

Denver Law Review

Volume 83
Issue 4 *Symposium - Borrowing the Land:
Cultures of Ownership in the Western
Landscape*

Article 5

January 2006

Old Ground and New Directions at Sacred Sites on the Western Landscape

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Kristen A. Carpenter, *Old Ground and New Directions at Sacred Sites on the Western Landscape*, 83 *Denv. U. L. Rev.* 981 (2006).

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Old Ground and New Directions at Sacred Sites on the Western Landscape

OLD GROUND AND NEW DIRECTIONS AT SACRED SITES ON THE WESTERN LANDSCAPE

KRISTEN A. CARPENTER[†]

ABSTRACT

The federal public lands contain places with both religious and secular value for American people. American Indians, in particular, hold certain natural features to be sacred, and visit them for ceremonies and worship. Simultaneously, non-Indians use the same places for economic, recreation, and many other purposes – and conflicts arise between these groups. In the past twenty years, a body of constitutional jurisprudence has developed to address questions of religious freedoms and public access rights on these lands that are owned and managed by the federal government. This article outlines the relevant First Amendment framework as well as recent statutes that apply in sacred sites cases. Acknowledging that the law fails to satisfy parties on all sides of the dispute, it also suggests new directions for scholarship and advocacy in the sacred sites realm.

TABLE OF CONTENTS

INTRODUCTION	982
I. THE CURRENT LEGAL FRAMEWORK.....	984
A. <i>Limiting Indian Free Exercise: Lyng</i>	985
B. <i>Towards Accommodation: Bear Lodge</i>	987
II. EMERGING APPROACHES.....	990
A. <i>Between Lyng and Bear Lodge</i>	990
B. <i>Statutory Reform</i>	992
1. <i>Religious Freedom Restoration Act</i>	992
2. <i>Property Law Interlude</i>	996
3. <i>The Religious Land Use and Institutionalized Persons Act</i> ..	998
C. <i>The Claims of Non-Indians</i>	999
CONCLUSION.....	1001

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Our sacred ceremonies teach us to stand in a defined sacred place to pray, that the laws we set for ourselves as humans are only as good as the way we observe them Every one of those places in the Black Hills has a specific relationship to us and to our origin legend going back to the beginning

The unfortunate thing for us in the Black Hills is that they are also one of the richest resource areas of the Earth. The world's largest producing gold mine is there [M]ost of the Black Hills are under private and federal ownership, and when we go back to these places we have to get permission from the government, or we have to sneak in as tourists to pray.¹

– Charlotte Black Elk

INTRODUCTION

The western landscape is beautiful and complex.² One factor that contributes both to its beauty and complexity is the fact that, for some people, certain locations within this landscape have spiritual meaning. They are religious or sacred sites.³ For American Indians, some sacred sites mark the place of creation for a particular tribe, while others have more recent historical significance. Today, Indians continue to visit sacred sites to hold ceremonies, to pray, gather medicine, and engage in other activities that perpetuate tribal cultures.⁴

These sites maintain their sacred quality to Indians even if other Americans do not ascribe religious significance to them.⁵ At Indian sacred sites, non-Indians conduct many activities such as tourism and natural resource extraction.⁶ For example, at Mt. Graham in Arizona, various

1. HUSTON SMITH, A SEAT AT THE TABLE: HUSTON SMITH IN CONVERSATION WITH NATIVE AMERICANS ON RELIGIOUS FREEDOM 64-65 (Phil Cousineau ed., 2006).

2. See generally Charles Wilkinson, *Listening to All the Voices, Old and New: The Evolution of Land Ownership in the Modern West*, 83 DENV. U. L. REV. 945 (2006); Federico Cheever, *Confronting Our Shared Legacy of Incongruous Land Ownership: Notes for a Research Agenda*, 83 DENV. U. L. REV. 1039 (2006).

3. See generally ANDREW GULLIFORD, SACRED OBJECTS AND SACRED PLACES: PRESERVING TRIBAL TRADITIONS (2000); CHARLES LITTLE ET AL., SACRED LANDS OF INDIAN AMERICA (2001).

4. See, e.g., *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814, 817 (10th Cir. 1999). [T]raditional religious uses of the tower are: 'vital to the health of our nation and to our self-determination as a tribe. Those who use the butte to pray become stronger. They gain sacred knowledge from the spirits that helps us to preserve our Lakota culture and way of life. They become leaders. Without their knowledge and leadership, we cannot continue to determine our destiny.

Id. (quoting Intervenor Cheyenne River Sioux Tribe).

5. See Laurie Anne Whitt et al., *Belonging to Land: Indigenous Knowledge Systems and the Natural World*, 26 OKLA. CITY U. L. REV. 701, 722 (2001) (Even if a place has been desecrated, "a people's custodial responsibilities remain. No matter how damaged, the land retains its power and significance.").

6. See Shawna Lee, *Government Managed Shrines: Protection of Native American Sacred Site Worship*, 35 VAL. U. L. REV. 265, 265 (2000).

People come to Devils Tower and think, 'We're on vacation, we're going to go see Indians and take videos of them doing their ceremonies while we drink beer and wear short shorts.' Cremated human remains, a .38 caliber bullet, and beef jerky have all been left as

universities and the Vatican have teamed up to install a giant astronomy project in an area where Apache people worship and prepare for ceremonies.⁷ Reflecting a real plethora of uses, Devils Tower, Wyoming, has been the star of a major motion picture, a summer home to RV-driving tourists on vacation, and a rock climbing mecca—all while Lakotas try to conduct sundances, sweat lodges, and other quiet spiritual activities there.⁸ There are, of course, other sacred sites whose location remains confidential among tribal members and whose ambience may be more conducive to religious ceremony.

The fact that an Indian sacred site is also a regular stop on a national motorcycle rally⁹ is, of course, a contemporary ramification of the historical process by which non-Indians acquired Indian lands.¹⁰ In early negotiations with European nations and the United States, Indian nations sometimes reserved title or rights to use their sacred sites through treaties.¹¹ But many such treaties were broken—others failed to protect sacred places in the first place. Moreover, Indian lands have been taken through generations of federal policies such as removal, allotment, and termination; illegal acquisitions by state and individual citizens; and outright physical conquest.¹²

The upshot is that, through varied means of acquisition, non-Indian governments, entities, and individuals have come to own Indian sacred sites.¹³ These current owners sometimes want to use their property in a

offerings at Native American religious shrines by visiting sightseers. Tourists trample over Indian graves, Steven Spielberg lands a spaceship on a sacred shrine, and families traipse poodles through sacred ceremonies.

Id. (citation omitted).

7. See WINONA LADUKE, *RECOVERING THE SACRED: THE POWER OF NAMING AND CLAIMING*, 19-32 (2005) (on a joint project of the University of Arizona, the Vatican, and other parties to install a Large Binocular Telescope at Mt. Graham International Observatory, on the mountain known to Apache people as *Dzil nchaá si an*, a sacred place).

8. See PETER NABOKOV, *WHERE THE LIGHTNING STRIKES: THE LIVES OF AMERICAN INDIAN SACRED PLACES* 215-18 (2006) (on the use of Devils Tower, called *Mato Tipila* or Bear Lodge by Lakota religious practitioners, in Steven Spielberg's movie *Close Encounters of the Third Kind*, as a rock climbing destination, and tourist attraction).

9. See SturgisZone.com, <http://sturgiszone.com/sturgis-bike-rally.html> ("At the Sturgis bike rally the best big thing has to do with nature—Devils Tower National Monument.") (last visited Apr. 5, 2006).

10. See Nell Jessup Newton, *Compensation, Reparations, & Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453, 458-61 (1994) (on the dispossession of Indian lands).

11. See, e.g., 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, 303 (2003) (on the Lakota people's treaty claim to ownership of the Black Hills).

12. See Stacy L. Leeds, *By Eminent Domain or Some Other Name: A Tribal Perspective on Taking Land*, 41 TULSA L. REV. 51, 59-67 (2005) (on federal policies to dispossess Indian land); Wenona T. Singel & Matthew L. M. Fletcher, *Power, Authority and Tribal Property*, 41 TULSA L. REV. 21, 23-36 (2005) (surveying several means of dispossessing tribal property including the use of "pure, brute physical power").

13. See Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites: Asserting a Place for Indians as Non-Owners*, 52 UCLA L. REV. 1061, 1069-85 (2005) (describing federal ownership of sacred sites).

way that will harm the physical integrity of the site or limit Indian access to it. On the federal public lands, the government promotes activities like tourism, recreation, and natural resource extraction that may disrupt Indian ceremonies or harm the physical integrity of sacred sites. Such conflicts prompt various parties, Indian and non-Indian, to turn to the legal system seeking vindication of their perceived entitlement to use the public lands in a certain way.

Of course, American Indians are not the only people who hold certain places sacred and seek to use them for religious purposes. Our federal public lands contain thousands of Catholic missions, historic Mormon sites, bible camps, and other places used for religion.¹⁴ In one notable case, the D.C. Circuit upheld the Interior Department's decision to allow the Pope to perform Catholic Mass on the National Mall, holding that even the exclusion of the public through construction of a fence around the Mass area did not violate the Establishment Clause.¹⁵

Here in the West, however, many sacred site disputes have concerned Indian tribes, and a distinct body of law now governs these cases. Accordingly, this article first articulates the current legal framework governing American Indian sacred sites claims on public lands.¹⁶ It then recognizes, however, that the parties affected most directly by this legal framework have not been altogether satisfied with it, and suggests several new directions for scholarship and advocacy.

I. THE CURRENT LEGAL FRAMEWORK

Sacred sites litigation is cabined by two major cases: *Lyng v. Northwest Indian Cemetery Protective Association*,¹⁷ a 1988 decision of the United States Supreme Court, and *Bear Lodge Multiple Use Association v. Babbitt*,¹⁸ decided eleven years later by the Tenth Circuit Court of Appeals here in Denver.

14. A recent Freedom of Information Act (FOIA) request initiated by Steven Moore, Native American Rights Fund, for example, reveals that dating back to the 1950s the Forest Service has granted over 350 special use permits to religious groups, primarily Christian churches and camps. Letter from the U.S. Forest Service to Steven Moore, Native American Rights Fund (2003) (on file with author). See also FOREST SERVICE AND BUREAU OF LAND MANAGEMENT, SPECIAL USES, NON COMMERCIAL GROUP USES REGULATIONS FREQUENTLY ASKED QUESTIONS 7 Nos. 22-24 (2002), available at <http://www.fs.fed.us/recreation/permits/documents/ngcu-q-a-2002.doc> (describing that the Forest Service allows the Rainbow Family, "a loosely knit association of persons who organize gatherings in the national forests for their stated purpose to celebrate life, worship, express ideas and values, and associate with others who share their beliefs" to use the national forests and BLM lands for gatherings attracting "as many as 20,000 people from across the nation"); Earl C. Leatherberry, *An Overview of African Americans' Historical, Religious, and Spiritual Ties to Forests*, in PROCEEDINGS OF THE SOCIETY OF AMERICAN FORESTERS 1999 NATIONAL CONVENTION 452 (2000), available at <http://ncrs.fs.fed.us/pubs/viewpub.asp?key=2570>.

15. *O'Hair v. Andrus*, 613 F.2d 931, 937 (D.C. Cir. 1979).

16. This article focuses on federal public lands but also makes several references to state public lands and privately owned property.

17. 485 U.S. 439 (1988).

18. 175 F.3d 814 (10th Cir. 1999).

A. *Limiting Indian Free Exercise: Lyng*

The *Lyng* case involved several Northern California Indian tribes who challenged the federal government's decision to build a road through a site where tribal religious practitioners gathered medicine and prepared for dances and ceremonies.¹⁹ The sacred area in *Lyng*, known as the High Country or Medicine Rocks, was within the tribes' traditional territory. In the mid-nineteenth century however, California tribes experienced white conquest at its worst. In one decade, white settlers massacred thousands of Indians²⁰ and the federal government wiped out Indian land title to the entire state.²¹ Though California reservations were later created by executive order, the tribes lost ownership of many sacred sites.

By the 1970s, when the *Lyng* litigation commenced, the sacred lands at issue were located in the Six Rivers National Forest, owned by government and managed by the Forest Service. While preparing an Environmental Impact Statement for the proposed road and logging project, the Forest Service commissioned a study of Indian religious uses. The study found that the area was "significant as an integral and indispensable [sic] part of Indian religious conceptualization and practice."²² Such religious activities were "dependent upon and facilitated by certain qualities of the physical environment, the most important of which are privacy, silence, and an undisturbed natural setting."²³ Because the road construction "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," the study authors recommended against road and logging activities.²⁴

The Forest Service decided to pursue the project anyway, and attempted to mitigate Indian and environmental concerns by choosing a road location that was "removed as far as possible" from archaeological sites and contemporary Indian activities.²⁵ A location that would have

19. *Lyng*, 485 U.S. at 443.

20. See RUSSELL THORNTON, AMERICAN INDIAN HOLOCAUST AND SURVIVAL: A POPULATION HISTORY SINCE 1942 107-09 (1987) (on the Gold Rush-era "genocide" of California Indians in which "primarily because of the killings, the California Indian population . . . decreased almost by two-thirds in little more than a single decade: from 100,000 in 1849 to 35,000 in 1860").

21. See Newton, *supra* note 10, at 460 n.26; see also Amy C. Brann, Karuk Tribe of California v. United States: *The Courts Need a History Lesson*, 37 NEW ENG. L. REV. 743, 753-54 (2003) (although eighteen treaties were negotiated with California tribes, the Senate refused to ratify them, instead passing the California Land Claims Act of 1851, which effectively transferred Indian aboriginal title into the public domain, except for lands occupied by certain bands of Mission Indians, and the Act of April 8, 1864, authorizing the President to create four reservations by executive order).

22. *Lyng*, 485 U.S. at 442.

23. *Id.*

24. *Id.*

25. *Id.* at 443.

avoided some sacred sites altogether was rejected because of soil stability problems and the need to acquire private land.²⁶

Because of the grave ramifications for their religious and cultural practices, the Indians continued to challenge the project through the administrative process. When those efforts failed, they sued in federal court, bringing claims under the First Amendment, several statutes, and common law doctrines.²⁷ Applying the Free Exercise Clause, the District Court enjoined the six-mile road and timber project on grounds that it would substantially infringe on the Indians religion and that the government had failed to demonstrate a compelling interest.²⁸ The Ninth Circuit affirmed.²⁹

The Supreme Court reversed, holding that even if the road would "virtually destroy" the Indians' ability to practice their religion, the government's action would not violate the Free Exercise Clause because it would not "coerce individuals into acting contrary to their religious beliefs."³⁰ And secondly, Justice O'Connor held that "[W]hatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all *its* land."³¹

The first prong of *Lyng* has been criticized as narrowing Free Exercise Clause analysis³² and the second as expanding government ownership rights.³³ But, in any event, that's our leading Supreme Court holding: by virtue of its ownership, the federal government can destroy a sacred site located on public lands so long as it is not coercing belief.³⁴

Justice O'Connor said one more thing in *Lyng* that laid the groundwork for contemporary sacred sites practice: "[N]othing in our opinion should be read to encourage governmental insensitivity to the religious

26. *Id.*

27. *Nw. Indian Cemetery Protective Ass'n v. Peterson*, 565 F. Supp. 586, 590-91 (N.D. Cal. 1983).

28. *Peterson*, 565 F. Supp. at 595-96.

29. *Nw. Indian Cemetery Protective Ass'n v. Peterson*, 764 F.2d 581, 585-87 (9th Cir. 1985), *aff'd in part, vacated in part*, 795 F.2d 688 (9th Cir. 1986). By the time the Ninth Circuit heard the case, Congress had enacted the California Wilderness Act of 1984, restricting commercial activities such as logging in much, but not all, of the contested area. See *Lyng*, 485 U.S. at 444.

30. *Lyng*, 485 U.S. at 450-51.

31. *Id.* at 453.

32. See, e.g., S. Alan Ray, Comment, *Lyng v. Northwest Indian Cemetery Protective Ass'n: Government Property Rights and the Free Exercise Clause*, 16 HASTINGS CONST. L.Q. 483, 490-510 (1989); see also Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 944-46 (1989); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1485-86 (1990); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 125-26 (1992); Peggy Healy, Casenote, *Lyng v. Northwest Indian Cemetery Protective Ass'n: A Form-Over-Effect Standard for the Free Exercise Clause*, 20 LOY. U. CHI. L. J. 171, 171-72 (1988); J. Brett Pritchard, Note, *Conduct and Belief in the Free Exercise Clause: Developments and Deviations in Lyng v. Northwest Indian Cemetery Protective Ass'n*, 76 CORNELL L. REV. 268, 269 (1990); Kathryn C. Wyatt, Note, *The Supreme Court, Lyng, and the Lone Wolf Principle*, 65 CHI.-KENT L. REV. 623, 624 (1989).

33. See generally Carpenter, *supra* note 13, at 1082-87, 1092-93.

34. *Lyng*, 485 U.S. at 447-53.

needs of any citizen.”³⁵ And more specifically “The Government’s rights to the use of its own land . . . need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents.”³⁶ Though those words sounded rather empty to many tribal advocates at the time, federal law and policy has actually evolved toward accommodating sacred site usage, as described below.³⁷

B. Towards Accommodation: Bear Lodge

Of course the federal government has long managed various uses of the public lands. The Constitution’s Property Clause gives Congress power to regulate the property of the United States.³⁸ Congress, in turn, delegates this power by statute to agencies such as the Forest Service, Park Service, and Bureau of Land Management.³⁹

In the 1980s and 1990s, these federal agencies were increasingly confronted with challenges of multiple uses on the public lands. For example, recreational visitorship was exploding, at the same time that many development activities continued.⁴⁰ Whether it was heightened tourism causing environmental degradation; local citizens protesting energy extraction; or rock climbers clashing with Indian sun dancers, agencies found themselves needing to fashion, or re-fashion, management plans for the lands under their authority.⁴¹

Though administrative law had long required public participation in agency management decisions, the 1990s also saw a growing body of federal law pertaining to sacred sites. These included amendments and guidelines to the National Historic Preservation Act (NHPA),⁴² rendering “traditional cultural properties” (TCPs) eligible for the Act’s consultation provisions.⁴³ The Act now provides that “properties of traditional reli-

35. *Id.*

36. *Id.*

37. See Marcia Yablon, *Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land*, 113 YALE L. J. 1632, 1653-54 (2004).

38. See U.S. CONST. art. IV, § 3, cl. 2; see also *Kleppe v. New Mexico*, 426 U.S. 529, 535 (1976) (holding Congress has the power to dispose of and regulate property under the Property Clause); *Camfield v. United States*, 167 U.S. 518, 523 (1897) (finding the federal government’s power over its own property is analogous to states’ police power).

39. See generally Martin Nie, *Statutory Detail and Administrative Discretion in Public Lands Governance: Arguments and Alternatives*, 19 J. ENVTL. L. & LITIG. 223 (2004).

40. See Hooker, *infra* note 41. Compare Jan G. Laitos & Thomas A. Carr, *The Transformation on Public Lands*, 26 ECOLOGY L.Q. 140, 143-46 (1999) (arguing that since the 1970’s, tourism and conservation have increased on public lands, while commodity uses like timber harvesting and mining have declined).

41. See, e.g., Ann M. Hooker, *American Indian Sacred Sites on Federal Public Lands: Resolving Conflicts Between Religious Use and Multiple Use at El Malpais National Monument*, 19 AM. INDIAN L. REV. 133, 134-52 (1994) (on the challenges faced by the National Park Service in accommodating multiple uses at a national monument).

42. See 16 U.S.C. § 470 (2005); see also Dean Suagee, *Historical Storytelling and the Growth of Tribal Historic Preservation Programs*, 17-FALL NAT. RESOURCES & ENV’T 86, 86-87 (2002) (describing 1992 amendments to the NHPA and implementing regulations).

43. Peter J. Gardner, *The First Amendment’s Unfulfilled Promise in Protecting Native American Sacred Sites: Is the National Historic Preservation Act a Better Alternative?*, 47 S.D. L. REV.

gious and cultural importance to an Indian tribe" may be determined eligible for inclusion on the National Register of Historic Places.⁴⁴ Federal agencies are directed to consult "with any tribe . . . that attaches religious and cultural significance to [such] properties" regarding federal "undertakings" on these TCPs.⁴⁵ Additionally, President Clinton issued an executive order directing agencies both to accommodate ceremonial uses and avoid "adversely affecting" sacred sites.⁴⁶

These circumstances and laws coalesced in a number of places. Devils Tower, Wyoming, was one of them. The Tower, known to some Plains Indians as Bear Lodge, is a place of historical significance and contemporary ceremony.⁴⁷ As part of the Black Hills, the Tower was originally reserved to the Great Sioux Nation with the Black Hills in the Treaty of Ft. Laramie of 1868, which was soon thereafter violated by the United States.⁴⁸ Devils Tower became a National Monument in 1906, and is now managed by the Park Service.⁴⁹ By the 1990s, conflicting use patterns of rock climbers, local citizens, tourists, environmental groups, and Indian religious practitioners were creating management challenges for the Park Service.⁵⁰

The Park Service was obligated to manage these conflicting uses at Devils Tower, not only by the NHPA,⁵¹ but also by the Park Service Organic Act and Presidential Proclamation establishing Devils Tower as a National Monument.⁵² After a planning process, including public meetings, circulation of drafts, and a formal notice and comment period, the Devils Tower Superintendent announced a management plan banning commercial rock climbing during the month of June when most religious ceremonies were conducted.⁵³ The Plan also called for educational programs on Indian religious and cultural uses and mitigation of climbing's

68, 79-82 (2002); see Dean Suagec, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 VT. L. REV. 145, 160 (1996).

44. 16 U.S.C. § 470a(d)(6)(A).

45. 16 U.S.C. § 470a(d)(6)(B); 16 U.S.C. § 470f.

46. Exec. Order No. 13007, 61 Fed. Reg. 26771 (May 24, 1996).

47. *Bear Lodge*, 175 F.3d at 815-16.

48. See National Park Service, *Devil's Tower History: Our First Fifty Years*, <http://www.nps.gov/deto/first50.htm> ("The Treaty of 1868 guaranteed this region to the Indians. In 1874, in violation of this treaty, General George A. Custer led a reconnaissance expedition into the Black Hills.")

49. *Bear Lodge*, 175 F.3d at 819.

50. *Id.*

51. *Id.* at 817-18.

52. See *id.* at 819 & n.7

Under its governing statute, NPS must protect the values for which Devils Tower National Monument was established . . . [O]ne of the primary bases for the Tower's designation as a National Monument is the prominent role it has played in the cultures of several American Indian tribes of the North Plains . . . President Roosevelt declared the Tower is 'a natural wonder and an object of historic and great scientific interest . . . [and] warning is hereby given to all unauthorized persons not to appropriate, injure, or destroy any feature of the natural tower.'

Id. (citation omitted).

53. *Id.* at 819-20.

effects on the environment through reduced use of pitons and closure of routes near raptor nests.⁵⁴

The Bear Lodge Multiple Use Association and several rock climbers filed suit, challenging the plan primarily on Establishment Clause grounds, and the Park Service changed the climbing ban to a voluntary closure.⁵⁵ The federal district court in Wyoming then upheld the plan, ruling it did not violate the Establishment Clause because it advanced secular purposes, did not have the primary effect of advancing religion, and did not entangle the government with religion.⁵⁶ On appeal, the Tenth Circuit affirmed, but not on the merits. It held that because the plan made the climbing restrictions “voluntary” and the plaintiff climbers had continued climbing, they suffered no injury and therefore lacked standing to sue.⁵⁷ The Supreme Court denied certiorari.⁵⁸

These two cases give us a legal framework applicable in many sacred sites disputes. *Lyng* generally forecloses First Amendment relief to Indians in cases where government activity on federal lands threatens religious uses of sacred sites,⁵⁹ but it leaves the door open for agency accommodations of religious practices.⁶⁰ *Bear Lodge* tells agencies how to craft those accommodations. So long as they are “voluntary” in nature

54. *Bear Lodge Multiple Use Ass'n v. Babbitt*, 2 F. Supp. 2d 1448, 1450 (D. Wyo. 1998).

55. *Bear Lodge*, 2 F. Supp. 2d at 1450-51.

56. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Court established a three-part test for delineating between proper and improper government actions. According to this test a governmental action does not offend the Establishment Clause if it (1) has a secular purpose, (2) does not have the principal or primary effect of advancing or inhibiting religion, and (3) does not foster an excessive entanglement with religion. *Lemon*, 403 U.S. at 612-13. In a concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984), Justice O'Connor sought to clarify the *Lemon* analysis by focusing on whether the government action endorsed religion. “Applying Justice O'Connor's refined analysis, the government impermissibly endorses religion if its conduct has either (1) the purpose or (2) the effect of conveying a message ‘that religion or a particular religious belief is favored or preferred.’” *Bauchman v. W. High School*, 132 F.3d 542, 551 (10th Cir. 1997). Recent jurisprudence has admittedly created some uncertainty about the content of the Establishment Clause test. See, e.g., Jessica Gavrich, *Constitutional Law: Judicial Oversight—Inconsistency in Supreme Court Establishment Clause Jurisprudence*, 58 FLA. L. REV. 437 (2006).

57. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The three essential elements necessary to establish standing are:

(1) plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) ‘actual or imminent,’ not ‘conjectural’ or ‘hypothetical;’ (2) there must be a causal connection between the injury and the conduct complained of - the injury has to be ‘fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court;’ (3) it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’

Lujan, 504 U.S. at 560-61 (citation omitted).

58. *Bear Lodge Multiple Use Ass'n v. Babbitt*, 529 U.S. 1037 (2000).

59. See Charlton H. Bonham, *Devils Tower, Rainbow Bridge and The Uphill Battle Facing Native American Religion On Public Lands*, 20 LAW & INEQ. 157, 165 (2002) (“The decision in *Lyng* effectively marked the end of Native American attempts to employ the Free Exercise clause to protect Native American religious sites on public lands . . .”).

60. See Marcia Yablon, Note, *Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims On Public Land*, 113 YALE L.J. 1623, 1629 (2004) (“[I]n foreclosing judicial protection, the *Lyng* court shut off one method of protecting sacred sites, but suggested another, more feasible method in its place—agency accommodation.”).

and do not "prohibit" other citizens from using the public lands, sacred site accommodations seem to withstand Establishment Clause challenges.⁶¹

II. EMERGING APPROACHES

A. *Between Lyng and Bear Lodge*

Recent cases have faithfully applied both *Lyng*⁶² and *Bear Lodge*.⁶³ And, as one might expect, parties on all sides are unsatisfied. Many Indians feel that the First Amendment should protect them just as meaningfully as it protects Christian church-goers and that accommodations like the one in *Bear Lodge* are extremely modest considering the centuries of religious oppression they have suffered.⁶⁴ Moreover, they argue that relegating their religious freedom to the discretionary powers of agencies leaves them vulnerable to shifting political winds. The differing priorities of the Clinton and Bush administrations would support these concerns.⁶⁵

On the other side, some of the multiple use groups, tourists, local citizens, and energy developers feel that the federal government is too solicitous of Indian nations, that each citizen should be entitled to an equal right of access to the public lands no matter what his or her religion or race, and that Indians are getting special treatment.⁶⁶ Indian nations respond that this analysis ignores their status as sovereign governments, some with ongoing treaty claims and all with an expectation that the federal government will meet its trust duties to tribes.⁶⁷

Responding to these concerns, scholars and advocates offer various legal theories and practices. Some articulate sacred sites claims in terms

61. See, e.g., *Natural Arch & Bridge Soc'y v. Alston*, 98 F. App'x 711, 713-16 (10th Cir. 2004) (upholding, on standing grounds, NPS' management plan accommodating sacred site usage). For a similar decision by a state, versus federal, agency, see *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 976-77 (9th Cir. 2004) (state Department of Transportation policy against using materials mined from Indian sacred site in state construction projects did not violate the Establishment Clause), *cert. denied*, 125 S. Ct. 1828 (2005).

62. See *Navajo Nation v. Forest Serv.*, 408 F. Supp. 2d 866 (D. Ariz. 2006); see also *United States v. Means*, 858 F.2d 404, 405 (8th Cir. 1988) (Forest Service did not violate the First Amendment when it denied a group of Sioux Indians a special use permit that would have allowed them to occupy National Forest land that they believed was sacred).

63. See *supra* note 61 (discussing *Cholla* and *Natural Arch*); see also *Wyoming Sawmills Inc. v. U.S. Forest Service*, 383 F.3d 1241, 1252 (10th Cir. 2004) (upholding Forest Service's historic preservation plan for management of Medicine Wheel National Historic Landmark against Establishment Clause and National Forest Management Act challenges).

64. See SMITH, *supra* note 1, at 65-66 (quoting Charlotte Black Elk on the challenge of trying to access Black Elk Wilderness, named after her own grandfather, by obtaining a "special use permit").

65. See Carpenter, *supra* note 13, at 1145 n.489.

66. See William Perry Pendley, *The Establishment Clause and the Closure of "Sacred" Public and Private Lands*, 83 DENV. U. L. REV. 1023, 1037-38 (2006).

67. See Tsosie, *supra* note 11, at 292, 300.

of environmental and cultural preservation statutes,⁶⁸ others appeal to a human rights framework,⁶⁹ and still others turn to the common law as a basis for sacred sites access arguments.⁷⁰ Many scholars focus on process, exhorting tribes to avoid rights-based lawsuits and instead work with agencies for negotiated solutions.⁷¹ Indian leaders may consider alternatives to litigation,⁷² such as legislation,⁷³ joint management programs,⁷⁴ land re-acquisition and trust programs,⁷⁵ state-level advocacy,⁷⁶ the development of tribal law,⁷⁷ coalition building and activism.⁷⁸ One non-Indian religious entity, the LDS Church, has negotiated a lease arrangement of a sacred site on BLM land.⁷⁹ Looking at the bigger picture,

68. See, e.g., Sarah Palmer, Cherie Shanteau & Deborah Osborne, *Strategies For Addressing Native Traditional Cultural Properties*, 20 NAT. RESOURCES & ENV'T 45 (2005) (discussing the National Environmental Protection Act, National Historic Preservation Act, and other statutes); Sandra B. Zellmer, *Sustaining Geographies of Hope: Cultural Resources on Public Lands*, 73 U. COLO. L. REV. 413, 439-54 (2002) (discussing the Archaeological Resources Protection Act, National Historic Preservation Act, and the Native American Graves Protection and Repatriation Act).

69. See, e.g., S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33, 82 (2001); see also SMITH, *supra* note 1, at 37-38 (interviewing Walter Echo-hawk on the legal challenges of protecting Indian religions, human remains, and sacred places in an international human rights context).

70. See Kevin J. Worthen, *Protecting the Sacred Sites of Indigenous People in U.S. Courts: Reconciling Native American Religion and the Right to Exclude*, 13 ST. THOMAS L. REV. 239 (2000) (advancing torts and property arguments).

71. See MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? xi, 144-72 (2003) (calling for "pragmatic compromise" in indigenous cultural property disputes, including sacred sites cases).

72. See generally R.C. GORDON-MCCUTCHAN, THE TAOS INDIANS AND THE BATTLE FOR BLUE LAKE (1991) (Taos Pueblo's experiences with Blue Lake provides a multi-faceted, successful approach to sacred site recovery that did not include litigation).

73. See, e.g., 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, 205 (2001) (describing the legislative restoration of Blue Lake to Taos Pueblo and Kaho'olawe to the Native Hawaiian people).

74. See Lee, *supra* note 6, at 303 (proposing legislation that would include legal basis for joint management programs). For discussion of an innovative tribal-federal management program in the wildlife habitat context, see Erin Patrick Lyons, Note, "Give Me a Home Where the Buffalo Roam": *The Case in Favor of the Management-Function Transfer of the National Bison Range to the Confederated Salish and Kootenai Tribes of the Flathead Nation*, 8 J. GENDER RACE & JUST. 711 (2005).

75. See, e.g., Charmaine White Face, *Bear Butte Land Trust Fund Started*, Jan. 2, 2006, <http://www.defendblackhills.org/article.php?id=108> (discussing the Bear Butte land trust initiative); see generally Lawrence R. Kueter & Christopher S. Jensen, *Conservation Easements: An Underdeveloped Tool to Protect Cultural Resources*, 83 DENV. U. L. REV. 1057 (2006).

76. Lucus Ritchie, *The Failure of the National Historic Preservation Act in the Missouri River Basin and a Proposed Solution*, 9 GREAT PLAINS NAT. RESOURCES J. 1, 11-12 (2005) (demonstrating the concern of South Dakota politicians regarding the disturbance of human remains apparently caused by federal management of the Missouri River Basin).

77. See generally Angela R. Riley, "Straight Stealing": *Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69 (2005).

78. See Hillary Rosner, *Saving a Sacred Lake: Zuni Activist Pablo Padilla*, HIGH COUNTRY NEWS, Feb. 2, 2004, <http://www.hcn.org/> (follow "Archives" hyperlink; then follow "Native Americans" hyperlink; then follow "Environmental Laws" hyperlink) (describing the success of Indian and environmental coalition that pursued an activist strategy to stop coal strip mining and its destructive impact on the sacred Zuni Salt Lake).

79. Sherry Hutt, *If Geronimo Was Jewish: Equal Protection and the Cultural Property Rights of Native Americans*, 24 N. ILL. U. L. REV. 527, 544 n.101 (2004).

a potentially groundbreaking new approach seeks to articulate and apply a theory of “cultural harm” to federal management of sacred sites.⁸⁰

B. Statutory Reform

All of the above strategies are integral to meaningful legal solutions of sacred sites disputes, but several federal statutory developments merit particular attention here. Enacted in response to Supreme Court cases that Congress perceived to diminish religious freedoms, both the Religious Freedom Restoration Act of 1993⁸¹ and the Religious Land Use and Institutionalized Persons Act of 2000⁸² offer some promise for Indian religions. However, in my view, these statutes may have only limited utility in the specific context of sacred sites litigation. Both the RFRA and the RLUIPA reflect a continuing legal privilege for property rights over religious freedoms. To the extent that Indians often lack ownership of their sacred sites, these statutes will only be useful where tribes can make innovative property arguments.

1. Religious Freedom Restoration Act⁸³

Passed in response to the Supreme Court’s 1990 decision in *Employment Division Department of Human Resources of Oregon v. Smith*,⁸⁴ rejecting Indian Free Exercise clause claims in a peyote case, RFRA aims to restore earlier First Amendment standards protecting religious freedom.⁸⁵ RFRA provides that the “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability,” unless it can show the burden on religion furthers a “compelling governmental interest” and is the “least restrictive means” of furthering that interest.⁸⁶ RFRA has been ruled

80. See generally Rebecca Tsosie, *Challenges to Sacred Site Protection*, 83 DENV. U. L. REV. 963 (2006).

81. 42 U.S.C. § 2000bb (2006).

82. 42 U.S.C. § 2000cc (2006).

83. 42 U.S.C. § 2000bb.

84. 494 U.S. 872 (1990).

85. See *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct. 1211, 1216-1217 (2006).

In [deciding *Smith*], we rejected the interpretation of the Free Exercise Clause announced in *Sherbert v. Verner*, and, in accord with earlier cases, held that the Constitution does not require judges to engage in a case-by-case assessment of the religious burdens imposed by facially constitutional laws. Congress responded by enacting the Religious Freedom Restoration Act of 1993 (RFRA), which adopts a statutory rule comparable to the constitutional rule rejected in *Smith*. Under RFRA, the Federal Government may not, as a statutory matter, substantially burden a person’s exercise of religion, ‘even if the burden results from a rule of general applicability.’ The only exception recognized by the statute requires the Government to satisfy the compelling interest test—to ‘demonstrate that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.’

Id. (citations omitted).

86. 42 U.S.C. § 2000bb-1(a)(b) (2006).

unconstitutional as applied to state governments⁸⁷ but still applies to the federal government.⁸⁸

Several lower courts have rejected Indian claims based on RFRA in sacred sites cases. In a very recent case, *Navajo Nation v. U.S. Forest Service*,⁸⁹ several tribes claimed that the Forest Service had violated RFRA in its decision to permit the use of wastewater in snowmaking on the sacred San Francisco Peaks.⁹⁰ While the district court recognized that RFRA was enacted to restore the compelling interest test to its pre-*Smith* vigor, it also noted that plaintiffs still must show a "substantial burden" to their religious freedom and that test has not evolved since *Lyng*.⁹¹ Therefore, "the government's land management decision will not be a 'substantial burden' absent a showing that it coerces someone into violating his or her religious beliefs or penalizes his or her religious activity."⁹²

Citing *Lyng*, the court held the plaintiffs "failed to present any objective evidence that their exercise of religion will be impacted by the Snowbowl upgrades."⁹³ According to the court, the plaintiffs had been unwilling or unable to show how the snowmaking plan would harm specific shrines or deny physical access to the mountain.⁹⁴ The court would not entertain "subjective" claims of "perceived religious impact" for several reasons.⁹⁵ First, previous caselaw on the same sacred site had already rejected a similar argument that "development of the Peaks would be a profane act, and an affront to the deities, and that, in consequence, the Peaks would lose their healing power and otherwise cease to benefit the tribes."⁹⁶ Moreover, if Indian religious practitioners could claim a substantial burden on facts such as these "the Forest Service would be left in a precarious situation as it attempted to manage the millions of acres of public lands in Arizona, and elsewhere, that are considered sacred to Native American tribes."⁹⁷

In short, the district court sounded like *Lyng* all over again when it concluded that the Forest Service's action "does not coerce individuals into acting contrary to their religious beliefs nor does it penalize anyone for practicing his or her religion."⁹⁸ *Navajo Nation* thus bears out the

87. See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

88. See *Gonzales*, 126 S. Ct. at 1216-17.

89. 408 F. Supp. 2d 866 (D. Ariz. 2006).

90. See *Navajo Nation*, 408 F. Supp. 2d at 870-71.

91. See *id.* at 903-04.

92. *Id.* at 904.

93. *Id.* at 905.

94. *Id.*

95. *Id.*

96. *Id.* (citing *Wilson v. Block*, 708 F.2d 735, 740 (D.C. Cir. 1983)).

97. *Id.*

98. *Navajo Nation*, 408 F. Supp. 2d at 905. The district court found that the government had met the "compelling interest" and "least restrict means" tests. *Id.* at 906-07.

predictions of commentators who had earlier pointed out that, by failing to overrule *Lyng*, RFRA did little for Indians in cases where the federal government chooses not to accommodate religious uses on property that it owns and manages.⁹⁹

Yet, there remains a (faint) glimmer of hope for RFRA. In February of this year, the Supreme Court decided *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*,¹⁰⁰ applying RFRA to prevent the federal government from enforcing a ban on a church's use of a hallucinogen.¹⁰¹ Members of the church ("UDV") ingest as a sacrament the tea known as *hoasca* brewed from plants that contain DMT, a drug regulated by the Controlled Substances Act.¹⁰² When customs inspectors seized a shipment of *hoasca* to the church, UDV sought declaratory and injunctive relief on grounds that the government action violated RFRA.¹⁰³ The government conceded burdening UDV's religious freedom, but contended that the seizure was the least restrictive means of furthering its compelling interests in enforcing the Controlled Substance Act and complying with the United Nations Convention on Psychotropic Substances.¹⁰⁴

The Supreme Court disagreed, holding that the government failed to *demonstrate* a compelling interest under either the Controlled Substances Act or U.N. Convention.¹⁰⁵ Though the Court recognized the government's interest in uniform administration of drug laws, promoting public safety and welfare, and complying with international law, it also emphasized that Congress expressly restored the compelling interest test to situations like that experienced by UDV.¹⁰⁶ In this case, application of a federal law of general applicability would substantially burden a sincere religious exercise. The government did not provide enough evidence to justify its burden on the sacramental use of *hoasca*, particularly in light of the fact that the government makes exceptions for religious use of peyote which is also regulated under the Controlled Substance Act (and which inspired passage of RFRA in the first place).

99. Anastasia P. Winslow, *Sacred Standards: Honoring The Establishment Clause In Protecting Native American Sacred Sites*, 38 ARIZ. L. REV. 1291, 1315 & n.198-99 (1996)

[I]n the Senate report leading to RFRA, Native American Free-Exercise claims were singled out for special treatment. Through the report, Congress was assured that RFRA would not create a cause of action on behalf of Native Americans seeking to protect sacred sites. The Senate report stated that RFRA would not overrule *Lyng* and that, under *Lyng*, 'strict scrutiny does not apply to government actions involving only management of internal government affairs or the use of the government's own property or resources.'

Id. (citing S. Rep. No. 111, 103d Cong., 1st Sess. (1993), reprinted in 1993 U.S.C.C.A.N. 1892, 1898 n.19)).

100. 126 S. Ct. 1211 (2006).

101. *Gonzales*, 126 S. Ct. at 1216.

102. *See id.* at 1217.

103. *See id.*

104. *See id.* at 1217-18.

105. *See id.* at 1218, 1221-22.

106. *See id.* at 1224.

Some commentators believe the unanimous decision in *Gonzales* may signal a new willingness of the Supreme Court, under Chief Justice Roberts, to consider seriously Congress' intent in restoring religious liberty in the post-*Smith* era. For example, Anthony Picarello, president and general counsel for the Washington, D.C.-based Becket Fund for Religious Liberty, expressed the view that the decision represents a "thumping victory for religious accommodation laws [and] [i]t's especially good news for religious minorities."¹⁰⁷

The *Gonzales* case, and other Supreme Court interpretations of recent religious freedoms statutes,¹⁰⁸ may indeed signal a new era for minority religious practitioners. At the very least, tribal advocates can cite *Gonzales* for the unremarkable point that RFRA mandates a compelling interest analysis when federal programs of general applicability burden religious freedoms, and argue that this principle should apply to Indians too. To the extent that the Court has expressly called for "case-by-case consideration of religious exemptions to generally applicable rules," rather than blanket statements of government interests,¹⁰⁹ Indian religious practitioners may have reason to hope that such scrutiny will apply to federal management of sacred sites on public lands.

On the other hand, it is not clear if such decisions will have any impact on sacred sites litigation. Congress¹¹⁰ and the courts¹¹¹ seem to view RFRA as a direct response to *Smith* and its restrictions on individual religious practitioners' ability to undertake sacraments or other religious practices required by their religion. By contrast, RFRA says nothing about *Lyng* or land-based religious practices, and legislative history would seem to confirm that it left *Lyng* in place.¹¹² Perhaps in some cases Indian practitioners could still argue that the destruction of a sacred place prohibits them from conducting a ritual or ceremony mandated by their religion, thereby appealing to the cases finding RFRA violations

107. David L. Hudson, Jr., *Tea and Sympathy: High Court Backs Religion Law: This Time, Ruling In Religious Drug-Use Case Favors Sacramental Rites*, 5 NO. 8 A.B.A. J. E-Report 1 (Feb. 24, 2006).

108. For example, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) allows federal and state prisoners to seek religious accommodations pursuant to the same standard as set forth in RFRA and limits governments' ability to use land use regulation to interfere with religious institutions that have a property interest in their religious facility. See 42 U.S.C. § 2000cc (2006). RLUIPA was recently upheld against a constitutional challenge. See *Cutter v. Wilkinson*, 544 U.S. 709, 125 S. Ct. 2113 (2005).

109. *Gonzales*, 126 S. Ct. at 1223-24.

110. RFRA sponsor Senator Orrin Hatch explained: "The elimination of the compelling interest standard has led to a string of lower court decisions eroding freedom of religion in a wide variety of areas The *Smith* case was wrongly decided and the only way to change it is with this legislation." 139 Cong. Rec. S14, 353 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch).

111. See *supra* notes 85 & 89 (citing *Gonzales* and *Navajo Nation* for this point).

112. See Winslow, *supra* note 99 and accompanying text. In addition to the recent San Francisco Peaks case, *Navajo Nation*, RFRA relief has been denied to a Native American couple challenging the construction of a road through the gravesite of their infant. See *Thiry v. Carlson*, 78 F.3d 1491, 1493 (10th Cir. 1996).

where non-Indian religious practitioners have been “prevent[ed] from engaging in conduct or having a religious experience which the faith mandates.”¹¹³

But Indian advocates should note that in the *Gonzales* case, the parties *agreed* that the government activity “burdened” the minority religion by limiting access to the sacramental tea. In sacred sites litigation, from *Lyng* to the post-RFRA *Navajo Nation* case, the courts regularly deny that the government’s neutral regulation of its own property ever constitutes a “burden” on Indian religion. If the courts adhere to this approach, the *Gonzales* court’s RFRA standard will probably not advance jurisprudence in many sacred sites cases, because the courts will rarely reach the compelling interest/least restrictive means step of the analysis.

2. Property Law Interlude

Of course it is no accident that federal activities on federally-owned lands are the ones that never give rise to a governmental “burden” on religion, even as free exercise law otherwise evolves. Rather, I believe the law reflects an ongoing preference for the rights of property owners in religious freedoms matters, and that this preference applies whether the owner is the federal government or private party.¹¹⁴

An example is RFRA’s silence on federally-owned sacred sites. Though it generally restores the compelling interest test to government activities, RFRA allows the *Lyng* standard to remain in place when it comes to lands that the government owns.¹¹⁵ RFRA seems thereby to immunize the government from most, if not all, claims that its regulation of the public lands burdens Indian religious practices. As discussed below, a privilege for property rights also appear in the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000.¹¹⁶ RLUIPA limits the government’s ability to impose a burden on religion through land use regulations, but only in cases where the plaintiffs have a property interest in the religious institution or place.¹¹⁷

113. *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1121 (9th Cir. 2000) (articulating the standard, though rejecting the RFRA claim). For cases finding RFRA violations, *see, e.g.*, *Cheema v. Thompson*, 67 F.3d 883, 884 (9th Cir. 1995) (affirming preliminary injunction on RFRA claim where school weapons’ ban prevented Khalsa Sikh schoolchildren from carrying kirpans, or ceremonial knives as mandated by their religion), *overruled on other grounds by City of Boerne v. Flores*, 521 U.S. 507 (1997). *But see United States v. Antoine*, 318 F.3d 919, 920, 924 (9th Cir. 2002) (no RFRA violation where Indian religious practitioner who took eagle feathers for use in potlatch ceremony was convicted of violating Golden Eagle Protection Act).

114. Indian practitioners and activists seem well-aware of this dynamic. *See, e.g.*, SMITH, *supra* note 1, at 66 (quoting Charlotte Black Elk) (“[T]here is a notion in Western society that if you own something you have property rights, and those rights are greater than the right of native people to exercise their religious and cultural uses of that place.”).

115. *See Winslow, supra* note 99, at 1315.

116. *See Religious Land Use and Institutionalized Persons Act of 2000*, 42 U.S.C. § 2000cc (2006).

117. *Id.*; § 2000cc-5(5).

Thus, one lesson from the recent cases and statutes is that property law remains a major factor in the sacred sites framework. While Congress has recognized a need to balance federal power with citizens' religious interests, it still defers to the rights of property holders. My own work has focused on this property law dimension of sacred sites disputes.¹¹⁸ I have first attempted to deconstruct the notion that property law allows any owner limitless rights over its land.¹¹⁹ All owners, including the federal government, have obligations to non-owners, and in some cases these obligations might include accommodating religious interests of non-owners. Second, I have attempted to conceptualize ways that Indians might assert their own property interests in sacred sites, even when they do not hold title to the property.¹²⁰

I realize the relationship between Indian nations and sacred places is much more expansive, spiritually, culturally, and historically, than Anglo-American "property" concepts typically capture. As a long-term goal, I want to push the envelope on those limitations of property law.¹²¹ But more immediately, tribes may be able to bring well-established property claims growing out of the common law, federal Indian law, and even international human rights.¹²² In the public lands context, there is a recurring set of events where the federal government claims rights stemming from its "ownership"—and non-Indian *users* claim competing rights stemming from things like "mining patents," "grazing permits," or "public highway easements."¹²³ All of these claims have a property law dimension.

In this climate, it is at least worth considering that Indian nations, too, might have property use rights at sacred sites. Indians have the longest and deepest relationship with sacred sites of any of the peoples in North America, and in some instances, some of those relationships may be cognizable under property law. Whether in the form of an express easement reserved through a treaty, a prescriptive easement accrued over time, or newly acquired right-of-way, Indian nations may be able to establish a limited right to "use" sacred sites.¹²⁴ In other instances, they may maintain a land claim including a sacred site.¹²⁵ Cases like *Navajo Nation* suggest that without such an interest, tribes will not be able to overcome the courts' perception that ownership gives the government

118. See generally Carpenter, *supra* note 13.

119. *Id.* at 1088-91.

120. *Id.* at 1092-1138.

121. *Id.* at 1138-42.

122. *Id.* at 1092-1138.

123. *Id.* at 1119-31.

124. *Id.* at 1092-1138.

125. See generally John P. La Velle, *Rescuing Paha Sapa: Achieving Environmental Justice by Restoring the Great Grasslands and Returning the Sacred Black Hills to the Great Sioux Nation*, 5 GREAT PLAINS NAT. RESOURCES J. 40 (2001) (on ongoing claims to the Black Hills); Alexandra New Holy, *The Heart of Everything That Is: Paha Sapa, Treaties, and Lakota Identity*, 23 OKLA. CITY U. L. REV. 317 (1998) (same).

near absolute rights to trample on Indian religious freedoms, even under RFRA. On the other hand, litigation under RLUIPA suggests that Indians may in some cases be able to use property claims to their advantage in sacred sites cases.

3. The Religious Land Use and Institutionalized Persons Act¹²⁶

RLUIPA creates a cause of action for plaintiffs who can demonstrate that a government regulation burdens their religious freedom by "limit[ing] or restrict[ing] a claimant's use or development of land."¹²⁷ Like RFRA, RLUIPA restores the strict scrutiny test by then requiring the government to show that its burden on religion is the least restrictive means of furthering a compelling state interest.¹²⁸ Enacted in part to respond to zoning laws perceived as unfavorable to religious institutions,¹²⁹ RLUIPA is explicit about the relationship between religious freedoms and property rights. The claimant must demonstrate "an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest."¹³⁰ That is, parties only qualify for RLUIPA protection if they can assert a property interest in their religious site.

In one recent case, *Northern Cheyenne v. Martinez*,¹³¹ an Indian nation successfully asserted a property interest sufficient to trigger application of RLUIPA.¹³² Northern Cheyenne and Lakota religious practitioners challenged the construction of a federally-funded shooting range near Bear Butte, a spiritually significant mountain. Bear Butte is within the tribes' traditional territory and was originally reserved to them by two treaties that were violated, leading to white settlement of the Black Hills.¹³³ Bear Butte was purchased in 1961 from private landowners by the State of South Dakota and placed on the National Historic Register of Places in 1973.

Despite the change in ownership, Indians continued to visit Bear Butte for ceremonial purposes. In 2002 and 2003, federal, state, and city officials joined forces with private developers to propose using public

126. 42 U.S.C. § 2000cc.

127. 42 U.S.C. § 2000cc-5(5).

128. 42 U.S.C. § 2000cc-1(a)(2).

129. See Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929, 931 (2001).

130. 42 U.S.C. § 2000cc-5(5).

131. Plaintiff's Third Amended Complaint for Preliminary and Permanent Injunction, *N. Cheyenne Tribe v. Martinez*, No. Civ. 03-5019 (D.S.D.W.D. May 23, 2003).

132. *Id.* See also James D. Leach, *A Shooting Range at Bear Butte: Reconciliation or Racism?*, 50 S.D. L. REV. 244, n.306 (2005).

133. See Steve Young, *A Broken Treaty Haunts the Black Hills*, ARGUS LEADER, June 27, 2001, available at <http://www.argusleader.com/specialsections/2001/bighorn/Wednesdayfeature.shtml>. For a map illustrating the location of Bear Butte and other sacred sites relative to the Treaty of Ft. Laramie of 1851, see http://www.sacredland.org/historical_sites_pages/black_hills.html.

funds for a large shooting range in the western part of the state. They picked a site several miles from Bear Butte, where religious practitioners engaged in “prayer, fasting, and Vision Quest” would undoubtedly hear “the piercing sound of gunfire—perhaps thousands of rounds a day.”¹³⁴ The tribal plaintiffs complained that “by placing the shooting range within earshot of Bear Butte, defendants’ land use regulation limited and restricted the tribes’ use of their land” as prohibited by RLUIPA.¹³⁵

Advocates for the tribes in *Northern Cheyenne* argued that, notwithstanding the land’s status as a state-owned park, the tribal plaintiffs met RLUIPA’s property requirement.¹³⁶ They alleged three types of property interests at Bear Butte State Park: small tracts of parcels owned in fee by two tribes, land held by the federal government in trust for two tribes, and a right of way.¹³⁷

Relying on RLUIPA and RFRA, the federal district court granted a preliminary injunction preventing the federal Department of Housing and Urban Development from disbursing funds for the shooting range.¹³⁸ State lawmakers then withdrew their support and funding, prompting the city and private developers to abandon the project.¹³⁹ Thus the underlying dispute became moot and neither the district court nor the Eighth Circuit issued a final decision on the merits of RLUIPA or the other religious freedoms claims.¹⁴⁰ Nevertheless, *Northern Cheyenne* is one of the rare, pathbreaking cases where tribes have effectively asserted property interests as part of a successful strategy to protect religious freedoms at sacred sites. In the long run, of course, tribes may seek outright return of their sacred sites through litigation, legislation, or trust programs. But a more feasible, short-term approach could be for tribes to emulate the *Northern Cheyenne* example by acquiring small property interests, such as title to modest amounts of acreage or express easements, that are eligible for RLUIPA protection.

C. The Claims of Non-Indians

As the above discussion suggests, many scholars and advocates focus on securing for Indians a baseline of religious freedoms protection at federally-owned sacred sites, as against threats by the federal govern-

134. Leach, *supra* note 132, at 245.

135. Leach, *supra* note 132, at 279.

136. See Leach, *supra* note 132, at 279 & nn.308-09.

137. See Leach, *supra* note 132, at 246 & nn.18-19.

The Northern Cheyenne Tribe and Rosebud Sioux Tribe own land at Bear Butte. The United States owns land there in trust for the Cheyenne and Arapaho Tribes of Oklahoma and for the Northern Cheyenne Tribe with a reserved right of access for other Indians for whom the area has a traditional religious significance.

Id. (citing evidence including warranty deed, maps, and depositions describing property rights).

138. Northern Cheyenne Tribe v. Jackson, 433 F.3d 1083, 1084 (8th Cir. 2006).

139. See *Northern Cheyenne Tribe*, 433 F. 3d at 1084.

140. See *id.* at 1085 (district court grant of preliminary injunction for tribes did not make them “prevailing parties” for the purposes of eligibility for attorneys fees under RFRA and RLUIPA).

ment and other non-Indian parties.¹⁴¹ Given the overwhelming historical and contemporary oppression of Indian religion and culture,¹⁴² I believe this is an appropriate focus. Yet, any meaningful long-term solution to disputes over sacred places on federal public lands must also take into account non-Indian concerns. Non-Indians have strong interests in the public lands, and power with which to assert them. Indians and non-Indians will be encountering each other on the public lands for quite some time to come. Thus, it is important to think seriously about non-Indian claims on federal public lands that are sacred to Indians.

Non-Indians (and many Indians too) are interested in using federally-owned lands for specific economic, recreational, and other activities.¹⁴³ Non-Indians may also have spiritual or symbolic attachments to the public lands.¹⁴⁴ We might consider the American people's attachment to concepts of wilderness¹⁴⁵ and national pride¹⁴⁶ embodied in the national parks. Less easy to understand in 2006 is some non-Indians' desire to maintain the federal public lands as a symbol of American conquest over the west and its original indigenous inhabitants—yet such sentiments are deeply felt and underlie sacred sites disputes.¹⁴⁷ Other examples include the Church of Latter Day Saints and its desire to pre-

141. See, e.g., Erik B. Bluemel, *Accommodating Native American Cultural Activities On Federal Public Lands*, 41 IDAHO L. REV. 475, 562 (2005) (analyzing “the management of public lands from the perspective of an Native American activist seeking to enforce through judicial means what she sees is her right”).

142. See generally Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773 (1997).

143. See generally Ray Rasker, *Wilderness for Its Own Sake or as Economic Asset?*, 25 J. LAND RESOURCES & ENVTL. L. 15 (2005).

144. See Jon K. Abdoney, Comment, *Environmental Ethics: The Geography of the Soul*, 27 CUMB. L. REV. 1217, 1236 (1996-1997) (“[O]ur freedom as a community lies in what externally gives us definition, sentimental or not, America's communal attachment to Mount Rushmore, to the California Redwoods, or to Ellis Island reflects a need for an iconography that then defines Americans before themselves and to themselves.”).

145. See RODERICK FRAZIER NASH, *WILDERNESS & THE AMERICAN MIND*, 350-51 (4th ed. 2001); MAX OELSCHLAEGER, *THE IDEA OF WILDERNESS* 3 (1991).

146. See National Park Service, Mount Rushmore National Monument, South Dakota, http://www.nps.gov/moru/park_history/carving_hist/carving_history.htm (last visited Apr. 17, 2006) (“Carved into the southeast face of a mountain in South Dakota are the faces of four presidents, a memorial to American history. The faces of George Washington, Thomas Jefferson, Theodore Roosevelt and Abraham Lincoln look down from their stoney heights and remind everyone that even the impossible is possible.”).

147. See also MARK DAVID SPENCE, *DISPOSSESSING THE WILDERNESS* 55-70 (1999) (on the use of military force and other tactics to remove Indians from Yellowstone National Park, making room for white uses, values, and occupation); Derek De Bakker, *The Court of Last Resort: American Indians in the Inter-American Human Rights System*, 11 CARDOZO J. INT'L & COMP. L. 939, 970 & n.242 (2004) (describing the carving of Mount Rushmore as a “final act of humiliation” against the Sioux to make clear that the United States has no intention of returning the Black Hills) . Compare SMITH, *supra* note 1, at 67.

I love Mt. Rushmore, because every time I look at that monstrosity I know that I will never back down on being Lakota. Everyone of those gentlemen up there represents institutionalized genocide against the American Indian people . . . So long as that thing, Mount Rushmore, sits in our sacred lands, I have a responsibility to live my culture.

Id. (quoting Charlotte Black Elk).

serve places associated with the Mormon migration to Utah;¹⁴⁸ rural communities of white ranchers, loggers, or miners, with a shared need and desire to maintain a certain way of life;¹⁴⁹ and the intergenerational claims of Hispanic families who maintain subsistence uses dating back to the Spanish land grants of their ancestors.¹⁵⁰

Even with this short list, we can see non-Indian interests manifesting in numerous public lands settings, some of which may be sacred to American Indians. This reality presents complex questions. How do we choose between people's livelihoods and religious freedoms? Between national and cultural identities? Among competing religions? Advocates and scholars have considered how to negotiate Indian and non-Indian interests at sacred sites,¹⁵¹ but additional work is still needed to develop frameworks for prioritizing claims, facilitating accommodations where possible, and making difficult choices where necessary. In a subsequent article, I will discuss these questions in the context of federal agencies' ability to address the competing claims of groups at sacred sites on public lands.

CONCLUSION

Sacred sites jurisprudence is sufficiently developed so that we have a legal framework to guide advocacy in this area. *Lyng* teaches that Indians will not often be successful in Free Exercise Clause claims challenging the federal government's use of its own property, even if it interferes with Indian religious freedom. But *Bear Lodge* suggests that courts will uphold agency accommodations of Indian religious practices, particularly if such measures only request that non-Indian voluntarily refrain from activities that threaten Indian ceremonies and observances. Recent statutes and innovative approaches by scholars shape Indian claims at federally-owned sacred sites, but do not significantly alter the *Lyng/Bear Lodge* framework. At this point, lawyers need to work toward securing more meaningful, permanent religious freedoms for Indian practitioners, while also coming to terms with the interests of non-Indians. Hopefully in the next generation of sacred sites advocacy, we can restore harmony

148. See generally Kevin Holdsworth, *Why Martin's Cove Matters*, 83 DENV. U. L. REV. 1003 (2006).

149. Compare Debra L. Donahue, *Western Grazing: The Capture of Grass, Ground, and Government*, 35 ENVTL. L. 721, 721 (2005) (critiquing federal policy promoting grazing on public lands as founded on "beliefs . . . that public-land ranching is a culture worth preserving, supports small communities, and is vital to maintaining open space").

150. See *Lobato v. Taylor*, 70 P.3d 1152 (2003).

151. See, e.g., Howard J. Vogel, *The Clash of Stories at Chimney Rock: A Narrative Approach to Cultural Conflict Over Native American Sacred Sites on Public Land*, 41 SANTA CLARA L. REV. 757 (2001); Sandra B. Zellmer, *Sustaining Geographies of Hope: Cultural Resources on Public Lands*, 73 U. COLO. L. REV. 413 (2002).

at various places, and among various peoples, on the western landscape.¹⁵²

152. See SMITH, *supra* note 1, at 185 (on “the numerous creative efforts at healing the great divide between the indigenous peoples and colonizing powers whose influence is still felt”).