

# Denver Law Review

---

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

---

Article 7

December 2020

## The Establishment Clause and the Closure of Sacred Public and Private Lands

William Perry Pendley

Follow this and additional works at: <https://digitalcommons.du.edu/dlr>

---

### Recommended Citation

William Perry Pendley, *The Establishment Clause and the Closure of Sacred Public and Private Lands*, 83 *Denv. U. L. Rev.* 1023 (2006).

This Article is brought to you for free and open access by Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [dig-commons@du.edu](mailto:dig-commons@du.edu).

# THE ESTABLISHMENT CLAUSE AND THE CLOSURE OF “SACRED” PUBLIC AND PRIVATE LANDS

WILLIAM PERRY PENDLEY<sup>†</sup>

## I. WYOMING SAWMILLS AND THE BIGHORN NATIONAL FOREST

Wyoming Sawmills, Inc., is the largest non-governmental employer in Sheridan County, which lies in north-central Wyoming next to the Montana border. The lumber mill itself is in downtown Sheridan, north-east of the historic Sheridan Inn<sup>1</sup> and between the Burlington Northern and Santa Fe Railroad yards and Interstate 90, which runs north and south along the Big Horn Mountains to the west. In business since 1964, Wyoming Sawmills’s philosophy is “to use every bit of every log we process and find outlets for all of our byproducts. Wood shavings, dry sawdust, bark, chips: all are sold to become useful products.”<sup>2</sup>

The prime source for its raw materials is the vast Bighorn National Forest and its abundant lodgepole pines. Created in 1897, the Bighorn National Forest is eighty miles long, thirty miles wide, and covers 1.1 million acres, including portions of four Wyoming counties (Sheridan, Big Horn, Washakie, and Johnson). It is nearly as large as the State of Delaware.<sup>3</sup> Under federal law, the Bighorn is managed in accordance with multiple use principles—that is, the land is to be available for use by a variety of users, including ranchers, miners, energy developers, recreationalists, and loggers, like Wyoming Sawmills.<sup>4</sup> In fact, the National Forest System was created by Congress in 1897 to serve two primary purposes: to generate water and timber.<sup>5</sup>

For decades, the U.S. Forest Service recognized and fulfilled its statutory obligations regarding its management of the Bighorn. Those portions of the forest that were capable of being managed as a source of

---

<sup>†</sup> President and chief legal officer of Mountain States Legal Foundation, a nonprofit, public interest law firm located in the Denver, Colorado, metropolitan area. This article is an excerpt from *WARRIORS FOR THE WEST: FIGHTING BUREAUCRATS, RADICAL GROUPS, AND LIBERAL JUDGES ON AMERICA’S FRONTIER* (2006).

1. The Sheridan Inn was built in 1893. From 1894 to 1901, Colonel William F. “Buffalo Bill” Cody was a part owner of the hotel, which is today a National Historic Landmark. See Sheridan Inn, <http://www.sheridaninn.com> (last visited Mar. 26, 2006).

2. See Wyoming Sawmills, <http://www.wyomingsawmills.com> (last visited Mar. 26, 2006).

3. See U.S. Forest Service, <http://www.fs.fed.us/r2/bighorn/about/facts> (last visited Mar. 26, 2006). See also U.S. DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT., PUBLIC LAND STATISTICS 1998 at 1-3 (1999), available at [www.blm.gov/natacq/pls98/98PL1-3.PDF](http://www.blm.gov/natacq/pls98/98PL1-3.PDF).

4. Multiple Use Sustained Yield Act of 1960, 16 U.S.C. § 528 (2000).

5. The Organic Act of June 4, 1897, 16 U.S.C. § 475 (2000), provides: “No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States . . .” (emphasis added).

timber were made available for sale to timber companies like Wyoming Sawmills. In the process, not only were fees paid to the Forest Service, twenty-five percent of which were returned to the county where the timber was harvested, but also jobs and wealth were created and taxes paid all while ensuring the health and viability of the forest itself.<sup>6</sup> In 1996, however, the Forest Service decided to manage nearly fifty thousand acres, about seventy-eight square miles, of the Bighorn in accordance with the demands of American Indian religious practitioners.

Various American Indian groups maintain that, notwithstanding its prehistoric origins, the Medicine Wheel, a designated National Historic Landmark on the western peak of Medicine Mountain in the northern part of the Bighorn just off Alternate Highway 14, is sacred to them.<sup>7</sup> In recognition of this belief system, the Forest Service granted free and open access to the Medicine Wheel to permit American Indian religious practitioners to engage in the free exercise of religion, even though that exercise would occur on federal or public land. In fact, the Forest Service granted the practitioners unlimited ceremonial use of Medicine Wheel, agreed to close the feature during ceremonial usage to ensure privacy, and authorized the presence of American Indian "interpreters" during tourist season to proselytize about their faith.<sup>8</sup> Even these extraordinary allowances were not enough for the practitioners. They maintained that any activity to which they objected that was audible or visible from the Medicine Wheel would interfere with their religious practices. Specifically, they objected to timber harvesting and demanded the closure of huge portions of the Bighorn to that activity.<sup>9</sup>

The process had begun in June 1993, when the Forest Service entered into an agreement with a variety of governmental and non-governmental groups, which did not include any members of the private sector, such as Wyoming Sawmills, that established the Forest Service's

---

6. Although environmental groups vehemently deny the obvious, failure to manage forests to preserve forest health results in dreadful forest fires, such as the 2002 Rodeo-Chediski fire, the worst in Arizona history; more than 467,000 acres (an area two-thirds the size of Rhode Island) went up in flames. See Wikipedia, *Rodeo-Chediski Fire*, [http://en.wikipedia.org/wiki/Rodeo-Chediski\\_fire](http://en.wikipedia.org/wiki/Rodeo-Chediski_fire) (last visited Mar. 26, 2006). The White Mountain Apache Tribe, for example, prevented even greater devastation of its forest by its aggressive forest thinning and fuel reduction program. See Dennis Wall, *The Rodeo-Chediski Fire: A Tribal Perspective*, NATIVE VOICES, Summer 2002, at 1, [http://www4.nau.edu/itep/about/assets/docs/\\_NV\\_Summer2002FINAL.pdf](http://www4.nau.edu/itep/about/assets/docs/_NV_Summer2002FINAL.pdf). Not surprisingly, an environmental group sued to prevent the Forest Service from engaging in post-fire timber sales to prevent future fires in the Rodeo-Chediski area. Ultimately, and perhaps for one of few times, that attempt to delay harvesting failed. *Forest Conservation Council v. U.S. Forest Serv.*, 110 Fed. App'x 26, 27 (9th Cir. 2004), *en banc denied* (Nov. 15, 2004).

7. See U.S. Forest Service, <http://www.fs.fed.us/r2/bighorn/recreation/heritage/nativeamericans> (last visited Mar. 26, 2006). The Medicine Wheel is a "roughly circular alignment of rocks and associated cairns enclosing 28 radial rows of rock extending out from a central cairn" some 75 feet in diameter at an elevation of 9,642 feet. See Wyoming State Historic Preservation Office, <http://wyoshpo.state.wy.us/medwheel.htm> (last visited Mar. 26, 2006).

8. See Sacred Land Film Project, [http://www.sacredland.org/historical\\_sites\\_pages/medicine\\_wheel.html](http://www.sacredland.org/historical_sites_pages/medicine_wheel.html) (last visited Mar. 26, 2006).

9. *Id.*

management priority for Medicine Mountain and Medicine Wheel as "continued traditional cultural use" of nearly twenty thousand acres as a "sacred place and important ceremonial site."<sup>10</sup> In addition, the agreement formed the groups into a permanent body called the "Consulting Parties" to determine how the sacred areas of the Bighorn would be managed. In April 1996, the Forest Service, responding to a "resurgence of Native American spiritualism and new information that all of Medicine Mountain [is] of religious importance to American Indians, not simply the Medicine Wheel," published a draft management plan that affirmed "the importance of the Medicine Wheel as a American Indian Shrine."<sup>11</sup> In September 1996, the Forest Service published its final plan in which it announced that its "management priority" was to bar any activity that might "detract from the spiritual and traditional values" associated with "Medicine Mountain and the surrounding area."<sup>12</sup> Then, in October 1996, as part of its statutorily mandated planning process, the Forest Service adopted an amendment to its forest plan under which all of Medicine Mountain, nearly twenty thousand acres, would be managed as a "sacred site."<sup>13</sup>

Previously, 15,840 acres of the sacred site area had been designed by the Forest Service as available for timber management and more than six thousand acres had been designated as available for timber harvesting.<sup>14</sup> In fact, the Forest Service regarded the timber there as especially valuable because the trees were mainly "large and very large."<sup>15</sup> Additionally, as a result of a pest infestation that has plagued the area since 1990, 1,135 acres had "a large amount of dead standing trees" and was selected for thinning in order to achieve "the desired state of forest

---

10. Memorandum of Agreement Among the Bighorn National Forest, Advisory Council on Historic Preservation, Wyoming State Historic Preservation Officer, Medicine Wheel Coalition For Sacred Sites Of North America, Big Horn County Commissioners, and Federal Aviation Administration Regarding the Long-Term Management of the Medicine Wheel National Historic Landmark and Historic Properties on Medicine Mountain, I-1 (June 21, 1993) (available from Forest Supervisor, Bighorn National Forest, Sheridan, Wyoming).

11. U.S. FOREST SERVICE, DRAFT MEDICINE WHEEL/MEDICINE MOUNTAIN HISTORIC PRESERVATION PLAN (Apr. 1996) (available from Forest Supervisor, Bighorn National Forest, Sheridan, Wyoming).

12. U.S. FOREST SERVICE, FINAL MEDICINE WHEEL/MEDICINE MOUNTAIN HISTORIC PRESERVATION PLAN, Sec. III-5 (Sept. 1996) [hereinafter FINAL PLAN].

13. *Id.* at I-2. The National Forest Management Act of 1976 (NFMA), 16 U.S.C. §§ 1600-14 (2006), requires each unit of the national forest system (forests and grasslands) to adopt plans pursuant to which the unit will be managed. General plans are followed by specific plans authorizing the previously approved management activity. Each plan must be adopted in accordance with the extensive paperwork and public comment mandates of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-47 (2000). These plans, often referred to as "environmental reviews," include Environmental Assessments (EAs) and Environmental Impact Statements (EISs).

14. U.S. FOREST SERVICE, ADDENDUM TO THE ENVIRONMENTAL ASSESSMENT FOR THE MANAGEMENT AND HISTORIC PRESERVATION PLAN FOR THE MEDICINE WHEEL NATIONAL HISTORIC LANDMARK AND VICINITY, ANALYSIS OF EFFECTS OF PROPOSED FOREST PLAN AMENDMENT No. 12 (available from Forest Supervisor, Bighorn National Forest, Sheridan, Wyoming).

15. *Id.*

health” and to reduce “potential wildfire risk.”<sup>16</sup> As a result of the Forest Service’s agreement with American Indian religious practitioners, these federal lands were now off-limits to timber harvesting.<sup>17</sup>

Ten months later, the Forest Service completed its environmental review of a timber sale plan that had been issued first in 1988 and determined that the sale could proceed.<sup>18</sup> Almost immediately the Consulting Parties objected.<sup>19</sup> Although the sale area was several miles north and outside of the twenty-thousand acre sacred site area, the sale would require timber hauling on a Forest Service road, a small portion of which was within the far eastern boundary of the sacred site area. In deference to the demands of the religious practitioners, the sale was cancelled.<sup>20</sup> By putting that road off-limits to timber hauling, the Forest Service added an additional thirty thousand acres to the lands being managed as “sacred.”

Wyoming Sawmills, which planned to bid on the sale and needed the timber for its mill, filed a lawsuit against the Forest Service contending, among other things, that managing fifty thousand acres of federal land as a sacred site violates the Constitution’s Establishment Clause and its mandate of government neutrality regarding religion.

## II. THE ESTABLISHMENT CLAUSE

The First Amendment to the Constitution reads, in part, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”<sup>21</sup> The first phrase is referred to as the Establishment Clause and the latter, the Free Exercise Clause. Since 1971, and its decision in *Lemon v. Kurtzman*,<sup>22</sup> the U.S. Supreme Court has defined expansively what governmental activities violate the Estab-

---

16. FINAL PLAN, *supra* note 12, Sec. IX-51 (available from Forest Supervisor, Bighorn National Forest, Sheridan, Wyoming).

17. American Indian religious practitioners often assert that such demands are merely a request that the government “accommodate” their free exercise of religion. Government action respecting religion is not constitutional “accommodation,” however, unless it removes a “discernible burden” on the free exercise of religion, which was government-created. *See Lee v. Weisman*, 505 U.S. 577, 629 (1992); *Corp. of Presiding Bishops of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338 (1987). The accommodation doctrine is “not a principle without limits,” because, “[a]t some point, accommodation may devolve into an unlawful fostering of religion.” *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 706 (1984), *Amos*, 483 U.S. at 334-35.

18. U.S. Forest Service, Amendment to Horse Creek Timber Sale Environmental Assessment (Aug. 8, 1997) (available from Forest Supervisor, Bighorn National Forest, Sheridan, Wyoming).

19. U.S. Forest Service, Bid Package for Horse Creek Timber Sale (Sept. 19, 1997); U.S. Forest Service, Forest Supervisor’s Notice of Cancellation of Horse Creek Timber Sale (Oct. 1, 1997) (available from Forest Supervisor, Bighorn National Forest, Sheridan, Wyoming).

20. U.S. Forest Service, Forest Supervisor’s Notice of Cancellation of Horse Creek Timber Sale (Oct. 1, 1997) (available from Forest Supervisor, Bighorn National Forest, Sheridan, Wyoming).

21. U.S. CONST. amend. I.

22. 403 U.S. 602 (1971).

lishment Clause;<sup>23</sup> the short answer, for the Supreme Court and the various federal appellate courts, is that nearly any government involvement with religion is unconstitutional.

Under *Lemon*, so as not to violate the Establishment Clause, governmental action "respecting" religion: (1) "must have a secular . . . purpose," (2) "must . . . neither advance[] nor inhibit[] religion" in "its principal or primary effect," and (3) "must not foster an excessive government entanglement with religion."<sup>24</sup> The *Lemon* test is supplemented with the "endorsement test," which asks "whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."<sup>25</sup> What the Establishment Clause requires, says the Supreme Court, is that government:

[N]ot coerce anyone to support or participate in a religion, or its exercise, or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so." . . . [For] [w]hat to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices . . . may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.<sup>26</sup>

Furthermore, a government may not send an "ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'"<sup>27</sup>

Applying these tests to the Forest Service's action in the Bighorn National Forest seems to compel that a court issue a ruling that the Forest Service had abandoned its constitutionally required neutrality. In fact, in two earlier instances that is exactly how the U.S. Court of Appeals for the Tenth Circuit and, eight years later, the U.S. Supreme Court ruled. In both cases, unlike the Forest Service in the Bighorn, the federal agencies involved refused to accede to the demands of American Indian religious practitioners.

23. *Lemon*, 403 U.S. at 625 (state-provided aid to church-related elementary and secondary schools regarding secular instruction violates Establishment Clause).

24. *Id.* at 612-13 (quotation omitted) (citing *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970)).

25. *Wallace v. Jaffree*, 472 U.S. 38, 56 n.42 (1985) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)) (state-authorized daily period of silence in all public schools for meditation or voluntary prayer violates Establishment Clause).

26. *Lee v. Weisman*, 505 U.S. 577, 587, 592 (1992) (quoting *Lynch*, 465 U.S. at 678) (public school requirement that students stand and remain silent during "nonsectarian" prayer at graduation ceremony violates Establishment Clause).

27. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000) (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)) (elected student giving a prayer over public address system at each varsity football game violates Establishment Clause).

In 1980, the Tenth Circuit ruled regarding the demands by several American Indian leaders and organizations that the National Park Service (NPS) restrict tourist activity at Rainbow Bridge National Monument in south-central Utah due to the needs of American Indian religious practitioners. The Tenth Circuit held that restricting public access to the Monument's lands would violate the Establishment Clause: "'The First Amendment . . . gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities.' . . . Were it otherwise, the Monument would become a government-managed religious shrine."<sup>28</sup>

In 1988, when members of three American Indian Tribes in northwestern California sought to prevent timber harvesting and road construction in a portion of the national forest traditionally used for religious purposes, the Supreme Court declared:

Nothing in the principle for which [American Indians] contend, however, would distinguish this case from another lawsuit in which they (or similarly situated religious objectors) might seek to exclude all human activity but their own from sacred areas of the public lands. . . . Whatever 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.<sup>29</sup>

### III. JUSTICE DELAYED IS JUSTICE DENIED

By October 1999, Wyoming Sawmills's lawsuit, filed the previous February, had been briefed fully and argued before the U.S. District Court for the District of Wyoming. Nonetheless, the district court did not issue its decision until December 2001, ruling that Wyoming Sawmills did not have the legal right ("standing") to file its lawsuit.<sup>30</sup> Although the district court agreed that Wyoming Sawmills had suffered an injury, which was its lost opportunity to bid on the timber sale, the district court held that it could not redress that injury because it "could not eliminate the Medicine Wheel as it is a protected National Monument."<sup>31</sup> Either the court was being obtuse—because addressing the constitution-

28. *Badoni v. Higginson*, 638 F.2d 172, 179 (10th Cir. 1980) (quoting Judge Learned Hand's decision in *Otten v. Baltimore & O. R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953)).

29. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452-53 (1988).

30. *Wyoming Sawmills, Inc. v. U.S. Forest Service*, 179 F. Supp. 2d 1279, 1286 (D. Wyo. 2001). Outrageously, these types of delays are not uncommon. One case litigated by MSLF was briefed fully and ready for decision on July 5, 2001; the federal district court did not rule for more than four years. See *Mount Royal Joint Venture v. Norton*, No. 99cv2728 (D.D.C. Aug. 26, 2005), available at [http://www.ifr-ors.com/mountain\\_states/legal\\_cases.cfm?legalcaseid=43](http://www.ifr-ors.com/mountain_states/legal_cases.cfm?legalcaseid=43).

31. *Wyoming Sawmills*, 179 F. Supp. 2d at 1294. Standing is required by the Constitution's "case" or "controversy" requirement, U.S. CONST. art. III, § 2, which the Supreme Court interprets to require: (1) an "injury in fact," which is an invasion of a legally protected interest that is "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical;" (2) a causal relationship between the injury and the agency action; and (3) a likelihood that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations and footnotes omitted).

ality of the Forest Service's closure of fifty thousand acres to timber harvesting would not affect the designation of the Medicine Wheel's 110 acres—or obstinate—because it did not want to apply the earlier holdings of the Tenth Circuit and the Supreme Court.<sup>32</sup> Perhaps it was a little of both; Wyoming Sawmills appealed.

At last, in May 2003, Wyoming Sawmills appeared for oral arguments before the Tenth Circuit, the matter having been briefed by Wyoming Sawmills, the U.S. Forest Service, which under the Bush administration continued to support the constitutionality of the closure,<sup>33</sup> and a group of American Indian religious practitioners.<sup>34</sup> The good news for Wyoming Sawmills was that the Tenth Circuit agreed that the district court's redressability holding was in error. The bad news was that the Tenth Circuit held that Wyoming Sawmills had suffered no injury whatsoever, neither the loss of its opportunity to bid on a timber sale nor its having been "directly affected" by an Establishment Clause violation. Even worse, the Tenth Circuit went so far as to accept the argument of the Forest Service that a corporation is not capable of suffering an injury under the Establishment Clause.<sup>35</sup>

The Tenth Circuit's ruling was particularly curious given that, for more than thirty years, anyone "offended" by government action that allegedly "respect[s] an establishment of religion," has been found to have been "directly affected" by that purported violation and given standing to sue. Famously, for example, the Tenth Circuit held that a local citizen offended by seeing an image of the Mormon temple on the seal of the City of St. George, Utah, had standing to challenge the seal's constitutionality.<sup>36</sup> In fact, according to the Tenth Circuit, all but one of the other federal appellate courts, and the Supreme Court, anyone who comes into direct contact with governmental action regarding religion

32. Interview with William Matthews, Forest Service Historian, U.S. Forest Service, in Lovell, Wyo. (Nov. 10, 2005).

33. By the time the Bush administration filed its brief in December 2002, all of its high-level and intermediary officials were in place. Moreover, the terrible 2002 fire season had energized the Bush administration into addressing, at least legislatively, the forest health issue. Furthermore, Governor Bush and Secretary Cheney had campaigned against Clinton's western policies. None of these was a sufficient basis for Bush administration lawyers to change their litigating posture in *Wyoming Sawmills*. In fact, to the writer's knowledge, on every lawsuit filed against the Clinton administration that challenged Clinton's western, environmental, or natural resources policies, the Bush administration aggressively defended its predecessor.

34. See *Wyoming Sawmills, Inc. v. U.S. Forest Service*, 383 F.3d 1241, 1243 (10th Cir. 2004). Friends of the court (*amici curiae*) briefs in support of the Forest Service were filed by the National Congress of American Indians, National Trust for Historic Preservation, The Becket Fund for Religious Liberty, Bureau of Catholic Indian Missions, General Conference of Seventh-day Adventists, Clifton Kirkpatrick, Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.), Union of Orthodox Jewish Congregations of America, Baptist Joint Committee on Public Affairs, and Council on American Islamic Relations. *Id.*

35. See *Wyoming Sawmills*, 383 F.3d at 1247. This is ludicrous. See, e.g., *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 592 (1961) (holding that corporation has standing to challenge whether law respected establishment of religion).

36. *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989).



has standing to file an Establishment Clause lawsuit.<sup>37</sup> Nonetheless, for unspecified reasons, the Tenth Circuit did not apply that test to Wyoming Sawmills. When the Tenth Circuit denied Wyoming Sawmills's petition to have the Tenth Circuit panel's decision heard by all Tenth Circuit judges, that is en banc, Wyoming Sawmills asked for Supreme Court review. In October 2005, the Supreme Court denied Wyoming Sawmills's petition.<sup>38</sup>

The refusal of the Supreme Court to hear Wyoming Sawmills's challenge, which was not surprising given that the Court grants only one percent of the petitions filed, reveals an often overlooked aspect of federal litigation. For all intents and purposes, the three-judge panel of a federal appellate court, whether the Tenth, the Ninth, or the District of Columbia, is the court of last resort, the supreme court, for almost all federal litigation. That is almost assuredly the result, regardless of the importance of the issues raised—such as whether federal lands may be managed to suit the demands of American Indian religious practitioners—if the appellate court resolves the case on procedural or technical grounds, such as “the plaintiff lacks standing.” Almost as unlikely is that a federal appellate court will hear the matter en banc, that is, before all the judges of the circuit. If two members of a three-judge panel agree on a decision, the third judge is encouraged to sign on as well, out of a spirit of comity. In the rare instance of a 2-1 ruling, the dissenting judge, often as not, declines to file an opinion. Finally, a circuit judge is disinclined to vote for en banc review of the decisions of his colleagues just as he would prefer that his colleagues withhold that vote on his rulings. Not surprisingly, when the Supreme Court considers a petition for writ of certiorari, a unanimous three-judge panel ruling, the absence of a written dissent in a 2-1 ruling, or the denial of a petition for rehearing en banc without dissent almost always dooms that petition.

If the law is so clear, one may ask in light of the Supreme Court's 1988 ruling regarding demands by American Indian religious practitioners for exclusive use of public lands, how may an appellate court refuse to follow it in addressing the issue of purportedly sacred federal lands. The answer is that the appellate court will recognize the Supreme Court's holding but will conclude that it lacks the jurisdiction to apply that holding in the case before it. The Supreme Court is highly unlikely to review such a holding. Even if the appellate court rules on the merits and refuses to apply, for example, that Supreme Court ruling or applies the

---

37. See *County of Allegheny v. ACLU*, 492 U.S. 573, 573-74 (1989) (holding that local residents had standing to challenge the presence of a creche on city and county property). In fact, in only one circuit must one who seeks to challenge an alleged Establishment Clause violation modify his behavior in response to that offending religious symbol. *ACLU v. City of St. Charles*, 794 F.2d 265, 269 (7th Cir. 1986). The Supreme Court knows of this split and may yet resolve it. See *City of Edmond v. Robinson*, 517 U.S. 1201, 1201 (1996) (Rehnquist, C.J., Scalia, J., Thomas, J., dissenting from denial of certiorari).

38. *Wyoming Sawmills, Inc. v. U.S. Forest Service*, 126 S. Ct. 330, 330 (2005).

ruling incorrectly, again the odds are that the Supreme Court will decline to review the matter given that "misapplication" of the law is not a basis for Supreme Court review.<sup>39</sup>

For more than a decade, that has been the fate of challenges to decisions by Clinton administration federal land managers restricting public use of purportedly sacred federal land either pursuant to Clinton's 1996 Executive Order<sup>40</sup> on the subject or, with that order as cover, to prevent activity that environmental groups or local land managers or both oppose. Thus:

- When commercial and recreational climbers challenged the National Park Service's decision to restrict June climbing of Devils Tower in northern Wyoming in deference to the demands of American Indian religious practitioners,<sup>41</sup> the Tenth Circuit ruled that none of them had standing to challenge the policy.<sup>42</sup>
- When local members of a national trade association challenged the U.S. Forest Service's decision to close nearly 1 million acres of federal land in north-central Montana to oil and gas exploration and development,<sup>43</sup> the Ninth Circuit ruled that they lacked standing and that the Forest Service's action met the *Lemon* test.<sup>44</sup>
- When visitors to Rainbow Bridge National Monument<sup>45</sup> sued after being told they could not approach Rainbow Bridge because it is god

39. SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

40. Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996).

41. Devils Tower, a vertical monolith that rises 1,267 feet above the Belle Fourche River in Crook County, near Hulett, Wyoming, is the nation's first national monument and was created by President Theodore Roosevelt on September 24, 1906. National Park Service, *Devils Tower*, [www.nps.gov/deto/index.htm](http://www.nps.gov/deto/index.htm) (last visited Mar. 25, 2006).

42. *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814, 821-22 (10th Cir. 1999), cert. denied, 529 U.S. 1037 (2000) (ruling that the commercial climber had failed to show an economic injury, the climbers who objected to the NPS's policy but climbed anyway had not suffered an injury in fact, and climbers who refused to climb for fear that if they did climb the NPS would close Devils Tower to all climbing year-round, had failed to show that their fears were anything more than "remote and speculative.").

43. The Lewis and Clark National Forest covers portions of 13 counties in central and north-central Montana. U.S. Forest Service, *Lewis & Clark National Forest*, <http://www.fs.fed.us/r1/lewisclark/about/index.shtml> (last visited Mar. 25, 2006). Its Rocky Mountain Division overlies the Overthrust Belt, a vast geological feature estimated to be the largest natural gas deposit in the continental United States. DAVID ALBERSWERTH & PETER A. MORTON, *THE WILDERNESS SOCIETY, WILDERNESS SOCIETY'S SUBMISSION FOR THE SENATE ENERGY AND NATURAL RESOURCES COMMITTEE'S PANEL DISCUSSION ON NATURAL GAS POLICY 1-2* (2005), <http://www.wilderness.org/Library/Documents/upload/WildernessSociety-SENRC-NG-PolicySubmittal20050107.pdf>.

44. *Rocky Mountain Oil and Gas Ass'n v. U.S. Forest Service*, 12 F. App'x 498, 500 (9th Cir. 2001), cert. denied sub nom. *Indep. Petrol. Ass'n of America v. U.S. Forest Service*, 534 U.S. 1018 (2001). Despite the Bush administration's public commitment to finding new energy sources, its lawyers opposed Supreme Court review of a decision closing one million acres of land thought to contain an abundant amount of natural gas.

45. Rainbow Bridge National Monument is the world's largest natural bridge. National Park Service, *Rainbow Bridge*, <http://www.nps.gov/rabr/index.htm> (last visited Mar. 25, 2006). It was

incarnate to some American Indian religious practitioners,<sup>46</sup> the Tenth Circuit held that none of the visitors had standing to challenge the NPS's policy.<sup>47</sup>

#### IV. DALE MCKINNON AND WOODRUFF BUTTE

Designating federal or public land as sacred to a particular religious group and thus off-limits to what the Supreme Court calls "nonadherents"<sup>48</sup> is one thing; after all, as the Supreme Court declared in the opposite context, it is "*its* land."<sup>49</sup> For the government to declare private land sacred to American Indian religious practitioners and off-limits to the owner's use is quite something else entirely! Or is it?

Woodruff Butte is private property located about ten miles southeast of Holbrook, Arizona, which is ninety-three miles due east of Flagstaff. Mr. Dale McKinnon and his family own Cholla Ready Mix, Inc., which first leased and then purchased Woodruff Butte to mine the unique and valuable aggregate found there for use in highway construction projects. In 1990, the Hopi, Zuni, and Navajo Indian Tribes passed resolutions against the mining of Woodruff Butte because they consider it a place of religious significance or sacred. On that basis, in or around 1990, the Arizona State Historic Preservation Officer declared Woodruff Butte eligible for listing on the National Registry of Historic Places (NRHP) over the objections of Mr. McKinnon. Woodruff Butte has yet to be listed on the NRHP.

In June 1991, the Arizona Department of Transportation (ADOT) granted Cholla a commercial source number allowing aggregate mined from Woodruff Butte to be used on ADOT projects. Nonetheless, beginning in 1992, ADOT took steps to bar the use of Woodruff Butte, which culminated in new ADOT rules adopted in 1999. Under those new rules, Cholla was required to apply for a new commercial source number. Its application was denied solely as a result of the religious significance of Woodruff Butte to the three Tribes.

In June 2002, Dale McKinnon's Cholla Ready Mix sued ADOT in Arizona federal district court claiming that ADOT's actions violated the Establishment Clause. In January 2003, the district court dismissed Cholla's complaint holding that ADOT's regulation—Historical and Cultural Resources Regulation—"[o]n its face . . . is aimed at protecting sites of historical and cultural significance. That a protected site also has

---

designated by President Taft on May 30, 1910, and today is managed by the National Park Service. Rainbow Bridge Home Page, <http://www.nps.gov/rabr/home.htm> (last visited Mar. 25, 2006).

46. Rainbow Bridge Home Page, *supra* note 45.

47. Natural Arch and Bridge Soc'y v. Alston, 98 Fed App'x 711 (10th Cir. 2004), *cert. denied sub nom.* DeWaal v. Alston, 543 U.S. 1145 (2005).

48. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

49. *Lyng*, 485 U.S. at 453.

religious significance does not make the regulation unconstitutional."<sup>50</sup> After the district court denied Cholla's motion for reconsideration, Cholla appealed to the U.S. Court of Appeals for the Ninth Circuit.

In September 2004, the Ninth Circuit affirmed dismissal of Cholla's complaint holding that "[n]o evidence could bolster Cholla's Establishment Clause claim because it is premised on flawed analysis of the governing law."<sup>51</sup> Although the Ninth Circuit upheld the Arizona federal district court's dismissal of Cholla's complaint, it issued a published ruling on the merits in which it declared: "[T]he Establishment Clause does not bar the government from protecting an historically and culturally important site simply because the site's importance derives at least in part from its sacredness to certain groups."<sup>52</sup>

After oral arguments in the case, but before the panel ruled, another Ninth Circuit panel ruled on the constitutionality of a Latin cross erected on federal land in the California desert to commemorate those who died in World War I. In September 2004, in light of the clear conflict between two panels of the Ninth Circuit, Cholla petitioned for a rehearing en banc. In October 2004, the petition was denied, as was Cholla's Supreme Court petition for writ of certiorari a few months later.<sup>53</sup>

Nonetheless, the Ninth Circuit may yet have the opportunity to decide which one of its opinions, *Buono* or *Cholla*, controls when considering American Indian religion, the use of public lands, and the Establishment Clause. In January 2005, the Nevada federal district court upheld the constitutionality of a decision by the Forest Service to close Cave Rock near Lake Tahoe to climbing in response to the demands of American Indian religious practitioners.<sup>54</sup> Relying on the Ninth Circuit's ruling in *Cholla*, the district court declared, "The Establishment Clause does not require government to ignore the historical value of religious sites[;] protecting culturally important Native American sites has historic value for the nations [sic] as a whole because of the unique status of Native American Societies in North American history."<sup>55</sup>

50. *Cholla Ready Mix, Inc. v. Mendez*, No. 02 Civ. 1185 (D. Ariz. Jan. 21, 2003).

51. *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 975 (9th Cir. 2004), *cert. denied sub nom. Cholla Ready Mix, Inc. v. Mendez*, 125 S. Ct. 1828 (2005).

52. *Id.* at 977.

53. *Cholla Ready Mix, Inc. v. Civish*, No. 03-15423 (9th Cir. Oct. 14, 2004) (order denying petition for rehearing en banc).

54. Transcript of Plaintiff's Motion for Summary Judgment and the United State's Motion for Summary Judgment at 54-55, *Access Fund v. Veneman*, No. CV-N-03-687-HDM (RAM) (D. Nev. Jan. 28, 2005) [hereinafter *Veneman*]. (The Access Fund, a climbing group, filed the lawsuit in December 2003). Cave Rock is a basalt plug rising 300 feet above the shores of Lake Tahoe on federal land along U.S. Highway 50. The U.S. Forest Service manages Cave Rock as part of the Lake Tahoe Management Unit. Lake Tahoe Basin Management Unit, <http://www.fs.fed.us/r5/ltbmu/> (last visited Mar. 24, 2006).

55. *Veneman*, No. CV-N-03-687-HDM (RAM) at 54-55 (quoting *Cholla v. Civish*, 382 F.3d 969, 976 (9th Cir. 2004)).

The Forest Service, in barring climbers from Cave Rock, engaged in a more blatant endorsement of American Indian religion than did the National Park Service, ten years earlier, when it closed Devils Tower to June climbing. Perhaps the federal government's string of procedural victories had made agencies much bolder; if no one could challenge sacred land closures to determine whether they violated the Constitution's Establishment Clause, then the agencies had *carte blanche* to accede to the demands of American Indian religious practitioners regarding public land. Whatever the reason, the Forest Service documents that accompanied its Cave Rock decision are breathtaking in their advocacy on behalf of American Indian religious practitioners.

The Forest Service characterized the religious "power" of Cave Rock as a "renewable" resource and concluded that the Forest Service had to take action to ensure that "the short-term uses at Cave Rock . . . will not compromise the area's long-term [religious] productivity."<sup>56</sup> That was not all. Wrote the Forest Service:

In the Washoe Tribe's view, effects of rock climbing, including physical alterations of the rock associated with sport climbing, the placement and presence of climbing equipment, and the presence of visible and audible persons on the rock, are considered to be insensitive, distracting, and incompatible with the traditional spiritual activities . . . . According to Washoe traditional belief, the intimate contact between climbers and Cave Rock leads to an exchange of power between the rock and climbers . . . . Washoe believe the presence of people at the rock can have ill effects on both the visitor and the Washoe people.<sup>57</sup>

One alternative considered by the Forest Service to preserve the religious power of Cave Rock would have "[v]oluntarily or mandatorily prohibit[ed] all activities under Forest Service jurisdiction, other than Washoe spiritual uses, during specific time periods."<sup>58</sup> The Forest Service rejected that alternative because

[American Indian religious] practitioners cannot follow a predictable schedule in knowing when the power that Cave Rock provides will be needed . . . this alternative would not meet the needs of the traditional tribal users . . . . [T]o implement it would unnecessarily restrict public access without benefiting the group for which the regulation was being established.<sup>59</sup>

---

56. U.S. FOREST SERVICE, CAVE ROCK MGM'T DIV., FINAL ENVIRONMENTAL IMPACT STATEMENT: LAKE TAHOE BASIN MANAGEMENT UNIT 3-72 (2002) [hereinafter CAVE ROCK].

57. *Id.* at 2-21.

58. *Id.* at 2-6.

59. *Id.*

Thus, the Forest Service rejected this alternative, not because such a closure is patently and facially unconstitutional,<sup>60</sup> but because it would not limit public access for as much of the year as American Indian religious practitioners demanded.

Preserving the power of Cave Rock was not the Forest Service's only concern. The Forest Service determined that recreational activities by climbers and non-climbers would "disturb traditional users of the property, [and] would affect the property's pre-European encroachment feel and association."<sup>61</sup> Furthermore, conversations by those recreating on Cave Rock "contribute to the generation of noise," which, although the Forest Service recognized was "not the dominant noise source in the area, current noise levels affect use by Washoe spiritualists, as rituals are intended to occur during serene and tranquil periods; this would affect the feel and association of the property."<sup>62</sup> Finally, the Forest Service, noting the need to protect American Indian religion, stated, "If current adverse impacts to [Cave Rock] continue, it is possible the Washoe Tribe would abandon its . . . [religious] practices at Cave Rock."<sup>63</sup>

In the end, the Forest Service barred use of Cave Rock by climbers and those on educational field trips, limiting access to American Indian religious practitioners, hikers, and picnickers.<sup>64</sup> Because hikers "only occasionally visit the cave, and more commonly walk up the backside of Cave Rock up to its summit," American Indian religious practitioners will be the primary users of the face of Cave Rock and the cave itself.<sup>65</sup> Effectively closing Cave Rock to all but American Indian religious practitioners was not enough; the Forest Service also included in its management plan a "signage component and a brochure designed to inform people of the cultural [that is, religious] significance of Cave Rock."<sup>66</sup>

It is remarkable, given Establishment Clause jurisprudence by the U.S. Supreme Court and the U.S. Court of Appeals for the Ninth Circuit, that the Nevada federal district court upheld the constitutionality of the Forest Service's actions at Cave Rock. After all, in *Buono*, the Ninth Circuit had ruled that the mere presence of a Latin cross on federal land

60. See, e.g., *Lyng*, 485 U.S. at 448–50.

61. CAVE ROCK, *supra* note 56, at 3-20.

62. *Id.* That the conversation of climbers at Cave Rock is not the "dominant noise source in the area" is a bit of an understatement; the four lanes of Highway 50, which transect Cave Rock, generate a continuous roar of speeding trucks, automobiles, and motorcycles.

63. *Id.* at 3-72.

64. See *id.* at 2-21.

65. See *id.* at 3-4, 3-5.

66. *Id.* at 2-7. A similar sign on federal land in California regarding a Latin cross erected to honor those killed in World War I yielded this ruling: "[D]espite the sign—indeed, perhaps because of it—observers might [still have] reasonably perceive[d] the City's display of such a religious symbol on public property as government endorsement of the Christian faith." *Buono v. Norton*, 371 F.3d 543, 549 (quoting *Separation of Church and State Comm. v. City of Eugene*, 93 F.3d 617, 626 (9th Cir. 1996)).

in California constituted an Establishment Clause violation.<sup>67</sup> As to Cave Rock, not only did the Forest Service agree that Cave Rock is sacred, it labeled the religious power of Cave Rock a “resource” to be protected by the Forest Service and barred non-believing climbers from recreating on Cave Rock.<sup>68</sup>

Furthermore, the Nevada court’s holding with regard to the unique status of American Indian religion and its blending of history, culture, and religion ignores that other Americans celebrate faiths that have rich histories and are part of their culture and the culture of this country.<sup>69</sup> Judeo-Christian religion, for example, imbued every aspect of the early American culture and history.<sup>70</sup> Moreover, even if American Indian religion were unique, that uniqueness does not exempt it from application of an Establishment Clause that has been applied to every other religious faith. It would appear that the Ninth Circuit must reverse the Nevada district court’s decision and rule that the Forest Service’s actions at Cave Rock are unconstitutional. Whether the Ninth Circuit will do so remains in doubt.

#### V. THE TEN COMMANDMENTS AND AMERICAN INDIAN RELIGION

When the Ninth Circuit decides the Cave Rock case, its ruling will be informed by two recent U.S. Supreme Court rulings regarding public display of the Ten Commandments.

In June 2005, the Court ruled that display of the Ten Commandments in the McCreary County and Pulaski County courthouses was unconstitutional. In a 5-4 ruling authored by Justice Souter and joined by Justices Stevens, O’Connor, Ginsburg, and Breyer, the Court held that, given the actions of the counties, “[t]he reasonable observer could only think that the Counties meant to emphasize and celebrate the Commandments’ religious message.”<sup>71</sup> In determining the counties’ purpose, the Court looked to “readily discoverable fact[s] set forth in a[n] . . . official act.”<sup>72</sup> The Court demanded that the counties’ purported secular purpose “be genuine, not a sham, and not merely secondary to a religious

67. *Buono*, 371 F.3d at 550.

68. *CAVE ROCK*, *supra* note 56, at 2-4.

69. *See* *McCreary County, Kentucky v. ACLU of Kentucky*, 125 S. Ct. 2722, 2748 (2005) (Scalia, J., dissenting); *Van Orden v. Perry*, 125 S. Ct. 2854, 2859 (2005) (Rehnquist, C.J., plurality); *Wallace v. Jaffree*, 472 U.S. 38, 100-03 (1985) (Rehnquist, J., dissenting).

70. *MICHAEL NOVAK, ON TWO WINGS: HUMBLE FAITH AND COMMON SENSE AT THE AMERICAN FOUNDING* 5-7 (2002). The author notes:

In one key respect, the way the story of the United States has been told for the past one hundred years is wrong. It has cut off one of the two wings by which the American Eagle flies, her compact with the God of the Jews—the God of Israel championed by the nation’s first Protestants . . . Believe that there is such a God or not—the founding generation did, and relied upon this belief. Their faith is an ‘indispensable’ part of their story.

*Id.* at 5.

71. *McCreary County, Kentucky v. ACLU of Kentucky*, 125 S. Ct. 2722, 2726 (2005).

72. *McCreary County*, 125 S. Ct. at 2724.

objective;" that is, the secular purpose must be "preeminent' or 'primary.'"73 Finally, the Court had to "be familiar with the history of the government's actions and competent to learn what [that] history has to show."74

The same day, the Court ruled that a six- by three-and-one-half-foot granite monolith containing the Ten Commandments set upon the Texas State Capitol grounds was constitutional. Chief Justice Rehnquist delivered an opinion in which Justices Scalia, Kennedy, and Thomas joined. Justice Breyer, who expressly declined to join the Chief Justice's opinion ("I cannot agree with today's plurality analysis,"75), concurred in the judgment. Justices Stevens, O'Connor, Souter, and Ginsburg dissented.

Justice Breyer called the case "borderline," given that "the Commandments' text undeniably has a religious message."76 Eschewing any particular Establishment Clause test and embracing instead the Establishment Clause's purposes, Justice Breyer concluded, after an "exercise of legal judgment," that the physical setting of the display "suggests little or nothing of the sacred."77 Most compelling to Justice Breyer, however, was that "[t]his display has stood apparently uncontested for nearly two generations [which] . . . helps us understand that as a practical matter of degree this display is unlikely to prove divisive."78

Therefore, the Supreme Court's two Ten Commandments cases provide no support for the Ninth Circuit's ruling in *Cholla*. If the Ninth Circuit rules, in the Cave Rock case, that federal land may be closed to public access because it is regarded by American Indian religious practitioners as sacred, then the tests adopted by the majority in *McCreary County* and espoused by the dissent in the Texas case compel reversal. Moreover, Justice Breyer's test in the Texas case does not apply in the Cave Rock case given that the Forest Service's access decision was challenged immediately. However, this does not mean that the Ninth Circuit will adhere to the Supreme Court's commands regarding the Establishment Clause and invalidate the Forest Service's closure of Cave Rock to climbing. Nor does it mean that, if the Ninth Circuit, as is its wont, ignores the Supreme Court's jurisprudence, the Supreme Court will hear the case. Finally, it does not mean that, even if the Supreme Court hears the Cave Rock case, that it will apply to American Indian religion the same principles that it has applied to Judeo-Christian religion.

---

73. *Id.* at 2735-36 (quoting *Stone v. Graham*, 449 U.S. 39, 41 (1980)).

74. *Id.* at 2737.

75. *Van Orden v. Perry*, 125 S. Ct. 2854, 2871 (2005).

76. *Van Orden*, 125 S. Ct. at 2869.

77. *Id.* at 2869, 2870.

78. *Id.* at 2871.



Until the Supreme Court does just that, the law of the land regarding government activity "respecting an establishment of religion" is Judeo-Christian, "no," and pantheism, "yes." As long as that is the law, millions of acres of federal land and goodness knows how much private land could be declared sacred and off-limits to the public and the people who own it. The people who use those public lands, for recreation and for economic purposes, will continue to challenge these unconstitutional closures until the Supreme Court issues a ruling on the issue.