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Rebecca Tsosie

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REBECCA TSOSIE†

Editor's Note: The following is an edited transcript of Professor Tsosie's presentation at the University of Denver Sturm College of Law on February 17, 2006.

PROFESSOR TSOSIE: Thanks to all of the wonderful people who organized this symposium, the *Denver University Law Review*, the Native American Law Students Association, and the excellent professors, Kristen Carpenter[1] and Fred Cheever.[2] These people have been my colleagues for a long time. I have an enormous amount of respect for their work. When I look into the audience, I see people that I have tremendous respect for. People who are leaders in the field—Professor Wilkinson,[3] all the folks from the Native American Rights Fund (NARF),[4] and my wonderful friends and students—I'm overwhelmed just to be here. I feel very blessed.

What I'd like to do is talk about sacred sites protection—highlighting some of the challenges that are quite apparent from the recent opinion dealing with Arizona's San Francisco Peaks[5] and the tribes that have an affiliation with that site. Then, I want to do something experimental with you, because when I think about what would be an appropriate way to manage lands that have sacred sites, I think that we need to go beyond the standard approaches. There are some incredible people in this room, and I hope that we can have a dialogue and share some perspectives.

I've been thinking about this issue, sacred sites, for a long time. I first experienced the need for a different way of thinking about the issues when I went to a summit in 2003 in Santa Fe, New Mexico.[6] Suzan Harjo,[7] a long-time activist and leader on this issue, hosted the summit.

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† Professor of Law, Willard H. Pedrick Distinguished Research Scholar, Executive Director, Indian Legal Program, Faculty Fellow, Center for the Study of Law, Science, and Technology, Affiliate Professor of American Indian Studies at the Arizona State University. The following is a transcript of remarks made on February 17, 2006 at the Denver University Law Review Symposium, "Borrowing the Land: Cultures of Ownership in the Western Landscape."

1. Assistant Professor of Law, University of Denver Sturm College of Law.
2. Professor of Law, University of Denver Strum College of Law.
3. Distinguished University Professor, Moses Lasky Professor of Law, University of Colorado School of Law.
4. *See* Native American Rights Fund, http://www.narf.org (last visited Apr. 14, 2006).
5. *See* Navajo Nation v. U.S. Forest Service, 408 F. Supp. 2d 866 (D. Ariz. 2006).
6. Summit on Consultation Protocols to Protect Native American Sacred Places, Nov. 14-16, 2003.
7. Suzan Shown Harjo (Cheyenne & Hodulgee Muscogee), President, The Morning Star Institute.

She brought together all of these native leaders—traditional leaders and political leaders—from just about every part of the country. There were also government people there and, of course, attorneys and other people. It was an amazing experience.

We started early in the morning. Every night we wouldn't stop talking until eleven or twelve. After the formal sessions were over, we would just convene in groups and share experiences—and you could talk. These were people from the northwest, from the southwest, from the plains, and all of these different areas with different sites. We started to talk about the connections—the stories and how those places were connected and what they meant. I learned so much during that time. It was just incredible.

The other thing I experienced listening to the stories was that people were dealing with the same type of challenges. Any time there was a native nation trying to protect a site on public lands, they had the same experiences in terms of the consultation process. The agencies, unless they had committed people within—and there are some very dedicated people in particular agencies—went about things with a procedural mechanism. Do we have some Indians at the table and are they talking to us? If so, let's check the consultation box.

On the other side, native nations would agonize because who actually had the right to reveal some of the things that the agency people wanted them to reveal?—the confidential things about your culture and about your way of living. In other words, who had the authority to talk for the tribe? How much could be said? Could you really identify these places on the map and then have everybody know where your site was?

There were all of those challenges. At one point—and I actually wrote this down because it was something that really stuck with me—John Sunchild, Sr.,[8] from the Chippewa Cree tribe, was speaking about a particular Chippewa sacred site, and he was talking in the context of their ways of knowing. He said

> The sacred places are made by the Creator, and the people have a duty to protect them, as you would protect altars. It's not only the sites, not just the land, but also the natural resources, the oil and the gas on them. The minerals help balance the earth. [They were fighting a strip-mining project up there.] By stripping minerals from the land, you're tinkering with the energy of the atmosphere, the fire and the wind. It's all related, and it's all embodied in our stories. In God's wisdom, this was meant for all of our survival.[9]

8. The late John R. Sunchild, Sr., was CEO of the National Tribal Development Association and chair of the Rocky Boy Tribal Council.

9. John Sunchild, Sr., Comments Presented at Summit on Construction Protocols for Protecting Native American Sacred Places, Nov. 14-16, 2003, Santa Fe, New Mexico.

That stuck with me. I thought about how right it was, but I also thought, how do you convey this idea to people that don't live that experience? How do you explain to a court, or to people from an agency, what we perceive as a truth about how human beings live in the world?

That's what I want to talk to you about today—what that process looks like. What are those connections that need to be made among people from different cultures so that respect can be carried out through the law? My starting assumption is that this can be done. I want to explore how we would do it.

I first want to discuss *Navajo Nation v. U.S. Forest Service*[10]—a district court opinion out of Arizona handed down on January 11, 2006. *Navajo Nation* was the second part of a long series of litigation where the Navajo, Hopi, and other affiliated tribes throughout Arizona's San Francisco Peaks have been fighting against the use of those mountains for a ski resort, lodge, and associated enterprises.[11] The ski lodge is operated by a private company, and it's on U.S. Forest Service land.[12]

Navajo Nation involves environmental claims under the National Environmental Policy Act (NEPA),[13] forest preservation claims under the National Forest Management Act (NFMA),[14] claims under the National Historic Preservation Act (NHPA),[15] and claims under the Religious Freedom Restoration Act (RFRA).[16] The biggest claim, and the only one that the court actually held the bench trial on, came under RFRA.[17] So, this was one of those cases that featured property claims, environmental claims, and religious freedom claims. Those were the three boxes. I guess you could put historic sites and cultural resources in a different category—although they are integrated.

Of course, the Forest Service won on all three accounts. The environmental and forest preservation claims were dismissed on summary judgment in favor of the Forest Service,[18] and the claims that went to trial were decided in favor of the Forest Service.[19]

Let me talk a little bit about what happened in the context of that case, and then, move into the other aspects of the larger issue.

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10. 408 F. Supp. 2d 866 (D. Ariz. 2006).
11. *Navajo Nation*, 408 F. Supp. 2d at 870-71.
12. *Id.*
13. National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4347 (2000).
14. National Forest Management Act of 1976 (NFMA), Pub. L. No. 94-588, 90 Stat. 2949 (codified in scattered sections of 16 U.S.C.).
15. National Historic Preservation Act (NHPA), 16 U.S.C. § 470 (2000).
16. Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb (2000). The *Navajo Nation* opinion also considered and rejected claims under the Endangered Species Act (ESA), 16 U.S.C. §§ 470, and the Grand Canyon National Park Enlargement Act (GCEA), 16 U.S.C. § 228i. *See Navajo Nation*, 408 F. Supp. 2d at 871.
17. *See Navajo Nation*, 408 F. Supp. 2d at 882-907.
18. *Id.* at 908.
19. *Id.*

The Arizona Snowbowl is a ski resort site. It is operated under a special use permit—covering about 700 acres of land in the Coconino National Forest, renewable on a forty-year basis.[20] The site has been used for skiing since the 1930s.[21] The big expansion happened in 1979, when there was a plan to expand the ski resort—cutting runs and doing all of these other things on the mountain.[22] The Navajo Medicine Men's Association and the Hopi tribe challenged the expansion in *Wilson v. Block*,[23] a 1983 opinion of the D.C. Circuit.

The court in *Wilson* used the constitutional standard for Free Exercise Clause claims and held that the tribes had not "shown an impermissible burden on religion."[24] Therefore, the developers could continue as planned. The *Wilson* decision validated the initial NEPA process of the Forest Service—there were many expansions that were planned but permitted back in 1979. So, since 1979, the ski operation has been successfully operating under *Wilson*.

What ended up happening, and this is in the recent *Navajo Nation* opinion, is that the new owners wanted to construct the rest of the things that were authorized under that 1979 action, but there was going to be a change in the use.[25] The ski resort said their operation couldn't be profitable unless they could engage in artificial snowmaking.[26] The only way to make artificial snow, they said, was to actually pipe waste water in from Flagstaff, requiring booster stations and a huge reservoir and all sorts of things.[27] Then, the waste water would actually be used in the snowmaking.

Flagstaff does have a wastewater treatment process. The tribes were horrified for a number of reasons, but the primary claim here, which environmentalists joined, was that the quality of the water wasn't sufficient to maintain the spiritual purity of the mountain.[28] The water was contaminated with a lot of human waste and by-products, including things from mortuaries and hospitals, etc. That was very inconsistent with the nature of the peak—a sacred site.[29] This was essentially the religious claim.

I want to tell you a little bit about what the court did with the environmental and historic preservation claims before moving into the religious claims. The environmental claims were all handled, of course,

20. *Id.* at 870.
21. *Id.*
22. *Id.*
23. 708 F.2d 735 (D.C. Cir. 1983).
24. *Wilson*, 708 F.2d at 740.
25. *Navajo Nation*, 408 F. Supp. 2d at 870-71.
26. *Id.* at 873.
27. *Id.* at 871.
28. *Id.* at 888.
29. *Id.*

using a very deferential standard. The environmental claims fell under the Administrative Procedures Act[30] and utilized the "arbitrary and capricious standard."[31] The court said that NEPA is a procedural statute, so the issue was whether or not the agency took the requisite hard look at the environmental consequences.[32]

The plaintiffs—the tribes—argued that because the Forest Service acted in response to the need for the ski resort to be a profitable commercial enterprise, the Forest Service's purpose was not sufficient purpose to outweigh the environmental impacts.[33] The court disagreed, saying this was a reasonable purpose.[34] The primary purpose was to maintain the economic viability of the ski lodge, and the secondary purpose was safety—they had to renovate the ski runs.[35] The court determined that those purposes were fine. This is one ground that the tribes are considering as a basis for appeal—whether or not the court came out right regarding purposes. But, the court said that procedurally, the agency had done everything that it was supposed to do—because it considered the requisite three alternatives: the no action alternative, the snowmaking alternative, and allowing the changes to proceed without the snowmaking.[36] So the intermediate alternative involved cutting the runs without the artificial snowmaking.

In terms of the scientific analysis, there were competing expert opinions on whether or not the use of this wastewater would have other detrimental environmental effects.[37] The agency, of course, discounted the ones that said it would, and it accepted the ones that said it wouldn't.[38] The court refused to second-guess the agency's assessment of the competing claims.[39] So, *Navajo Nation* was very much a procedural holding.

On the National Historic Preservation Act (NHPA) claim, Arizona's San Francisco Peaks are considered to be a Traditional Cultural Property under Bulletin 38 of the National Register.[40] They are also eligible to be listed on the National Register of historic places.[41] So the agency has to go through the NHPA process and figure out whether there was an adverse effect on this historic property.[42] Essentially, if it materially

30. Administrative Procedures Act § 1, 5 U.S.C. § 551 (2000).
31. *See Navajo Nation*, 408 F. Supp. 2d at 872.
32. *Id.* at 872.
33. *Id.* at 873.
34. *Id.* at 873.
35. *Id.*
36. *Id.* at 874.
37. *Id.* at 876-77.
38. *Id.*
39. *Id.* at 878.
40. *Id.* at 883.
41. *Id.*
42. *Id.* at 878-80.

changes the nature of that place in a way that's antagonistic to the reason why it's considered a historic property, then that's sufficient to be an adverse effect.[43] The Forest Service concluded that there was going to be an adverse effect.

Now, what's the remedy? Again, it's much more of a procedural situation. You do need to engage in consultation with affected parties. The Forest Service claimed they did that by entering into a memorandum of agreement (MOA) under the requisite regulations of NHPA.[44] Two of the tribes—the Hualapai and Yavapai Apache nations signed onto that MOA.[45] The others did not. The Forest Service said that all of it's consultation requirements under NEPA were in many ways duplicative of the NHPA consultation requirements and, therefore, they didn't have to be held to the time and notice provisions of NHPA.[46]

The court accepted that argument and said that as long as the agency makes an extensive good-faith effort to seek out consultation, the requisite standard was met.[47] So, by complying with RFRA, they complied with NEPA and the MOA was the requisite proof. The MOA did have provisions in it for continued access to the peaks and things like that, that were considered to be culturally beneficial.

Now, that in itself is probably unremarkable for people that practice in this area of the law. I think the holdings on both *Wilson* and *Navajo Nation* are unremarkable. The tribes had tried to go one step further, arguing there was a separate trust responsibility to native people in terms of the executive order on sacred sites.[48] There's a consultation process, there's the executive order on the government to government relationship, and you can't just say that because we met our duties under NEPA or NHPA—that we've actually served the trust responsibility. What about the trust responsibility? The court did not buy that, at all.[49] One of the things that is most important to me about the court's opinion in *Navajo Nation* is that it says the government's duties under it's trust responsibility to Indian tribes are the same as it's duties under NEPA, NHPA, and the other federal statutes. There is no additional duty that attaches.[50]

What about the executive orders? The court said those were just ways for the federal government to manage its affairs efficiently.[51]

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43. *Id.* at 879.
44. *Id.* at 879-80.
45. *Id.* at 880.
46. *Id.*
47. *Id.*
48. *Id.* at 871.
49. *Id.* at 888.
50. *Id.* ("Because this case does not involve tribal property, the Forest Service's duty to the tribes is to follow all applicable statutes.").
51. *Id.* at 888 n. 14.

They're not legally enforceable, and they cannot be maintained in terms of this position of the trust.[52]

So, that was the whole thing on that side of the fence. Now, the religious freedom claim was obviously the one that the court felt was more problematic. And there was the predecessor case, *Wilson*, but that, of course, was a case that pre-dated the Religious Freedom Restoration Act (RFRA),[53] and so it was going to be very interesting to see what the court did with the whole pre-RFRA line of cases, including *Wilson* and *Lyng v. Northwest Indian Cemetery Protective Association*.[54] How does RFRA change that, if at all? What would the court do?

The way that the court approached the issue in *Navajo Nation* is to say what the court is interested in is whether or not the agency action placed a substantial burden on the plaintiffs' exercise of religion.[55] Therefore, the court said it needed to make findings of fact.[56] But, what is the starting place? The starting place was *Wilson*.[57] So, the court said that it already considered this in the federal courts and found that the 1979 project was authorized—and it did not pose a substantial burden.[58] It answered the more general question of whether skiing was antithetical to the religious interests, and obviously answered, no, it's not antithetical.[59]

Given the starting place, what the court was actually probing was—is there anything more happening now that would place a substantial burden on the plaintiffs' religion? I think this part of the opinion is very problematic. The standard the court used was to say, under RFRA, since that was the statutory fix to *Employment Division Department of Human Resources of Oregon v. Smith*,[60] that a law of general applicability substantially burdens a person's exercise of religion is invalid unless the law is the least restrictive means of serving a compelling interest.[61] So, RFRA reinstates a compelling-interest test.

In addition, the court notes a Ninth Circuit case, *Guam v. Guerrero*,[62] which actually says that the action burdens the free exercise of religion if it puts pressure on the adherent to modify behavior and violates his belief, and results in the individual having to abandon his religious principle or face criminal prosecution.[63] Those are pretty stringent

52. *Id.*
53. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2000).
54. 485 U.S. 439 (1988).
55. *Navajo Nation*, 408 F. Supp. 2d at 882.
56. *Id.*
57. *Id.* at 904-06.
58. *Id.*
59. *Id.*
60. 494 U.S. 872 (1990).
61. *Id.* at 895-903.
62. 290 F.3d 1210 (9th Cir. 2002).
63. *Navajo Nation*, 408 F. Supp. 2d at 904-06 (quoting *Guam*, 290 F.2d at 1222).

standards. However, in *Navajo Nation*, the court goes back to *Lyng* and finds that unless the government is affirmatively coercing you to give up your religion, then there isn't a cause of action under RFRA. So, RFRA does not make any difference here.

The court then moves into findings of fact. What are the facts here that are different than in *Wilson*? What has happened in the interim? The court denotes what I would perceive as bad facts, right at the outset—and I'm just going to give you the list of them. These facts worked against the native people.

First of all, the court says that it had no doubt that the plaintiffs are sincere in their beliefs about the following: The peaks are a living entity.[64] The presence of the Snowbowl desecrates the mountain and causes various problems for mankind.[65] Snowmaking will exacerbate the problems, and creates others, including drought.[66] The quality of the water, because it's contaminated with by-products, is inconsistent with the use of that site as a sacred site.[67]

The court had no problem accepting the sincerity of the native people's beliefs,[68]—however, the court asked whether they caused any tangible harm—or whether they were purely subjective beliefs.[69] The court moved on to examine whether or not there were shrines and trails and cultural resources on the land and concluded that none of those tangible things were affected.[70] Furthermore, the court was very troubled that the plaintiffs didn't want to specifically identify those aspects of their religion that they were saying would be harmed.[71] The court ultimately concluded that the plaintiffs' testimony was about their subjective beliefs.[72] Because there was no tangible harm to the religion—like a shrine or plant or something—the court had to consult the experts to see whether or not there was a substantial burden on their belief.[73]

Does anybody want to guess who the experts were? Anthropologists and archeologists.[74] The court had these experts do studies about native beliefs, and the experts concluded that the Snowbowl activities didn't amount to a substantial burden.[75] How did the experts conclude

64. *Id.* at 887.
65. *Id.*
66. *Id.* at 887-88.
67. *Id.*
68. *Id.*
69. *Id.* at 904.
70. *Id.* at 888.
71. *Id.* at 905.
72. *Id.* at 904.
73. *Id.* at 888.
74. *Id.*
75. *Id.*

that? Pretty much the same way the court did. If there wasn't a tangible harm to some physical shrine, there really wasn't a substantial burden.[76]

In terms of the bad facts, the court also found from questioning the Hopi people that they still believe the Kachina spirits inhabit the mountains, even though there had been a big ski lodge there since 1979.[77] Additionally, the Hopis believe the Kachina spirits would continue to inhabit those sites, even if this use was permitted.[78]

The court also said they interviewed all of the tribes that were making claims and found that collectively, if you look at all of the sacred sites claims, they extend to Ohio and to the Mexican border.[79] In other words, the court felt that the tribes were having a really hard time determining just what is the sacred land. There are millions and millions of acres of land—including public land—that would be considered sacred by these tribes.

Finally—this was the real killer fact—the court asks, what are other tribes doing with their own land?[80] And so, there's a part of the findings of fact where the court says the White Mountain Apache tribe and other claimants have a ski resort on the White Mountains—which the tribe considers sacred—that relies on artificial snowmaking, and uses in part, reclaimed water.[81] Additionally, the Navajos and Hopis have strip mining on Black Mesa, which they consider sacred.[82] There is also a pipeline that discharges water of ambiguous quality on lands that they consider sacred.[83]

The court was asking, in what sense are these claims credible? Not surprisingly, by the time we actually get to the legal standard—this was the opportunity for the court to use *Lyng* to find that the government's land management decision on its own public lands does not impose a substantial burden, absent some showing that it coerces activity that would violate religious belief or penalize religious activity.[84]

The court says that RFRA is not the constitutional version of free exercise, it is the statutory version of free exercise.[85] Therefore, the RFRA standard is qualified because it has to be read in light of all of the other statutes that Congress has passed.[86] Under that analysis, the court concluded the National Forest Management Act has a mandate requiring

76. *Id.* at 888.
77. *Id.* at 895.
78. *Id.*
79. *Id.* at 897-98.
80. *Id.* at 888.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 904-06.
85. *Id.*
86. *Id.*

that the agency serve multiple uses.[87] This is at least equal to the RFRA mandate.

Finally, in conclusion, the court says, the question was already answered in *Wilson*.[88] They didn't see anything beyond what the court did there.[89] They do engage the compelling interest step, however, and they say that there is a compelling interest in recreational uses such as skiing on public land.[90] Additionally, the court finds there is a compelling interest in public safety on the ski run.[91] There is also a compelling interest in serving the Establishment Clause.[92] The government has lots of compelling interests.

The court also considered the least restrictive means, and they said that prong was met as long as the agency demonstrates that it actually considered and rejected other alternatives before it went with the one that it chose—and they did that here, through NEPA.[93]

That's the holding. What are the areas that need to be explored? The problems—and I see at least four—are quite immediate. The first one is that obviously all of these statutes—NEPA, the NHPA, etc. in the court's analysis here—consider Indian nations to be stakeholders in a much larger discussion about public lands management. They're stakeholders. The tribes have some voice as governments, but it's not the type of standing that we would hope would emerge out of the history of this nation in terms of the treaty relationships.

The second thing that's problematic is that these claims for sacred sites are handled by balancing property claims—those largely being the property of the United States and the interests of the public that it serves—against the religious claims of tribal members. They're sort of group-based religions. But when you look at the court's analysis, the free exercise standard is one that goes to individual adherence. How are individuals penalized? How are they coerced? The witnesses that are interrogated are very much within the scope of that inquiry.

The third problem is that the courts are unable and unwilling to actually look beyond these categories—these narrow categories, property, religion, etc.—to actually examine what's going on. What's going on in these cases is a dynamic process that calls for accommodation of both political and cultural pluralism—and it is unique to native nations. But the courts seem reluctant to endorse any "special" rights. They want these categories to basically serve everybody.

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87. *Id.* at 904.
88. *Id.* at 905.
89. *Id.*
90. *Id.* at 896-00.
91. *Id.*
92. *Id.* at 899-00.
93. *Id.* at 900-03.

Further—and finally—I think tribal rights to sacred sites are being collapsed into a series of procedural requirements. You have the list. It says, "Did you consult?" The court actually looks at this and says in essence:

> Well, the Forest Service has been consulting since 1979. They've called several Indians on the phone, by mail, probably by email now—maybe not, since their email is always shut down. But, they tried. So, we're going to say consultation's met on testimony of tribal members. Did we get a couple of people from White Mountain, a couple of people from Navajo? If so, we have got the requisite testimony from them. Now we can go to the real experts, i.e., the archeologists. We can see what they have to say.

Those are all problematic parts of the process.

I'm going to wrap up my discussion by mentioning what I think are important inquiries in terms of building an alternative theory. I am committed to building an alternative theory. I think we absolutely have to do that. How to do that and what it looks like are going to be the subjects of the dialogue.

When I look at these cases, I see that there are all of these interests—some are legal, some are moral, some are political, and some are cultural—all convening in terms of the protection of sacred sites. I believe that the trust doctrine is essentially a political doctrine. The trust doctrine says to Indian nations, "Look, if you form a political alliance with us, the United States, we're going to protect your status as sovereigns under our protection against these claims of states and citizens of the states, etc." Is that right? Am I right about that?

That's my understanding of the genesis of the trust doctrine, that it is a political doctrine. That's why in *Lone Wolf v. Hitchcock*[94] they said that congressional actions with respect to the tribes are a political question.[95] The trust responsibility wasn't co-extensive with some federal statute. It was different. And it still is different—at least, that's my claim.

So, what do we do? We could try to craft categories where the trust responsibility serves to justify an agency in accommodating a cultural use as opposed to the claim of some commercial enterprise. The closest thing to that approach might have been *Bear Lodge Multiple Use Associates v. Babbitt*.[96] The agency there—the National Park Service—called for a voluntary agreement by hikers not to climb on Devil's Tower during the month of June and to have an educational process to basically tell non-Indians what's going on in terms of tribal ceremonial use and why

94. 187 U.S. 553 (1903).
95. *Lone Wolf*, 187 U.S. at 565.
96. 175 F.3d 814 (10th Cir. 1999).

it's important.[97] Because the climbers lacked standing, the court sustained the NPS policy against an Establishment Cause claim.[98] I think that part of the argument there was if the policy serves cultural purposes, it's really not "religious." The agency is just doing a good job with education. So, maybe, you could get there that way.

The second inquiry is whether we can develop a new theory. If so, then what is that theory? I want to encourage everybody to read Professor Kristen Carpenter's article on property theories in terms of justifying sacred site protection.[99] Her article is actually the best treatment, overall, of the tensions between the religious freedom cases—why are those falling short?—and she asks, what would property law have to add onto that? The theoretical basis of American property law and American religious freedom jurisprudence, as discussed by Professor Carpenter, is very integral to what we're talking about here. I loved the article, but it obviously shows that neither of those approaches is sufficient to meet the interests that we're talking about here.

How would we go about doing that? This is the experimental part of my work. I am trying to build a moral theory, a political theory, and finally, a legal theory, to justify a new and different approach to sacred sites protection. The starting place for this work is that whole question about what does cultural survival really entail? Why is it important and how do we protect it—if at all—in this society?

The questions that I've asked in my preliminary work are: Is there a right to culture? How do we account for cultural harm in the law? Do we? How should we be thinking about that? I'll just highlight some of the things that I've been thinking about.

Cultural survival is hard to understand for cultures that have not been under a consistent attack. That strikes me as one of the starting places for a dialogue—what are people talking about when they're talking about cultural survival? It's a response in many ways to coercive assimilation over a very long time. The U.S. government looks back at those laws that said native religions were criminalized, and you couldn't have plural marriages. The government says those laws were designed to serve beneficial purposes, and we don't do the most extreme penalties any more.

Now, everybody is an equal citizen, right? So the way of thinking is: look, we have a Constitution. Indians are citizens. They can bring a Free Exercise Clause claim. They can bring a Takings Clause claim.

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97. *Bear Lodge*, 175 F.3d at 819-20.

98. *Id.* at 820-22.

99. Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061 (2005). Kristen Carpenter is an Assistant Professor of Law at the University of Denver Sturm College of Law.

They have all of those Constitutional rights. That's why, when native people go into the international forum, the United States usually just says that human rights norms are for countries that don't respect basic civil rights—but we're the United States, and we do—and Indians can go to court, and they can bring their claim.

What is missing is the account of cultural harm. The United States has not arrived at a place where it's willing to accept cultural rights as being anything different than the panoply of constitutional rights. That's what the United States thinks cultural rights are. We have things like the International Covenant on Civil and Political Rights, article 27, protecting the rights of minority and ethnic groups and religious groups.[100] The federal courts have said that we already do that under the Constitution.[101] We don't need to go any further.

What happens to claims of cultural harm? Here, I'm going to briefly talk about some cases. One of the things that's critically important to realize about the nature of native peoples as cultural groups is that religion and culture and environment are all intertwined. There is a huge debate internationally on what defines indigenous people. They won't even try to define it because they're not really sure what constitutes an indigenous people. They know that it has something to do with a long association with the land and traditional ways of interacting with the environment, and a distinctive culture that's different than the people who came later. All of those things are what justify the status of indigenous peoples. Arguably, that is going to be a category for rights, if the UN draft declaration[102] can ever reach consensus.

That's where a lot of the debate is. "Indigenous" must identify a category for rights holders. Will the United States accept that? That would be kind of scary. What if indigenous people are no longer "indigenous"? You look at the media, and they're out there saying that native people are all doing gaming casinos. They're really not indigenous people because they don't have their traditional way of life anymore. So it gets used in that way, in the media.

That's why cultural survival is important. I co-authored an article with Wallace Coffey about cultural sovereignty.[103] One of the things we were trying to say in that article is that we, Indian nations, have to be the ones to define sovereignty within a cultural framework—and to assert that that is the relevant framework. It's not what the exterior society says about sovereignty—it's what we actually say about it.

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100. International Covenant on Civil and Political Rights, art. 27. Mar. 23, 1976.

101. *See, e.g.*, Crow v. Gullet, 541 F. Supp. n.85 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983).

102. U.N. Draft Declaration on the Rights of Indigenous People art. 27, pt. IV (Aug. 26, 1994).

103. Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191 (2001).

In terms of the cases, cultural harm has not been a basis for a successful legal action. Here I want to talk about a case that stemmed out of the Exxon Valdez oil spill.[104] A native village was severely impacted by that oil spill.[105] They sought to recover damages from the injury to their lands, resources, and culture.[106] The environmental damage claims were handled under the CERCLA (the superfund law).[107] But, the cultural category—the damage to the subsistence life way and to their culture—and they had put in a lot of evidence about the impact on them and their health and mortality, etc.—and the court said that can't constitute a basis for compensation.[108]

This is the language of the U.S. District Court in justifying that conclusion: "[O]ne's culture—a person's way of life—is deeply embedded in the mind and heart. Even catastrophic cultural impacts cannot change what is in the mind or in the heart unless we lose the will to pursue a given way of life."[109] So, put the blame on them, right? If they voluntarily gave their culture up, then that would be their problem. But it's not like anybody did that to them.

I think that the court in the San Francisco Peaks case (*Navajo Nation*) shares that impression—that culture is an inner state—that religion is an inner state. So, their subjective beliefs are not impaired. We can let them have those subjective beliefs. It's not a substantial burden if we authorize this other enterprise that offends them. That's not the same thing.

What is that dialogue going to be about in terms of the inner state of being and the outer state—the tangible aspect of what's happened? Have we polluted your waters in a way that we can give you damages for that? But the cultural—the inner state—is not a category that's protected.

Na Iwi O Na Kupuna O Mokapu v. Dalton[110] is another example of cultural harm involving NAGPRA.[111] The cultural harm involved the disclosure of photographs and documentation of native skeletons that were analyzed pursuant to a NAGPRA inventory.[112] The claimants were trying to prevent that from being disclosed under the Freedom of Information Act (FOIA)[113] and given out publicly because it was so detailed

104. *In re* Exxon Valdez, 104 F.3d 1196 (9th Cir. 1997).
105. *Exxon Valdez*, 104 F.3d at 1196.
106. *Id.*
107. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) (Superfund Act), Pub. L. 96-510, 94 Stat. 2767.
108. *Exxon Valdez*, 104 F.3d at 1197-98.
109. *In re* Exxon Valdez, No. A89-0095-CV (HRH), at *4 (D. Alaska Mar. 23, 1994) (granting Exxon's motion for summary judgment on Native claims for non-economic injury).
110. 894 F. Supp. 1397 (D. Haw. 1995) (Na Iwi).
111. Native American Graves Protection and Repatriation Act (NAGPRA), Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified at 25 U.S.C. §§ 3001-3013 & 18 U.S.C. 1170).
112. *Na Iwi*, 894 F. Supp. at 1402.
113. Freedom of Information Act (FOIA), 5 U.S.C. §§552 (2000).

and so invasive.[114] The native claimants said that the people that were harmed were not only the descendants, but the spirits of the remains that were displayed and held out there for everybody to see.[115] The court in that case said that there is no category of harm the court could respond to.[116] There's no legal action that will protect the native people.[117]

I think that what we see is that the applicable moral theory needs to respond to a harm principle. I think we do that in standard liberal jurisprudence. We look at the harm principle as being the basis for rights, but we haven't extended that far enough to protect unique native cultures.

Then, building the political theory involves responding to what's going on in the international arena, in terms of indigenous rights, in terms of self-determination, in terms of the original government-to-government relationship between the United States and the nations here—the treaty relationships. It's all coming together on a political level that's really challenging this whole notion as Indians as equal citizens with these Constitutional rights. That is not the framework that is going to get us where we need to go.

Specifically, in terms of the sacred sites issue—building the legal theory—people have started to try to do this with various kinds of proposed legislation. The problem that we've experienced in those proposals is: How do you define sacred sites? That's always the big question. The courts don't want the slippery slope problem—the easement over millions and millions of acres. How do you respond to the need of native practitioners to keep the confidentiality of the information? How do you prove what is sacred? That's the big issue. If the conception of the sacred doesn't even have an anchor in Anglo-American culture, then it's always a losing battle.

I think we just need to get into that dialogue—and I actually did this with a group that came to an event sponsored by Arizona State University. They didn't understand sacred sites at all. I did this experiment with them where I actually took them through various aspects of what they perceived of as sacred and different scenarios. That was really a revealing process because there is a different metaphysics that underlies many native epistemologies. Just by virtue of our identity as human beings, however, I think all of us have a conception of what's sacred. If we can just get beyond the talk of rights into what is significant about our lives as human beings in this world.

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114. *Na Iwi*, 894 F. Supp. at 1410-14.
115. *Id.* at 1406.
116. *Id.* at 1407.
117. *Id.*

So, what are the connectors? I was having that conversation with my colleague, John LaVelle,[118] over lunch about how you connect interculturally on those levels. I think that that's important. We do have some models out there. A good example of the co-management model is the Agua Caliente case in California.[119] The ultimate goal in many cases is repatriation of sacred sites, which has occurred in some instances.[120] The stories that different tribes have about what the connections between sites are, sometimes only come into a collective understanding around these co-management models—where people are present and in that dialogue.

I'd like to save a few minutes to engage in that dialogue. Thank you.

QUESTION: I'm really interested in what you were saying about cultural rights because, as you said, it is difficult to incorporate cultural rights or group rights in that framework. I understand that native rights cannot be divorced from ones community and culture. Is that diametrically opposed to liberalism?

PROFESSOR TSOSIE: I think that is one of the most important issues right now. International law is where I see that happening. When, for example, the right of self-determination is designated as a moral right and also a group right. Even within the liberal framework, we have to accept that there are some group rights.

Where things break down is when the discussion involves the idea of an individual's right to autonomy and whether the state can endorse a comprehensive notion of the good. Individuals have this interest in a good life. Therefore, on the level of cultural rights, the right-holder really is the individual member. So if the members of a group decided that it no longer speaks its language, or no longer wanted to practice their religion, this would not be actionable. The group could not coerce anybody to maintain culture. That would have to be a voluntary thing.

Will Kymlicka is one of the most prolific scholars on this whole area of group rights within moral theory. He's a liberal philosopher who believes in group rights—but only to serve the individual's interest to the extent that they decide that they want to retain their cultural life.[121] Therefore, the only thing that the nations state can't do, for example, under Article 27, is they can't coerce them to give their culture up. They

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118. Professor of Law, University of New Mexico School of Law.

119. Rebecca Tsosie, *The Conflict Between the "Public Trust" and the "Indian Trust" Doctrines: Federal Public Land Policy and Native Nations*, 39 TULSA L. REV. 271, 309-10 (2003).

120. *Id.* at 306-09. *See also* Susan Shown Harjo, *Protecting Native Peoples' Sacred Places*, INDIAN COUNTRY TODAY, Apr. 1, 2002, http://www.indiancountry.com/content.cfm?id=1017430958.

121. *See* WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 94 (1995); WILL KYMLICKA, LIBERALISM, COMMUNITY, AND CULTURE 196-98 (1989).

can't penalize them for speaking their language, but they don't have to do anything affirmative to help them sustain it. That's the account that we have.

There's another scholar out there, Jeremy Waldron. He's a property law scholar. He's been dabbling in native land rights recently. He has this whole idea of the cosmopolitan citizen.[122] He says globally what we're trying to do is create a society where you can be anything you want to be. You can eat Italian food, you can be a Buddhist, you can—whatever you want to do you can do—because the individual holds that autonomy.

That intersects with cultural appropriation. A lot of what native people are trying to do is to preserve a cultural context for themselves, but also to prevent cultural appropriation. I think you can look at what is happening with sacred sites as cultural appropriation. Look at the Black Hills. Look at where Mount Rushmore is. That's not an accident. That's making a statement and that is the most insulting and defamatory thing—but how do you relate that? I have long been arguing for a theory of group rights.[123] But what I'm really looking at or what I'm interested in looking at is native epistemologies. I think that the categories that come out of Anglo-American jurisprudence fall so short of what we are trying to argue. We have to do a better job of saying what it is that we're doing in responding to those challenges.

QUESTION: What do you think the problems are with a statutory solution to the sacred sites problem?

PROFESSOR TSOSIE: I think that's an excellent question. As my colleagues at NARF experienced, this was the subject of a vehement discussion in the context of what legislation could you propose that could fix some of the problems that were occurring. I think that one of the biggest obstacles was: Could you develop a standard that they would use fairly—or would they then turn the standard against you?

I am stumped on that one, because I think that the right thing to do would be a political agreement that would allow the tribes to have autonomy over management under a flexible framework that would not force tribes to prove the particulars about a sacred site. This would be a framework based on equal respect.

I'm still on the fence, and I'm open to suggestions. There are dangers with a legislative "fix." On the other hand, the default is what we have now, and that is not a good situation. So the executive order, for example, I'd love to be able to make an argument triggering the protec-

122. Jeremy Waldron, *One Law for All? The Logic of Cultural Accomodation*, 59 WASH. & LEE L. REV. 3, 16 (2002).

123. *See* Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L. J. 299 (2002).

tions of an executive order on sacred sites—but the court just says I can't. The executive order is just something that the agency uses to make its own life happier. It doesn't have any substance to it. So we at least have to try, but we have to be mindful of that challenges.

QUESTION: I have two questions. The first is on the cases that you briefly mentioned. Are those happening outside of government and federal agencies and bureaucracies or are people doing it on more of an autonomous level? The second one has to do with a book, *Who Owns Native Culture?*, by Michael Brown.[124] If you're familiar with that, what do you think about his work?

PROFESSOR TSOSIE: In response to the first question, Agua Caliente was a case where Congress actually passed a statute that enabled this co-management plan between a federal land manager and the tribe. There, the tribe's land—it's traditional land encompassed by the public lands—and that is the case with virtually ever set of public lands that we're talking about. But the tribe's own lands were contiguous to the public lands. It made a lot of sense in terms of the uniform management. But what was great about that process is that the federal agency people said that they learned so much about what they ought to be protecting. That wouldn't have happened without the co-management scheme.

I do have a great deal of respect for Michael Brown's book and his work. A lot of voices are making suggestions out there. What I really see of value there is the inception of a dialogue that is more diffuse. Oftentimes it's just a native person who gets up and testifies. The more voices you get from scholars in different disciplines making these arguments within those disciplines is a powerful and positive thing.

124. MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? (2004).