2004

Secularizing the Sacrosanct: Defining "Sacred" for Native American Sacred Sites Protection Legislation

Amber L. McDonald

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlr

Part of the Law Commons

Recommended Citation
Available at: http://scholarlycommons.law.hofstra.edu/hlr/vol33/iss2/9

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
NOTE

SECULARIZING THE SACROSANCT: DEFINING "SACRED" FOR NATIVE AMERICAN SACRED SITES PROTECTION LEGISLATION

"A kind of poverty results from the decimation of cultural resources and the reduction of cultural diversity. The death of the religion of any indigenous American people shames and impoverishes our society."1

I. INTRODUCTION

For more than 120 years, the Navajo people worshipped at Utah’s Rainbow Bridge, a nearby spring, a cave and a prayer spot on a tributary of the Colorado River.2 These locations are of "central importance" to their religion, and "[f]or generations Navajo singers... performed ceremonies near the Bridge and water from the spring has been used for other ceremonies."3 Among the Navajo, it is believed that these places of worship are the "incarnate forms" of their gods and offer protection and ensure rainfall.4 They further "believe that if humans alter the earth in the area of the Bridge, [their] prayers will not be heard by the gods and their ceremonies will be ineffective to prevent evil and disease."5

Despite the beliefs of the Navajo, in 1964, the Glen Canyon Dam impounded the Colorado River and formed Lake Powell,6 and these sacred sites were submerged below water. Moreover, tourism has destroyed the area with "noise, litter and defacement of the Bridge itself."7 As a result of the unnaturally high water level and tourists, the

2. Badoni v. Higginson, 638 F.2d 172, 177 (10th Cir. 1980).
3. Id.
4. Id.
5. Id.
7. Badoni, 638 F.2d at 177.
Navajo are no longer able to worship at Rainbow Bridge. In fact, the Navajo believe that the creation of the lake has resulted in the drowning of their gods.

Desperate to save Rainbow Bridge, the Navajo brought suit, claiming that the government had infringed upon their ability to practice their religion, that they were denied "access to a prayer spot sacred to them" and that "by allowing tourists to visit Rainbow Bridge, the government . . . permitted desecration of the sacred nature of the site."

However, the court found that the Navajo lacked a cause of action under which to sue for the protection of their sacred sites.

The problems faced by the Navajo are by no means unique. Currently, all Native Americans lack a cause of action to protect their sacred sites from development and destruction. One of the primary bars to legislative protection is the lack of an adequate definition of the term

8. Id.
9. Id. at 176.
10. Id.
11. Id. at 177. The story of Rainbow Bridge is merely illustrative of the numerous sacred sites that have already been destroyed or are currently under threat. See, e.g., Electa Draper, Feds Sued over OK for Drilling in N.M. Coalition: Wells will Hurt Indian Sites, Environment, DENVER POST, Feb. 25, 2004, at B4 (highlighting the struggle of the Navajo to stop proposed drilling on two New Mexico mesas sacred to them); Suzan Shown Harjo, Sacred Places Under Attack in Native America, INDIAN COUNTRY TODAY, Dec. 18, 2002, available at http://www.indiancountry.com/content.cfm?id=1040221839 (listing two dozen sacred sites which were labeled as "endangered" by the National Congress of American Indians and a meeting to protect sacred sites); Indianz.com, List Highlights Threats to Sacred and Historic Sites (May 30, 2003), at http://www.indianz.com/News/show.asp?id=2003/05/30/endangered (discussing the National Trust for Historic Preservation's annual list of threatened sites, which named "[a] lake in New Mexico held as sacred by several tribes and an area in Georgia known as the cradle of Muscogee civilization . . . [among] the nation's most endangered places"); Angie Leventis, Tribe Sues over Subdivision, NEWS TRIB. (Tacoma, Wash.), Jan. 6, 2004, at B1 (discussing the Nisqually tribe's suit against the Washington city of DuPont and the city's largest developer "to try to stop a housing subdivision the Indian tribe fears will ruin cultural artifacts and harm the environment"); Keith Rogers, Nuclear Waste Repository: Yucca Mountain Already Having Effect on Tribes, LAS VEGAS REV. J., Sep. 2, 2003, at 1B, available at http://www.reviewjournal.com/lvrj_home/2003/Sep-02-Tue-2003/news/22036708.html (discussing the burial of "highly radioactive spent fuel from U.S. nuclear power reactors" on a site considered sacred by the Shoshone tribe); Arthur H. Rotstein, Court: Claim vs. Mount Graham Observatory Moot, ARIZ. DAILY SUN, Dec. 3, 2002, http://www.azdailysun.com/non_sec/nav_includes/story.cfm?storyID=54513 (discussing the decision of a federal appeals court that refused to stop a telescope project that would affect a mountain sacred to the Apachi, Hopi and other tribes); Kelly Watson, Profits, Religion Battle over Peaks, LUMBERJACK (Nov. 19, 2003), at http://www.lumberjackonline.com/vnews/display.v/ART/2003/11/19/3fbc63f1d388d (giving an overview of the battle between a ski resort and the Hopi and Navajo over Arizona's San Francisco peaks, which both tribes hold as sacred).

"sacred." This Note will suggest a definition such that legislation could proceed.

Part II of this Note will offer an overview of traditional Native American religion, providing a comparison between native and non-native faiths. In addition, Part II will provide a brief discussion of the intolerance endured by Native Americans and the lingering effects of this treatment.

In Part III of this Note, the historical discussion continues with a summary of the history of the Native American legal struggle to protect their sacred sites. This Note will discuss their attempts to find justice in the American court system, utilizing treaties, the First Amendment and the American Indian Religious Freedom Act of 1978, as well as AIRFA's failure to provide Native Americans with a cause of action. Part III of this Note will also address endeavors to protect sacred geography through the Antiquities Act of 1906, the National Historic Preservation Act of 1966, the National Environmental Policy Act and the Archeological Resources Protection Act of 1979.

Part IV of this Note will examine the definitions of "sacred" utilized in legislation intended to protect the sacred sites of indigenous people in Australia and New Zealand. The laws of these countries will be analyzed in comparison with the Native American Sacred Lands Act, which is currently in committee in the House of Representatives. In addition, Part IV will examine two California bills, the Native American Sacred Sites Protection Act, which failed to pass, and the

13. Reynolds, supra note 12. "The National Congress of American Indians has adopted a resolution to support or oppose legislation on Native sacred places" based upon several factors, which include the definition given to sacred sites. Id. The organization maintains that sacred sites should "be defined only as places that are sacred to practitioners of Native traditional religions," and include "land (surface and subsurface), water and air, burial grounds, massacre sites and battlefields." Essential Elements of Public Policy to Protect Native Sacred Places, Nat'l Cong. of Amer'n Indians Res. SD-02-027 (Nov. 10-15, 2002), available at http://www.ncai.org/data/docs/resolution/2002Annual/027.pdf. Moreover, they deem it objectionable to include "[a]ny definition of 'sacred' as it applies to Native religious practices, a measure not ordinarily enjoined on other religious practices." Reynolds, supra note 12.
Traditional Tribal Cultural Sites bill, a later version of which was signed into law by Governor Schwarzenegger in 2004.

Finally, Part V of this Note will offer a definition of “sacred.” Having analyzed the successes and failures of the United States, Australia and New Zealand, this Note strives to create a definition that strikes a balance between the interests of Native Americans, the federal government and private industry, and could be viable as part of legislation.

II. TRADITIONAL NATIVE RELIGION AND TIES TO THE LAND

In traditional Native American religions, all land is sacred. The Crow people exemplify this “religious love for land” found in native religions:

The Crow have a long prayer which thanks the Great Spirit for giving them their land. It is not too hot, they say, and not too cold. It is not too high and snowy and not too low and dusty. Animals enjoy the land of the Crow, men enjoy it also. The prayer ends by declaring that of all the possible lands in which happiness can be found, only in the land of the Crow is true happiness found.

Even with such affection for the land in general, there are special, holy places that Native Americans consider to be even more sacred than others. These sites generally include the birthplaces and homes of gods, areas in which people may commune with spirits or be cleansed, or where the world is believed to have begun. “Many Native American religions require that their adherents make pilgrimages to these sites, or that prayers, vision quests, and ceremonies or rituals be held there in a quiet, pristine, undisturbed atmosphere to maintain harmony and balance in the universe.”

For the preponderance of traditional Indian religions, the center of their religious worship is one of these sacred natural features.

23. Ward, supra note 1, at 801.
25. Id. at 103.
26. Ward, supra note 1, at 801.
28. Id. at 569 (footnote call numbers omitted).
29. VINE DELORIA, JR., GOD IS RED: A NATIVE VIEW OF RELIGION 67 (Fulcrum Pub’g. 1994) (1972) [hereinafter, DELORIA, GOD IS RED]; see also Deward E. Walker, Jr., Protection of American
Navajo, for example, have sacred mountains from which, they believe, their people ascended from the underworld.30

Because traditional Native American practices are fundamentally different from other American religions, they are often misunderstood.31 There are very few parallels between Native American and other religions.32 Most significantly, traditional native religions do not, in general, have "institutional structures" like those found in other organized religions, such as Jewish synagogues, Christian churches and Moslem mosques.33 Unlike these manmade structures, Native American
sacred sites are considered to have spiritual powers in and of themselves.\textsuperscript{34} Moreover, sacred sites are not interchangeable.\textsuperscript{35} Unlike Catholicism, in which the faith's practitioners may worship at any Catholic church, in traditional tribal religion the particular location in which a ceremony is performed is crucial to that ceremony's success.\textsuperscript{36} “To substitute an alternate area in place of a sacred site would even be viewed as sacrilegious.”\textsuperscript{37}

Finally, sacred sites cannot be moved or changed as manmade structures can.\textsuperscript{38} Altering the physical structure of a sacred place is believed to weaken that site's spiritual power, making rituals and prayers ineffective, and may even destroy an entire “site-specific religion.”\textsuperscript{39}

Indeed, many Christians would maintain that to tie their god to a specific location or an individual sacred site would “reduce Him to a facade of power and intelligence.”\textsuperscript{40} Rather, for Christians, “the places at which religious experiences take place are of no consequence... God is everywhere at all times, and to define divinity according to sacred or

\begin{itemize}
\item \textsuperscript{34} See Falcone, \textit{supra} note 27, at 569; see also DELORIA, GOD IS RED, supra note 29, at 275 (noting that in the United States, “Bear Butte, Blue Lake, and the High Places... are all well known locations that are sacred in and of themselves”).
\item \textsuperscript{35} See Falcone, \textit{supra} note 27, at 569.
\item \textsuperscript{36} See id.
\item \textsuperscript{37} Id.
\item \textsuperscript{38} Id.
\item \textsuperscript{39} Id. It would, however, be inaccurate to state that other religions do not have some sense of sacred geography. See DELORIA, GOD IS RED, supra note 29, at 67. For example, The Holy Land contains a host of sites considered sacred by three world religions. \textit{Id.} There is even reference to sacred land within the Old Testament. \textit{Id.} at 275. In Exodus, one can read the account of Moses and the burning bush. \textit{Exodus} 3 (Good News). Moses, who was herding sheep saw a bush flaming with fire, “but... it was not burning up.” \textit{Id.} at 3:1, 3:2. As Moses drew closer to the bush, his Lord called out from the flame, “Do not come any closer. Take off your sandals, because you are standing on holy ground.” \textit{Id.} at 3:5.

While the story of Moses tells us that many faiths should accept that “there are places of unquestionable, inherent sacredness on this earth... where people have always gone to communicate and commune with higher spiritual powers,” this is not generally the case. DELORIA, GOD IS RED, supra note 29, at 275. The burning bush did not become a place of worship, and the sacred places of the Holy Land “are appreciated primarily for their historical significance and do not provide the sense of permanency and rootedness that the Indian sacred places represent.” \textit{Id.} at 67, 287.

However, the Mormon Church's recent behavior has indicated that they may also have a unique understanding of the importance of natural landscapes. See Nick Rahall, \textit{Martin's Cove Act Could Protect Native Sacred Sites}, \textit{INDIAN COUNTRY TODAY}, June 5, 2002 (reprinting remarks made by Rep. Nick Rahall at a congressional hearing on May 16, 2002), available at http://www.IndianCountry.com/content.cfm?id=1023130868. Church Elders have requested that the federal government turn over to the Church Martin's Cove, a Wyoming spot in which 150 to 200 Mormons died “from starvation and exposure” in October of 1856. \textit{Id.}
\item \textsuperscript{40} DELORIA, GOD IS RED, supra note 29, at 287.
\end{itemize}
holy places is to limit His powers beyond reason.” These Christian beliefs exemplify the fundamental difference between traditional Native American religious practices and those of other religions, as well as the source of much misunderstanding: Christianity, like most world religions, resides in “the temporal dimension,” while tribal religions are “basically spatially located.”

Native concepts of land and religion have long been a source of confusion for other Americans. For centuries before the arrival of Europeans, Native Americans lived as hunters and maintained an intimate relationship with the land. Yet, the Native American veneration for land was puzzling to the United States government, and when the government ordered the native population to farm their land, many refused.

In the 1880s, a government agent was sent to convince the Shahaptins, a group of several hunting and fishing tribes, to farm their land. Smohalla, the chief of the Wanapums, explained to the agent:

You ask me to plow the ground. Shall I take a knife and tear my mother’s bosom? Then when I die she will not take me to her bosom to rest. You ask me to dig for stone. Shall I dig under her skin for her bones? Then when I die I cannot enter her body to be borne again. You ask me to cut grass and make hay and sell it, and be rich like white men. But how dare I cut off my mother’s hair?

41. Id.
42. Id. at 122.
43. See DELORIA, CUSTER DIED, supra note 24, at 102-03; see also DELORIA & LYTLE, AMERICAN INDIANS, supra note 33, at 231 (noting that confusion and misunderstanding about native practices have led, at one time or another, to the banning of the “ceremonial Sun Dance ritual, the controversial Ghost Dance, the religious use of feathers, and the use of peyote”).
44. DELORIA, CUSTER DIED, supra note 24, at 103.
45. Misunderstanding in the American courts has been particularly destructive. Courts have dismissed as “romantic description” Native American beliefs that, for example, a rock contains the spirit of God. However, courts would never challenge the Catholic belief that consecrated bread is the embodiment of Christ. Courts must adopt similar respect in regard to native practices and never “challenge as romantic overstatement that places of things contain the spirit of God.” Vernon Masayesva, Epilogue to HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM 134, 135 (Christopher Vecsey ed., 1991); see also Lyng v. Northwest Indian Cemetery Protective Ass’n, 485 U.S. 439, 473-77 (1988) (Brennan, J., dissenting) (discussing the inherent ethnocentrism in Court decisions).
46. See DELORIA, CUSTER DIED, supra note 24, at 103.
48. Id. at 54.
As Smohalla sought to elucidate, in many traditional native religions, land was and continues to be considered a mother and treated with religious reverence.49

Yet, European settlers, and later the United States government, generally did not seek to gain an understanding of Native American relationships with their land. Rather, land became the core of conflict between Native Americans and non-natives.50 Ironically, the very religion that so endears Native Americans to their land became the basis on which their rights to the land were denied.51

The young American government even criminalized tribal religion through the passage of the Code of Indian Offenses of 1883, which was enforced by the Courts of Indian Offenses.52 Each court was presided over by three Native American judges, who had been appointed as rewards for assimilating into white culture.53 The government’s resolve to quash native religion culminated in the 1890 massacre at Wounded Knee, where 390 men, women and children were killed.54

49. See Deloria, Custer Died, supra note 24, at 103. The native connection to the land has not changed with time. Testifying before the House Committee on Resources, Mike Jackson, Sr., President of the Quechan Indian Nation of Fort Yuma, California and Arizona, stated:

   When a site is lost, our hearts break. Our link to our ancestors and our future is broken. Our traditional singers cannot sing about a place that is lost. Our youth cannot learn about what happens at a location when that location is permanently converted to an industrial use. Our practitioners cannot conduct ceremonies at sites when access to them has been blocked. The bulldozer or backhoe ripping into the earth, rips into our hearts. Our inability to stop this destruction makes us feel as though we are failing our ancestors and our children. If you destroy the land, you destroy what we believe in, who we are.


51. See id. at 16; see also Johnson v. McIntosh, 21 U.S. 543, 577 (1823) (outlining how the United States, at its founding, accepted the principle that Christian conquerors are free to extinguish the land rights of non-Christian “heathens,” such as Native Americans). The Supreme Court in McIntosh also noted its concern that to leave Native Americans “in possession of their country, was to leave the country a wilderness.” Id. at 590. The American notion that land left to its natural state is wasteful is another problem in protecting indigenous places of worship. See Jerry Reynolds, Sacred Sites and the ‘Concentrated Will’ of the West, Indian Country Today, Nov. 17, 2003, available at http://IndianCountry.com/content.cfm?id=1068221807. Americans have created shrines that are “mountainous, masses of cliff and stone, marble, granite or steel... Rushmore, the Washington Monument, the Lincoln Memorial, the Grand Coulee Dam and Golden Gate Bridge,” and because of our fondness for such landscapes, Americans have difficulty seeing the sacred within native sites. Id. Among the general population, native sites are sometimes viewed “as inconveniences and sometimes standing insults to progress.” Id.

52. See Falcone, supra note 27, at 570.

53. Id.

awarded thirty Medals of Honor to the soldiers who committed the atrocities there.55

The effects of the actions taken during the founding of this country are still felt today. First, as a result of the United States’ removal policy, which took people away from their original homeland and the sites which they held sacred, many of these holy sites are not on native-held land.56 The majority of sacred sites that are outside Native American possession are held by the federal government.57

Furthermore, the growth in population since World War II, improved farming practices that have made formerly unusable land cultivatable, expanded timber and mining industries and increases in the leisure industry have negatively impacted native use of these federal lands.58 “Few rural areas now enjoy the isolation of half a century ago, and as multiple use of lands increase[s], many of the sacred sites that [are] on public lands [are] threatened by visitors and subjected to new uses.”59 The profound loss of sacred native relationships with the land is no less tragic when it results from the construction of ski resorts, weapon ranges and logging roads today, than it was in the nineteenth century under the policy of removal.60

Second, because the United States gained its property through the denial of native land rights, American values have been formed against traditional Native American religions and, therefore, Americans have

55. Id.
56. See DEORIA, GOD IS RED, supra note 29, at 267. Numerous policies of the United States government have deprived the indigenous population of their land. For example, the Homestead Act of 1862, ch. 75, 12 Stat. 392, which offered 160 acres to settlers in exchange “for $18 and an obligation to work it for five years,” resulted in the loss of 270 million acres. Sylvia A. Law, White Privilege and Affirmative Action, 32 AKRON L. REV. 603, 612 (1999); Earth Land Institute, U.S. Laws & Court Cases Involving Sacred Lands, at http://www.sacredland.org/resources/legal.html (last visited March 10, 2005) [hereinafter Earth Land Institute]. In addition, the Indian General Allotment Act of 1887 (Dawes Act), ch. 119, 24 Stat. 388, “fragmented Indian tribal land holdings and allotted land to individual Indians with the effect of breaking up tribal structures.” New Rider v. Bd. of Educ., 414 U.S. 1097, 1101 (1973). This Act led to the whittling away of native lands, which were “reduced from 140 million acres to 50 million acres” from 1887 to the 1930s. Earth Land Institute, supra. Finally, the 1872 Mining Act, ch. 152, 17 Stat. 92, which was created to transfer public lands to miners, is still in effect and continues to lead to conflicts involving the protection of sacred sites. 30 U.S.C. § 29 (2000); Earth Land Institute, supra.
58. DEORIA, GOD IS RED, supra note 29, at 267-68.
59. Id. at 268.
60. Vecsey, supra note 31, at 21.
been less than accommodating in providing the native population access to lands it considers sacred.61 "Even in the most enlightened parts of our country there is still controversy over . . . allowing Indians access to national parks and forests for the practice of traditional religion at sacred sites in those areas."62 Despite the end of blatantly discriminatory policies, the country's general prejudice against and lack of understanding regarding traditional native religions has not ended. Resistance by non-natives has been "fostered and fueled" by recent conservative administrations,63 and today Native Americans face "an entrenched federal bureaucracy, with an engrained resistance to any change, much less the profound changes necessary to provide real accommodation for Indian religious practices."64 In general, the non-native, dominant "society and its economic, political, legal, and social institutions embrace and foster an ethnocentric view of America."65

While these anti-native views work against native access to sacred sites, right of entry is increasingly important to Native Americans. Traditional native ceremonies are making a resurgence on many reservations.66 Moreover, traditional practices involving sacred sites are the most likely to have survived from the time of contact with non-natives because of their "extraordinary planetary importance."67

III. THE LEGAL STRUGGLE TO PROTECT SACRED SITES

A. Actions Under the First Amendment of the Constitution and Concerns Arising from the Establishment Clause

Religious freedom was very important in the development of the United States.68 In fact, the impetus for coming to America was, for many, a life free from religious persecution.69 Certainly, religion was on

61. Id. at 23.
62. DELORIA, CUSTER DIED, supra note 24, at ix.
64. Id. at 84; see also Jim Adams, Search for Sovereignty: Protecting Tribes from the Supreme Court, INDIAN COUNTRY TODAY, June 13, 2003, available at http://IndianCountry.com/content.cfm?id=1055515243 (discussing the three Supreme Court decisions of the Marshall Court that established the foundations of Native American law and how these precedents may be inappropriately applied today).
65. Moore, supra note 63, at 84.
66. DELORIA, CUSTER DIED, supra note 24, at 112.
67. DELORIA, GOD IS RED, supra note 29, at 276.
68. DELORIA & LYTLE, AMERICAN INDIANS, supra note 33, at 230.
69. Id.
the minds of the Founding Fathers, who included two clauses dealing with the issue in the Constitution. The first of these clauses, the Free Exercise Clause, "is designed to permit people to worship as they see fit." Because access to undisturbed, undamaged sacred sites is necessary to the practice of tribal religions, the Free Exercise Clause would seem to provide an excellent means for Native Americans to protect their sacred sites.

However, those litigating under the Free Exercise Clause have found that it provides little or no protection. For example, in the mid-twentieth century, the Navajo Tribal Council grew concerned about peyote use among its tribe. To prevent the continued use of peyote, the Council outlawed it on the Navajo reservation. In response, the Native American Church, which considers peyote a central, irreplaceable aspect of their worship, sued the Council. The Church sought an injunction to thwart enforcement of the Council's ordinance. In Native American Church v. Navajo Tribal Council, the Native American Church "argued that the ordinance violated the Free Exercise Clause of the First Amendment, which the Church felt should apply to the Navajo tribe as well as to the federal and state governments." The Court rejected the Church's argument, stating that the Constitution generally does not apply to Native American tribes, which, as "domestic dependant nations" are separate from the government. Rather, the Court stated that the Constitution applies to the native

70. Id.
71. Id.
72. See supra notes 38-39 and accompanying text.
73. See Ward, supra note 1, at 808-13.
74. DELORIA & LYTLE, AMERICAN INDIANS, supra note 33, at 233.
75. Id.
76. Id.
77. Id.
78. 272 F.2d 131 (10th Cir. 1959).
79. DELORIA & LYTLE, AMERICAN INDIANS, supra note 33, at 232-33.
80. Id. at 233; Native Am. Church, 272 F.2d at 134-35; see also DELORIA, CUSTER DIED, supra note 24, at 50-51 (explaining that the special status of Native Americans has repeatedly been used to their disadvantage in suits seeking protection for their sacred sites). When suing as dependent domestic nations, they have been denied relief because they are "wards of the government." DELORIA, CUSTER DIED, supra note 24, at 50. However, when other tribes have gone to the Supreme Court to seek relief against the United States, they "have been told in return that they are not wards but 'dependent domestic nations.' Under the laws and courts of the present there is no way for Indian people to get the federal government to admit they have rights" to the lands which are home to their religious sites. Id. For an in-depth analysis of the trust doctrine in relation to sacred site protection, see Jeri Beth K. Ezra, The Trust Doctrine: A Source of Protection for Native American Sacred Sites, 38 CATH. U. L. REV. 705 (1989).
population only where they are “expressly mention[ed].” 81 Therefore, the Court maintained that the Free Exercise Clause, because it does not expressly provide for protection of Native Americans, “cannot be used as a protective constitutional cloak.” 82

Although a subsequent case determined that Native Americans are indeed provided protections under the First Amendment, 83 Native American Church is still a valid example of the lack of success Native Americans have experienced in litigating under the First Amendment. In fact, litigants seeking to protect their sacred sites under the Constitution have lost every single case. 84

Suits brought by Native Americans under the Free Exercise Clause are analyzed under a test unique to them. 85 Under this test, native litigants must show “that the religious practice is central to their religion . . . that the religious belief or practice is indispensable to their religion . . . [and] that the practice or belief cannot be done elsewhere.” 86 Because of the unique nature of native religions, this three-part test is “almost impossible to satisfy” and potentially “culturally biased.” 87

81. DELORIA & LYTLE, AMERICAN INDIANS, supra note 33, at 233; Native Am. Church, 272 F.2d at 133.
82. DELORIA & LYTLE, AMERICAN INDIANS, supra note 33, at 233.
83. See People v. Woody, 394 P.2d 813 (Cal. 1964).
84. Ward, supra note 1, at 809.
85. Masayesva, supra note 45, at 135. When determining infringements of free exercise rights in cases involving nonindigenous plaintiffs, the federal courts have utilized a two-part test first established by the Supreme Court in Sherbert v. Verner, 374 U.S. 398 (1963). Rayanne J. Griffin, Sacred Site Protection Against a Backdrop of Religious Intolerance, 31 TULSA L.J. 395, 403 (1995).
86. Masayesva, supra note 45, at 135.
87. Id. Masayesva maintains that the test is inappropriate because it lacks an understanding of native religions and their fundamental differences from other major religions. Further, the test asks practitioners of native religions to answer questions that would never be put to those who practice Christianity or Judaism; he questions how a people can define what practices or beliefs are essential or indispensable to their religious practice. For example, “Can Catholics do without the Vatican?” Id.; see also O’Brien, supra note 54, at 42 (stating that the test under which native religions are judged is “more stringent” than the test applied in all other religious cases). When courts, using this test, “have balanced Indian religious rights against those of the dominant population, the courts judged tourism, water development, and commercial development to outweigh the plaintiffs’ First Amendment rights.” O’Brien, supra note 54, at 42.
Protection of native sacred sites is particularly challenging under the Free Exercise Clause because, historically, “[r]eligious freedom has existed as a matter of course in America only when religion has been conceived as a set of objective beliefs.” 88 Beliefs, but not practices, are beyond government interference.89 Practices can still be regulated by the state.90 Where a state government can exhibit “a compelling state interest in the subject matter and relate the objective of the regulation to a ‘valid secular purpose,’ it may control the religious practice”91 even if it is unable to control the belief behind the practice. Thus, in Crow v. Gullet, the court held that “the free exercise clause places a duty upon a state to keep from prohibiting religious acts, not to provide the means or the environment for carrying them out.”92

However, for those who practice traditional Native American religions, the right to hold objective religious beliefs “is a hollow and meaningless phrase when access to sacred religious sites is denied.”93 Still, thus “far in American history, religious freedom has not involved the consecration and setting aside of lands for religious purposes or allowing sincere but highly divergent behavior by individuals and groups.”94

Because the Constitution cannot be utilized to protect the religious freedoms of our indigenous population, the only way in which Native Americans can be guaranteed the right of worship is through an act of Congress.95 The Northwest Ordinance, which was passed by the Articles of Confederation, provided that:

The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their

---

88. DELORIA, GOD IS RED, supra note 29, at 278.
89. DELORIA & LYTLE, AMERICAN INDIANS, supra note 33, at 231.
90. Id.
91. Id.
93. Falcone, supra note 27, at 569.
94. DELORIA, GOD IS RED, supra note 29, at 278-79.
95. DELORIA & LYTLE, AMERICAN INDIANS, supra note 33, at 233; see also Vecsey, supra note 31, at 10 (noting that it is “remarkable” that legislation is required to protect the traditional religions of Native Americans because these faiths are both “domesticated” and “safe”). The solution lies in legislation, not in treaties, which have done little to protect Native American sacred sites, or even their lands in general. See DELORIA, CUSTER DIED, supra note 24, at 28. Indeed, “America has yet to keep one Indian treaty or agreement despite the fact that the United States government signed over four hundred such treaties and agreements with Indian tribes.” Id. Moreover, legal actions taken to protect treaty rights have generally come too late. See id. at 43. Notice of infringement “rarely reached the ears of tribemen in time to remedy the situation either by further agreements or appeals to conscience.” Id.
Thus, as early as the 1780s, the United States government acknowledged that legislation may be required to protect Native Americans and injustices committed against them.

Legislation, however, raises questions under that second Constitutional reference to religion, the Establishment Clause. The purpose of the Establishment Clause is, in effect, to create a wall of separation between church and state such that the government is not subjugated by religion and, likewise, religion is not dominated by the state.

Most relevant to Native Americans and their struggle to protect their sacred sites, "the Supreme Court has generally held that any special governmental attention to religion or any governmental ‘entanglement’ with religion constitutes ‘an establishment of religion.’" However, the unique relationship between Native Americans and the federal government makes the question of governmental entanglement particularly difficult. Because tribes are considered to be dependent domestic nations to which the federal government has a fiduciary responsibility and because of "the intimate connection between Indian religion and culture, there is no way completely to eliminate any entanglement between the government and American Indian religions." Moreover, given that sacred sites are out of native control only as a direct result of government interference, it seems only right


97. The Articles of Confederation were passed March 1, 1781. See Articles of Confederation.

98. See Ward, supra note 1, at 813.

99. Id. at 812.

100. Michaelsen, supra note 32, at 119; see also Robert C. Cannada, Is Our Government to Protect Our “Freedom of Religion” or “Freedom from Religion”? [Vol. 33:751


102. Id.

103. See supra notes 56-60 and accompanying text.
that the government make "amends for past sins by taking steps to remove governmental barriers that impede Indian religious practices."  

In addition, religious and cultural diversity as well as the free exercise of religion are "valid secular purposes of a constitutional democracy." Therefore, a law that protects the free exercise of traditional indigenous religions from impositions by the government would not be a violation of the Establishment Clause so long as the legislation insured "a fair balancing [of] the needs and interests of Native peoples and the government." Thus, the real question is not "whether the government will have anything to do with Indian religions but how the government and its agents will respond to Indian religious practices."

B. The American Indian Religious Freedom Act

In 1978, the American Indian Religious Freedom Act ("AIRFA"), sponsored by Senator James Abourzek (Dem., S.D.) and Representative Morris Udall (Dem. Ariz.), was passed. The law, which "was an attempt to direct policy comprehensively toward promoting the free exercise of Indian religions," appeared to require the government to take action toward protecting and preserving "for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites." The resolution referred specifically to Indians’ access to unspoiled sacred sites, the use

104. Michaelsen, supra note 32, at 119. Native-rights leader Suzan Shown Harjo makes this ethical argument:

[S]acred places went into the public domain and private hands when the federal government put Indians on reservations and made it a federal offense for Indians to worship in traditional ways or to travel to traditional places. At the same time, Christian denominations were federally funded to [convert] Indian people to their religions.

In light of this sorry history, it is both arrogant and hypocritical for any lawyer to raise separation of church and state or establishment issues when addressing Native American religious freedom.


105. Moore, supra note 63, at 98.

106. See id.


111. 42 U.S.C. § 1996. The bill went no further in seeking to define these sites. See id.
of natural resources normally protected by conservation and other laws, and participation in traditional Indian ceremonies as areas of Indian religious practice to be protected."

When signing AIRFA into law, President Jimmy Carter echoed this sentiment. Carter stated that the law would thus make it "the policy of the United States to protect and preserve the inherent right of American Indian, Eskimo, Aleut and Native Hawaiian people to believe, express and exercise their traditional religion." There were, however, several problems with the law. AIRFA failed, for example, to state what would be a violation of the law or how the government would handle violations. Subsequent litigation under AIRFA would reveal even more significant oversights.

In Lyng v. Northwest Indian Cemetery Protective Ass'n, a site sacred to the Yurok, Karok and Tolowa tribes was threatened by proposed timber harvesting and the construction of a road. Two lower courts had ruled that the proposed road would violate the Government's "trust responsibilities to Indians living on the Hoopa Valley Reservation" and significantly impact "Indian religious practices." Furthermore, when making its decision, the Supreme Court acknowledged a study commissioned by the National Forest Commission, which "concluded that constructing a road along any of the available routes 'would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples.'" However, the Court overturned the injunction granted below and held that AIRFA did not create any enforceable cause of action.

112. See Vecsey, supra note 31, at 7.
115. See Falcone, supra note 27, at 572.
117. See id. at 442.
118. Id. at 444-45. For a more detailed discussion of one of these decisions, Northwest Indian Cemetery Protective Association v. Peterson, 552 F. Supp. 951 (N.D. Cal. 1982), and the court's analysis of the National Historic Preservation Act, see infra notes 143-49 and accompanying text.
119. 485 U.S. at 442.
120. Id. at 455.
Lyng was not the only case to be brought under AIRFA. \(^{121}\) However, the Supreme Court's ruling "hindered all subsequent efforts to protect sacred sites. It was AIRFA's final defeat."\(^{122}\)

In order to guarantee AIRFA's passage, Rep. Udall assured opponents of the law "that the bill would not put Native Americans in a more favorable position than anyone else."\(^{123}\) To that end, he stated that AIRFA was "a mere policy statement . . . with no teeth."\(^{124}\) The Supreme Court took these statements to heart when it made its decision in Lyng.

The net effect has been that AIRFA has guaranteed no additional protection for the practice of traditional Native American religions than what they originally had under the First Amendment.\(^{125}\) Instead of providing a cause of action to protect Native American sacred sites, AIRFA has been "construed to require only that procedural steps be taken."\(^{126}\) The Federal Agencies Task Force Report, created under the direction of AIRFA, which charged federal agencies with the duty to review their practices with greater tolerance toward native religions in mind, published in 1979, "identified minimal changes in the day-to-day affairs and activities of the executive branch necessary to bring the bureaucracy into compliance with AIRFA and the First Amendment [of] the Constitution."\(^{127}\) However, none of these changes has been implemented.\(^{128}\) Yet, this is considered compliance with AIRFA because the law does not require "any result, only process."\(^{129}\)


\(^{122}\) Earth Land Institute, supra note 56; see also Ward, supra note 1, at 815 (explaining that since the failure of AIRFA, Native Americans are fearful of taking additional legal steps to protect their sacred geography because "action risks erosion of what they seek to preserve by establishing case law hostile to Native American religions").

\(^{123}\) Falcone, supra note 27, at 577 n. 81.

\(^{124}\) Id. (citing 124 CONG. REC. 21444-45 (July 18, 1978) (statement of Rep. Udall)).

\(^{125}\) See Crow, 541 F. Supp. at 793 (referring to the purpose of AIRFA as stated in the legislative history: "[T]o insure that American Indians were given the protection that they are guaranteed under the First Amendment; it was not meant to in any way grant them rights in excess of those guarantees.").

\(^{126}\) Masayeva, supra note 45, at 134-35; see also Wilson, 708 F.2d at 747 (holding that "AIRFA requires federal agencies to consider, but not necessarily to defer to, Indian religious values" and "does not prohibit agencies from adopting all land uses that conflict with traditional Indian religious beliefs or practices").

\(^{127}\) Moore, supra note 63, at 83-84.

\(^{128}\) Id.

\(^{129}\) Masayeva, supra note 45, at 135 (also noting that because it does not require results, AIRFA has less of an impact in saving native religions that those laws "that protect endangered fish and animal species, or laws that protect water quality").
Moreover, in many instances, "[f]ederal departments and agencies have worked actively against accommodation of Native religions, in direct contravention of AIRFA's findings and policy pronouncements."\textsuperscript{130} For example, the United States Forest Service, an agency of the Department of Agriculture, "has fought aggressively against Indian religious interests in the federal court system."\textsuperscript{131} Meanwhile, the National Park Service, an agency of the Department of the Interior, has created a Native American Relationships Policy that subjugates religious claims "to all other service management priorities."\textsuperscript{132}

There have been repeated attempts to amend AIRFA, but, thus far, none have been enacted into law. For example, in 1988, Senator Alan Cranston of California sought to add an additional section to AIRFA, which stated that "[e]xcept in cases involving compelling governmental interests of the highest order, Federal lands that have been historically indispensable to a traditional America[n] Indian religion shall not be managed in a manner that would seriously impair or interfere with the exercise or practice of such traditional American Indian religion."\textsuperscript{133} The following year, in response to the \textit{Lyng} decision, Representative Udall, one of the original sponsors of AIRFA, also introduced a bill into Congress to amend his failed legislation.\textsuperscript{134} In 1993, the Native American Free Exercise of Religion Act,\textsuperscript{135} which included a provision providing for additional protection of sacred sites, was introduced and dropped.\textsuperscript{136}

\textsuperscript{130.} Moore, \textit{supra} note 63, at 82. "There are many sacred places that are being desecrated, damaged and destroyed right now. The federal agencies are doing some of it and they are permitting or looking the other way while non-federal entities are doing their share." Harjo, \textit{supra} note 104; \textit{see also} Harjo, \textit{supra} note 11 (criticizing the Bureau of Land Management, the Forest Service and the National Park Service for desecrating holy sites).

\textsuperscript{131.} Moore, \textit{supra} note 63, at 85; \textit{see also} Wilson, 708 F.2d 735, and \textit{Lyng v. Northwest Indian Cemetery Protective Ass'n}, 485 U.S. 439 (1988) for examples of the Forest Service's hard-fought battles against indigenous rights.

\textsuperscript{132.} Moore, \textit{supra} note 63, at 86; \textit{see also} Indianz.com, \textit{Bush Judicial Nominee Blasted by Democrats} (Feb. 6, 2004), at \texttt{http://www.indianz.com/News/archives/003650.asp} (discussing William G. Myers III, Bush nominee to the Ninth Circuit Court of Appeals, who, in his previous position as the Department of the Interior's top lawyer, "pav[ed] the way for a mine on sacred land in California").


\textsuperscript{134.} \textit{See O'Brien, supra} note 54, at 40.

\textsuperscript{135.} S. 1021, 103d Cong. (1993).

C. Additional Actions

"In the absence of statutory protections, native activists have been forced to use other laws . . . to protect sacred places."

The Antiquities Act required archeologists to obtain permits for digs on federal land and created penalties for injuring or destroying protected sites. The Antiquities Act was ineffective in protecting sacred sites and the courts deemed it to be "unconstitutionally vague."

Section 106 of the National Historic Preservation Act discusses historic and cultural properties and requires federal agencies to address and mitigate the effects of their actions on such sites. Northwest Indian Cemetery Protective Ass'n v. Peterson exemplified the failures of this Act.

137. Earth Land Institute, supra note 56.
139. The Act states, in pertinent part:
   Any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than five hundred dollars or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.
142. Id.
143. 552 F.Supp. 951 (N.D. Cal. 1982). The Federal Communications Commission ("FCC") has potentially breathed new life into the National Historic Preservation Act in 2004, when it voluntarily adopted a set of guidelines ("Best Practices") to assist FCC applicants in their assessment of the possible impacts of wireless towers on the sacred sites of the United South and Eastern Tribes ("USET"), a group comprised of twenty-four federally recognized tribes. See Press Release, Fed. Communications Comm'n, FCC and United South and Eastern Tribes, Inc. Adopt Voluntary "Best Practices" Concerning Protection of Historic Properties of Religious and Cultural Significance to Tribes in the Tower Siting Process (Oct. 25, 2004), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-253516A1.pdf. Under the Best Practices, USET member tribes alert the FCC to counties "for which they desire notification of proposed facilities." Fed. Communications Comm'n, Voluntary Best Practices for Expediting the Process of Communications Tower and Antenna Siting Review Pursuant to Section 106 of the National Historic Preservation Act, (Oct. 25, 2004), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-253516A2.pdf. If a tribe indicates that a proposed facility may negatively impact a sacred site, the tribe and the applicant are to work collaboratively toward a mutually satisfactory agreement. Id. If they are unable to avoid or mitigate damages to a sacred site to the satisfaction of the tribe, the FCC will step in and make a final determination. Id. The new FCC policy applies only to USET member tribes and pertains only to those sites which are eligible for, or already included in, the National Register; thus, the scope of the policy is extremely limited. Id. Moreover, the shortcomings of the National Historic Preservation Act are highlighted in the Peterson case. See infra notes 144-49. However, the overall impact of the policy remains to be seen, and the process of consultation and cooperation is certainly
In *Peterson*, the U.S. Forest Service was seeking to construct a road in a remote region of California that would have disturbed land sacred to the Yurok, Karuk, and Tolowa Indian tribes. The tribes comprised “a religious community of some 4,500 persons and approximately 140 leaders” and worship at the site comprised “the core of their beliefs, for meditation and preparation for rituals, which demand solitude, silence, and undisturbed natural surroundings.” The *Peterson* court found that although the native plaintiffs believed that “construction of the road... and the accompanying disruptive intrusions such as logging activity and increased road traffic, are ‘totally incompatible with the ritual uses of this sacred country,’” the proposed road would not “unlawfully burden the Indian plaintiffs’ exercise of their religion.”

Ultimately, much of the geography sacred to the tribes was spared by congressional act. The California Wilderness Act made construction of the road illegal. Through its decision in *Peterson*, however, the government “confirmed its power to build a road and cut trees on public land,” irrespective of native wishes. Moreover, it made clear how important legislation can be in the struggle to save the sites sacred to Native Americans.

The National Environmental Policy Act was a “Congressional effort to ensure that federal agencies consider the effects of their proposed actions on the environment... [and make a] rigorous assessment of both the ecological and cultural impacts of federal undertakings.” However, the courts have held that in determining the effects of the proposed undertakings, the Forest Service need do no more than consult local governmental offices and conduct its own survey. Despite the fact that Native Americans will rarely reveal the location of sacred sites before they have knowledge that the area is threatened, there is no requirement to consult with local tribes. Moreover, courts have

---

149. Emenhiser, *supra* note 144.
151. Earth Land Institute, *supra* note 56.
153. *See id.*
held that mere consideration of alternatives to the destruction of sacred geography is sufficient to satisfy the National Environmental Policy Act, irrespective of the actual costs and benefits or what other governmental agencies recommend.\textsuperscript{154}

Native Americans have also sought protection of their sacred geography under international laws, such as the 1948 Universal Declaration on Human Rights.\textsuperscript{155} Because this United Nations charter is not a self-executing document and the courts have no duty to enforce it until Congress undertakes legislative action, such suits have also proved unsuccessful.\textsuperscript{156}

IV. A COMPARATIVE ANALYSIS OF FOREIGN AND AMERICAN LEGISLATION\textsuperscript{157}

A. Australia

Land rights for Australia’s Aboriginal population became a major political issue in 1972 when the Australia Labor Party incorporated the matter into their platform.\textsuperscript{158} At the initiation of his party’s campaign, Labor Party leader Gough William stated: “We will legislate to give Aboriginal land rights . . . because all of us as Australians are diminished while the Aborigines are denied their rightful place in this nation.”\textsuperscript{159}

Upon election, the Labor Party appointed Justice Woodward “to inquire into appropriate ways to [recognize] Aboriginal land rights in the Northern Territory.”\textsuperscript{160} After nearly one year of research, Woodward


\textsuperscript{157} Although Canada has “no legislation directly concerned with sacred sites on Crown lands . . . [and] no reported religious claim has been made under [any] treaty clause,” see Richard B. Collins, Sacred Sites and Religious Freedom on Government Land, 5 U. PA. J. CONST. L. 241, 260-61 (2003) for a discussion of the Nunavut Settlement Act, which created an immense territory to be governed by the Inuit of Canada.

\textsuperscript{158} Galarrwuy Yunupingu, From the Bark Petition to Native Title, in OUR LAND IS OUR LIFE: LAND RIGHTS – PAST, PRESENT AND FUTURE 1, 6 (Galarrwuy Yunupingu ed., 1997).

\textsuperscript{159} Id (citing CENTRAL AND NORTHERN LAND COUNCILS, OUR LAND, OUR LIFE: ABORIGINAL LAND RIGHTS IN AUSTRALIA’S NORTHERN TERRITORY 6 (1995)).

\textsuperscript{160} Yunupingu, supra note 158. “The Northern Territory’s legislative and executive authority is more limited than that of [states] and not all constitutional guarantees are applicable to its citizens.” NORTHERN TERRITORY STATEHOOD WORKING GROUP, FINAL REPORT at i (Northern
issued a report, which included suggestions that no additional Aboriginal land rights be denied “except in the national interest”; compensation be given to those who had already been dispossessed of their land rights; a provision of land be returned to the Aborigines “where it [would] benefit the largest number of people economically, socially, or culturally”; and that Aborigines be given the “the right to prevent mining on their land.”

Based upon Woodward’s suggestions, the Aboriginal Land Rights (Northern Territory) Act was introduced into Federal Parliament. However, it could not be passed before a new Prime Minister came to office. “Despite election promises that the Bill would be passed without amendment, the new Prime Minister Malcolm Fraser buckled to pressure from mining and pastoral industry groups and conservative Northern Territory politicians.” The revised bill, which was passed in Parliament, lacked many of Woodward’s proposals and, as a result, sacred sites not on Aboriginal land were left open to destruction by developers.

However, the Land Rights Act was successful in returning land ownership to the indigenous Australian population. “[M]ost of the existing Aboriginal reserves became Aboriginal land, with inalienable freehold title held by local Aboriginal Land Trusts, and a procedure was established for the claiming of unalienated Crown land—that is, land which no one else is using or has an interest in—and Aboriginal-owned pastoral leases.”

Territory ed. May 1996), http://www.nt.gov.au/lant/parliament/committees/condev/ntconstitution/ntcons/finalreportworkinggroup.PDF. However, the Territory does have limited self government as granted under the Self-Government Act of 1978. See id. at 6. The legislation passed by the Legislative Assembly, the Northern Territory unicameral parliamentary system, can be overturned by the Australian government. Id. In 2002, 25% of those living in the Northern Territory identified themselves as indigenous, compared to “an average of 2.2% for all Australians.” Indigenous Territorians, The Territory, at http://www.nt.gov.au/dcm/otd/publications/otd_general/indigen.pdf.


163. See Yunupingu, supra note 158, at 7.

164. See id.

165. Id.

166. See id. The law granted “the Northern Territory Legislative Assembly responsibility for ‘complementary’ legislation covering sacred site protection.” CENTRAL AND NORTHERN LAND COUNCILS, supra note 159, at 7. Unfortunately, the Aboriginal community feels that the Northern Territory Government has a tradition of “blatantly anti-Aboriginal policies.” Id.

167. See CENTRAL AND NORTHERN LAND COUNCILS, supra note 159, at 7.

168. Id. As of 1995, approximately 40% of the Northern Territory was owned by Aborigines. Id. “Almost half of this is land [that was] formerly set aside as Aboriginal reserves.” Id. In direct
For sacred sites located on Aboriginal land in the Northern Territory, where the native population has "control of access and use of the land," maintaining the integrity of sacred sites is a relatively uncomplicated issue.\textsuperscript{169} After a developer submits his proposed plan to the appropriate land council, one of the major legislative bodies of native people in the Northern Territory, the future work area is "examined by Aboriginal landowners assisted by anthropologists and a report is prepared."\textsuperscript{170} This process guarantees that the proposed work can continue "as submitted or amended while maintaining the confidentiality of information about the sacred sites."\textsuperscript{171}

Aboriginal interests maintain that "the Land Rights Act offers mining companies enormous benefits in terms of risk reduction."\textsuperscript{172} If a mining company negotiates the terms of their agreements with Aborigines who have a land interest, "then the company knows that the terms of the agreement are certain and binding" before they begin work.\textsuperscript{173} This knowledge has transformed the culture in mining companies "to one of negotiation and acceptance."\textsuperscript{174}

Moreover, the negotiation process has not proved to be too encumbering to mining companies.\textsuperscript{175} In fact, in the Northern Territory, the majority of the land under mining exploration is held by Aboriginal contrast to the rights sought by Australia's Aborigines under the Land Rights Act, "[i]n all but the most exceptional of circumstances Native [American] groups have never and will never seek exclusive use of a land area for religious purposes." Moore, supra note 63, at 97. In \textit{Lyng v. Northwest Indian Cemetery Protective Ass'n}, Justice O'Connor, delivering the opinion of the Court, expressed concern that finding in favor of the native litigants would result in forcing public lands into "religious servitude." 485 U.S. 439, 452 (1988). She maintained that "[w]hatever rights the Indians may have to the use of the area ... those rights do not divest the Government of its right to use what is, after all, its land." \textit{Id.} at 453. This concern is unfounded, however. Native Americans "in \textit{Lyng} ... or in other sacred site cases have never sought to tie up the sacred land areas for their exclusive use." Moore, supra note 63, at 97. While "the range of interests immediately served by private profit is narrow and not multidimensional ... [s]uch is not the case with respect to the other values with which Native interests are aligned." \textit{Id.} at 98.

\textsuperscript{169} \textit{CENTRAL AND NORTHERN LAND COUNCILS}, supra note 159, at 35.  
\textsuperscript{170} \textit{Id.}  
\textsuperscript{171} \textit{Id.}  
\textsuperscript{172} Yunupingu, supra note 158, at 11.  
\textsuperscript{173} \textit{Id.}  
\textsuperscript{174} Lois O'Donoghue, \textit{Something to Celebrate, in OUR LAND IS OUR LIFE: LAND RIGHTS—PAST, PRESENT AND FUTURE} 28, 31 (Galarrwuy Yunupingu ed., 1997). "Increasingly [mining companies] are offering equity in projects and pro-active training and employment deals—while at the same time respecting traditional owners' concerns over sacred sites and hunting grounds and living areas." John Ah Kit, \textit{Land Rights at Work—Aboriginal People and Regional Economies, in OUR LAND IS OUR LIFE: LAND RIGHTS—PAST, PRESENT AND FUTURE} 52, 55 (Galarrwuy Yunupingu ed., 1997).  
\textsuperscript{175} Yunupingu, supra note 158, at 12.
interests. As of 1997, 517 of 705 applications for mining exploration on Aboriginal lands had been processed. At that time, 152 of the 188 outstanding applications were “under examination,” and only thirty-six had been “delayed for logistical reasons.”

However, sacred sites that are not located on Aborigine-owned land lack the same protections. “The Land Rights Act gives . . . Land Councils a specific function to assist Aboriginal people to protect sacred sites, whether or not they are on Aboriginal land, but it also gives the Northern Territory Legislative Assembly the responsibility for sacred site legislation.” Pursuant to the powers granted under the act, the Northern Territory government passed the Northern Territory Aboriginal Sacred Sites Act in 1989.

“The first statute [in Australia] to address religion specifically,” the Sacred Sites Act adopted the definition of “sacred site” that was utilized in the Land Rights Act, which categorizes a sacred site as one that “is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes any land that, under a law of the Northern Territory, is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition.”

Although this definition appears to state that a sacred site may be protected without specific government acknowledgement, the Sacred Sites Act provides that a reasonable lack of knowledge as to the sacredness of a site is a defense to prosecution for its desecration.
Therefore, registration is virtually essential to ensuring the protection of Aboriginal holy land.\(^{185}\)

To establish whether or not to designate a site as sacred, the government created the Aboriginal Areas Protection Authority.\(^{186}\) Land Councils nominate twenty potential members of the Authority, from which the Administrator, an agent of the Northern Territory government, selects ten.\(^{187}\) The Administrator appoints two additional members of his own choosing.\(^{188}\)

When determining whether or not a site is sacred, the Authority looks at, among other things, the history of the site according to native tradition, traditional restrictions on on-site activities and the concerns of and detriments to the land owner.\(^{189}\) This well-rounded consideration has earned praise from the mining industry,\(^{190}\) and has generated some successful compromises.\(^{191}\) For example, outside the city of Alice Springs, a development company revised its original plans for a residential subdivision after consultation with the local native population.\(^{192}\) “Likewise, in a conscious act of cooperation and conciliation, Aboriginal custodians . . . accepted compromises in the delineation of those traditional sites.”\(^{193}\)

The designation process has not, however, escaped criticism. According to the Land Councils, the legislation is merely providing a “legal means for miners and developers to desecrate sites.”\(^{194}\) They object to the fact that the Aboriginal Authority is not an independent organization, but “is subject to the direction of the Minister,”\(^{195}\) and a minister adversarial to the aboriginal population can lead to the

\(^{185}\) Although the legislation eventually failed, the Northern Territory government has even sought “to make it a criminal [offense] to write that a sacred site was a sacred site if the Government said it was not.” CENTRAL AND NORTHERN LAND COUNCILS, supra note 159, at 35. Such proposals make it abundantly clear how essential registration is to protection.

\(^{186}\) Id. at 38; see also Galarrwuy Yunupingu, The Desecration of Injalkajananama (Nyalkalypyaname), in WAYWARD GOVERNANCE: ILLEGALITY AND ITS CONTROL IN THE PUBLIC SECTOR 211-23 (Australian Institute of Criminology 1989), at http://www.aic.gov.au/publications/lc/wayward/ch14.html (explaining that it is the “responsibility of the Sacred Sites Authority . . . to examine and to evaluate all claims by Aboriginal people regarding the significance of sites in question, and to establish and maintain a register of sacred sites in the Northern Territory”).

\(^{187}\) Sacred Sites Act § 6.

\(^{188}\) Id.

\(^{189}\) Sacred Sites Act §§ 27, 29.

\(^{190}\) CENTRAL AND NORTHERN LAND COUNCILS, supra note 159, at 37.

\(^{191}\) Yunupingu, supra note 186.

\(^{192}\) Id.

\(^{193}\) Id.

\(^{194}\) See CENTRAL AND NORTHERN LAND COUNCILS, supra note 159, at 38.

\(^{195}\) Sacred Sites Act § 5.
destruction of sacred sites, despite the willingness of the Land Councils and the Authority to work toward a better solution.\textsuperscript{196} Moreover, because of the economic fragility of the Northern Territory and a general sentiment that "federally inspired land rights and sacred sites protection legislation constitute an unwarranted federal intrusion on Territory autonomy," there is high incentive for the Minister to actively work against the preservation of sacred sites.\textsuperscript{197} "The Northern Territory Government has instructed its authorities and departments, and encouraged private developers, to . . . by-pass[] the [organizations] with the legislative function and the expertise to perform sacred site avoidance surveys—the Land Councils and the Aboriginal Areas Protection Authority."\textsuperscript{198}

B. New Zealand

In New Zealand, sacred site legislation was nonexistent until 1991 and the creation of the Resource Management Act ("RMA").\textsuperscript{199} The RMA "consolidated many land use and planning laws into a single, complex, and somewhat controversial enactment of more than 400 sections."\textsuperscript{200} The Act provides for protection of wahi tapu, the sacred sites of the Maori.\textsuperscript{201} These sacred sites are defined "only in section 2 in the Historic Places Act of 1993 as 'a place sacred to Maori in the traditional, spiritual, religious, ritual, or mythological sense.'"\textsuperscript{202}

The definition provided in the RMA is very general, which allows the Maori to seek protection for the broadest possible range of sacred geography.\textsuperscript{203} However, the final determinations reside with the Maori Heritage Council of the Historic Places Trust, which maintains a register of wahi tapu and wahi tapu areas.\textsuperscript{204} In order to ensure some confidentiality, "[t]he registration process provides for only the general location and nature of wahi tapu to be given."\textsuperscript{205} The Council then

\begin{thebibliography}{99}
  \bibitem{196} Yunupingu, \textit{supra} note 186.
  \bibitem{197} Id.
  \bibitem{198} CENTRAL AND NORTHERN LAND COUNCILS, \textit{supra} note 159, at 38.
  \bibitem{200} Collins, \textit{supra} note 157, at 247.
  \bibitem{201} Resource Management Act § 6.
  \bibitem{202} Collins, \textit{supra} note 157, at 247.
  \bibitem{203} Nick Tupara, "Sacred Places" to the Maori, \textit{NEW ZEALAND HISTORIC PLACES MAG.},
  \bibitem{204} Id.
  \bibitem{205} Id.
\end{thebibliography}
determines whether the proposed site warrants a space on the register. Following acceptance, the Council notifies local authorities and makes recommendations on how to protect the location. However, the Council has no real authority; "registration of a place does not affect the property rights of owners or confer statutory protection." Ideally, it only serves to "alert potential purchasers or developers to the significance of wahi tapu so they can be preserved through the sharing of information and through consultation."

Despite its apparent shortcomings, the RMA has created an incentive for planners and developers to consult with the local Maori people before beginning their proposed projects. Although the requirements are merely procedural, "they assure Maori the opportunity to present their substantive claims, including sacred site claims, and have them considered in the consent process." In order to avoid conflicts, it is in the best interests of both the Maori and developers to discuss pending proposals and work toward a satisfactory solution, together. "If a party is dissatisfied with a decision, judicial review can be had in the Environment Court, an institution that bears some resemblance to an American administrative court."

However, the success of the RMA is in part based upon an element that is unique to New Zealand: the Environmental Court. Institution of a similar law in the United States would, therefore, either require the creation of a new court or require our current courts to be the main voice on what is sacred, which, as outsiders to native religion, would be exceptionally difficult to do and is a role for which their earlier failures in protecting sacred lands appear to deem them inappropriate.
C. Legislation in the United States

In July 2002, California State Senator John Burton (Dem., San Francisco) introduced the Native American Sacred Sites Protection Act. The bill defined sacred sites as:

[A]ny geophysical or geographical area or feature that is sacred by virtue of its traditional cultural or religious significance or ceremonial use, or by virtue of a ceremonial or cultural requirement, including a religious requirement that a natural substance or product for use in Native American tribal ceremonies be gathered from that particular location.

The Act passed both the senate and assembly before it was eventually vetoed by Governor Grey Davis. In recent years, Congressman Nick Rahall (Dem., W.V.) has championed the struggle to amend AIRFA on the federal level. Rahall introduced the Native American Sacred Lands Act on June 11, 2003. The bill, which utilizes the same definition of sacred as is found in the California legislation, would grant tribes "the right to petition land management agencies to have sacred sites 'designated as unsuitable for any or certain types of Federal or federally assisted undertakings.' In addition, the bill "would require consultation with tribes before any activity... that may alter the cultural and religious significance of the sacred site." In essence ... [Rahall’s proposed legislation] would order federal agencies such as the Bureau of Land Management and the Forest Service to work closer with tribes on the use of public lands.


http://scholarlycommons.law.hofstra.edu/hlr/vol33/iss2/9
“treat oral history of a geographic area... as scientific evidence that a geographic structure or area is sacred.” If the “departments or agencies [did] not abide by the conditions of the act, the federal courts would be the courts of jurisdiction.”

Rahall’s bill, which has remained in the House Committee on Resources since its 2003 introduction, “suffers from the same problems as the California bill.” Davis, in a letter to the Senate outlining his reasons for vetoing S.B. 1828, manages to highlight the problems at the core of both bills, namely, the review process for determining which sites are indeed sacred, and finding a balance between disclosure and confidentiality.

[S.B. 1828] was designed to protect Native American sacred sites by giving tribes a significant voice in the environmental review process for projects that might impact them. At the heart of the bill is the list of sites maintained by the Native American Heritage Commission. But, that list can be both under-inclusive and over-inclusive. It is under-inclusive because some tribes, understandably fearing destruction of sites, have not disclosed their identity to the Commission. It can be over-inclusive because, under this bill, any site may be placed on the list by anyone, no matter the level of evidence that the site is sacred. Nonetheless, simply placing a site on the list gives it all the protections afforded by the bill.

Davis released the Traditional Tribal Cultural Sites bill, a revised version of the Native American Sacred Sites Protection Act, on June 26, 2003. However, S.B. 18 failed to garner enough support and failed to pass the California State Assembly.

223. Melmer, supra note 221.
224. Id.
225. King, supra note 220.
226. See Letter from Gray Davis, Governor of California, to California State Senate (Sep. 30, 2002), available at http://www.governor.ca.gov/state/govsite/gov_htmldisplay.jsp?BV_SessionID=@@@@@@096001648.1110771825@@@@@@&BV_EngineID=cccaddfjhmiecfmkmdffidfni60&sCatTitle=Previous+Administration%2fPress+Release&sFilePath=/govsite/press_releases/2002_09/20020930_L02246_Major_vetoes.html&sTitle=LEGISLATIVE+UPDATE+-+VETOES+II%3B%26amp;OID=36672 (highlighting his reasons for vetoing S.B. 1828, including the bill’s failure to “find the right balance between the need for confidentiality to protect sites, and the need for disclosure and notification to allow those planning projects to know to avoid areas containing sacred sites”). For purposes of this Note, only the former issue is significant. However, the need for confidentiality is an important aspect of sacred sites legislation. See Moore, supra note 63, at 97 (discussing the value of privacy in sacred sites disclosure).
227. Letter from Gray Davis, supra note 226.
229. For an overview of objections to S.B. 18, see Letter from Curtis Alling, Association of Environmental Professionals Legislative Review Committee, to Gray Davis, Governor of California
The Traditional Tribal Cultural Sites bill sought to provide protection to sacred lands while avoiding the pitfalls of the Native American Sacred Sites Protection Act and Rahall’s proposed legislation. Davis’s bill would have incorporated the Traditional Tribal Cultural Site Register, a confidential list. Qualification for registration would have required that a site was “traditionally associated with, or has served as the site for engaging in activities related to, the traditional beliefs, cultural practices, or ceremonies of a Native American tribe.” Whether a site should be listed on the Register would have been determined by a majority of the Native American Heritage Commission, which, under Davis’s bill, would have consisted of nine members, including six “elders, traditional people, or spiritual leaders of California Native American tribes, nominated by Native American organizations, tribes or groups within the state” and reflecting the northern, central and


230. “The bill died 38-14, three short of the 41 votes needed for passage.” Jacob Coin, Coin: Sacred Sites Mean Protecting Our Way of Life, INDIAN COUNTRY TODAY, Nov. 10, 2003, available at http://www.indiancountry.com/content.cfm?id=1068486795. A later version of the bill passed the California legislature and was signed into law by Governor Arnold Schwarzenegger in September 2004. S.B. 18 (Ca. 2004). The revised bill “does not give authority to the California Native American Heritage Commission to define sacred and other culturally-sensitive sites.” James May, Watered Down Sacred Sites Bill Passes California Senate, INDIAN COUNTRY TODAY, Aug. 30, 2004, available at http://www.indiancountry.com/content.cfm?id=1093893338 [hereinafter May, Watered Down]. In fact, the law does little more than require developers to notify tribes of proposed developments. Id. It does not require that developers actually honor concerns expressed by Native Americans and, thus, adds nothing to already existing enforcement law. Id. Tribes will be “given an opportunity to... urge local governments to preserve sacred sites,” something they have already been doing, with little success, for decades. James P. Sweeney, State Senate OKs Revised Bill to Protect Sacred Tribal Sites, SAN DIEGO UNION-TRIB., Aug. 20, 2004, at A6.

The revised version of S.B. 18 was not met with the ferocious opposition of the business lobby that it encountered in its earlier, more significant form. See May, Watered Down, supra. This is likely why Governor Schwarzenegger signed the bill into law. Prior to his election, Sean Walsh, a spokesman for the Governor, maintained that Schwarzenegger would “not be biased against tribes should he win.” James May, Where Does Schwarzenegger Stand on Indian Issues?, INDIAN COUNTRY TODAY, Sept. 25, 2003, available at http://www.indiancountry.com/content.cfm?id=1064523086. While Schwarzenegger disparaged his opponents for accepting campaign contributions from Native Americans, Walsh insisted that his criticisms were based on the belief that “campaign donations would make them beholden to tribes across the board.” Id. However, the majority of donations to the Schwarzenegger campaign came from large California developers, the main threat to federally held sacred sites. James May, Schwarzenegger to Face Challenges in Indian Country, INDIAN COUNTRY TODAY, Oct. 10, 2003, available at http://www.indiancountry.com/content.cfm?id=1065805463. While the tribes of California have “[adopted] a wait and see approach,” their sacred sites remain under threat absent additional, perhaps federal, action. Id.


232. Id. § 13m.
southern regions of the state.\textsuperscript{233} In addition, one member would have been a representative of the Governor and at least two members would have been "recognized professionals in... ethnohistory, archaeology, anthropology, ethnography, or other related disciplines.\textsuperscript{234}

V. PROPOSED DEFINITION

What the legislation (or proposed legislation) of Australia, New Zealand, California and the federal government all have in common is that none require that the native worshippers make a showing that a particular site under threat is central or integral to their faith in order to find protection.\textsuperscript{235} While this is the requirement adopted by the courts when making a Free Exercise Clause analysis,\textsuperscript{236} it has not been adopted in these definitions. This is an important aspect when defining what is "sacred." "Regardless of whether beliefs are central or indispensable, [the] government should not be able to violate [religious] rights unless very important national interests are at stake."\textsuperscript{237} Moreover, this test has been categorized as "culturally biased.\textsuperscript{238}

In addition, none of the definitions rely entirely on a historical religious relationship with a particular site in order to garner protection.\textsuperscript{239} Some federal courts have required "that traditional religious practitioners restrict their identification of sacred locations to places that were historically visited by Indians, implying that at least for the federal courts, God is dead."\textsuperscript{240} Yet, such a rule is inappropriate for traditional Native American religions and lacks understanding of their beliefs.\textsuperscript{241} Practitioners of traditional native religions are continually "look[ing] forward to the revelation of new sacred places and ceremonies.\textsuperscript{242}

However, the most essential factor in the protection of sacred sites is not an all-encompassing definition of what is sacred. For example, the native population of New Zealand, while having one of the most inclusive definitions of sacred on the books, is forced to litigate in court

\textsuperscript{233} Id. § 14.
\textsuperscript{234} Id.
\textsuperscript{235} See supra notes 182-83, 201-02, 216-17, 220 and accompanying text.
\textsuperscript{236} See supra notes 85-86 and accompanying text.
\textsuperscript{237} Masayeva, supra note 45, at 136.
\textsuperscript{238} Id. at 135; see also note 87 and accompanying text.
\textsuperscript{239} See supra notes 182-83, 201-02, 216-17, 220 and accompanying text.
\textsuperscript{240} DELORIA, GOD IS RED, supra note 29, at 277.
\textsuperscript{241} See id. at 277-78.
\textsuperscript{242} Id. at 277. In fact, some followers of native faiths maintain that "[i]f this possibility did not exist, all deities and spirits would be dead." Id.
for much of its protection. In fact, it has been suggested that "the strongest and best-modulated protection for 'sacred sites' could be achieved through legislation that doesn't necessarily even mention 'sacred sites.'" Rather, this argument maintains that the greatest defense would be "to strengthen and improve the way Federal agencies consult with tribes . . . about projects that may affect their interests."

However, while such a bill would be ideal for practitioners of traditional native faiths, it would undoubtedly be met with fierce opposition from developers who fear that legislation of this type would consume and destroy their industries. A better compromise is found in the Northern Territory Aboriginal Sacred Sites Act and in the Traditional Tribal Cultural Sites bill.

What these efforts have in common are very general definitions that incorporate committee reliance for interpretation. In Australia, the Aboriginal Areas Protection Authority, a body comprised of both Aborigines and government officials, determines whether a site meets the definition; and where the government has not actively worked against the Authority, the law has been very successful. Davis's bill relied upon a similar plan; his Native American Heritage Commission would also have been comprised of native and non-native interests, working together to determine which sites should be saved.

As Congress debates the pros and cons of the Native American Sacred Lands Protection Act, they would do well to look at the successes of the Northern Territory Aboriginal Sacred Sites Act, as well as the Traditional Tribal Cultural Sites bill. These laws make it apparent that a successful, viable definition is (1) simply stated rather than overly specific and (2) relies upon native and non-native committee members to determine whether a site meets the definition.

Because it rejects the centrality requirement that is predisposed to findings against indigenous populations; because it is capable of growing with native religions and protecting new sacred sites as they are revealed; because it provides a generalized definition which relies upon

243. See supra notes 213-15 and accompanying text.
244. King, supra note 220.
245. Id.
246. Developers turned out in force to testify against Rahall's bill, which provides significantly more protection for development interests than would a law with no definition of "sacred." See Bill to Protect Sacred Native American Federal Lands Would Jeopardize Mining and Other Land-Development Activities, MINING WK. (Nat'l Mining Ass'n, Washington, D.C.), Oct. 4, 2002, at 2, available at http://www.nma.org/newsroom/miningweek/miningweekarchive/pdf2002/mw100402.pdf (arguing that such a bill would "induce chaos" within industry). It goes without saying that the opposition to a bill with no definition would be too fierce for it to ever pass Congress.
a committee comprised of both natives and non-natives for interpretation; and because it has been tested for nearly fifteen years and has been found, generally, to be a success, Australia’s Northern Territory Aboriginal Sacred Sites Act provides an ideal definition of “sacred” for future United States federal legislation. Thus, this Note proposes that a sacred site be defined as follows:

A sacred site is one which is sacred to those practicing traditional native religions or is otherwise of significance according to native tradition, and includes any land that, under a law of the United States government, is declared to be sacred to Native Americans or of significance according to the Native American tradition.

No matter what the outcome of the Rahall bill, it should be clear that sacred sites protection legislation is long overdue. “It is simply unacceptable for a nation to be prepared to adopt world’s best practice standards for commerce and trade, but adopt a lesser standard for the rights of its citizens who contribute and participate in the economy served by commerce and trade.” Moreover, with the destruction of each sacred site, we risk the loss of entire religions, something that deprives us all.

Amber L. McDonald*

---

248. Deloria states:
No movement can sustain itself, no people can continue, no government can function, and no religion can become a reality except it be bound to a land area of its own. The Jews have managed to sustain themselves in the Diaspora for over two thousand years, but in the expectation of their homeland’s restoration. So-called power movements are primarily the urge of peoples to find their homeland and to channel their psychic energies through their land into social and economic reality. Without land and a homeland no movement can survive. And any movement attempting to build without clarifying its goals usually ends in violence, the energy from which could have been channeled toward sinking the necessary roots for the movement’s existence.

Deloria, CUSTER DIED, supra note 24, at 179; see also Dodson, supra note 247, at 42 (“Land rights is a social justice issue because the result of not having access to your land is in the destruction of culture, language, and spirituality.”).

* J.D. Candidate, 2005, Hofstra University School of Law. I would like to thank my advisor, Professor Richard K. Neumann, Jr., and my uncle, Doctor Allan T. Scholz, for their guidance and insight throughout the development of this Note. I would also like to express my appreciation to the members of the Hofstra Law Review, particularly Dinetah Kilburn and Corey Delaney for their invaluable advice and editorial skill and Susie Duffy for her indefatigable work ethic. Finally, I am truly grateful to my family for their absolute love and support. This Note is dedicated to the memory of my grandfathers, Major Allan E.V. Scholz and Matthew McDonald, each of whom inspired my interest in Native American culture in his own unique way.