.

In 1890 Hopi land was surveyed for the purposes of allotment.[247] Hopi land was held collectively by clan at the time.[248] All Hopi village leaders opposed allotment.[249] 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 arid Hopi lands was that a flexibility in planting was necessary beyond which individual allotments were capable of meeting.[250]

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.[251] 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.[252] 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

[247] Clemmer, Roads in the Sky, 91.
[248] Clemmer, "Strike My Head," 56.
[249] Clemmer, Roads in the Sky, 91.
[250] Ibid.
[251] James, Pages, 185.
[252] Clemmer, Roads in the Sky, 108.

to bolster the decontextualized propaganda collected by the agents, actively prevented outsiders from accessing any but his supporters within Hopi lands.[253] 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.[254]

Resistance to Settler Efforts to Eliminate the Hopi Way

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.[255] 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.[256] 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.[257] 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.[258]

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253 Geertz, Invention of Prophecy, 133.
254 Clemmer, Roads in the Sky, 132.
255 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.
256 Ibid., 162-3.
257 Scott Rushforth and Steadman Upham, A Hopi Social History, (Austin: University of Texas Press, 1992), p.16.
258 Dockstader, The Kachina, 172.

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.[259] 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 schooling.[260] 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.[261]

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.[262] 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,[263] 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.[264]

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

[259] Clemmer, Roads in the Sky, 108-9.
[260] Ibid., 109.
[261] Geertz, Invention of Prophecy, 128.
[262] Clemmer, Roads in the Sky, 109.
[263] Clemmer, "Strike my Head," 54.
[264] Geertz, Invention of Prophecy, 128-9.

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.[265]

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, worked to publicize the extent of BIA repression and the deliberate misrepresentations of Hopi culture to the outside world.[266] The Indian Welfare League, a nongovernmental organization based in the settler community, took up the Hopi cause in the 1920s.[267] This marked the first major use of outsiders as allies by Hopis to protect indigenous cultural practices and their religious freedom.[268] 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.[269] By 1927 the Navajo presence had come to surround the entire Hopi reservation.[270]

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

[265] Geertz, Invention of Prophecy, 128-30.
[266] James, Pages, 189.
[267] Geertz, Invention of Prophecy, 133.
[268] Clemmer, Roads in the Sky, 132.
[269] James, Pages, 190-91.
[270] Geertz, Invention of Prophecy, 133.

based upon the Hopi clan structure.[271] 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.[272]

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.[273]

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.[274] 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. [275]

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

[271] James, Pages, 203.
[272] Justin B. Richland, "The State of Hopi Exception: When Inheritance is What You Have," Law and Literature, Vol.20 No.2, (2008): 266.
[273] Ibid., 267.
[274] Geertz, Invention of Prophecy, 134.
[275] Clemmer, Roads in the Sky, 151-2.

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 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.[276]

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."[277] 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.[278] Hopi sovereignty was

[276] Clemmer, Roads in the Sky, 152.
[277] Ibid., 151-52.
[278] Richland, "Hopi Exception," 268.

practically nonexistent in Lafarge's constitution as every Tribal Council resolution required the approval of the Indian Agent Superintendent from the U.S. government.[279]

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 percent participation rate based upon what are now highly disputed population statistics.[280] Hopi tradition was to abstain from that which they viewed as illegitimate and most Hopi abstained from the vote for ratification.[281] 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."[282] 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.[283]

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.[284] Further tensions developed as members of the general population began to criticize Kikmongwi for stepping outside their

[279] Clemmer, Roads in the Sky, 151.
[280] Ibid., 154-5.
[281] James, Pages, 204.
[282] Ibid., 205.
[283] Clemmer, Roads in the Sky, 160.
[284] Ibid., 161.

traditional roles and interfering in secular affairs. Entire villages boycotted participation in the IRA constitution in the name of Hopi tradition.[285]

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 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.[286]

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.[287]

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

[285] Clemmer, Roads in the Sky, 164.
[286] Geertz, Invention of Prophecy, 134.
[287] Ibid., 137.

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 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.[288]

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.[289]

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.

[288] Geertz, Invention of Prophecy, 141-42.
[289] Clemmer, Roads in the Sky, 186.

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. [290]

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 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.[291]

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.[292]

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[290] Clemmer, "Strike My Head," 62.
[291] Clemmer, Roads in the Sky, 190.
[292] Ibid..

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 approve mineral leases on Hopi land.[293] Not surprisingly, the Hopi Tribal Council's legitimacy was still contested by many Hopi in 1951.[294]

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.[295] 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. [296]

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.[297] Similarly, there is a strong Hopi tradition of not

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[293] Richard O. Clemmer, "The Hopi Traditionalist Movement," American Indian Culture and Research Journal, vol.18:3 (1994): 144.
[294] James, Pages, 205.
[295] Ibid.
[296] Clemmer, "The Hopi Traditionalist," 145.
[297] Clemmer, Roads in the Sky, 186.

favoring those who claimed to speak for the Hopi people.[298] 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 this audience and acted as the charismatic leaders claiming to speak for the Hopi, this ran contrary to traditional Hopi disdain for those claiming to speak for the Hopi people. This new world popularity undermined local Hopi support for the Traditionalist movement.[299]

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.[300] 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.[301]

Throughout the 1970s the Traditionalists continued to garner support in the world outside Hopi land while continuing to lose support amongst the Hopi.[302] During this time the Traditionalists opposed mineral leasing and took the unpopular stand against bringing

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[298] Richland, "Hopi Exception," 268.
[299] Clemmer, Roads in the Sky, 186.
[300] Geertz, Invention of Prophecy, 150.
[301] Ibid., 149-50.
[302] Ibid. 151.

public utilities to the Hopi.[303] 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.[304]

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 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 practice.[305]

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.[306] 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.[307]

Hopi Activism Against the Snowbowl Resort

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

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303 Clemmer, "The Hopi Traditionalist," 146-47.
304 Clemmer, Roads in the Sky, 272.
305 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.
306 Geertz, Invention of Prophecy, 143.
307 Clemmer, Roads in the Sky, 238.

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.[308] 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.[309]

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.[310] 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.[311]

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.[312] The case was one of the first tests of the American Indian Religious Freedom Act, signed

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[308] Clemmer, Roads in the Sky, 195.
[309] Brown, Religion, Law, 63.
[310] Clemmer, Roads in the Sky, 194.
[311] Brown, Religion, Law, 67.
[312] Ibid., 64.

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.[313] 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.[314]

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.[315] Initiations to Kachina societies have increased since the Second World War and the Hopi have increased the number of Kachina ceremonies performed.[316] This increase in participation is more of a statement of the importance of the indigenous Hopi religion and the

[313] Brown, Religion, Law, 81.
[314] Ibid., 87-88.
[315] Tr. 510, 594.
[316] Dockstader, The Kachina, 147-8.

Kachinas in Hopi social life than any agreed upon historical place of the Traditionalist movement.

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.[317] Many Christian Hopi returned to the Kachina ceremonies partaking in them as social and cultural occasions.[318] The Kachinas are of prehistoric origin and are a central part of continuing Hopi cultural survival.[319]

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.[320] These partisans point to the accomplishments and actions of the Hopi Tribal Council in later years in protecting Hopi sovereignty,

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[317] Dockstader, The Kachina 158-9.
[318] Ibid., 147-8.
[319] Ibid., 159.
[320] Geertz, Invention of Prophecy, 217, 251.

cultural resources, tradition, and indigenous religion.[321] One partisan scholar has even argued that the Hopi Tribal Council was the legitimate Hopi government, despite the fact that at any time between one half and one quarter of Hopi were not represented on the council due to boycotts.[322] Many Hopi boycotting the Hopi national Tribal Council continues to this day. Two villages refused to certify representatives to the council in 2008.[323]

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.[324] 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."[325] With the return of Christian Hopis to the Kachina ceremonies this was surely true to a large extent.

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[321] Geertz, Invention of Prophecy, 153-6.
[322] Clemmer, Roads in the Sky, 301.
[323] Richland, "Hopi Exception," 264-5.
[324] Clemmer, Roads in the Sky, 197.
[325] Clemmer, "The Hopi Traditionalist," 157.

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 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.[326]

[326] Justin Richland, e-mail message to the author, June 22, 2009.

V. 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 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.[327] The Indian group, Youth for the Peaks, provided information to the public through use of the Internet and Myspace.[328]

Early in the consultation process, the Arizona Daily Sun, an allegedly liberal newspaper Flagstaff newspaper, printed a staff editorial that denigrated indigenous religion and fueled local racism against Indians.[329] 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[.]"[330]

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

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

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

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

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

DEIS urging the Forest Service to adopt alternative one. Coalition members stressed in 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.[331]

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.[332] 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.[333]

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

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

10,000 square foot guest services facility, an increase in skiable acreage to 205 acres, 47 acres of thinning the trees, and 87 acres of grading/stumping and smoothing.[334] 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.[335] 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.[336]

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.[337] 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.[338] Judge Rosenblatt determined the only issue he could not determine on summary judgment[339] was the religious freedom claims of the indigenous religious practitioners. The district court held an eleven day bench trial before issuing its

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[334] 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.

[335] 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).

[336] 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.

[337] 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.

[338] Ibid., Item No. 23.

[339] 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.

opinion.[340] Practitioners of indigenous religions and their allies carried on demonstrations in opposition to the proposed expansion of Snowbowl facilities outside the courthouse in Prescott, Arizona.[341]

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.[342] 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.[343] 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.[344] 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

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

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

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

[343] Tr.2.

[344] 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).

care. He came in third, behind the National Democratic Party supported Ann Kirkpatrick, and former broadcast journalist Mary Kim Titla, who had hoped to be the first Native American women in Congress.[345] 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.[346] 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

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

not changed since 1983 and that there were in fact more practitioners of the Hopi religion than in 1983.[347] 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.[348]

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.[349] 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.[350] 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.[351] 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

[347] Tr. 510, 594.
[348] Tr. 127, 128, 138, 494.
[349] Tr. 139, 146.
[350] Tr. 145, 147.
[351] Tr. 156-59.

at the University of Arizona and Kachina expert, and Antone Honanie, Hopi silversmith and maker of Kachina dolls.

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.[352]

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.[353]

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[352] Tr. 555-59.
[353] Tr. 127-26.

Leigh Kuwanisiwma represented the Hopi government with his presence throughout the trial. Kuwanisiwma was initiated into the Kachina society at age 11, as 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.[354]

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

[354] Tr. 414-18.

Dictionary, Hopi Dictionary/Hopiikwa Lavaytutuveni: A Hopi-English Dictionary of the Third Mesa Dialect. The dictionary has over thirty thousand entries with pronunciation 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.[355]

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

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

devastating cultural, spiritual, and emotional impacts they expected the expansion with artificial snowmaking would reign down upon the Hopi people.

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.[356]

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.[357]

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

[356] Tr. 450-52.
[357] Tr. 136.

> 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.[358]

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.[359]

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."[360] 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.[361]

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

[358] Tr. 134-35.
[359] Tr. 601-02.
[360] Tr. 530.
[361] Tr. 530-31.

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 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 settler population have sought for generations.[362]

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.[363] 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

[362] Deloria, For This Land, 228.
[363] 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.

Freedom Act, yet the Forest Service approved the proposed expansion and the courts of 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 as Related to 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.[364] 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."[365] 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."[366] 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."[367] Based on the above factual

[364] 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.
[365] 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.
[366] Ibid., 41.
[367] Navajo Nation v. Forest Service, Case Nos. CV 05-1824-PCT-PGR, CV 05-1914-PCT-EHC, CV 05-

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."[368]

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."[369] 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.[370] 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."[371]

1949-PCT-NVW, CV 05-1966-PCT, Order, p. 42.

368 Ibid., 56.

369 Cindy Cole, "Judge OKs snowmaking on Peaks," The Arizona Daily Sun, January 11, 2006.

370 Cindy Cole, "Snowmaking opponents now targeting city council," The Arizona Daily Sun, January 12, 2006.

371 Cindy Cole, "Snowmaking opponents now targeting city council," The Arizona Daily Sun, January 12, 2006.

The Appellate Decisions

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.[372] The Court further found that not only was religion burdened, the Forest Service did not have a compelling reason for doing so.[373] 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 extent or lack there of of legal protections for Indian religious concerns on public lands. While the Lyng opinion stood as precedent that

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

directly denied any form of constitutional protection to followers of Indian religions when the government acts on land it purports to own as public lands, the Justices of the Supreme Court could not agree upon 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.[374] 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.[375]

[374] Howard Fischer, "Snowbowl Fight Rages On," The Arizona Daily Sun, March 12, 2007.
[375] Howard Fischer, "Snowbowl Fight Rages On," The Arizona Daily Sun, March 12, 2007.

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.[376] 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.[377] 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 a 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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[376] Randy Wilson, "Snowbowl coverage a moving target," The Arizona Daily Sun, April 7, 2007.
[377] Howard Fischer, "Snowbowl Fight Rages On," The 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."[378] 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[.]"[379]

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

[378] Cindy Cole, "Court sides with Snowbowl," The Arizona Daily Sun, August 8, 2008.
[379] "Responses to news on Snowbowl," The 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.[380]

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.[381] 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.[382] 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.[383] Fletcher also noted the concerns of the testimony already examined in detail previously in this essay,

[380] 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).
[381] Navajo Nation, 479 F.3d 1040.
[382] Ibid., 1040-41.
[383] 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."[384]

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.[385]

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.'"[386] 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

[384] Navajo Nation, 479 F.3d 1043.
[385] Ibid., 1044.
[386] 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."[387]

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.[388]

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."[389] 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

[387] Navajo Nation, 479 F.3d 1044.
[388] Second emphasis added, Navajo Nation, 479 F.3d 1044-45.
[389] 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.”[390] 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."[391] 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.[392] 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

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

would 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.[393]

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.'"[394] 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.[395]

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

[393] Navajo Nation, 479 F.3d 1046.
[394] Ibid., 1048.
[395] 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.[396]

The majority of the judges on the Ninth Circuit Court of Appeals joined with Judge Carlos T. Bea, author of the opinion. Judge Bea was born in Spain in 1934, a Cuban citizen, and left for the United States at age five in 1939. He became a resident alien in 1952 and played basketball at Stanford. Bea took a year off of college to play basketball for the Cuban Olympic Team in the Helsinki games. Not aware of the potential consequences, he mistakenly returned to finish his studies on a student visa, rather than a residency visa. Upon completion of schooling, deportation proceeding began against Bea as immigration officials accused Bea of avoiding the draft and the Korean War by playing basketball for Cuba, despite Bea's offer to immediately enter the military. Fortunately the judge that reviewed his case on appeal was an avid basketball fan, and granted Bea a residency visa in 1956. This experience sensitized him to the need for reforming the immigration process and the overwhelming case loads immigration officials face.[397] Bea became a naturalized citizen in 1959 and entered private law practice that same year. He engaged in the private practice of law until 1990 when he joined the San Francisco Superior Court in 1990. President George Bush named Bea, also a Republican, to the Federal Bench in 1991 as a judge for the Northern District of California. In 2003, the second President Bush appointed Bea to the Ninth Circuit Court of Appeals.[398]

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396 Navajo Nation, 535 F.3d 1058, 1067.

397 Carlos T. Bea, "Address by the Honorable Carlos T. Bea, Judge, U.S. Court of Appeals to the Ninth Circuit, To the Board of Immigration Appeals and Immigration Judges," (August 10, 2007). http://lawprofessors.typepad.com/immigration/files/bea_address_to_bia_and_ij_2007_annual_convention.pdf (accessed July 1, 2010).

398 David Madden, "Circuit Judge Carlos T. Bea takes Oath of Office," (January 28, 2004), http://207.41.19.15/web/ocelibra.nsf/504ca249c786e20f85256284006da7ab/77898c3f5921623488256e2900035d77?OpenDocument (accessed July 1, 2010).

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."[399] 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.[400]

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

[399] Navajo Nation, 535 F.3d 1058, 1063.
[400] Ibid., 1063-63.

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.[401]

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."[402] The dissenting opinion called for the effect on religion to be the important consideration, rather than the particular mechanism religion might be burdened.[403] 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 support a finding of "substantial burden" upon the religions of the Indians in violation of the RFRA, the dissent reasoned.[404]

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 the types of

[401] Navajo Nation, 535 F.3d 1063.
[402] Ibid., 1090.
[403] Ibid., 1086.
[404] Ibid.

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.[405] 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.[406]

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.'"[407] Implicit in this interpretation of Lyng is the notion the Indian religious would in some way be harmed or 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

[405] Navajo Nation, 535 F.3d 1070.
[406] Ibid., 1071-73.
[407] Lying, 485 U.S. 451 as quoted in Smith, 494 U.S. 883.

government used or disposed of government land, as an exception to the compelling interest test.[408] 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. 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.

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

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.[409] 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.[410]

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.

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

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

[410] 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).

increase their case loads, 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 relate to the Hopi as human beings. 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 human 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 humanity to the Hopi and treated them as obstacles to be overcome- as objects. There can be any number of 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 conscious. 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. Supervisor Rasure hid her responsibility behind stated policy needs she did not personally craft. Neither the Ninth Circuit nor Nora Rasure asked if desecrating the most sacred place of the Hopis was a decent thing to do in order to provide a more regular ski season for a middling ski resort in a desert.

The Ninth Circuit Court majority and Forest Supervisor Rasure could not contemplate the propriety of desecrating to most sacred of Hopi places to regularize the ski season of Snowbowl, as Fletcher and the dissent in the Ninth Circuit did, because decent people do not desecrate the sacred places of others for such paltry reasons. Instead they used the law as cover to deny the reality of the liberty available to them in their choices and avoid responsibility for the predictable consequences of the decisions and choices they were part of.[411] Rather than acknowledge that they had the legal power and

[411] It should be noted this is not a case of ignoring the humanity of the thousands of skiers (though it should be noted ASR was never human, but a legal entity designed to use humans as objects to generate profit), but a reasonable case of balancing the proposed benefit to the potential harm of desecrating a sacred site. In this case, it was obvious, if one really listened to the Hopi concerns and treated them in a

authority to act to prevent the desecration of the most sacred of places to the Hopi, Forest Supervisor Rasure and the Ninth Circuit majority constructed policy and legal edifices that seemingly removed ultimate responsibility for their choices from themselves.

human way, that decent people do not desecrate another's sacred place for a more regular skiing season. It would be considerably more complicated of an issue if desecrating the most sacred of Hopi places would provide a cure for cancer. But it should be noted, decent people would work with and discuss the matter with the Hopi to produce this hypothetical cure in the least offensive and hurtful way possible.

VI. The Snowbowl Ordeal and its Implications for the Religious Freedom of the Hopi and Other Indian Nations

Given the relative success of the consultation process in accommodating Indian religious concerns in management of what the Federal government claimed as its own lands, how could administrators who spoke directly to concerned Hopi people and understood the scope of the harm they would be doing to the Hopi people by desecrating their most holy of places, still chose to approve the desecration of Nuvatukyaovi?

The Hopi appealed the decision of the Forest Service and argued that decision violated their rights to religious freedom under the Religious Freedom Restoration Act. The Religious Freedom Restoration act required any act of the Federal government that substantially burdened the religious freedom of a person to be set aside unless it forwarded a compelling governmental interest in the least restrictive means possible. Unfortunately Congress did not define precisely what it meant for religion to be "substantially burdened." In the process of appeals, the first and third (and final) courts to consider the case found the definition of substantial burden not to include the types of harms the Hopi and other Indian appellants suffered. An intermediate appellate court interpreted the RFRA to have a definition of "substantial burden" that would have included the types of harms the Indian appellants suffered. Again, it cannot be stressed enough, no court ever disputed the finding of the Forest Service that the expansion with artificial snowmaking would be an adverse action and harm the interests of the Indian plaintiffs. The entire appellate debate, on the issue of religious freedom, was whether or not the particular types of harm the Indians were expected to suffer were a "substantial burden" upon their practice of religion as Congress contemplated in the RFRA.

So, the question remains, why did the consultation process (and subsequent appellate process) fail to protect the Hopi from this most disrespectful of adverse actions by the Forest Service? The answer is found in the way the Forest Service conducted the consultation process. As was demonstrated by the reaction to Justice Scalia's elimination of constitutional religious freedom protections in the Smith case, protection of religious freedom was found in people relating to each other as human beings, not in the pronouncements of laws and constitutions. The consultation process worked in other cases because Forest Service officials spoke with Indians to learn their concerns and worked with them to manage the land involved for everyone. In this particular case, elements within the Forest Service worked with representatives of ASR to formulate policy goals that required the building of infrastructure for artificial snowmaking before any consultation began. Former Secretary of Interior Bill Bennett, working as an attorney for ASR, then pressed Forest Service officials to approve the expansion and reminded them that the courts would uphold their decision, regardless of any impacts on Indian religious concerns. Significant organizers of the consultation process treated Indians peoples as an obstacles to be overcome, rather than relating to them as humans they should be concerned for and considerate of.

The settler population of the United States was never monolithic, and while those political forces that supported racist policies dominated the political landscape for centuries, more existentially honest settlers constantly resisted with the assistance of indigenous peoples. Progress was not steady and there were periods of reaction. The

United States government abandoned overtly racist policies in the 1970s, but, on issues of sovereignty and land ownership, often failed to honestly address the lasting difficulties of settler history. Public land management was intrinsically tied to indigenous religious concerns because of this history. The failure of the courts to take notice of this history had placed indigenous religious practitioners at a disadvantage when seeking to preserve the integrity of sacred places before the courts of the United States.

Indian militancy helped the settler community to better come to terms with the depths of its collective self-deception.[412] This altered the balance of power in competing settler perspectives regarding what is commonly referred to as the fundamental human rights of indigenous peoples. The nature of the past could not be completely ignored as Indian activists forced settlers to come to terms with the inhuman nature of the status quo, and the legacies of an inhuman past. In the face us this success of helping more and more members of the settler communities escape the bonds of ignorance and self-deception, another challenge moved to the forefront in the struggle to have a human centered society.

Societies, much like individuals, in coming to terms with their own self-deception, and what this means to their self image, experience resistance. There remained those elements that felt it was better to continue to wallow in self deception, rather than undertake the hard work of actually treating other peoples with respect. Within any

[412] Racism is a special case of existential self-deception where the racist denies one's own human responsibility in choosing to construct the self by instead attributing negative qualities to other races while retaining positive qualities. Rather than acknowledge the human self is created by human activity and choice, the racist instead hides from responsibility for identity by tying value to intrinsic qualities of race. Human responsibility and freedom are denied as one is simply born that way. See generally, Jean-Paul Sartre, "Portrait of the Antisemite," in Existentialism form Dostoevsky to Sartre, ed. Walter Kaufmann, (New York: Meridian Books, 1956), 270-87.

society there always have been individuals who have acknowledged the indecent nature in which one community or group treated another. Even as the United States embarked on the policy of ethnically cleansing the eastern states of indigenous peoples, individuals denounced the actions, both inside and out of the government, as repugnant and indecent. As these humanist elements grew in strength, resistance to this change often took the form of pretending to acknowledge and address the history and legacies of this indecency.

There are two primary ways one can read the support within Congress of the American Indian Religious Freedom Act of 1978, and surely both strains existed to some extent. First, the intent of the AIRFA, for some within Congress, was to actually protect and preserve the indigenous religions the U.S. and reverse the longstanding policy of seeking to eliminate the separate political and cultural identities of indigenous peoples. In such a case, the lack of substantive protection provisions beyond consultation requirements would have been an unfortunate political compromise. The second alternative is that elements of Congress were seeking to pretend to address the issues while offering no substantive change in actual practice. In such a case, the purpose of the legislation would have been to blunt criticism of the status quo and undermine arguments that there remains a considerable amount of difficulty still to be overcome. Rather than self-deception, such use of official policy pronouncements, lacking any substantive enforcement, were acts of active deception directed at the international community and the domestic population.

The ongoing case of the Snowbowl ski resort stands as a stark example of the dark direction the American Indian Religious Freedom Act could have, and could still, take.

While the AIRFA lacked any substantive measures of policy enforcement beyond the required consultation procedure, the improvement within the settler community in coming to terms with the truth has promoted improved human relations. The ongoing activities of Indian activists and allies within the settler communities, including the annual Indian law and public lands conferences Professor Raymond Cross of the University of Montana conducted with Forest Service and Indian officials, have aided in promoting and preserving human relations between administrative agencies and indigenous communities. Unfortunately, there have been lingering institutional structures and attitudes that constantly press against the advancement of progress in human relations in the United States and there continues to remain the danger that in any particular instance dehumanization and objectification would dominate relations between different communities, returning to the forefront the overt racist domination of settler society.

Historical precedent, European notions of property ownership, a failure of judges to take indigenous religions serious as religions, particular forms of states' rights perspectives, state supremacy, and the institutional objectification of individuals to be managed for the alleged benefit of society are all difficulties the advocates for a human centered society have had to overcome in presenting arguments that forward respect for indigenous rights to the courts. There has been the added obstacle that courts have historically been reluctant even to admit the existence of these difficulties within their deliberations. For these reasons, many supporting human relations with Indian communities have supported avoiding the courts as a means of protecting Indian religion, culture, and sovereignty. These institutional burdens were part of the source of Bill

Bennett's confidence that the courts would uphold any decision to approve the snowmaking with reclaimed sewage effluent in the face of Hopi protests, as he advised Supervisor Rasure.

Underlying this historic problem of the courts has been the fundamental nature of the economic system. The Arizona Snowbowl Resort Limited Partnership was created as a legal entity with the express purpose of using the skiing population as a means to generate profits. The economic life of settler society historically has been based upon the alienation of individuals from each other and themselves, with an economic system designed where everyone was to seek economic gain through using others as means to that end. The dominant settler society in the United States has a long history of objectifying its own population.[413] While it has been the natural tendency of people to have human and social relations with one another that has held together settler society in the face of this antisocial economic orientation, the fact ASR worked with Ranger Waldrip to treat the Hopi as objects, obstacles to be overcome by the consultation process, should not be surprising. ASR was created to use humans as tools to generate profits and it related to skiers as objects everyday.

ASR and Waldrip worked together to create the policy to support a proposal that would enhance the ability of ASR to make profit from skiers without consulting the Hopi or other potentially impacted Indian interests. That policy was to create a more regular skiing season for a middling ski resort in a desert. Waldrip first considered simply pushing through the expansion with a series of categorical exemptions that had a

[413] Erich Fromm, The Sane Society, (1955; repr., New York: Fawcett Publications, Inc., 1969), pp. 21-28, 308-315.

truncated consultation process and could not be appealed. Waldrip and ASR abandoned this plan because it was politically unviable. They then moved the consultation procedure forward, stressing that the Forest Service thought the proposal of building an infrastructure for artificial snowmaking with reclaimed sewage effluent was necessary to meet the policy goals.

In the course of the consultation process, the Forest Service modified the proposal and expanded the alternatives examined. The first alternative, included by legal requirement, was no action. The second and preferred alternative included snowmaking with reclaimed sewage effluent. Initially the proposal included night lighting, but this was removed from the plan because the local settler community was sensitive to the issue on nonreligious grounds. The newly added third alternative called for the same expansion of facilities without the snowmaking or snowplay area. In 2005, Forest Supervisor Nora Rasure was responsible for choosing which alternative would be adopted.

Supervisor Rasure had a significant cohort within the Forest Service administration, led by Ranger Waldrip, that had long before decided to support the snowmaking. ASR worked daily with these members of the Forest Service. Attorney for ASR, former Secretary of the Interior, William Bennett informed Rasure that if she approved the snowmaking, the courts would support her decision. Rasure, in the consultation process, was fully informed and Forest Service Archaeologist Heather Provencio did her best to express the importance of the Peaks to the Hopi and other Indian peoples.

In the face of this difficult decision, Supervisor Rasure objectified both the Hopi and herself, in an existential sense, to deny her human liberty and responsibility from the choices she had to make. One of the policy goals of the project was to regularize the ski season. Rather than make any intellectual effort to weigh the potential benefit of regularizing the skiing season to skiers, against the known harm of the adverse action of desecrating the most sacred of Hopi places (not to mention the harms to other practitioners of indigenous religions), Rasure focused on the policy need itself. She determined only one alternative, alternative two with snowmaking with reclaimed sewage effluent, could fulfill the the policy goals of the project. Under this formulation a machine could have made the decision. A device that could select the only alternative that met the policy goals could have done the job. Such a machine had no need to consider the extent of the adverse impact on human beings.

Something very real was lost, not just to the Hopi, in the decision of Nora Rasure, but to Rasure and the settler community as well. Decent people do not desecrate the sacred places of others merely to regularize the ski season. Rasure had the opportunity on behalf of the United States to treat the Hopi with respect and consideration, but instead chose to hurt hundreds of thousands of people for no particularly good reason. To do so she denied her own humanity and her ability to chose. There was no legal requirement to make the decision she made, as the opinion of the three judge panel of the Ninth Circuit made quite clear. Despite the legal ability of the United States government to destroy indigenous religions as a consequence of its land management, there was no legal requirement to do so, and accommodation could be sought, as Justice O'Connor noted in

the Lyng case. Nora Rasure chose for the United States to act indecently yet again. Forest Supervisor Rasure became so detached from reality that in the face of bitter Indian resentment over her decision and on the eve of Indian and environmental interests filing a federal law suit to prevent the desecration her decision made possible, she publicly claimed her decision was based upon shared values with Indian communities. In an editorial in The Arizona Daily Sun she wrote, "I hope these areas of shared values and respect for others' cultures can contribute to future conversation about the use and management of this special mountain."[414]

At the beginning of the new millennium it was an open question as to whether or not the Religious Freedom Restoration Act offered any substantive protection of Indian sacred sites on public lands from total desecration or destruction. The inherent western and ethnocentric approaches that the courts had taken for various reasons caused many commentators to be pessimistic the courts might offer any relief. The Ninth Circuit, which had the best record of providing protection for Indian religious freedom under the RFRA, ultimately could not bring itself to interpret the definition of substantial burden on religion to include destruction of sacred sites on public lands. As the other federal appellate circuit courts have been less cognizant of burdens on Indian religions, there is little reason to believe that there will be a contrary decision in another circuit that would give the Supreme Court reason to revisit the issue. The decision of the full court in Navajo Nation v. Forest Service, denying the protections of the RFRA to Indian religious interests on public lands, will likely be the controlling interpretation of the law for the foreseeable future.

[414] Nora Rasure, "Snowbowl decision based on shared values," The Arizona Daily Sun, March 12, 2005.

While the courts offered the Hopi and other Indians no protection from the most disrespectful and disgraceful of treatment by Forest Service officials, there is still hope to be found in the potential of government officials to treat indigenous peoples as human beings. While the Obama administration continued to disrespect the Hopi by not consulting the Hopi and learning they find any making of artificial snow to be a desecration of Nuvatukyaovi, the administration has moved to delay the necessary permits for the Snowbowl expansion to move forward. Only addressing part of the problem for the Hopi, the Obama administration has sought to secure funding providing water from potable sources for snowmaking.[415]

Conclusions

United States Indian policy, dating back to the 1830s, shaped the way tribes, such as the Hopi, would react to regulatory decisions adversely impacting their religious life in the twentieth century. The settler government began to deal with the issue of Indian religious freedom in the late twentieth century in a way that was much more humane than in the nineteenth century and early twentieth century. The passage of the American Indian Religious Freedom Act in 1978 marked an official reversal of policy and the United States Congress now claimed the official policy of the government was to protect and preserve Indian religions.

Almost immediately the courts refused to recognize any substantive protections for Indian religious concerns beyond consultation. In Wilson v. Block (1983) the District Court of Appeals for the District of Columbia found the law offered the Hopi and Navajo

[415] Rob Capricioso, "Snowy relations on sacred site development," Indian Country Today, April 7, 2010.

no legal means to prevent the first major expansion of the Snowbowl resort. With Lyng (1989) Justice O'Connor removed any lingering doubt the laws or Constitution of the United States provided any protection for sacred sites on public lands, even in the face of the potential destruction of an indigenous religion. With Smith (1990) the Supreme Court removed all Constitutional prohibitions against all religious suppression short of the direct outlawing of religious practices as religious practices.

The legal landscape was again altered with the passage of the Religious Freedom Restoration Act (1993). Congress designed this law to directly overturn the Smith decision and expand the legal protections for religion in the United States beyond what existed before the the Smith decision. Despite active opposition throughout the legally mandated consultation process, the Forest Service ignored Hopi objections to the further expansion of the Snowbowl resort to include the making of snow with reclaimed sewage effluent. After more than a half a century of opposition to the Snowbowl Resort, the RFRA appeared to the Hopi to offer some mode of stopping the expansion of the Snowbowl Resort and the defilement of the Peaks with artificial snow.

The aggressive response of the Hopi to the expansion in 2005 was grounded in Hopi religion, its connection to the sacred peaks, and critical developments within the religion and political culture of the Hopi nation through the twentieth century. Already having a long tradition of resistance to settler political and religious domination dating back to the Pueblo Revolt against the Spanish in 1680, the Traditionalist movement played an important part in the Hopi religious revival of the twentieth century and a

deeply contested role in the institutionalization of cultural preservation activities within the Hopi government.

A mix of Hopi private individuals and government representatives chose to resist the 2005 approval of snowmaking by the Forest Service in federal court, hoping the untested Religious Freedom Restoration Act might provide new avenues for the protection of sites sacred to Indians on public lands. Repeatedly the courts, at the trial and appellate level, ruled that the RFRA offered no protection as the types of harms the Indian plaintiffs complained of did not fall within the meaning of "substantial burden on religion" as intended by Congress. Only the intermediate level of the three judge panel of the Ninth Circuit Court of Appeals found religion to be substantially burdened. The three judge panel determined the desecration of the most sacred of places to the Hopi was a substantial burden and that regularizing the ski season at Snowbowl was not a compelling governmental interest that could justify so burdening the various Indian religions With the decision of the full Ninth Circuit Court of Appeals restoring the decision of the trial court, the RFRA provided no grounds for the Hopi to prevent the expansion. The Supreme Court refused to consider the case in 2009.

This study is the only in depth look at the first case to test the scope of religious protections offered to Indian sacred places on public lands by the Religious Freedom Restoration Act of 1993, Navajo Nation v. Forest Service. Departing from most studies of Indian legal history, this study provided a detailed examination of the Forest Service consultation process and the Hopi objections to the development the Forest Service approved. To bring the issues involved in this case into clear focus, again departing

significantly from traditional legal history, this study brought an explicit existential analysis to the significant decision makers that freely chose to approve the desecration of the most sacred of places to the Hopi merely to regularize the ski season of a middling resort located in a desert. While there were potentially several different motivations for the decision makers to support the desecration of the home of the Kachinas, each used the legal system and administrative process to deny their responsibility for this approval, as if they had no choice in the matter.

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