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Legal protection for Native American sacred landscapes involving Forest Service lands

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LEGAL PROTECTION FOR NATIVE AMERICAN SACRED LANDSCAPES

INVOLVING FOREST SERVICE LANDS

By

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The land base of Native American traditional religions is threatened by federal public land development. In the past two decades, several cases have come before the federal court system involving violations of Native American free exercise rights on public lands. Many of these cases resulted from the passage of the American Indian Religious Freedom Act (AIRFA) of 1978.

AIRFA brought Native American religious use into the framework of multiple use public land management practices. Armed with this legislation and the First Amendment of the Constitution, which prohibits the government from preventing an individual’s free exercise of religion, Native Americans felt they had solid support to protect public lands essential for their religious practices from government destruction. The Wilderness Act of 1964, which enables the government to preserve certain public lands from development was, in appropriate cases, looked to for additional support.

Through reviewing specific free exercise/public land cases it is obvious that all three pieces of legislation are ineffective for this Native American cause. The courts interpret AIRFA as a policy directive to insure that Native American concerns are taken into account in government land management decisions; the Act does not guarantee Native American religious protection. The Free Exercise clause is interpreted to only require that the federal government attempt to pursue its developments in a manner that is least restrictive to Native American religious beliefs, it does not prohibit the government from carrying out an activity that may destroy Native American religions. The Wilderness Act, although it may protect the necessary solitude and pristine quality of an area, is incapable of protecting more than bits and pieces of sacred lands; it has no provisions in its language to protect the integrity of public lands for Native American religious/cultural use. At the present time, Native Americans have no legal means to protect their sacred public lands from disrespectful government practices.

This paper demonstrates the inadequacy of existing legislation and attempts to explain the cultural differences between traditional Native Americans and the dominant Anglo-American society which contribute to the conflicts in public land use.
I would like to extend a very big Thank You to my committee members: Marge Brown, Rich Clow and Tom Roy. I have truly appreciated all of your input, including technical assistance.

I also would like to say Thank You to my parents for the moral support you have given me "all these years."

Thank You to my sister, Robin, for the use of the computer and all of the help in getting the "obnoxious machine" to "do its duty." I must admit—it did make the process go a bit faster. I don't know if that is good—but at least this paper is FINISHED!!

There were many individuals who contributed to this paper in an indirect way—their help was no less important. My gratitude to each and everyone of you who shared your insights with me.

This paper resulted from my interest in the controversy surrounding the Badger/Two Medicine area in Montana and its preservation for Blackfeet religious use. The situation renewed my interest in the San Francisco Peaks case in Arizona of which I had been vaguely aware as an undergraduate at Northern Arizona University in Flagstaff. The paper was a desire on my part to determine if Native Americans had any legislative means to turn to for protection of their sacred areas on public lands. In the process I increased my own awareness of Native American cultures, both traditional and modern, and realized the issues covered in this paper are more complex than can be explained in a written thesis. This paper serves only as an introduction to the problem. I would encourage any interested individual to further investigate the problem through personal communication with affected Native Americans.

This was written for the land and the people whose traditions have maintained its health for centuries. I pray for the maintained integrity of both. May we learn the lessons they teach.

-HOZHO-
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INTRODUCTION

In the past fifteen years, many cases have been brought before the federal court system regarding Native American religious freedom violations on public lands due to proposed, or already established, government development projects. These types of cases have been relatively new to the courts; their increase might be attributed to the growing conflict between Native American traditional religious views of the land and Western land use practices.

The final decisions rendered in these cases have been against Native Americans. This is due to the lack of strong legislative support for Native American religious freedom which directly results from Anglo-American naivety about traditional tribal land use and tribal concepts of land spirituality.

Spirituality is actually a description of religious views. Religion refers to those human actions which shape and create a culture to give human life meaning beyond the limits of human existence; these actions often define the limits of a culture’s reality.  

In tribal life, reality includes three indivisible elements: humans, their environment (defined within their territory), and the "other than human" persons who also inhabit the territory and retain its regenerative potential. Tribal members perform ceremonies and rituals to communicate with the "other than human" persons and to acquire their power to stimulate the environment's regenerative potential.

By maintaining a symbiotic social relationship with the powerholders through ceremonies and rituals, tribal people guarantee the environment's future productivity. Since the land sustains

2. For the purpose of this paper, tribal and Native American will be used interchangeably.
the people, they also guarantee their own survival. If tribal people destroy this relationship through improper conduct and disrespect, power will be withheld and the tribe will find it difficult to survive. As the "religious" actions which insure human survival, these ceremonies and rituals are an integral part of traditional tribal life

Tribal religions differ from Western Judeo-Christian religions because they are tied deeply to the geography of a tribe's territory—an animated place created for the tribe by its Creator. When the federal government confined tribes to reservations, tribal territory became a static place created by the government. Tribal people were legally separated from all or much of their "original" territory upon which they had depended for subsistence. Although they could still communicate with the "other than human" persons who inhabited the territory, tribal people lost the ability to protect those areas from desecration by those who did not respect the powers in the land. In the tribal belief system, disrespect can cause the powerholders to leave. Many federal government land management practices threatened tribal religious practices with destruction.

Traditional Native Americans grew more vocal in their criticism of the dominant culture's disrespectful practices on tribal sacred lands. They protested the damage public land management practices had on their tribal religious practices. Gradually, the dominant culture became aware of the problem and, displaying some sensitivity for tribal culture, Congress passed

4. The Anglo-American community refers to the tribal/land relationship as Native American traditional religion due to its inherent spirituality; tribal territory is inhabited by "other than human" persons who possess power to make the land productive. I will more often refer to these beliefs as tribal religion since they originated in tribal subsistence culture. This "religion" is an all-encompassing part of tribal life.

5. Some tribal members eventually accepted Anglo-American religions. Others retained parts or all of the tribal religious practices; these are the tribal religious practitioners. Through time, they have adapted past traditions to their current lifestyle; their religious practices still demand respect for the land and its inherent powers. These religious practitioners are often referred to as traditionalists.
the American Indian Religious Freedom Act in 1978. This Act seemingly directs federal agencies to adopt land management policies which will be sensitive toward tribal religious needs concerning federal public lands.

One major tribal religious need regarding public lands is the protection of areas essential to tribal religious practices. Land protection would prevent the offensive government actions which could destroy the affected tribal religion by causing the powerful "other than human" persons to leave. Such religious destruction would deny individuals their rights to freely exercise their religion and could jeopardize their survival. In the late 1900s, tribal members began seeking protection of federal public lands essential to their religious practices by asserting Free Exercise of religion rights protected by the United States Constitution's First Amendment.

In search of greater support for protection of their religious needs concerning public lands, tribal religious practitioners found themselves aligning with environmentalists and looked to the Wilderness Act of 1964 as an alternative legislative protection. Since Congress passed the Wilderness Act to protect "wild" lands from development, it appeared that wilderness designation might lend support to protecting such lands used for tribal religious practices. Many proponents of wilderness designation valued the inherent spirituality of nature; it only seems logical that a link would eventually develop between the protection of "wild" lands and tribal religions.

This paper will briefly explain the history and purposes of the American Indian Religious Freedom Act...
Freedom Act, the Wilderness Act and the Free Exercise clause of the United States Constitution's First Amendment, and discuss their limitations through the examination of specific public land/Free Exercise cases. In order to explain the cultural conflicts between Anglo-American land use and traditional tribal land use, it will also attempt to demonstrate the depth of the tribal land/religion link. It will be shown that there is little constitutional and legislative support to protect the integrity of undeveloped federal public lands threatened by government development and essential to tribal religious practices; this lack of support results from the dominant culture’s lack of understanding for the tribal/land relationship.

If there is no legislative or constitutional protection for public lands essential to tribal religious practices, where are Native Americans to turn? Is there a solution to this problem? This last question will be explored in the conclusion.
CHAPTER ONE:
The American Indian Religious Freedom Act and Free Exercise Rights of Native Americans

Passage of the American Indian Religious Freedom Act

During the mid to late 1800s, the federal government removed tribal people from parts or all of their territory in the western United States and confined them to reservations. In the process of treaty-making, some affected tribes reserved the rights to hunt, gather, fish and collect wood in their original, but now ceded territories; other tribes did not reserve these rights. In both situations, major portions of tribal lands had become public lands that were managed by the Federal government; tribal people no longer managed the lands that were important to their religious/cultural ceremonies.1 This weakened tribal land-based cultural religions.

Further destruction to tribal religions occurred as federal officials assimilated the tribes into the dominant Anglo-American culture by adopting a policy to eliminate tribal religious practices.2 The government considered tribal practices a barrier to cultural "advancement,"3 and therefore forced Native Americans to alter their lifestyles. Government activities gradually impaired ceremonies that originated in tribal geographic territory, and which were essential to tribal life.4

Repression of tribal religious practices on reservations continued into the 1900s and expanded to include practices on federal public lands that were historically tribal territory. Most

1. This will be explained in Chapter 4
government officials did not recognize or accept the importance of undeveloped public lands to tribal religious practices, nor did they attempt to understand the relationship between tribal people and their territory. As a result, federal public land policies abused tribal religious practices: federal land management agencies obstructed ceremonies, denied access to religious practitioners, prohibited the gathering of natural substances with religious significance, and often defiled public lands essential to tribal religious practices. As some congressional leaders became aware of this problem, they recognized the need for a special federal policy to protect tribal religious practices on public lands. Congress passed the American Indian Religious Freedom Act in 1978. The Act states:

... it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

This act is based in the trust relationship between the federal government and Native American tribes, wherein the government acts as guardian and must work in the tribes' best interest to protect their rights and privileges as separate legal entities. The government must pursue policies which preserve tribal rights.

One commentator has noted:

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5. Supra note 3 at i.
7. Id. (Note: Because AIRFA was designed to protect cultural and religious interests of individual Native Americans and Indian tribes as cultures, Indians are not defined in tribal terms but as individuals who are accepted as Indians where they live. Supra note 3 at 93.)
In stressing the importance of tribal identity and of the elements which undergird that identity, such as "traditional religions," AIRFA both assumes the existence of a trust responsibility and supports tribal sovereignty.  

If the government initiates an activity that threatens tribal religious and/or cultural rights, the tribe can challenge the action in court by claiming a violation of the guardian's trust responsibility.

The Intent of the American Indian Religious Freedom Act

Under a broad interpretation, AIRFA extends the federal trust duty from reservation lands to public lands; it mandates a policy protective of tribal religious practices on public lands. Federal agencies must institute policies to accommodate those religious practices. Government activities which frustrate practices violate the trust duty.

By enacting AIRFA, Congress reduced part of federal land ownership rights in deference to protection of tribal religious rights on public land. To insure the stated protection, section 2 of AIRFA requires, "the various federal departments, agencies, and other instrumentalities responsible for administering relevant laws to evaluate their policies and procedures in consultation with native traditional religious leaders to determine changes necessary to preserve Native American religious cultural rights and practices and report to Congress twelve months after August 11, 1978."  

The subsequent Task Force Report studied the cultural differences existing between Native Americans and Anglo-Americans that promoted the discriminatory practices by the federal

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11. Supra note 6.
government. It also evaluated different federal agency policies to identify whether they addressed Native American concerns and what policy changes agencies were making in response to AIRFA's passage. After obtaining input from Native Americans concerning existing conflicts between federal policy and tribal religious practices, the Task Force Report made the following suggestions:

1. Each agency could directly address in their regulations, policies and enforcement procedures, the religious practices of Native Americans on public lands, in regard to access, gathering and use of natural substances with a religious significance.

2. Each agency could revise existing regulations, policies and practices to take into account Native American religious concerns before making public land use decisions.

3. Each agency could reserve and protect public lands of special religious significance to Native Americans in a manner similar to its reservation and protection of lands of special scientific significance.

These suggestions concern use of federal public lands that are essential to tribal religious practices.

The government addressed the first two suggestions by including tribal concerns in federal policy. For example, the United States Forest Service, when conducting land and resource management planning as required by the National Forest Management Act, must protect and preserve the "inherent right of freedom of American Indians to believe, express, and exercise their traditional religions." The National Environmental Policy Act of 1969 requires that as part of the scoping process for an Environmental Impact Statement (EIS), the lead agency must "invite the participation of affected Federal, state and local agencies, any affected Indian

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12. Supra note 3 at 62-63.
14. Code of Federal Regulations (CFR) 219.1(a)(6). (Note: Since the cases I will focus on in Chapter 3 involve Forest Service lands, I will limit my discussion to Forest Service policy concerning Native Americans.)
In addition, the National Historic Preservation Act directs agency officials identifying historic properties affected by governmental actions to "seek information in accordance with agency planning processes from local governments, Indian tribes, public, and private organizations, etc . . . [who] have knowledge of or concerns with historic properties in [the] area." These policies require federal agencies to consider tribal input in public land management decisions, but they do not emphasize the protection of public lands for tribal religious needs; the third suggestion was not accepted. This lack of protection creates problems.

Tribal religions focus on a landscape full of power; these places often must be maintained in an "undeveloped" state. Destructive human impacts may weaken the spiritual power in the area, rendering related ceremonies ineffective. If Congress passed AIRFA to protect tribal religious expression, specific lands should be protected from development; otherwise, the government is not meeting the Act's purpose.

Ellen Sewell, in her article, "The American Indian Religious Freedom Act," suggests that AIRFA requires the federal government to accommodate tribal religion when at all possible. The reason for the Act's passage—the prevention of tribal religious repression—supports her statement. Effective protection of tribal religious practices requires an effort to prevent unnecessary government activities that would interfere with the needs of tribal religions.

16. 40 CFR 1501.7(a)(1).
18. 36 CFR 800.4(a)(iii).
19. Supra note 3 at 54.
20. Sewell, supra note 8 at 437.
Tribal Use v. Multiple Use

Tribal religious use may encompass a large area of public lands. Some traditionalists have claimed that all the land on which their tribe has lived, celebrated, and worshipped in the past has religious connotations and is essential to the practice of their religions today. Since Native Americans originally inhabited the entire continent, this statement has far-reaching implications. Some people fear that if public land management practices prefer tribal religious use, all public lands will be "returned" to Native Americans. This is unlikely.

Congress passed the Multiple-Use Sustained-Yield Act in 1960. The Act requires the United States Forest Service to manage its lands to accommodate the different needs of the general public, including outdoor recreation, range, timber, watershed, and fish and wildlife purposes. Management to accommodate tribal religious practices is one other possibility. In spite of the original intent of AIRFA, the federal government is not required to prefer tribal land use over other uses. AIRFA only requires the government to consider religious use as one alternative; the management agency will determine which alternative will best meet public needs while maintaining the "productivity of the land."

This philosophy burdens tribal religious beliefs and practices because they often require solitude and undeveloped land, qualities that government use may disturb. Also, the federal government usually prefers those activities which are most economically advantageous. The protection of tribal religious lands would not fall under this category.

The First Amendment Right to Public Land Protection

Multiple use conflicts and the lack of direct land protection under AIRFA pose problems

21. Michaelsen, supra note 9 at 108.
23. Barsh, supra note 4 at 409
for tribal religions which are rooted to specific public land areas. There is no guarantee the federal
government will protect the areas in a pristine state. As a result, site specific land-based religions
are threatened with destruction.

However, if government land use does encroach upon tribal religious use, Native
Americans can claim relief under the First Amendment. The Amendment states:

Congress shall make no law respecting an establishment of
religion, or prohibiting the Free Exercise thereof.

The federal government must protect all citizens' religious rights by tolerating and
accommodating all religions—including tribal religions. If the government does not accommodate
all religions, it would promote a "callous indifference" which violates the intent of the
establishment clause.24

The United States Supreme Court functionally defines religion as "a sincere and
meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God
of those" who practice conventional deistic faiths.25 The Free Exercise clause protects those
beliefs from governmental interference. Beliefs must be "based upon a power or being, or upon a
faith, to which all else is subordinate or upon which all else is ultimately dependent,"26 but they
need not be acceptable, logical, consistent or comprehensible to others.27 Courts can not
inquire into the truth, validity, or reasonableness of a belief.28 This assures protection from those
who condemn religions they fail to understand, as has happened continuously with tribal
religions. Native American religions are practiced with sincerity and are a central part of the

25. Barsh, supra note 4 at 375.
26. Id.
practitioners' lives; therefore, they qualify for First Amendment protection.

The passage of AIRFA did not add to Native American religious rights protected by the Free Exercise clause, but the legislation did identify what activities could come within its scope. Following the passage of AIRFA, most Free Exercise/public land cases argued in the court system claimed violations of both AIRFA and the Free Exercise clause. AIRFA assures that government management decisions have included consideration of tribal religious concerns, but actual religious protection falls under the Free Exercise clause.

If a court case involves a violation of a tribal member's right to the Free Exercise of his religion on public land, traditionally the courts have used the Free Exercise balancing test to decide the claim. Religious burden has been balanced against a compelling government interest. The claimant had to demonstrate a substantial burden on his religion by the government action. The state then had to show a "compelling interest" to carry out the action; the "compelling interest" had to outweigh the Free Exercise claim. If the government was successful in its argument, it then had to perform its duty by a means that was least restrictive to religious practices.29

To establish a burden, the claimant had to show:

1. his beliefs are sincere and religiously based,

2. the land in question is central and indispensable to a religious practice, and

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3. the proposed government action on the land threatens the religion.\textsuperscript{30}

Sincerity and religious basis of beliefs had to be accepted at face value. Problems arose when the claimant attempted to demonstrate the indirect importance of a portion of land to tribal beliefs and practices.\textsuperscript{31} It was difficult to explain how beliefs originated and continued due to "other than human" persons who occupy the landscape and hold the power sought by humans in ceremonial performances. (See Chapter 4.) If the land base was desecrated, the powers could be withheld and the people, whose lives function because of those beliefs, would suffer.

Government actions could indirectly affect religious practitioners by weakening an area's power. Outsiders usually fail to understand this concept, passing it off as folklore, but how would they know if they are unaware of the specific religion? Unfortunately, due to ignorance and arrogance, proof of a burden was often overruled.

If a tribal religious practitioner was successful at demonstrating a religious burden from a governmental action, the government could justify its infringement by stating a compelling interest. This interest had to be of the highest order to overbalance a legitimate Free Exercise of religion claim.\textsuperscript{32} If the federal government had to perform an action for the "good of the greater public," it could violate Free Exercise rights. The Free Exercise clause does not dictate how the government will carry out its activities, it only prevents the government from forcing individuals to violate their religious beliefs.\textsuperscript{33}

If a burden was proved, and a compelling state interest was not demonstrated, the federal government often squirmed out of its duty to protect tribal religious practices on public lands by


\textsuperscript{31} Indirect burdens are also subject to First Amendment protections. Sherbert v. Verner, 83 S.Ct. 1790 (1963).

\textsuperscript{32} Supra note 27 at 1425.

\textsuperscript{33} Supra note 31 at 1798.
stating that to provide such protection would constitute a violation of the establishment clause. The First Amendment prohibits the government from establishing religions.\textsuperscript{34}

Congress enacted AIRFA to include tribal religions under First Amendment protections; the Act does not direct the government to give preference to tribal religions. Due to the land base of tribal religions, government accommodation will be unusual because it involves public land protection. This policy causes controversy. If land is protected to accommodate tribal practices, establishment is considered to have occurred. Clearly, it has not. Explained in the Task Force Report of 1979:

\begin{quote}
The establishment of a religion is not a problem when viewed from within the tribal context ... Establishment is fundamentally the imposition by the political institution of forms of belief and practice which are in conflict with or are distasteful to people of a different tradition. Protecting Indian religious practices from curiosity seekers, casual observers, and administrative rules and regulations is the only practical way that religious freedom can be assured to Indian Tribes and Native groups. It is not the establishment of their religion because their religions, not being proselytizing religions, seek to preserve the ceremonies, rituals and beliefs, not to spread them.\textsuperscript{35}
\end{quote}

Therefore, protecting public lands for tribal religious purposes does not create an establishment problem.

Cultural conflicts pit Native American concerns for public land protection against judges ignorant of tribal religious needs, and also against a public land use scheme which places little

\textsuperscript{34} Interpreted broadly, the establishment clause is designed to assure that the advancement of a church will come only from the voluntary support of its followers and not from the federal government's political support. Thus, the survival of religious groups depends on the strength of their beliefs and practices. Laurence H. Tribe, \textit{American Constitutional Law}, 2nd ed. (Mineola, NY: The Foundation Press, Inc., 1988) 1160.

\textsuperscript{35} \textit{Supra} note 3 at 12.
value on land based religious beliefs. This situation condemns tribal religious lands and the
religions and cultures they created. AIRFA was meant to have rectified this problem, but it did not
achieve its goals.

At the time of the 1979 AIRFA Task Force Report, some tribal religious leaders and
practitioners feared that the implementation of AIRFA would generate a new wave of tribal
religious persecution; others had hope for stronger protections. The fears of the former are
being realized. As will be shown in the Free Exercise/public land claims mentioned throughout
this paper, AIRFA has only increased tribal religious harassment. The cultural differences
between Anglo-Americans and Native Americans have promoted an ignorance and arrogance on
the part of the majority which tends to destroy the culture of the minority.

Claims of Free Exercise Violations on Public Lands Unavailable for Wilderness
Classification

The following cases involved violations of Native American Free Exercise of religion on
public lands due to government land development projects. They demonstrate the vulnerability
of tribal religious values connected with public lands. The first two cases relied specifically on a
Free Exercise claim; the remainder depended on AIRFA and the Free Exercise clause.

In Badoni v. Higginson, a group of Navajo Indians sought an injunction against the
filling of Lake Powell; this would have prevented further destruction and desecration to their gods
and tribal religious lands in the vicinity of Rainbow Bridge National Monument in Southern Utah.

36. Id. at 47.
37. 638 F.2d 172 (10th Cir. 1980), cert. denied, 452 U.S. 954 (1981). (AIRFA was mentioned in this case,
but was immediately dismissed as being irrelevant.)
When the federal government constructed Glen Canyon Dam, the creation of Lake Powell drowned part of Rainbow Bridge National Monument, weakening the power in the area, and denying the Navajo access to a tribal religious site. The lake also provided easier access, allowing more boat tourists to visit the area and interrupt ceremonies. These impacts rendered specific ceremonies ineffective.

The court decided in favor of the government development, because a compelling interest outweighed any religious interest; Lake Powell had to be maintained at capacity because it was extremely important as a multi-state water storage and power generation project. The government had the unquestionable right to desecrate the tribal religious area. The burden on tribal religious beliefs was not addressed.

To strengthen its victory, the government also stated in the course of the lawsuit that any claim asking it to exclude others from a public area for religious purposes violated the establishment clause. The Navajo lost the case; they failed to present their argument in an effective manner (the fact that the dam was already built also made it difficult to reverse the project). As years passed, tribal members would learn how much evidence they needed to support a claim of Free Exercise violation on public land.

A decision similar to that reached in Badoni was rendered in Inupiat Community of Arctic Slope v. U.S. The Inupiat people of Alaska's north slope sought to quiet title in large portions of the Beaufort and Chukchi seas. They explained how inextricably entwined their hunting and gathering lifestyle was with their religion, and how the exploratory activities allowed by the government oil leases in that area would negatively affect a portion of their subsistence area.

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They asked that such activity be interdicted on Free Exercise grounds.

As in Badoni, the government argued that it had a compelling interest to pursue development in the area, and that interest outweighed any religious interest. The court held that "the federal government has a significant stake in the development of energy resources within its borders." Any burden on religious belief was ignored. Furthermore, the court stated that to interdict the activity would result in the creation of a "vast religious sanctuary over the Arctic Seas beyond the state's territorial waters"; this would directly violate the establishment clause. The court decided against the Inupiat claim.

AIRFA's introduction into Native American Free Exercise claims displayed its weaknesses. In Sequoyah v. Tennessee Valley Authority, members of the Cherokee Nation appealed their suit for injunctive relief against the proposed construction of the Tellico Dam on the Little Tennessee River in Monroe County, Tennessee. They explained that the dam would flood their tribal religious lands—part of the landscape created by one of their cultural heroes. This would violate AIRFA and their Free Exercise rights. AIRFA was immediately disregarded by the court because Congress had commanded that no law was to prevent the completion and operation of the dam. The court could only overturn that order by finding a constitutional violation.

The claimants sought relief through the Free Exercise clause. Their sincerity and their religious belief that honored ancestors in the area were not doubted, but they were unable to convince the court that worship in the area was inseparable from their way of life, that it was the cornerstone of religious observance, or that it played a central role in their religious ceremonies and practices. The court held that the Cherokee concern appeared to be related to the historical

39. Id. at 189.
40. Id.
beginnings and cultural development of the tribe rather than particular religious observances. This holding was crucial because the Free Exercise clause does not protect cultural history and tradition.\textsuperscript{42}

The court relied on a demonstration of centrality to show a burden, but failed to understand that religion and culture are one and the same for tribal religious practitioners. Anglo-American language, not tribal traditions, separates the two concepts. For practitioners, if the cultural history of a tribe is denied, the tribal religious beliefs are denied.

One dissenting judge stated that the Cherokee may not have known precisely what they had to prove to make their constitutional claim, since the centrality standard had not been clearly articulated. The dissenting opinion argued that the case had been poorly reviewed; the federal district court had not explored, developed or found any facts concerning the importance of geographical place to Cherokee religion.\textsuperscript{43} The Cherokee were not given adequate "representation." Their beliefs were not taken seriously enough to warrant further study, and the court simply denied the claim of burden. (Undoubtedly, if a burden had been shown on the Free Exercise of religion, the government would have stated a compelling interest to continue the project.)

In 1982, \textit{Crow v. Gullett}\textsuperscript{44} came before the federal district court in South Dakota. Leaders of the Lakota Nation and the Tsistsista Nation brought suit under the Free Exercise clause and AIRFA, claiming that South Dakota's construction of a paved access road and parking area near ceremonial religious grounds at Bear Butte State Park damaged religious practices. Tribal

\textsuperscript{42} Id. at 1164, 1165.

\textsuperscript{43} Id. at 1165.

members considered Bear Butte the most powerful ceremonial site for religious practices.\textsuperscript{45} The claimants stated that the proposed activities and the resulting increase in tourists would destroy the sanctity and power of their religious ceremonies and violate their right to freely exercise their religious beliefs.\textsuperscript{46} They sought an injunction to enjoin the construction projects or other alterations to the natural features of Bear Butte and also a court order to remove any existing roads, parking lots and buildings at the park.\textsuperscript{47}

The court interpreted AIRFA to only require compliance with the First Amendment; therefore, it dismissed the AIRFA violation claim. The court did require claimants to demonstrate a burden to their religious practices, but they could not; claimants were not denied access and the park already gave them special privileges to perform ceremonies. The Free Exercise clause did not obligate the state to manage and develop its park for tribal religious interests.\textsuperscript{48} Injunctive relief was denied.

Establishment problems were not voiced in the course of the lawsuit. This is interesting, since the park policy provided special privileges to tribal religious practitioners. These privileges were permissible because the tribal religious tradition helped define the value and importance of Bear Butte to the region.\textsuperscript{49} Evidently, park officials found value in tribal religions, but only in their benefit to tourists. The value of the religion to the practitioners was unimportant or else park managers would have supported the Native American Free Exercise claim.

The preceding cases involved attempts to secure injunctions against developments on

\begin{enumerate}
\item\textsuperscript{45} Id. at 787.
\item\textsuperscript{46} Id. at 788.
\item\textsuperscript{47} Id.
\item\textsuperscript{48} Id. at 791.
\item\textsuperscript{49} Id. at 794.
\end{enumerate}
public lands due to threats to tribal religious practices. All of the claimants failed in their efforts to seek relief and protect the lands from development. AIRFA provided no support because it does not directly mandate protection, but only mandates that the federal government consider tribal religious use in public land management decisions. It also fails to establish the religious connection between people, culture and land. The resulting dependence on Free Exercise claims for protection become burdened by arguments against religious establishment and compelling state interests. Judges continuously fail to understand how tribal religious beliefs are deeply rooted in the land.

Two Free Exercise/public land cases have involved undeveloped lands for which wilderness designation was sought. Since the areas are not yet damaged, does AIRFA or the Free Exercise clause provide strength to protect undeveloped public lands from destruction? Can the Wilderness Act provide *de facto* support for protecting tribal religious practices involving undeveloped public lands? Would it be correct to use the Wilderness Act for such purposes? These questions will be explored in the following chapters.
CHAPTER TWO:
Anglo-American Conceptions of Wilderness Spirituality and
Their Relation To Wilderness Preservation Legislation

"Wilderness" is defined in Webster's dictionary as "a tract or region [of land] uncultivated and uninhabited by human beings—an area essentially undisturbed by human activity together with its naturally developed life community."¹ To many Anglo-Americans, wilderness is a land where modern technological influences do not damage natural processes and scenic beauty, where humans can find a challenge in primitive "recreation," and where humans may find spiritual renewal. Within these concepts are associations with both tribal cultures (primitive "recreation") and religion (spiritual renewal). It is understandable how wilderness and tribal cultural religions eventually became linked in the legal system, even though the Western concept of wilderness differs from the tribal concept; western wilderness spirituality is based on an individual religious experience, whereas tribal "wilderness" spirituality involves a human relationship with an animated world.

This chapter explores the religious value of wilderness in Anglo-American culture and how that value contributed to the introduction of wilderness preservation legislation. It also explores the cultural differences between tribal wilderness spirituality views as compared to those of Anglo-Americans.

¹. Webster's Ninth New Collegiate Dictionary, 1990, s.v. "wilderness." Tribal people did not share in this concept of wilderness; they inhabited their entire territory. What Anglos consider wilderness was usually part of tribal territory.
Original Anglo-American Conceptions of Wilderness

When the first European immigrants arrived on the East Coast of North America in the 1600s, the wild, uncultivated quality of the land—its wilderness value—attracted them as a haven from past problems. The New World was a place to start afresh in search of a better life. The immigrants' first step was to bring the wilderness under control.

Many colonists considered the "wild" land and its tribal inhabitants dangerous because neither evidenced the order to which colonists were often accustomed. They feared the perceived chaos and worked to overcome its threat by cultivating the land and conquering the human and nonhuman "savageness." Order and control provided comfort and safety. The colonists' general lack of acceptance for the existing order, along with the ever-increasing demands of their growing numbers, threatened wilderness and tribal cultures with extinction.

Mircea Eliade states, "for religious man the supernatural is indissolubly connected with the natural, . . . nature always expresses something that transcends it." Tribal culture viewed wilderness as a natural part of life and integral to religion; it honored powers in the land and maintained a reciprocal relationship with them. The colonists did not view the landscape as being animated. Most of them feared tribal culture and the "wild land"; they viewed wilderness as a negative force and their religious beliefs gave it little value. For them, wilderness prevented progress and threatened their well-being. Wilderness was not meant to be a part of their lives. Colonists upset the human/land relationship as they directly translated their conception of the evil in wilderness to their treatment of the land.

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3. Id., at 24 and 28.
5. The land was not truly wild since it was used by humans.
The Evolution of Wilderness Spirituality in Anglo-American Culture

Some colonists began to give wilderness positive value in the 1700s, during the period of the Enlightenment. This period emphasized the importance of critical reasoning and intellectual progress. From its ideology arose the philosophy of deism. "Christian" deists applied critical reasoning to natural, uninhabited landscapes to understand the truths of the Creator. These individuals were acknowledging the presence of a "divine plan" in all life processes, but they did not believe in supernatural actions. They believed that God's involvement in the world was through natural laws and not mysticism.

Romanticism evolved as a reaction against the contempt for tradition embraced by Enlightenment philosophers. It valued ancient, spiritual and primitive cultures and adherents believed wilderness to be, not only a place to contemplate life, but also the best place to communicate with the Creator. An aesthetic of nature was essential for this communication—nature's intrinsic beauty represented God.

Wilderness, regarded as a spiritual necessity, had become a religious concept, but it only had value as an undisturbed place. "Christian" deists and Romanticists felt they could learn universal truths by observing, or visiting, pure nature, but they did not necessarily see objects in nature as being important in and of themselves. More often they seemed to value the parts as important to the whole, but not individually. They also did not seem to view themselves as part of nature.

In the early nineteenth century, followers of the transcendental movement expanded the importance of place in achieving religious enlightenment to include each part that contributed to making that place. Natural objects were symbols of universal truths. The idea of attaining moral perfection and communicating with the Creator was enhanced by the wildness of things within a wilderness place. In essence, transcendentalism combined deistic ideas with romanticism, and extended those ideas to include the spiritual importance of the interconnections in nature.

Ralph Waldo Emerson, the leader of the New England transcendentalists, expressed the connection between nature and religion in his essays entitled "Nature":

> Nature is loved by what is best in us. It is loved as the city of God, although, or rather because there is no citizen. In nature... all mean egotism vanishes. I become a transparent eye-ball; I am nothing; I see all; the currents of the Universal Being circulate through me; I am part or particle of God.

These words stress the position humans have as part of the whole. Emerson acknowledged a closer relationship between humans and nature. Wilderness religion was evolving into a deeper concept than aesthetic purity.

Although wilderness was taking on a positive religious meaning, it did not hold the same place in Anglo-American culture as it did in tribal cultures. Tribal people considered "wilderness" an all-encompassing part of their life, and not only a place to escape to for spiritual renewal.

Wilderness spirituality for tribal people, as pertaining to religious matters, was not separated from other aspects of their life. The continuity of their physical and spiritual existence

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9. Nash, supra note 2 at 85.
11. Id. at 10.
12. See Chapter 4.
depended on nurturing a relationship between themselves and the "other than human" persons which inhabited the landscape; tribal people had to treat the land and its nonhuman inhabitants with respect. On the other hand, Anglo-Americans originally considered wilderness spirituality only necessary for maintaining an individual's health and did not recognize a spiritual human/land relationship as being essential for human existence. By not acknowledging an animated landscape, Anglo-Americans had reduced the land's spiritual connotations.

Henry David Thoreau, philosopher and writer, was also associated with New England Transcendentalism. He recognized the spiritual importance of wilderness and considered nature his church—his god lived there.

In my Pantheon, Pan still reigns in his pristine glory, with his ruddy face, his flowing beard, and his shaggy body, his pipe and his crook, his nymph Echo, and his chosen daughter lambe; for the great god Pan is not dead, as was rumored. No god ever dies. Perhaps of all the gods of New England and of ancient Greece, I am most constant at his shrine.13

Thoreau considered wilderness important to all aspects of life. Humans were not only part of the whole, but their spiritual health was associated with a lifestyle more closely connected to the land. Wilderness symbolized unexplored qualities of individuals.14 Humans could not reach their full potential if wildness was not present. A well-adjusted society required wilderness.

So strong was Thoreau's belief that in 1858 he suggested the establishment of national preserves to allow wild animals and Indians freedom to live outside of civilization.15 These

15. Id. at 102.
preserves would also provide a place for human inspiration and re-creation.

The Need for Wilderness Preservation

Thoreau was not the first to suggest preserves for tribal people in conjunction with wild land. At the time transcendentalism was a popular philosophy, the need for wilderness preservation grew obvious as more uninhabited land succumbed to settlers. George Catlin, in 1832, was actually the first person to publicly suggest the preservation of Indians, buffaloes and wilderness in a national park to prevent the disappearance of the "primitive." Obviously by mentioning Indians, both Catlin and Thoreau were interested in not only protecting the land, but in protecting a "primitive" way of life—a life where humans lived more closely with the rhythms of nature. Wilderness spirituality included a nostalgia for a "simpler" lifestyle.

Anglo-Americans were beginning to view wilderness and tribal cultures in positive terms, although romanticized. The concept of "preserving" wilderness and tribal culture actually further separated Anglo-Americans from a more intimate existence with their environment. Tribal cultures and wilderness would become living museums which humans could "visit" and "contemplate" but not participate in or inhabit; they would provide a means of "recreation." Anglo-Americans had left behind their "all-encompassing" relationship with the land, and most did not seem to want to regain it except as a fragmentary part of their lives.

In the late nineteenth and early twentieth century, the naturalist John Muir expressed his belief in the spiritual quality of wilderness. Throughout his writings, he displayed belief in an

16. Id. at 100-101.
animated natural world. Observing a waterfall Muir stated:

How interesting does man become considered in his relations to the spirit of this rock and water! How significant does every atom of our world become amid the influences of those beings unseen, spiritual, angelic mountaineers that so throng these pure mansions of crystal foam and purple granite. I cannot refrain from speaking to this little bush at my side and to the spray drops that come to my paper and to the individual sands of the slopelet I am sitting upon.¹⁷

By recognizing an animated world, Muir acknowledged the spiritual connection between humans and nature. Muir felt that humans could "communicate" with the spirits of the natural world and learn to appreciate life more fully because all natural objects are "terrestrial manifestations of God." Wilderness is the best place to contemplate these objects because they are more perfect in "wild" places¹⁸—possibly because they are free to be. Muir wrote,

Wonderful how completely everything in wild nature fits into us, as if truly part and parent of us. The sun shines not on us but in us. The rivers flow not past, but through us . . . every bird song, wind song, and tremendous storm song of the rocks in the heart of the mountains is our song . . . the Song of God, sounding on forever. So pure and sure and universal is the harmony . . . as soon as we are absorbed in the harmony, plain, mountain, calm, storm, lilies and sequoias, forests and meads are only different strands of many-colored Light—are one in the sunbeam!¹⁹

Muir, like the "christian" deists, balanced his religious views with scientific views and indicated that greater knowledge of the world could be found by observing the land and its natural processes. The processes connect the parts of nature; these interconnections allow humans to

¹⁸. Nash, supra note 2 at 125.
exist. Muir stated,

... the most terrestrial being is the one that contains all the others, that has, indeed, flowed through all the others and borne away parts of them, building them into itself. Such a being is man, who has flowed down through other forms of being and absorbed and assimilated portions of them into himself...  

All parts are important to the whole and God is in all parts. God exists in the forces of nature. For Muir,

Creation belonged not to a manlike Christian God, but to the impartial force of Nature.  

The strength of Muir's feelings for wild land is best expressed in his statement on the damming of Hetch Hetchy in Yosemite:

These temple destroyers, devotees of ravaging commercialism, seem to have perfect contempt for Nature, and instead of lifting their eyes to the God of the mountains, lift them to the Almighty Dollar. Dam Hetch Hetchy! As well dam for water-tanks the people's cathedrals and churches, for no holier temple has ever been consecrated by the heart of man.  

By imparting spiritual value to nature, Muir associated wilderness with religion. To Muir, the world of nature, especially Yosemite, signified a sacred landscape. Out of this reverence for the land, the concept of wilderness preservation on public lands grew.

**Passage of Wilderness Preservation Legislation**

As the twentieth century progressed, the majority of people in the United States did not...

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20 Id. at 138.
22 Id. at 144.
advocate wilderness preservation; supporters tended to be wealthy. The wealthy did not need to spend their days working to survive; they had an abundance of spare time to enjoy and ponder the value of wilderness. As more people became affluent and leisure time for many increased, appreciation of wilderness grew, and preservation developed stronger support.\textsuperscript{23}

Wilderness areas were eventually afforded protection from development, but not for religious reasons. In dealing with a public that probably abhorred most pantheistic ideas,\textsuperscript{24} preservationists found it necessary to present their cause in a utilitarian manner. Although the spirituality of wilderness was the underlying reason to preserve it, proponents expounded upon spirituality less, and conservation and recreation became the preservation arguments. If humans understood how nature benefited them in a utilitarian sense, they would be more likely to support preservation.

When Yellowstone National Park was established by Act in 1872, "all timber, mineral deposits, natural curiosities, or wonders" were to be kept "in their natural condition," but not for religious reasons; initial advocates for the park wanted to prevent private exploitation of geysers, hot springs, and waterfalls and to maintain a well forested watershed.\textsuperscript{25} Yellowstone's preservation as the country's first national park indirectly protected the spiritual quality of the area.

The first established "wilderness area\textsuperscript{26} was in the Gila National Forest of New Mexico. In 1924, through the efforts of Aldo Leopold, a strong supporter of wilderness in the Forest Service, the Gila Wilderness Area was created.\textsuperscript{27} Leopold defined wilderness as:

\begin{itemize}
  \item \textsuperscript{23} Craig W. Allin, The Politics of Wilderness Preservation (Westport, Conn.: Greenwood Press, 1982), 24, 43.
  \item \textsuperscript{24} Pantheism is the belief that "God" exists, and is not just represented, in all of nature.
  \item \textsuperscript{25} Nash, supra note 2 at 108 and 113.
  \item \textsuperscript{26} This was an administrative decision which could be recalled at any time.
  \item \textsuperscript{27} Nash, supra note 2 at 187.
\end{itemize}
He reasoned that wilderness preservation is necessary because wilderness adds meaning to life and provides a base for future generations to see, feel and study the origins of their cultural inheritance. Leopold also stated that wilderness allows one to use primitive skills of pioneer travel and subsistence and it is important as a laboratory for studying land health. These needs gave religious use less importance as grounds for wilderness preservation, and instead, emphasized recreational and scientific use. The reference to primitive skills and subsistence did express the importance of wilderness to life—an indirect association with the tribal view of "wilderness," but not in the "religious" sense; there was no mention of an animated landscape.

As proponents of wilderness preservation increased, the desire to organize their forces strengthened. In 1935, a well-known wilderness advocate, Robert Marshall, financially backed and helped establish the Wilderness Society. He also had a religious motivation to preserve wilderness. Marshall considered the wilderness his temple and did not want to see something destroyed that held so much spiritual value.

The Wilderness Society was intended to advance the wilderness preservation movement to the national level. Backers established it "for the purpose of fighting off invasion of the wilderness and of stimulating . . . an appreciation of its multiform emotional, intellectual, and scientific values." Even though the word "emotional" gave superficial acknowledgement to the

29. Id. at 265, 269 and 274.
31. Id. at 175.
spiritual value of wilderness, the need to appeal to the scientific community overshadowed the religious argument. Was it a sellout on the part of the land? By avoiding the spiritual value, was it not easier to compromise on preservation issues? As long as humans did not stress respect for the human/land relationship, they could easily give up land for development because they denied an emotional attachment to the spiritual value; they deanimated the landscape, thus eliminating any spiritual religious relationship with the land. Were the majority of wilderness advocates only concerned with the land's benefit to humans . . . and did they actually understand their connection with the land?

Regardless of motives, the push for preservation legislation increased as proponents realized the inadequacy of the then-current administrative protection of undeveloped lands. Agency protection was not solid. The Secretary of Agriculture could declassify an established primitive area on National Forest lands if he so desired. No law prevented the National Park Service from developing its wild lands. These threats of possible development resulted in the introduction of the first federal wilderness bill on June 7, 1956. The wilderness bill would give land management agencies support to resist pressure for the development of roadless areas; it would give statutory protection to wild lands.

On September 3, 1964, following much dissension and several revised versions, Congress passed the Wilderness Act of 1964. The Act defines wilderness as:

... an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain ... an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its
preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.\textsuperscript{33}

Once again a vague link between tribal cultures and wilderness value is obvious in the use of the word "primitive," but wilderness is given no religious value, beyond a remote reference through the word "solitude." This is odd since the idea of preservation originated within the concept of spirituality.

\textbf{The Meaning of Wilderness Spirituality}

The lack of spiritual reference in the Wilderness Act is stranger considering that the famed naturalist and wilderness advocate, Sigurd F. Olson, expounded on the spiritual value of wilderness only three years before the passage of the Wilderness Act at the Wilderness Conference of 1961:

Intangible values of wilderness are what really matter, the opportunity of knowing again what simplicity really means, the importance of the natural and the sense of oneness with the earth that inevitably comes within it. These are spiritual values. . . By affording opportunities for the contemplation of beauty and naturalness as well as further understanding of the mysteries of life in an ecologically stable environment, it will inculcate reverence and love and show the way to a humanism in which man becomes at last an understanding and appreciative partner with nature in the long evolution of mind and spirit.\textsuperscript{34}

Images of John Muir come to mind. The spiritual values so important to Muir and others following him found no direct protection in the Wilderness Act. Legislative emphasis for preservation was not on spiritual value, but on a direct utilitarian value. This might be attributed to the fact that restrictions against establishing a religion, as set forth in the First Amendment to the

\textsuperscript{34} David Brower, ed., \textit{Wilderness: America's Living Heritage} (San Francisco: Sierra Club, 1961), 24-25.
United States Constitution, probably prevented Congress from including mention of a religious concept in the legislation. Maybe it was also a point of uneasiness for some to admit that other life forms had the same value as humans.

After the Act's passage, the concept of wilderness spirituality remained important. Sigurd Olson expressed its need at the Wilderness Conference held in 1966:

The reasons to save wilderness are the preservation of our spiritual values. Unless . . . spiritual needs of man can be fulfilled and nourished, we will destroy our culture and ourselves.35

Extension of Spiritual Value to Include Intrinsic Value

John Muir had once expressed the need to respect nature for itself:

Nature's object in making animals and plants might possibly be first of all the happiness of each one of them, not the creation of all for the happiness of one.36

In setting aside legislated wilderness areas without any acknowledgement of their spirituality, we were designating natural museums for humans to enjoy. We deanimated the landscape and did not acknowledge the intrinsic value of other life forms in the area. Without recognition of intrinsic value, humans denied the spiritual connection between themselves and the land.

If we gave spiritual value to all of the parts in wilderness, it seems that we would be more apt to protect complete roadless areas from unnecessary development. Boundaries would have more meaning than as "arbitrarily" selected lines. Wilderness preservation would reach farther so as not to protect only portions of land, but also the complete habitat of wilderness inhabitants.

36. Fox, supra note 21 at 53.
Government officials interested in the most economically advantageous use of our nation's public lands probably would not desire such far-reaching protection.

Exempted from wilderness legislation, the spirituality of wild land remains a highly debated topic among those who value wilderness. William Devall, coauthor of Deep Ecology, states the need for wilderness areas as a gesture of planetary modesty; humans should respect the intrinsic value of nature and not only its outdoor recreation value.

Wilderness preservation demonstrates a human commitment to share the environment with present and future generations of all creatures, rocks and trees. 37

This is the present ideology of the Deep Ecology movement. Adherents realize the need for wilderness to help humans mature, but they also recognize the right of other beings to live and self realize in the same habitat; they respect the inherent spirituality of nature. They also believe all existing unmodified areas should be preserved as wilderness so that they may develop without interference from modern human technological influences. 38

The Wilderness Act denied land spirituality, but Deep Ecology expresses the need to reacknowledge it. This philosophy is the association between some current Anglo-American views of wilderness and tribal cultural religion. The land and all of its nonhuman inhabitants are honored and respected. It is unusual that they are used unnecessarily to benefit human greed. Humans are a part of, rather than apart from, the natural community and therefore have a direct responsibility to maintain a balanced relationship with it. The difference between the two belief systems is that tribal people are active participants in their natural community and Anglo-Americans

Wilderness Legislation and Tribal Religions

Unfortunately, the Wilderness Act does not protect land spirituality and it does not directly mention tribal cultures; this prevents a Wilderness Area's boundaries from protecting the integrity of tribal cultural/religious areas on "wild" public lands. With the passage of the Act, the original connection between wilderness preservation and tribal cultural preservation was obliterated. The actual language of the Act, as written by Anglo-Americans, displays the difference between Anglo-American concepts of wilderness spirituality and tribal concepts; it describes wilderness as a place where "man . . . is a visitor who does not remain . . . ." Anglo-Americans do not tend to view themselves as an integral part of the landscape; they see themselves as land stewards.

The Wilderness Act separates tribal people from the land; it denies the tribal concept of spirituality. Tribal people considered themselves a part of their landscape, not visitors and not stewards. They had a symbiotic relationship with the land. The Wilderness Act fails to address traditional tribal religious land use. Yet, the Wilderness Act is invoked in conjunction with the American Indian Religious Freedom Act to protect tribal cultural/religious areas on public lands from unnecessary government development. Success or failure? As will be shown in the following case studies—primarily failure. The Wilderness Act lends no support to protect cultural/religious areas as a whole.

In some ways, it is only logical that tribal religions be linked to wilderness, since Native Americans lived on this continent when Europeans conceived of it as wilderness. Thoreau and Colter both mentioned the linkage and the linkage is more apparent as tribal cultural religions fade away as fast as wilderness. Perhaps it is appropriate that they be saved together.
CHAPTER THREE:
Free Exercise/Public Land Cases on Lands "Available" for Wilderness Classification

Return of Blue Lake to Taos Pueblo

The first legislative linkage between tribal land use and wilderness designation occurred on December 15, 1970 with the passage of Public Law 91-550. The United States government returned Blue Lake to the Taos Pueblo Indians with Wilderness Act stipulations. This was the first time Congress restored land to a tribe because of an aboriginal land claim partially based on tribal religious use.

Blue Lake is located in north-central New Mexico on the present 95,341 acre Pueblo de Taos Indian Reservation. Taos Pueblo members have continuously used the area for centuries.

When the Spanish arrived and claimed the land, including the Taos territory, their government recognized the tribe's right of possession to 130,000 acres of land. Later, the Mexican government acknowledged those same rights. When the United States acquired the area through the Treaty of Guadalupe Hidalgo in 1848, the treaty terms stated that the United States would respect and protect all property rights within the area ceded to it. Taos Pueblo Indians demanded acknowledgement of their rights in 1904, but their voices went unheard.

In 1906, President Roosevelt violated the 1848 treaty when he established the Taos

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1. The Havasupai Indians later regained 185,000 acres in the Grand Canyon of Arizona with the same stipulations as the Taos/Blue Lake Bill. 16 U.S.C.A. 228i.
National Forest\textsuperscript{5} by executive order, thus cancelling tribal title to most of the land without a compensation payment.\textsuperscript{6} The Pueblo protested this "illegal" land taking.

More than four decades later, Taos Pueblo entered a claim for the land through the Indian Claims Commission;\textsuperscript{7} it demanded return of the entire Blue Lake area and refused financial compensation. The Pueblo's historic use of the area strengthened its claim.

The Blue Lake area is important to Pueblo ceremonial life. Many "shrines" are in the area, and many plants and geographic features are used in rituals and ceremonies that are necessary for maintaining the tribal religion which regenerates life. Development causes the disappearance of religious items; religious ceremonies cannot be performed properly.\textsuperscript{8} This profanes the religion. Since religion is an integral part of culture—the human lifeway—development destroys the Taos Pueblo lifeway. The Pueblo wanted to regain "ownership" of the area to manage it properly for its religious use.

Forest Service management decisions did not consider the land's religious value. The agency's emphasis on multiple use jeopardized tribal religious use.\textsuperscript{9} By practicing commercial timber harvesting, stocking sacred lakes and streams with fish, dynamiting sacred lakes, and constructing buildings a few hundred yards from the Taos Pueblo's most sacred shrine—Blue Lake\textsuperscript{10}—the Forest Service offended the Pueblo religion.

Since the Indian Claims Commission could only reimburse the tribe with money, Congress

\begin{itemize}
\item[5.] The name is now Carson National Forest.
\item[6.] \textit{Supra} note 3 at 4.
\item[7.] The Indian Claims Commission was established in 1946 to provide monetary compensation for tribal lands taken illegally by the United States government, or taken with inadequate compensation (fair market value at the time of the taking) paid by the United States under the treaties and agreements with the tribes. William C. Canby Jr., \textit{American Indian Law in a Nutshell} (St. Paul, Minn.: West Publishing Co., 1981), 228-231.
\item[8.] Bodine, \textit{supra} note 2 at 30.
\item[9.] \textit{Supra} note 3 at 111.
\item[10.] \textit{Id.} at 5.
\end{itemize}
would have to pass a special Act to return the land to Taos Pueblo. After Congressional hearings, the government decided to return 48,000 acres of the disputed area to the tribe in Public Law 91-550. This included Blue Lake and its watershed.

The return of Blue Lake to the Pueblo carried with it one restriction—the area would be administered by stipulations of the Wilderness Act.\textsuperscript{11} The Wilderness Act mandates that the wilderness character of an area must be preserved by managing agencies; no motorized equipment can be used in a designated wilderness area and no developments, structures or roads are allowed (outside of those necessary for administrative duties). The Pueblo accepted these stipulations to dispel the idea that it wanted to exploit the natural resources of the area for private gain.\textsuperscript{12} In essence, the government forced the tribe to accept wilderness designation.

The Taos/Blue Lake Act states that the land may only be used for traditional purposes: religious ceremonies, hunting and fishing, as a water source, forage for domestic livestock, and as a source for wood, timber, and other natural resources for the Indian's personal use. Aside from these uses, the land is to be maintained as wilderness. The Secretary of Interior is responsible for the conservation and maintenance of the area; the tribe is responsible for issuing use permits.

Although the Taos Pueblo had to prove the Blue Lake area's importance to the tribe's religion and life, the federal government's response was not based primarily on religious reasons. The government's "illegal" taking of the land provided the necessary grounds to pressure the government to return part of the lands to Taos Pueblo.

While the Taos Pueblo claim was based on land "ownership," the following two cases involved federal management practices and Native American Free Exercise rights on federal

\textsuperscript{12} Supra note 3 at 112.
public lands. Historical and religious use proved to be weak arguments in protecting the lands from unnecessary development.

**Tribal Religious Significance of the San Francisco Peaks**

The San Francisco Peaks are three closely grouped mountain peaks\(^{13}\) located north of Flagstaff, Arizona in the Coconino National Forest. They rise majestically from the Colorado Plateau and are essential to Navajo and Hopi tribal religious practices. Many people also value the Peaks for their year round outdoor recreation opportunities.

Snow Bowl ski area, located in a valley between Agassiz Peak and Humphreys Peak, was built for downhill skiing on a 777 acre Forest Service permit area in 1937; ski lifts were added in 1958 and 1962. A strip of land along the northern border of this area, approximately 500 feet wide, was left heavily forested. In the late 1970s, the current lessee, Northland Recreation Company, proposed to increase development of the permit area and strip the undeveloped acreage for skiing. On February 7, 1979, the Forest Supervisor of Coconino County, after reviewing the Environmental Impact Statement (EIS) for the proposed activities, issued the decision to allow moderate development. The Supervisor denied the requested 120 acre development, but did approve the clearing of 50 acres for ski runs, and the construction of a new lodge and three new lifts.

The Regional Forester received several requests from affected individuals to deny the entire development proposal. Subsequently, on February 7, 1980, he overruled the Supervisor's decision and ordered the permit area to be maintained in its present state. The Chief Forester reinstated the Forest Supervisor's decision on December 31, 1980.\(^{14}\)

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\(^{13}\) These include Humphreys Peak, Agassiz Peak and Fremont Peak.

The Hopi Indian Tribe, the Navajo Medicinemen's Association, individual Navajos and Richard F. Wilson filed suit against the government's decision. The proposed development would violate the affected Native Americans' Free Exercise rights, AIRFA, the Wilderness Act, and several other Acts which are not pertinent to this paper. Tribal members asked that further development of the permit area be prohibited and that existing ski facilities be removed. The case came before the federal district court as *Wilson v. Block*. On May 14, 1982, the judge vacated his stay and entered final judgement for the defendants. An appeal followed immediately.

*Wilson v. Block* differs from those cases mentioned in Chapter 1 because it involves a Free Exercise claim on undeveloped federal public land for which plaintiffs sought wilderness designation, and which tribal people were attempting to protect for its religious value as undisturbed land.

In most cases involving AIRFA, the final decision has been made after a court considers claims asserting that there has been a violation of the Free Exercise clause. This case is no different. The court interpreted AIRFA to require that the government permit tribal members access to federal public lands to collect ceremonial objects from the area and hold actual ceremonies there. Furthermore, the government in making its final management decisions has to consult with affected tribal religious leaders to determine the impact of a development on tribal beliefs. The Forest Service had adhered to these procedures; violation of AIRFA was a moot point.

15. Id. at 738-739.
16. Id. at 739.
17. Id. at 747.
The question then turned to the issue of whether the proposed activities would violate Navajo and Hopi Free Exercise rights. To address this issue, tribal members had to demonstrate the value of the Peaks to Hopi and Navajo tribal religious practices and explain why it was important they be maintained in an undeveloped state—what some might call a "wilderness" state.

The Navajo and Hopi had to show the centrality of the San Francisco Peaks to their belief system, and that development would prevent their ceremonial use; they had to demonstrate (at minimum) that the government's land use would impair a tribal religious practice that could not be performed at any other site.

In the case proceedings, the Navajo and Hopi both expressed their religious view of the San Francisco Peaks. The Navajo explained their significance as one of the geographic features which define their world. They explained that deities live in the Peaks, and their presence gives power to the Peaks and the life upon them. This power is honored and invoked in religious healing ceremonies. Artificial development would offend the deities, causing them to withhold their powers, and thus impair the healing ceremonies and other ceremonies for which the Peaks are important.

The Hopi explained that development would directly affront their Kachinas, who are emissaries between the Creator and humankind. The Kachinas' activity on the Peaks creates the rain and snowstorms which sustain the villages, and the Kachinas participate in annual village ceremonies which insure the future life of the tribe. The Hopi feared that if the Kachinas were affronted by unnecessary artificial development, the rains would not come to nourish their crops, and their traditional life would be destroyed. As a result, both the Hopi and Navajo sought a phased removal of all structures on the Peaks, or at least an injunction against further

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18. Id. at 738.
The court had to decide whether or not the tribal religious practices would be damaged by the proposed development. If the judge believed the Navajo and Hopi testimony, he would have to admit that tribal religious practices would be eroded due to the offended powers. If the deities withdraw their powers, the religion loses its power base, and a culture slowly dies. If a judge chooses to deny this truth, he allows himself to permit development without violating the Free Exercise clause.

The plaintiffs attempted to explain that the Free Exercise burden, though indirect, was significant. By developing the land, the government would "desecrate and destroy the spiritual character of a religion's most sacred shrine which may force practitioners" to fundamentally modify their religious doctrine to conform to the changed circumstance."20 The court disagreed. The judge decided that the government practices did not penalize tribal religious practitioners for their actions; they had access to the area and could still conduct their ceremonies. They suffered no burden.21

The court also declared that the tribes had not shown the centrality of the permit area to their religious beliefs, and thus had not presented a Free Exercise claim. The statement that "all parts of the Peaks are sacred" did not explain why they are essential.22 The plaintiffs should have stated that all parts of the Peaks are essential to important tribal ceremonies.

The court failed to understand how the tribal religious beliefs involved not only a direct physical connection with the land, but extended to an indirect spiritual connection with the powers of the "other than human" persons which are the basis for life in this world. The powers

19. Id. at 740.
20. Id. at 741.
21. Id.
22. Id. at 743-744.
connect to all parts of life. If these powers are withheld, the tribal religious world suffers
destruction. Choosing to ignore the truth behind a cultural religious belief when making a court
decision essentially nullifies protection of religious freedom.

Judge Richey, in the original hearing, stated, "the Snow Bowl operation has been in
existence for nearly fifty years and it appears that plaintiffs' religious practices and beliefs have
managed to coexist with the diverse developments that have occurred there."23 The judge's use
of the word "appears" indicates his ignorance concerning what is actually happening within the
religion. If he is not a practitioner how does he know if the religion is not already deteriorating due
to artificial developments?

The court ruled that the government has a statutory duty to manage the public forest in
the public interest; in this situation, the expansion of Snow Bowl would be best for the public.24
Does this indicate that tribal members are not part of the public? Was this decision based on the
economic advantages of the ski area as opposed to a protected tribal religious area? Probably.
Tribal people had lost another Free Exercise claim on public lands.

While the plaintiffs sought protection of the San Francisco Peaks through claims of Free
Exercise violations, the Wilderness Act was being considered as a possible solution. On May 2,
1979, President Carter had recommended wilderness designation for 14,650 acres of the Peaks,
part of which bordered the permit area. At the time of this case, the recommendation had not
been acted upon. The plaintiffs hoped that the Wilderness Act would provide the basis for
including the undeveloped portion of the permit area in the recommended wilderness. According
to the Act, the president and Congress may add contiguous areas of wilderness value to existing

\textsuperscript{23} Id. at 745. These developments include natural gas lines, telephone lines, electric transmission
lines, stock water tanks, and unpaved roads.

\textsuperscript{24} Id. at 742. Citing 16 U.S.C. 471.
primitive areas in order to protect their pending wilderness consideration.25 The San Francisco Peaks, including the Snow Bowl permit area, were never designated a primitive area. This excluded the permit area from wilderness consideration; the Wilderness Act provided no support to protect the area.

Wilson v. Block focused on the protection of undeveloped federal land. The tribes desired government recognition of their religious rights in the disputed area; wilderness designation was not the main argument. Perhaps wilderness designation would have provided de facto protection of the tribal religious area, thus indirectly supporting the tribe's Free Exercise rights, but the Wilderness Act has no provisions to protect tribal religious areas as a whole. The Act provides no basis for establishing cultural/religious boundaries, and therefore does not completely support the tribal cause.

Protecting the "High Country" of Northwest California

Doctor Rock, Peak 8, and Chimney Rock are three tribal ceremonial sites located in what is known as the "high country" of the Siskiyou Mountains in northwestern California. This area is part of the 76,500 acre Blue Creek Unit (BCU) of the Six Rivers National Forest; 31,500 acres were inventoried as roadless at the time Northwest Indian Cemetery Protective Association v. Peterson was originally tried.

The BCU is adjacent to the 8 Mile and Siskiyou roadless areas and contains Blue Creek, which flows into the Klamath River and is important spawning habitat for several anadromous fish species.26 The area traditionally provided sustenance for the Yurok, Karok, Tolowa, and Hupa

25. Id. at 751-752.
tribes and was important to many of their "religious" ceremonies.

In 1981, the Forest Service issued a management plan for the BCU; it proposed the harvesting of 733 million board feet of Douglas Fir over an 80 year period, and the construction of approximately 200 miles of logging roads in the areas immediately adjacent to Chimney Rock, Doctor Rock, Peak 8 and other religious sites in the high country. At the same time, the Forest Service issued a plan to complete the last six miles of the paved Gasquet-Orleans (G-O) road which ran directly through the BCU. The Final Environmental Impact Statement (FEIS) was issued for the proposed road in 1982.

After exhausting all administrative remedies, the state of California (through its Native American Heritage Commission) and several other Native American and environmental organizations brought suit against the Forest Service for its proposed plans. Tribal people claimed construction of the road would violate their Free Exercise rights, AIRFA, and the reserved fishing and water rights for individuals on the Hoopa Valley Indian Reservation, which borders on the BCU. Among other claims, violation of the Wilderness Act was also mentioned. The plaintiffs sought an injunction against all proposed activities. The case was tried in the federal district court as Northwest Indian Cemetery Protective Association v. Peterson.

AIRFA's weakness in protecting tribal religious sites on federal public lands remained obvious. The Forest Service, before submitting its final plan, had contracted an anthropologist, Dorothea Theodoratus, to study the impact the G-O road would have on tribal cultural/religious activities in the area. After reviewing this study, the Forest Service chose the G-O route that

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27. Id. at 584.
29. Id. at 590.
30. Supra note 26 at 584.
would minimize negative visual and aural impacts on tribal religious sites.\textsuperscript{32} It made this decision despite the recommendation of the Theodoratus Report:

\begin{quote}
It is [this Report's] . . . recommendation . . . [to] prohibit the construction of the Chimney Rock Section of the G-O road and any of its alternative forms. The nature of NW Indian perceptions of the high country and the requirements of their specific religious beliefs and practices associated with the high country make mitigation of the impact of construction of any of the proposed routes impossible . . . Blue Creek area [should] remain environmentally pristine in every respect, to insure appropriate access and use by practitioners. Only by such actions can beliefs and practices of these Native American's culture be protected and granted the freedom of expression necessary for their survival.\textsuperscript{33}
\end{quote}

The Forest Service used the Report's results to attempt to decrease direct impacts from harvesting activities; it proposed undeveloped buffer zones within a half mile of all specified sites. The Forest Service would not mitigate the sight, noise and indirect environmental impacts of logging activities on the high country's religious characteristics.\textsuperscript{34}

By identifying tribal concerns and considering them in their final plan, the Forest Service had complied with AIRFA. The court decided AIRFA had not been violated.

Although tribal members found no protection under AIRFA for their religious use of the area, they still believed their Free Exercise rights would be honored. The court required them to demonstrate the burden on their religion from the government action, while also demonstrating why the area is essential to their religious practices. This claim was decided in a rehearing of the

\textsuperscript{32} Id., at 954.

\textsuperscript{33} Dorothea J. Theodoratus, Cultural Resources of the Chimney Rock Section, Gasquet-Orleans Road, Six Rivers National Forest, prepared for Six Rivers National Forest, United States Department of Agriculture, Contract No. 53-9158-8-6045 (Fair Oaks, California: Theodoratus Cultural Research, April 9, 1979), 420, 422-423.

\textsuperscript{34} Supra note 28 at 592.
As in Wilson v. Block, the plaintiffs suggested wilderness designation to preserve the area in an undeveloped state. This was not desired by all local tribal people. One Yurok Medicine man, Calvin Rube, objected to wilderness designation because it suggests federal ownership of Yurok territory and the area is "not perceived of as being wild, but natural, complete, a perfect place under the dominion of higher power . . . where Indians may go to be restored."35

Although tribal people should be allowed to manage their religious areas, wilderness designation would not allow such management. Federal government officials are not likely to give up their management power on public land. Since the BCU is considered federal public land, wilderness designation may be the only method to preserve the land in an undeveloped state.

In this case, the plaintiffs argued that the Forest Service had violated the Wilderness Act because it had not evaluated the value of the BCU as part of a larger potential wilderness area which included the roadless and undeveloped lands contiguous to BCU. The Wilderness Act directs the Secretary of Agriculture to review for wilderness preservation each national forest area previously classified as primitive.36 The plaintiffs interpreted this statement to include the entire contiguous, roadless area of which BCU was a part. The judge denied this claim, stating that a road already separated BCU from the other areas; BCU need not be considered as part of a larger area. Wilderness designation was put to rest.37

The final argument in this case with which I am concerned is the violation of reserved rights. As will be explained in Chapter 4, fishing and hunting are connected to tribal religious

37. Supra note 31 at 956-957.
ceremonies. If fishing and hunting rights are reserved in a treaty, it is possible that religious rights are indirectly reserved also. As far as I know, this connection has not been addressed.38

In NW Cemetery, the plaintiffs said the G-O road construction would adversely affect the water quality and fishing resources in the Blue Creek area, which would deprive the Hoopa Reservation of its reserved fishing rights in the Klamath River. The presiding judge found no evidence showing that salmon and steelhead habitat would be degraded in a manner that would impair their production, because fish could not spawn closer than 7.5 miles from the proposed road, due to natural barriers. Since only a small portion of the road was near Blue Creek, possible landslides were unlikely to affect fish habitat negatively.39 The court decided reserved rights were not adversely affected; the federal government, therefore, would not be violating its trust responsibility by constructing the road.

In the preliminary hearing, an injunction to stop the road construction was denied, on the understanding that construction would not begin prior to a ruling on the merits.

In 1983, the federal district court addressed the merits of the case.40 Violation of AIRFA remained a moot point. The judge proceeded to review possible violations of Native American Free Exercise rights.

Tribal members explained their religious use of the area and how it would be disturbed by the proposed developments. They stressed that the Chimney Rock area is sacred "high country" to the Yurok, Karok and Tolowa who use the area for core religious rites and to train community

38. In Washington v. Washington State, etc., (99 S.Ct. 3055, 3067 (1979)), the court indirectly mentioned religious observance as part of a reserved right when it allocated fishing rights partially for ceremonial purposes.
39. Supra note 31 at 956.
40. Supra note 28.
medicinal and spiritual practitioners. Individuals hike into the high country and use "prayer seats" located at Doctor Rock, Chimney Rock and Peak 8 to seek religious guidance or personal "power" through "engaging in emotional and spiritual exchange with the creator." The solitude, quietness, and pristine quality of the BCU makes this communication possible.\textsuperscript{41}

The Theodoratus Report explained that a religious site is not only significant in its physical state, but also possesses "qualitative, psychological and sensory aspects."\textsuperscript{42} The Report also stressed that although a particular site may be focused upon, it is only part of a much larger whole.\textsuperscript{43} The "religious" experience depends on more than immediate physical surroundings; it requires aural, aesthetic, and historical knowledge of the area.

Road construction, increased road traffic and logging activities are incompatible with the ritual uses.\textsuperscript{44} Road visibility would damage the pristine visual conditions, noise from construction and road use would prevent a practitioner's concentration, and environmental degradation would damage the area's religious significance by destroying the landscape where the "other than human" persons reside.\textsuperscript{45}

The presiding judge acknowledged a burden on tribal religious practices. The government had to demonstrate a compelling interest that would warrant continuing its projects and thus infringing upon the plaintiffs Free Exercise rights.

The Forest Service declared many public needs that would be served by the projects, but each was shown to be insignificant.\textsuperscript{46} To the court, the government had not demonstrated a

\textsuperscript{41} id. at 591.
\textsuperscript{42} Theodoratus, supra note 33 at 10-11.
\textsuperscript{43} id. at 72-73.
\textsuperscript{44} Supra note 31 at 954.
\textsuperscript{45} Supra note 28 at 591-592.
\textsuperscript{46} id. at 596. Jobs would not increase, but would only move from one location to another, administration
compelling interest for burdening the tribal religion. The government responded by stating that protection of an area for religious purposes would violate the establishment clause. The court ruled this an invalid point since the plaintiffs had not asked for the exclusion or regulated use of non-tribal members. To the court, the government would not be excessively entangled with religion by accommodating Native Americans' Free Exercise rights. Tribal plaintiffs were granted relief on these grounds.47

For the first time, tribal people had gained protection of their off-reservation tribal religious lands through asserting their Free Exercise rights, but to prevent further development threats, they needed permanent protection. Wilderness designation could provide this, and it was still a factor in the case. The judge overturned the previous decision for wilderness consideration, finding the FEIS to be inadequate; the Forest Service was required to assess the management plan impact on the wilderness resource as a single area. The low standard road which was deemed a separation barrier by the previous court, did not constitute an "improved" road and was ruled as being unimportant; vegetation would eventually reclaim it.

As a result of the judge's decisions, construction of the G-O road was permanently enjoined. The court permanently enjoined commercial timber harvesting and logging road construction in the high country, and harvesting and road construction were enjoined in the Blue Creek Roadless Area until a new EIS was carried out to evaluate its wilderness potential as a part of the larger 8 Mile, Siskiyou, Blue Creek roadless area.48

47. Id. at 597.
48. Id. at 603-604, 606.
In 1985, the Forest Service challenged the lower court's Free Exercise decision.\textsuperscript{49} The California Wilderness Act,\textsuperscript{50} passed in 1984, rendered the wilderness argument moot, because it included much of the disputed area as wilderness. Unfortunately, the Act left open a 1200 feet-wide corridor "to enable the completion of the G-O road project if responsible authorities so decide."\textsuperscript{51} The Wilderness Act has no provisions to protect cultural/religious areas, and thus tribal religious concerns could not be the basis for including the strip within the designated wilderness area. This strip of land would be the focus of the continuing debate.

At the time the wilderness issue became moot, the judge also denied the reserved rights claim. Although road construction would result in as much as a 500% increase in sediment loads into Blue Creek, thus decreasing the amount of fish and violating the government's trust responsibility, the claim was dismissed because the Hoopa Valley Tribe—owner to the rights—was not party to the action.\textsuperscript{52}

Once AIRFA, the Wilderness Act, and reserved rights were no longer deemed relevant to this case, the decision concerning protection of federal public lands for tribal religious purposes rested on the Free Exercise clause. On appeal, William C. Canby, the presiding judge for the Ninth Circuit Court panel, held that the district court did not err in enjoining road construction and timber harvesting in the area; these activities \textit{would} impermissibly burden the tribal plaintiffs' Free Exercise rights.\textsuperscript{53}

\textsuperscript{49} Supra note 26.


\textsuperscript{52} Supra note 26 at 587, 589.

\textsuperscript{53} Id. at 581.
A governmental action that makes it more difficult to exercise First Amendment rights may be invalid even if the burden is indirect. The proposed project would indirectly affect tribal religious practices. The claim against establishment was overstated. The Forest Service was only enjoined from timber harvesting and constructing logging roads; it was otherwise free to manage the high country for outdoor recreation, range, watershed, wildlife and fish habitat, and wilderness; there was no entanglement of the Forest Service with religion, as prohibited by the establishment clause. On the merits of the Free Exercise clause, the previous decision was upheld. The Court of Appeals reheard the case in 1986 with the same result.

The United States Department of Agriculture carried the case to the Supreme Court; certiorari was granted on the constitutional issue alone. In 1988, the Supreme Court heard the case as Lyng v. Northwest Indian Cemetery Protective Association. The decisions of the United States District Court and the United States Court of Appeals for the Ninth Circuit were reversed. After so many years of discussion, in which the Native Americans' Free Exercise claims were so openly expressed and a burden was obviously shown, the majority opinion of the Supreme Court denied them their Free Exercise rights; it lifted the injunction on road construction and timber harvesting.

Justice Sandra Day O'Connor, writing the majority opinion, stated that individuals would not be coerced by the governmental actions into violating their religious beliefs and that individuals would not be penalized for the exercise of their rights; they would have "an equal share of the rights, benefits, and privileges enjoyed by other citizens." Basically, they still had access to the area for religious practices; the majority did not understand the nonphysical

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54. Id. at 586.
55. Northwest Indian Cemetery Protective v. Peterson, 795 F.2d 688 (9th Cir. 1986).
56. Supra note 51.
57. Id., at 1321.
ceremonial needs. The Supreme Court's decision stripped tribal people of their Free Exercise rights on federal public lands.

The Court interpreted the Free Exercise clause as providing individuals protection from oppressive government actions, but not providing individuals the right to demand preferential treatment from the government. 58

Quotes from the majority opinion express the Court's interpretation of tribal religious rights:

No disrespect for these practices is implied when one notes that such beliefs could easily require de facto beneficial ownership of some rather spacious tracts of public property . . . Even assuming that the Government's actions here will virtually destroy the Indians' ability to practice their religion, the Constitution simply does not provide a principle that could justify upholding respondents' legal claims . . . Whatever rights the Indians may have to the use of the area, those rights do not divest the Government of its right to use what is, after all, its land. 59

A fear is expressed that tribal religious practices, if protected, will tie up too much government land. The government would then be unable to use its land as its administrators (ignorant though they may be of public needs) see fit. Regardless, traditional tribal beliefs are tied to the land; to deny their protection by allowing unnecessary development on federal public land is a direct violation of the Free Exercise clause. If Native Americans cannot depend on protection from the Constitution for their religious use of public land, where are they to go? Tribal culture and religious beliefs continued to be attacked by an insensitive majority.

Justice Brennan, writing the dissenting opinion, stated:

Because the Court today refuses even to acknowledge the

58. Id.
59. Id. at 1321, 1327.
constitutional injury respondents will suffer, and because this refusal essentially leaves Native Americans with absolutely no constitutional protection against perhaps the greatest threat to their religious practices, I dissent.\textsuperscript{60}

The dissenting opinion rested in previous court decisions. Laws that frustrate or inhibit religious practice trigger protections of the Constitution (the religious practices of affected California tribal people would be frustrated); those who challenge a proposed use of federal land should be required to show that the decision poses a substantial and realistic threat of frustrating their religious practices (the plaintiffs showed a burden); the government then has the responsibility of showing a compelling interest (it failed to do so).\textsuperscript{61} The case should have been decided for the plaintiffs.

Unfortunately, the majority opinion held that the government can do as it wants on its lands, even if it violates an individual's rights. This is not the statement of a constitutional democracy, but of an unrestricted government. Native Americans are denied equal rights. The government can claim an unjustified compelling interest and in the process destroy a culture's religious base; there is no constitutional protection to prevent this result.

This case evolved into an unwarranted power struggle to force a precedent showing that tribal people have no rights to protect areas of federal public lands on the grounds of Free Exercise of religion. In 1990, the strip of land excluded from wilderness designation for the G-O road was quietly included into the Siskiyou Wilderness area\textsuperscript{62}—but only after the damage was done and the government had "proved its power."

\textsuperscript{60} Id. at 1330.
\textsuperscript{61} Id. at 1335, 1339.
Tribal Religious Rights in the Badger/Two Medicine Area of Northwest Montana

The Badger/Two Medicine area is located in the Lewis and Clark National Forest in Northwestern Montana. It borders on Glacier National Park and the Blackfeet reservation; it includes a roadless area of approximately 102,100 acres which is a subunit of the Great Bear, Bob Marshall and Scapegoat wilderness areas and the Swan roadless areas.63

The Blackfeet tribe ceded the Badger/Two Medicine area to the United States in the Agreement of 1896, wherein the tribe reserved hunting, fishing, access, and timber collection rights. The tribe commonly refers to the area as the Ceded Strip.

Currently, the area is the focus of a development controversy. In the early 1980s the Forest Service received two applications for permits to conduct oil and gas exploratory drilling in the Badger/Two Medicine; one was from Chevron USA and the other from Fina Oil and Chemical Company. The FEIS conducted by the Forest Service and the Bureau of Land Management approves the exploration projects despite the controversy surrounding tribal rights in the area.64

Many Blackfeet tribal religious practitioners have stated their opposition to both projects. Exploratory activities would cause a major disturbance to the quiet and solitude necessary to practice certain aspects of their religion; they fear that exploration would permanently destroy the power in the area.65 The tribal council opposes the development because of uncertainty surrounding the extent of reserved rights in the area. Due to this opposition (and that from non-tribal wilderness proponents), a final decision in support of drilling will probably bring this case before the courts. Several of the claims brought forward assert potential violations of: AIRFA, the

63. Lewis and Clark National Forest and Bureau of Land Management, Glacier and Pondera Counties, Montana, Final Environmental Impact Statement for Exploratory Oil and Gas Wells: Proposed Oil and Gas Drilling near Badger Creek and Hall Creek (October 1990), Chapter III-26, 27.
64. The agencies have decided to permit the proposed Fina activity, but have yet to issue a final decision on the Chevron activity. (The Fina decision is in the Forest Service Appeals process.)
65. Supra note 63 at Chapter III-67.
Wilderness Act, the Agreement of 1896, and the Free Exercise Clause. Once again Native American Free Exercise rights on undeveloped federal public lands will come before the judgement of the non-tribal community. Is it possible for Blackfeet claims to stand up?

To charge a violation of AIRFA as presently written is a useless claim. As demonstrated by previous cases using this Act, it has never been the basis for judicial protection of public land for tribal religious use. The Forest Service consulted with Blackfeet tribal religious practitioners and considered their views in writing the FEIS. It contracted with an ethnoscientist, Dr. Sherri Deaver, who found that oil and gas exploration activities would cause visual, aural, and physical disruption to the peacefulness of the area and could interfere with cultural/religious practices. The qualities necessary to communicate with the "other than human" persons in vision quests and sweats would be decreased.66

The FEIS states that tribal religious practitioners may choose to mitigate impacts by going into the mountains and making individual atonements (it is unclear whose idea this is); the agency would issue a work schedule to be published in local papers, so people could choose a proper method of atonement in privacy.67 By considering Blackfeet concerns and expressing possible measures to mitigate problems, the Forest Service complied with AIRFA.

Because of the Lewis and Clark National Forest's sizable acreage of undisturbed land, Blackfeet tribal religious practitioners are using it more for vision quests and fasts. This includes the Badger/Two Medicine area. Wilderness designation has been suggested for this area and is supported by some tribal religious practitioners; the tribal religious need for solitude and an undisturbed environment would be protected in a wilderness area.68 The tribe has

66. Id. at Appendices M-1.
67. Some Blackfeet tribal religious practitioners say that cultural/religious resource impacts cannot be mitigated. Id. at Chapter V-11.
68. United States Department of Agriculture, Report on Social Effects, Perceptions, and Attitudes of the Chevron Exploratory Well Proposal - Lewis and Clark National Forest, prepared for the Forest Service,
acknowledged the importance of the area's undeveloped state for tribal religious practices. The Blackfeet Tribal Business Council on May 10, 1973, in a tribal resolution, declared the area to be tribal religious ground; it cannot be disturbed without the consent of the tribe.69

All Chevron roaded alternatives mentioned in the FEIS would diminish the values or characteristics of the roadless area; 56 acres would be directly disturbed and 7,680 surrounding acres would be indirectly affected by the preferred alternative. This accounts for at least 7.5% of the Badger/Two Medicine roadless area.70

A proposed bill, the Blackfeet Nation Cultural and Spiritual Wilderness Protection Act, was drafted in late 1989 on behalf of the Pikuni Traditionalists Association.71 This bill would have designated the Badger/Two Medicine area a Spiritual Wilderness area, similar to the Taos/Blue Lake Act. Instead of returning the area to the tribe, the tribe would only participate in the Forest Service management decisions. The proposed bill was never introduced in Congress.

In spite of the desire to maintain this area in an undeveloped state, there is not likely to be a successful wilderness designation argument without full support from the Blackfeet tribe. In the Forest Service Planning procedures, the Badger/Two Medicine was classified as non-wilderness due to Blackfeet reserved rights and the tribe's historical opposition to wilderness designation.72 This opposition results from the unresolved treaty rights in the area. Some believe the area is actually owned by the tribe, and has never been sold, but only leased.73 Others believe the tribe


69. Blackfeet Tribal Resolution #219-72.

70. Supra note 63 at Summary-6 and 7. Since the Fina activity is outside of the designated roadless area, only the Chevron activity will directly impact possible wilderness designation (as Forest Service management plans are written now).

71. The Pikuni Traditionalists Association is an association of Blackfeet tribal religious practitioners. (The bill was drafted by Attorney Jack Tuholske, Missoula, Montana.)

72. Supra note 63 at Chapter III-31.

retained mineral rights. In any case, there is a lack of support for wilderness designation until treaty rights are resolved.\textsuperscript{74}

Currently, the Business Council supports the idea of a three year wilderness study area as proposed in H.R. 3873.\textsuperscript{75} The tribe's interest is not wilderness designation, but the extent of Blackfeet treaty rights. It believes that until mineral rights have been addressed and legally adjudicated, any development should be prohibited.\textsuperscript{76} Because Blackfeet have rights in the area, they must be active participants in all resource management decisions involving the Badger/Two Medicine. It is the tribal council's responsibility to consider the needs of all tribal members—including the tribal religious practitioners—when making its decisions. Anglo-Americans can not make these decisions for the Blackfeet.

A new bill, entitled the Badger/Two Medicine Act of 1991,\textsuperscript{77} would make the disputed area a Congressional study area for three years to specifically evaluate the wilderness value of the land and Blackfeet tribal religious use of the area. The Blackfeet would be directly involved in formulating the final management plan.

Obviously the Badger/Two Medicine lands, because of Blackfeet treaty rights, are not public lands in the sense of most federal public lands. Therefore, wilderness designation is an issue that must be agreed to by the tribe.\textsuperscript{78} The Blackfeet may not desire wilderness designation. If they do, the two previous cases show that the Wilderness Act is not likely to support inclusion of the entire area (including the roaded portion) on the basis of cultural/religious use—it has no provisions to cover such use.

\textsuperscript{74} Supra note 68 at 7.
\textsuperscript{75} This Bill was introduced in Congress in early 1990, but was not enacted.
\textsuperscript{76} Supra note 63 at Appendices J-13.
\textsuperscript{77} Drafted by Attorney Jack Tuholske, Missoula, Montana.
\textsuperscript{78} Supra note 63 at Appendices J-9.
There is dissension on the Blackfeet reservation as to how the Badger/Two Medicine should be used, but since the focus of this paper is on tribal religions and their need for protected undeveloped federal public lands, I will discuss a possible argument for preserving the Badger/Two Medicine area if the case is treated as a Free Exercise/public land situation.

A Free Exercise claim will be difficult to maintain successfully in court. The Lyng decision dispensed with the need to show the centrality of a disputed area to a religious belief and burden is no longer an issue if the federal government can use its land as it pleases. If they were addressed, centrality would be very difficult to prove. The Blackfeet tribal religious practices extended over their entire hunting area; few places were given more importance than others.

Burden on Blackfeet religious practices could be demonstrated since the Badger/Two Medicine has religious significance to the Blackfeet and since the tribe does not have open rights to any other nearby undeveloped mountain area that provides the solitude and quiet needed for tribal religious practices. Whether the government could override a finding of burden is debatable, since the likelihood of finding enough oil to support a field development is less than 1%. Unfortunately, if the federal government decides it needs to use all of its fuel resources, any undeveloped area on public lands, regardless of individual Constitutional rights or wilderness designation, can be opened for resource extraction. The Lyng decision strengthened the government’s right to use its lands as it pleases.

Due to the uniqueness of the Badger/Two Medicine situation, namely the issue of reserved rights, I am able to suggest a possible alternative protection for undeveloped federal public lands essential to tribal religious practices.

79. Id. at Appendices L-11.
Since the only method for stating a Free Exercise claim against federal government land management practices is now through claims of government discriminatory actions, such a claim would probably only stand in conjunction with a violation of reserved rights. I suggest exploring a possible avenue for Free Exercise protection as part of the tribal reserved rights.

Before 1874, when the Blackfeet reservation boundary was moved northward to the Birch Creek/Marias River line, Little Plume of the Piegan band had said his people did not want to move the line; he said that it would confine them to too small a territory and deprive them of a large and desirable portion of hunting ground. Little Dog, in the talks to reduce the reservation size, stated, "we like the land near the mountains... We would rather stay here where there are streams and good land..." The area at that time had hunting value. The Blackfeet were not inclined to sell it, but they did.

Later, in the talks preceding the Agreement of 1896, the federal government asked to buy the land from Birch Creek to the United States/Canada border. The Blackfeet several times stated that they only wanted to sell from Cut Bank Creek north, and not from Birch Creek. Three Suns stated that they wanted to reserve a part of the mountains. The Indian agents convinced the Blackfeet to sell from Birch Creek north by saying the tribe would be unable to keep prospectors off of the mountain land.

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82. This might be attributed to the fact that they were starving. The buffalo herds on which the Piegan depended for their primary subsistence had been decimated. They needed food.
83. Minutes of the Proceedings prior to the Final Ratification of the Agreement of June 10, 1896 as recorded in September 1895, Blackfeet Agency, Montana, 4-5.
84. Id., at 10.
Nobody except the Blackfeet know why their people did not want to sell the land between Cut Bank Creek and Birch Creek—the location of the present Badger/Two Medicine area. Little Dog had told the federal commissioners that the mountains were of benefit to the Indians, but he did not explain how—or perhaps the translator did not translate accurately. It is very possible that the lands held an unexpressed religious significance.

The importance of hunting in the area was obvious throughout the meeting. Little Plume stated that tribal members hunted in the mountains. White Calf and Big Brave went on to say that they wanted reserved hunting and fishing rights in the ceded strip.

As a result of these comments, when the final agreement was signed by the tribal people, certain rights were retained, including hunting and fishing.

... said Indians hereby reserve and retain the right to hunt upon said lands and to fish in the streams thereof so long as the same shall remain public lands of the U.S. under and in accordance with the provisions of the game and fish laws of the State of Montana.

Although limited by state law, the Blackfeet tribe holds hunting and fishing rights in the Ceded Strip and perhaps, indirectly, religious rights. The fact that hunting, as part of their daily life, had its own ritual meanings that connected it to powers of the "other than human" persons world warrants its classification as a religious act, remembering how religion is defined in the Introduction and Chapter 1. To reserve hunting rights would then be reserving religious rights. These rights are open to Free Exercise protection. Since a reserved right in an area is the same as having a property interest, the federal government is obligated to protect the hunting and

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85. Id. at 7.
86. Id. at 10.
87. Id. at 18-19.
89. Allen H. Sanders and Robert L. Otsea, Jr., Protecting Indian Natural Resources: A Manual for
fishing habitat and... perhaps the religious "habitat." A lack of habitat protection would render the right meaningless, and would directly violate the 1896 Agreement.

Not all Blackfeet may currently associate hunting with religious activities, but the more traditionally oriented may. Also, in determining a religion/hunting connection, it is unimportant how hunting is regarded today; what matters is how the tribe regarded hunting at the time the Agreement was signed. Interpretations must be made in the spirit of the Agreement as it was written in 1896, and as the Blackfeet would have understood it. At that time, it is probable that many Blackfeet still held to tribal beliefs and practices, even if they were not expressed outwardly. This would mean that hunting was what Anglo-Americans would consider a religious event, and religious protection would be inherent in the Agreement.

If religious interests were a part of the 1896 Agreement, Free Exercise claims may be made against environmental degradation of the Badger/Two Medicine's cultural/religious value, backed by claims of a violation of reserved rights. Even though the type of religious use may be expressed differently today (vision quests may be more common than traditional hunting practices), the area would still be protected by reserved rights. If the area's degradation due to development is offending a religious use, a reserved right is being violated.

Lawyers Representing Indian Tribes or Tribal Members. (Boulder, Col.: Native American Rights Fund, August 1982), 20.


91. Supra note 68 at 11.

92. See Pitt, supra note 73 at 23-25.

93. In the same Agreement, the Blackfeet reserved the "right to go upon any portion of the lands" as long as the lands remained public property. Supra note 88. It is possible that this right was also reserved for religious ceremonial purposes. In such a case, a reserved right for religious use would be direct, and it would be necessary to manage the lands appropriately.
Since the Badger/Two Medicine is a historical Blackfeet area, the Forest Service is presently in the process of contracting an ethnographer to identify potential sites in the Badger/Two Medicine that would be eligible for nomination to the National Register of Historic Places.\textsuperscript{94} This is in accordance with the National Historic Preservation Act which mandates the federal government to consider the effect of any of its undertakings on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register.\textsuperscript{95} Before approving an undertaking, the government must also afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking.\textsuperscript{96} Regulations implementing the Act mandate the agencies to be sensitive to special concerns of Indian tribes in historic preservation issues.\textsuperscript{97}

The Forest Service has identified four potential sites which will be evaluated by the ethnographer as to their eligibility. It is highly probable that several of these sites will be eligible, and an even higher probability exists that more sites will be located during the ethnographic and archaeological study to be conducted during the summer of 1991. If many eligible sites are located, a National Historical District could be created around them, thus mandating a specific management program by the Forest Service for the affected area. Unfortunately, this would not prevent exploratory drilling in the area by current leaseholders. (It must be noted that wilderness designation also would not prevent drilling, because the lease holders possess definite rights to act upon their leases.) Aside from reserved rights arguments, there are realistically only two other ways to protect the Badger/Two Medicine from exploratory drilling: the tribe must regain ownership and make their own decree of preservation for the area or Congress must pass an Act.

\textsuperscript{94} The preliminary ethnographic study presented in the FEIS was deemed inadequate.
\textsuperscript{96} 36 CFR 800.1(a).
\textsuperscript{97} 36 CFR 800.1(c)(2)(iii).
in which the United States government would buy back the present leases and designate the area as wilderness.98
CHAPTER FOUR:  
Four Specific Examples of  
How Tribe’s Viewed Their Landscapes

The United States, as trustee, has an obvious problem when attempting to support protection of federal public lands for tribal religious use through legal means. Legal arguments tend to become strictly religious arguments, but expressing the tribal/land relationship in terms of western religious concepts can be misleading; it tends to diminish the integral part religion has in the relationship between the human and nonhuman world. Tribal religion, culture and landscape are indivisible. Court decisions deny the depth of their connection; the dominant culture consistently fails to understand the tribal relationship with the land.

In an attempt to demonstrate how tribal religious practitioners may view their relationship to their territory, and why it is important that specific land areas be protected from unnecessary development, this chapter explores the relationship between tribal peoples, their culture, and the land. I strongly believe that only sincere, long time participants in the traditional ways can fully understand the depth of the tribal/land relationship. For this reason, I am cautious that my own interpretations may not do justice as an explanation. I can only hope that they may reveal the true extent of how land development offends tribal religious-environmental beliefs.

Religious man can live only in a sacred world, because it is only in such a world that he participates in being, that he has a real existence.¹

As one aspect of culture, religion is part of the ritual behavior that enables humans to

adjust to their environment; ritual puts into practice a culture's religious beliefs. The environment and its seasonal or geographical availability of resources shape the culture and religious beliefs. Since traditional Native Americans had subsistence cultures, they identified specific resources in their environment as sources of life. Through direct use of the land, tribal people realized their survival depended on those resources.

Tribal people viewed their world as the territory where they carried out their subsistence activities. A tribe's Creator established the boundaries and in the process of creation, left regenerative potential (the "original" power) throughout the area. This territory, after it has been filtered through the culture's belief system, is the tribal landscape.

In this landscape, the world and its nonhuman inhabitants possess potential to make the land productive. Tribal members have to establish a social relationship with the "other than human" persons who hold the potential, and communicate with them by performing obligatory rituals and ceremonies. This nurtures a reciprocal relationship to insure the future productivity of the land.

The rituals and ceremonies demonstrate respect for the "other than human" persons, who in return, release the potential to make the land productive. Successful communication with the "other than human" persons means the tribal community will have food in the coming year. Therefore, ritual religious action and the quest for food are both essential to life; the two actions

are conducted in the same event.

These religious-environmental actions are a way of ethically dealing with the tensions in the tribal/land relationship. The success of traditional tribal society depends on the proper conduct of ritual activities to renew the necessary resources and secure the survival of the tribe's world.

Although tribal religious-environmental beliefs have an underlying concept which threads them together, each tribe has an independent belief system. Since different resource uses produce different ceremonies, tribal landscapes are specific and depend on each tribe's subsistence activities and environment. Oral traditions of individual tribes explain tribal history and the people's relationship to their landscape; they insure proper actions will be maintained to guarantee the tribe's continuity.

Differences, and similarities, in tribal world views will become obvious in the following examples of tribal land use. The tribes mentioned are those involved in the four cases analyzed in Chapter 3.

Blue Lake and Taos Pueblo

The land and the people 'are so closely tied together that it is what might be technically called a symbiotic relationship—the people, by their prayers and their religious functions, keep the land producing; and the land keeps the people.'

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5. Ingold, supra note 3 at 140-141.
Thus was described the relationship between the Taos Indians and Blue Lake area during the Blue Lake Amendment Hearings of 1970.

Taos pueblo is located on a plateau between the Rio Grande river and the western foot of the Sangre de Cristo mountain range in north/central New Mexico. The tribe's original territory is approximately 300,000 acres; the boundaries extend east from the Rio Grande river, up the Rio Hondo past Wheeler Peak, south around Blue Lake, west down the mountain ridges behind the Pueblo, on past the Ranchos valley to the end of the Picuris mountain spur, and then north along the Rio Grande to Hondo Canyon. (See Figure 1) Vegetation ranges from desert sagebrush, to cottonwood trees, to oak/pinyon pine forests that blend into forests of Douglas fir, aspen and softbark at higher elevations. The mountains are home to deer, elk, bear, turkey, grouse and squirrel; antelope and rabbits inhabit the desert areas west of the Rio Grande river.

Within this area the Taos Indians conducted their subsistence activities. They hunted game, gathered wild onions, berries, pine nuts, wild celery and sage and practiced agriculture, although not as extensively as the southern pueblos, due to a shorter frost-free growing season. The principal domesticated crops of corn, wheat and squash were planted around May 3rd and harvested around September 30th. The Taos Indians also used their territory for forage, water, and collecting wood and timber.

12. Supra note 6 at 5.
Due to persecution and because tribal organizations require that specific knowledge be known to only a few, Taos Indians have clung tightly to maintaining the secrecy surrounding their religious beliefs that tie them to the land.\textsuperscript{13} They fear that either outside knowledge of specific ceremonial practices or improper performance of ceremonies by untrained individuals will be disrespectful and offend the "other than human" persons; the Taos Indians will lose their potential to make the land productive.\textsuperscript{14} For this reason, there is very little accurate information on the Taos Pueblo belief system, but a basic idea of the symbiotic social relationship between the Taos Indians and their territory can be obtained from anthropological literature.

The Taos Indians originally emerged from Blue Lake in the San Luis Valley of Colorado.\textsuperscript{15} Fearing a renewed pestilence, they left Colorado\textsuperscript{16} around the 14th century and came south to settle at their present location.\textsuperscript{17} They adopted Blue Lake in the Taos mountains as a symbolic substitute for their original emergence location.\textsuperscript{18} Shrines and holy places are located over the entire Blue Lake watershed\textsuperscript{19} and Blue Lake, Bear Lake, Star Lake, Waterbird Lake, and Next Lake all possess ceremonial importance.\textsuperscript{20}

\begin{thebibliography}{9}
\bibitem{14} U.S. Senate, \emph{Taos Indians - Blue Lake: Hearings before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs}, 90th Cong., 2nd Sess. on H.R. 3306, S. 1624 and S. 1625, 18.
\bibitem{17} \textit{Supra} note 15 at 115.
\bibitem{18} \textit{Id}, at 39. It is standard Pueblo custom to transpose an old sacred location on a comparable spot in a tribe's new territory.
\bibitem{19} \textit{Supra} note 6 at 117.
\bibitem{20} Ellis, \textit{supra} note 15 at 117, 125-126.
\end{thebibliography}
To honor the land and the "other than human" persons which provide resources essential to the tribe's survival, the tribe performs rituals and ceremonies throughout the year at specific places in their territory. This nurtures a positive social relationship between the human persons and "other than human" persons; the Taos Indians retain the potential to make the land productive.

When a Taos tribesman hunts, he performs a ritual to honor the animal. He asks the animal to give itself to him and, following the hunt, the hunter makes offerings of gratitude to the animal's spirit. The animal's body must be used respectfully; the animal's spirit is aware of disrespect. If the hunter offends the animal's power by misusing its body, he is unlikely to have success in the future. The ritual maintains a balanced relationship between the Taos Pueblo people, their landscape, and the "other than human" persons. Other ceremonies at Taos have a similar role.

The Taos Indians often conduct ceremonies to benefit their hunting, gathering or agricultural practices. They acknowledge their connection to the land through the ceremonial use of objects from their landscape. One example is when the two moieties of the pueblo hold footraces during the growing season. Participants run these races to encourage the sun on its course and to encourage the Cloud People to race across the sky bringing rain for the crops. To ensure swiftness, the runners wear the down from a hawk. The bearer of the down gains the power of the hawk, provided the proper honor rituals have been performed. The actual race then transfers the power back to the Cloud People.

Taos ceremonies also maintain the "original" power in the kiva, a unifying force within the

22. Wood, supra note 11 at 12.
Pueblo. The kiva religious societies, because they provide leaders for the governmental system, are central to traditional Taos Pueblo culture. Each kiva member is responsible for specific ritual knowledge; through their combined knowledge, members perform rites to insure the future of the Pueblo.

Each year, a select number of boys between the ages of 7 and 10, are initiated into the kiva society; they complete and publicly validate their initiation during the August tribal pilgrimage to Blue Lake. The ceremonies and rituals performed during this time bind the boys to the traditional Taos community and lifeway. Blue Lake symbolizes the continuity of Taos Pueblo. Without it, the kiva society would be destroyed along with the traditional Taos Pueblo religion.

Blue Lake is important because it represents the source of all life and it is the principal source of the Rio Pueblo, which flows through Taos Indian territory. The water has potential to bring life to the plants which nourish the people.

Blue Lake is also home to the ancestors (ka'tsina), and the Cloud Boys live in the Blue Lake watershed. The presence of the ka'tsina and the Cloud Boys instills the area with the "original" power to make the land productive. This power often comes in the form of rain. To show respect and appreciation for the powerholders that nurture life and to solidify a solid social relationship between the ka'tsina and Taos Indians, the Pueblo must follow proper rituals and make appropriate offerings to these "other than human" persons. Kiva members are often

23. Supra note 14 at 25.
24. Supra note 6 at 299.
25. Bodine, supra note 7 at 262.
27. Id. at 24. When people die their souls return to the lake.
required to perform secret practices in the Blue Lake area,\textsuperscript{29} probably to maintain good relationships with the ka'tsina and to keep the power of the kiva.

The importance of Blue Lake is further documented in Taos historical literature, where a distraught Yellow Corn Woman, upon finding her husband Magpie showing interest in her sister (Blue Corn Woman), returns to Blue Lake to commit suicide. When she dies, a yellow corn ear emerges from the water and is retrieved by Magpie. This corn ear symbolizes regeneration.\textsuperscript{30} A similar incident is related where Magpie pushes Yellow Corn Woman into the lake "where the fathers and grandfathers are living," because she remarried when he was kidnapped by witches. Once again yellow corn floats on the water.\textsuperscript{31}

Relating corn to Blue Lake demonstrates the lake's importance as the Taos Indian's source of life. The ka'tsina, the Cloud Boys and Corn Woman are the human forms of the "other than human" persons and provide the potential for plants to grow; they nourish life in the entire watershed. When Taos Pueblo crops are good, successful ritual communication with these power holders has occurred.

Since the souls of the deceased reside in Blue Lake, the lake is the source of powers that revitalize Taos land—it allows the Pueblo to survive. The Pueblo ceremonial life connects the powers of the "other than human" persons with the productivity of the landscape. The Indians of Taos Pueblo are the only ones who possess knowledge to honor the powerholders properly. In order to ensure their future, they must perform the proper ceremonies. If they perform improper rituals or destroy the ka'tsina's home by improper management, they would be showing

\textsuperscript{29} Supra note 14 at 25.
\textsuperscript{30} Elsie Clews Parsons, \textit{Taos Tales}, American Folklore Society, (New York: J.J. Augustin Publisher, 1940), 18-22. Corn is a symbol of fertility and also indicates a connection with the Earth. See Wood, supra note 11 at 121.
\textsuperscript{31} Id. at 36-39.
disrespect to the power holders. The ka'tsina would probably be offended and withhold their power to make the land productive.

Taos Pueblo justified its claim to the Blue Lake watershed in 1970 and was fortunate to receive protection of its cultural/religious landscape—Blue Lake is now part of the Pueblo de Taos reservation. The integrity of the area rests in the strength of tribal beliefs.

The San Francisco Peaks

The San Francisco Peaks of Wilson v. Block hold significant meaning in both Hopi and Navajo traditional life; they are within both tribes' historical landscapes, and are important to major rituals and ceremonies.

Located on the Colorado Plateau (southern Utah, northern Arizona, northwestern New Mexico, and southwestern Colorado), the historical territory of the Navajo and Hopi is an area of deep river canyons, mesas, buttes, unusual rock formations, desert and forest plateaus, and mountains. Elevation ranges from about 6,000 to 12,000 feet above sea level. For the most part, it is a rugged land that receives very little moisture; the main precipitation comes in July and August. Being an arid area, the lower elevations are quite barren; vegetation primarily consists of cacti, yucca, greasewood, and sagebrush scattered among sparse patches of grass. As elevation increases, moisture increases—juniper and pinyon pine association blends into ponderosa pine forests and eventually into denser spruce and fir forests. The highest elevations have alpine-like vegetation. Deer, elk, black bear and other smaller mammals inhabit the forested areas. In the arid desert areas, bobcats, coyotes, antelope, jackrabbits, and many small rodents, reptiles and amphibians make their homes. Bodies of water are scarce throughout the area, aside from a few
rivers and springs.

Hopi Land Use

Presently, the Hopi live on a reservation of 1.6 million acres in northeastern Arizona; the Navajo reservation surrounds it. Most tribal members live on three sandstone mesas, which they have occupied for almost 900 years. Their historical territory is bounded by the Chevelon Cliffs, Bear Springs, Bill Williams Mountain, Point Sublime at the Grand Canyon, the junction of the Colorado and Escalante rivers, Navajo Mountain, Betatakin Ruins, Lolomai Point, Lupton, and Woodruff Butte—an area greater than 9 million acres. (See Figure 2) Within this area, the Hopi gathered rocks, plants, and roots for ritual ceremonies; they also hunted, collected salt, and obtained timber and stone to build their homes and kivas. Their main subsistence activity was raising corn, beans, and squash.

The traditional Hopi life involves maintaining a positive social relationship with the Kachinas, who are powerful breath bodies of the deceased old people. This relationship is important because the Kachinas carry Hopi prayers to the deities.

In Hopi oral history, the people originally lived side by side with the Kachina in the world

33. Harry C. James, Pages from Hopi History (Tucson: Univ. of Arizona Press, 1979), 104. But see Harold Courlander, Hopi Voices: Recollections, Traditions and Narratives of the Hopi Indians (Albuquerque: Univ. of New Mexico Press, 1982), 145. Courlander states the boundaries to be Navajo Mountain, the Supai Trail (West of Grand Canyon Village), Kawestima (ruins north of Kayenta), Grass Hill (near Williams, Arizona), the San Francisco Peaks, Woodruff Mountain (south of Holbrook), Namiteika (near Lupton), and the Apache Trail (on the Mogollon Rim).
34. Id. JAMES at 103.
37. Washburn, supra note 32 at 44.
they inhabited before emerging into this one. The Hopi were taking the Kachinas' "blessings" for granted and the Kachinas chose to leave. Before leaving, they decided to teach the Hopi rituals in which the people could communicate with the Kachinas and ask for their assistance in receiving continued kindness from the deities during the agricultural season.38

Upon emerging into this world, one group of Kachinas settled in the San Francisco Peaks. Now they appear to the Hopi only during ceremonies the Hopi conduct to insure a good crop.

The winter solstice initiates the new growing season.39 At this time, the Kachinas return to the Hopi to bring blessings to new plant life. To redirect the sun in its course, so that it may bring warmth and strength to the crops, they perform the Soyal ceremony.40 The Kachinas remain in the Hopi villages through the Powamu ceremony in February, when the fields are prepared and bean sprouts are grown in the kivas to symbolically encourage germination of crops. They dance through the Spring months, imploring good weather conditions. In late July, during the Niman ceremony, the Hopi thank the Kachinas for their help. The Kachinas then return to the Peaks until the next winter solstice.41

The Soyal, Powamu and Niman ceremonies insure a good future for the Hopi. Through their performance, the Hopi show respect for the Kachinas and encourage the deities to release their potential to make the land productive. They bring together all parts of the Hopi world (in the form of plants, animals, and other items collected from the territory and used as ritual items); the

38. Id. at 43. Another version explains how a young Hopi boy journeyed to the top of the San Francisco Peaks, where he met up with the Kachinas. Their chief was Mulaingwa, the Germ god—the Creator of life. The Kachinas taught the boy dances to show his people and the Germ god taught him songs, saying, "this ceremony will surely bring rain if you do as we do up here." Edmund Nequatewa, Truth of a Hopi (Flagstaff, Az.: Northland Press, 1985), 79-83 and 124-125.
39. Id. Washburn at 43.
41. Washburn, supra note 32 at 43.
The connection between humans and nature is acknowledged.

The actual ceremony maintains a positive social relationship with the "other than human" persons in the Hopi landscape. Through the use of ritual items and ceremony, the Hopi make a connection with their deities' powers located in the land, wind and rain. For example, the men who become the Kachinas by wearing Kachina masks collect spruce boughs from the mountains, and wear them as collars, hand and ankle ornaments during the Niman ceremonies. The spruce boughs are a symbolic recognition of plants in the Hopi world, and they also possess power to bring clouds and moisture.  

The problem occurring in the San Francisco Peaks is not one of access, as the courts seem to think, but is one of disrespect to the forces that exist there. If the traditional Hopi declare that development will offend the Kachinas, their fear is justified. If the Kachinas are angered, they may cease to act as intermediaries to the deities, and power within the landscape will no longer be controlled by the ritual ceremonials used to ask for blessings. Crops will fail, as rain will no longer come at the best times, and the Hopi will lose their ability to produce food for their community's survival.

Navajo Land Use

The Navajo Indians occupy a reservation in northeastern Arizona, northwestern New Mexico, and southeastern Utah; the reservation covers more than fourteen million acres. Their original territory, as designated by First Man and First Woman, is bounded by the four sacred mountains: Sierra Blanca Peak in the East, Mount Taylor in the South, San Francisco Peak (Mt.

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42. Id. at 42 and Waters, supra note 40 at 200.
Humphrey) in the West and Hesperus Mountain in the North.\textsuperscript{43} It is an area of greater than 30 million acres. (See Figures 1 and 2) The Navajo used this area for hunting and gathering. When horses and sheep were introduced in the 16th or 17th century, sheep became their staple food and hunting/gathering/raiding activities extended over a larger area. Agriculture supplemented the Navajo diet.\textsuperscript{44}

According to traditional Navajo belief, the land and its nonhuman inhabitants possess powerful inner life forms. By carrying out rituals, humans can build relationships with these life forms and ask for their assistance in different life activities.\textsuperscript{45} These rituals constantly identify geographic features.

First Man and First Woman created the Navajo world when they emerged from the world before this one. They brought soil collected from the previous world's sacred mountains, and used it to establish the four mountains of this world.\textsuperscript{46} By placing these mountains at the four cardinal points, they strengthened the Navajo world.\textsuperscript{47} Due to their origin, the mountains possess power which can aid the people if the proper rituals are performed.\textsuperscript{48} These rituals are often accompanied by a song. The song is important to preserve order, to coordinate ceremonial

\begin{thebibliography}{9}
\bibitem{zolbrod38} Paul G. Zolbrod, \textit{Dine bahane: The Navajo Creation Story} (Albuquerque: Univ. of New Mexico Press, 1984), 87.
\bibitem{wyman75} Leland C. Wyman, \textit{Blessingway} (Tucson: Univ. of Arizona Press, 1975), 16.
\bibitem{vanvalkenburgh38} Van Valkenburgh, \textit{supra} note 46 at 30. These rituals include prayers and offerings.
\end{thebibliography}
symbols, and to obtain power. As the Navajo perform a song, the space its sound occupies fills with the power that the song invokes from specific inner forms.

Blessingway is a song ceremonial complex central to Navajo religion. It is called the backbone of Navajo religion because it is the source and pattern of the tribe's lifeway. Blessingway must be performed to maintain the world in a state of perfect beauty. It was first performed at the creation of the Navajo world; therefore, the way of creation guides all Blessingway performances. Traditional Navajo will conclude other chants with one song from the Blessingway complex to strengthen the chant; this insures a chant's effectiveness and corrects any errors.

Blessingway focuses on the sacred mountains and their inner forms, and also on the inner forms of nature. In the song ceremonial complex, each phenomenon of nature is given an inner form that functions as its life principle. The inner forms, or holy people, who occupy San Francisco Peak are Fabrics Boy and Jewels Girl. If they are shown respect and if their gifts are used properly, they provide the people with water, fuel and game.

Mountain bundles are necessary for the Blessingway performance and insure a good relationship between the bundle owner and the inner forms of the mountains. Originally made by Changing Woman, who collected soil from the sacred mountains, the mountain bundle

52. *Id.*, at 10.
53. *Id.*, at 24.
54. *Id.*, at 211. Zolbrod (*supra* note 43 at 88) states the inner forms of San Francisco Peak to be White Corn Boy and Yellow Corn Girl.
55. *Id.*, at 237.
symbolizes First Man's powerful medicine. Now humans make their own bundles using soil from
the same mountains; offerings must be made to the inner forms and mountain songs sung during
their preparation. The soil symbolizes the mountains inner forms, and gives the owner power to
control the ceremony. Prayers to the inner forms may bring blessings from the phenomena they
control.56

Throughout Blessingway, San Francisco Peak is mentioned.57 Mention describes the
need to respect this landform:

Do not by any chance forget that one called . . . San Francisco
Peak. If at any time you have forgotten them (the sacred
mountains) it will not be well58 . . . Whenever visits are made on
them or when visits are made to their summits, prayers (to the
inner forms) should accompany them59 . . . on . . . San Francisco
Peak . . . there will be holy places.60

These statements indicate that disrespect to the inner forms of the mountains will
encourage them to deny the Navajo's ritualistic plea for assistance. Any development of San
Francisco Peak may offend the inner forms, because it does not maintain a positive relationship
between the inner forms and the people. The reciprocal relationship is upset. This may cause the
inner forms to stop giving blessings to the Navajo. Traditional Navajo may see this as a beginning
to the end of their life.

As in the case of the Hopi, access should not have been the main focus of the decision in
Wilson v. Block because the issue involves understanding of an intricate relationship between the
Navajo and their landscape. When the landscape is destroyed, due to abuse or improper rituals,

56. Id. at 21-23.
57. Id. See pages 123, 125, 127, 134, 136, 150 and 151.
58. Id. at 157.
59. Id. at 158.
60. Id. at 159.
the life of the traditional Navajo is being destroyed; their life depends on maintaining a reciprocal relationship with the inner forms through proper rituals.

The Blue Creek Area and the Yurok Indians

The Yurok, Karok, Tolowa and Hupa Indians live in Northwestern California; their original territories are adjoining. All four tribes have similar subsistence activities and religious ceremonies, although the Yurok and Karok ceremonies are more closely related. Since the Blue Creek watershed is located in traditional Yurok territory, I will limit my discussion to the Yurok tribe.

The Yurok Indian tribe presently lives on the Hoopa Valley Indian Reservation in the northwest corner of California; it covers approximately 86,000 acres. The tribe's original territory is over 450,000 acres in size and includes a section of the Pacific Coast and part of the lower Klamath River drainage basin, including Blue Creek. (See Figure 3) It is a mountainous area, with oak and redwoods at the lower elevations which give way to spruce/fir forests at the higher elevations. Other major vegetation types, depending on available sunlight, water and elevation, include hemlock, white cedar, berry bushes, manzanita, and different species of ferns. Small game is scarce, but there is an abundance of deer. Wolverines, mountain lions, black bear, coyotes and elk also live in the area.

The Yurok, before being confined to the reservation, lived in communities along the Klamath River and ranged over their entire territory to seasonally hunt for food. Their main subsistence activities were gathering acorns in the foothills of the surrounding mountains and salmon fishing in the Klamath. To supplement their diet, they hunted deer occasionally, dug bulbs in the summer and collected seeds off the open ridges in the fall.61 They used the higher

61. Harold E. Driver, "Excerpts from the Writings of A.L. Kroeber on Land Use and Political Organization
mountain peaks for religious purposes throughout the year.

The G-O road controversy discussed in Chapter 3 involved the high country of the Blue Creek drainage area. To determine how much of this disputed area has cultural/religious significance to the Yuroks, it is necessary to identify the historical use of the area as documented in Yurok literature.

The Yurok world was originally inhabited by very powerful, small, humanlike beings called woge. When humans arrived on earth, the woge escaped their contact by withdrawing into the mountains and across the sea, or by turning into landmarks, birds or animals; they still live in the Yurok territory.\footnote{AL. Kroeber, \textit{Yurok Myths} (Berkeley: Univ. of California Press, 1976), xxxii, and 30 at note 6.} Woge might be considered the inner forms that occupy the land and its nonhuman inhabitants. The Yurok world is alive with their potential power.

The woge established the Yurok culture and are the focus of important ceremonies. They "direct" the annual performance of the World-Renewal ceremony around the first new moon of September.\footnote{Philip Drucker, "A Karuk World-Renewal Ceremony at Panaminik," \textit{University of California Publications in American Archaeology and Ethnology} \textbf{35}, no. 3 (1943): 23.} This ceremony insures an abundance of food and good health for the tribe, and renews or repairs the earth for the coming year.

Several days prior to the tribal renewal rites, the priest who conducts the ceremony makes a personal journey to communicate with the woge. He greases his body with deer tallow and visits sacred spots for several days. During this time the priest prays, sweats, and alternates daily meals...
of salmon or acorn mush with fasts.\textsuperscript{64} These rituals of honor encourage the woge to give the priest a formula which provides the "original" power for the ceremony. When the priest speaks the woge formula during the tribal rites, he achieves the same result as the woge who first performed the ceremony. \textsuperscript{65} Essentially, the priest is creating the world as the woge once did.

The use of the deer tallow, acorns, salmon and specific geographic places to communicate with the woge shows respect for the interconnection between the Yurok and their world. The Yurok are acknowledging the importance of plants, animals, land, and the "other than human" persons' power for maintaining a healthy world. To insure their future, the Yurok communicate with the powerholders through ritual and ceremonial performances. If they do not perform these rituals and ceremonies properly, the woge will be offended and power transfer will not occur.

Woge are also important as a source of power for individuals. Individuals can obtain the woges' "original" power by visiting them at their sacred places and conducting specific rituals. The Yurok define many mountain peaks as specific locations of the "original" power; stone closures on peaks are known to be places where the woge would sit and think.\textsuperscript{66} Their presence instills the places with the "original" power.

Woge live on the mountain Oka (Red Mountain), thus giving it a meaning of goodness.\textsuperscript{67} Yurok literature identifies Oka as being a place where an individual can go to obtain power:

\begin{itemize}
\item \textsuperscript{64} Id. at 23-24 and supra note 61 at 105.
\item \textsuperscript{67} Kroeber, supra note 62 at 414.
\end{itemize}
If a poor man goes there [Oka] for sweathouse wood, he calls to it [woge]; after ten days, he can get what he calls for, wealth or gambling luck.  

An individual can obtain different songs through proper ritual performance; these songs bring power, in the form of luck, for gambling, obtaining money and probably success in subsistence activities. Luck, a nearly tangible essence, is actually the possession of the "original" power which enables humans to live a successful life. Woge transfer power to the individual in response to proper ritual performance.

The mountain peaks along the Blue Creek drainage are not only places of power for obtaining luck. In traditional Yurok culture, doctors receive their curative powers when they go to the mountain peaks and dance to receive "pains." To understand the importance of this ritual, it is necessary to understand how Yurok traditionally view disease; it is caused by small, material objects, pointed at both ends and referred to as "pains." These "pains" enter a victim's body due to an offense to "other than human" persons. The offense could be the violation of a taboo or showing disrespect to those who possess power.

The "pains" are removed when a doctor "sucks" them out. The doctor possesses a pair of "pains" that help her locate and remove the patient's "pains"; she receives these "pains" through a ritual process. She goes to a mountain top associated with the "original" power and dances until she achieves a trance-like state. During her trance state (or dream state), a guardian spirit transfers the "original" power to the doctor novitiate in the form of a "pain." This "pain" becomes "animate" and helps put a trained doctor in a trance state during which she receives her healing potential. A doctor must obtain a pair of "pains" and learn to control both of them before she can actually cure a

68. Id.
69. Spott, supra note 66 at 163.
The "original" power inherent in the pair of "pains" is used to remove a patient's offending "pains."

Oka and Doctor Rock are specifically mentioned in Yurok literature as doctor training places. One Yurok narrative explains how a practicing doctor, "kept going up on Oka to dance where the seven seats or enclosures are." In dreams she was told, "from where you go you can hear every kind of song: songs for money, for gambling, for the Brush Dance . . . ." but she specifically wanted doctor powers, so she danced on Oka until she heard the doctor song. A whale then flapped, and she heard the song again. "She danced . . . until she felt something with wings coming against her, got something into her hand and lost consciousness." The "pain" given to her as curing power was the red-headed woodpecker. Once she learned to control this "pain," the novitiate had to return to Oka to receive the "pain's" pair. She mastered that "pain" and her final proving took place on Oka, "where former doctors had danced."

The preceding narrative states the importance of Oka as a place for doctor novitiates to receive power for conducting healing rites. In a dream, the novitiate was directed to Oka to receive curative potential; her guardian spirit, the whale, is an inland spirit (perhaps originally a woge) which lives in a lake on Oka. Once the novitiate arrives at the specified location, she dances intensely and concentrates on achieving power transfer. The whale rewards the novitiate's proper ritual performance with the transfer of the doctor power. Oka is important to receiving powers because the guardian spirit lives there; the whale actually transfers the "original"

71. Spott, supra note 66 at 155.
72. Id. at 220.
73. Id.
74. Id.
75. Id. at 221.
76. Id. at 224. The lake is only visible to doctors or to Yuroks who have purified themselves and are in a trance.
power. The novitiate had to go to the residence of her guardian spirit; if she had not gone to that specific mountain, power transfer would not have occurred.

Another Yurok narrative describes a novice doctor going to Doctor Rock, to a mountain top half-enclosure of stone, where she dances until she receives her second pain. She was probably directed to that location for the same reason the previous doctor was directed to Oka; her guardian spirit dwelled on Doctor Rock.

Specific locations are essential for power transfer to occur, but a designated mountain top is not the only necessary criteria. The process of receiving doctor power or luck depends on a seeker's ability to dance him/herself into a state of trance. For this, there must be solitude in the place of power. Outside disturbances may prevent seekers' from obtaining a trance state and power transfer will not occur.

Disturbances may also affect the woge, who dislike human contact. Since the "original" power in the land is due to the woges' presence, if many people come to a site, the woge will leave and take their power with them. Then power transfer cannot occur and the Yurok culture will be lost.

The underlying problem in the G-O road case was that the dominant culture failed to understand the traditional symbiotic Yurok/land relationship. Completion of the G-O road would have disrupted the solitude in Yurok cultural/religious areas by encouraging more traffic and people. Any disturbance in this area disrupts its potential power; unnecessary development of Yurok territory may offend the woge and cause them to leave. This would prevent transfer of the "original" power. The World Renewal ceremony and the rituals for obtaining doctor powers or luck

77. Id. at 156.
would be unsuccessful. The traditional Yurok world would fall apart.

Yurok traditionalists wanted the solitude of the area protected and asked the Forest Service not to build the G-O road. Cultural/religious protection required protection of the entire Blue Creek area from artificial disturbances.

The Badger/Two Medicine and The Blackfeet

The Piegan\(^78\) Indian tribe occupies the 937,838 acre Blackfeet reservation along the Rocky Mountain front of Northwest Montana. The reservation is a small portion of the tribe's original territory.

Na'pi, the land's creator and the "original" power, marked off the Blackfeet territory (including Blood, Piegan and Blackfeet tribes) with a boundary running east, from a point in the summit of the Rocky Mountains west of Fort Edmonton, to the mouth of the Yellowstone River (including the Porcupine Hills, Cypress Mountains, and Little Rocky Mountains), then west up the Yellowstone to its headwaters, across the Rocky Mountains to the Beaverhead River, continuing to the summit of the Rocky Mountains, and north along it to the starting point. (See Figure 4) Na'pi told the Blackfeet,

> There is your land, and it is full of all kinds of animals, and many things grow in this land. Let no other people come into it. This is for you five tribes. When people come to cross the line . . . keep them out. If they gain a footing, trouble will come to you.\(^79\)

The Blackfeet world covered over 80 million acres; the tribes occupied this territory since the middle of the 18th century.\(^80\) The Piegan ranged in the southernmost part. Their hunting

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78. They are referred to as Blackfeet by most Anglo-Americans.
80. Oscar Lewis, *The Effects of White Contact Upon Blackfoot Culture (with special reference to the*
ground included Three Forks, the Rocky Mountain front northeast to the head of the Marias and north toward Saskatchewan, and all the area in between. To allow for a balanced allocation of resources, different Piegan bands used different parts of this area for subsistence purposes.

In this land of pine clad mountains, fertile river valleys, and grassland prairies, a variety of plants was available to the Piegan for subsistence purposes, including an abundance of berry bushes. Many game animals also inhabited the area. Buffalo and antelope roamed the prairie, deer populated the river bottoms and mountains, and beaver lived in the waterways. The Piegan territory was also home to wolves, fox, bear, mountain lions, and numerous small mammals.

The Piegan people were hunter/gatherers. Originally they spent most of their time in the foothills and eastern slopes of the Rocky Mountains. They hunted buffalo, deer, moose, elk and smaller mammals. The women gathered roots in the early summer and chokecherries and buffalo berries in the fall. The camas root, which only grows in certain spots along the eastern slope of the Rocky Mountains, was also common to their diet. The few bands of Piegan who continuously lived in the foothills of the Rocky Mountains trapped beaver; the remaining bands originally did very little trapping.

Around 1730, after the tribe was introduced to the horse, buffalo became the Piegans' primary food source. They moved on to the plains during the summer months to follow the

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84. Id. at 86.

85. Grinnell, supra note 79 at 204.

86. Lewis, supra note 80 at 24, 28.

87. Ewers, supra note 83 at 21.
herds. When winter set in, the Piegan returned to the safer Rocky Mountain foothills.

The territory the Piegan occupied to hunt and gather is their world. As a creation of Na'pi, the entire area possesses his regenerative potential; the land has potential to "grow" the resources the Piegan need to survive. Na'pi can give the Piegan power to "grow" and use the resources, but the Piegan must fulfill ritual obligations first. If the Piegan do not fulfill the obligations, they destroy the symbiotic relationship between themselves and Na'pi's world and lose their power to hold the land. Ritual activity is necessary for maintaining the environment's productivity.

This obligatory/reciprocal social relationship with the "other than human" persons which occupy the landscape is termed Piegan religion by Anglo-American culture; it is actually an integral part of everything they do.

Since power is present in all of Na'pi's world—the earth, the plants and the animals—the Piegan are constantly confronting it. The tribe performs ceremonies to maintain its social relationship with the powers in the landscape, but some individuals have special, or very powerful relationships with their own spirit powers. By performing a specific ritual an individual can potentially obtain power from the nonhuman world.

To attempt to enter into the world of power directly, the individual will visit an isolated place, which is also dangerous. The individual fasts for up to four days, calling upon the "other

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88. Id. at 144.
89. Id. at 39.
90. See Ingold, supra note 3. Ingold goes into depth on how tribal people appropriate their lands.
92. Ewers, supra note 83 at 17.
93. Bulchild, supra note 91 at 79. When bravery is tested, power is more likely to be obtained.
than human" persons for pity, and eventually falls asleep or into a trance-like state. While in this semiconscious state, the "other than human" person visits the individual, and gives him "some of its power"; a relationship is established between the two, and the human, from then on, is obligated to conduct certain rituals to honor his "spirit power." If these rituals are not adhered to, the "other than human" person becomes angry and the individual loses his powers to "hold" the land.

The power from the "other than human" person is often in the form of a song and/or specific objects from the tribe's landscape. The objects may be collected and cared for in a personal medicine bundle. This bundle, or the song, becomes the source of power and brings success and protection to its bearer if it is handled properly. The bundle and song serve as connections between the human and nonhuman world.

The Badger/Two Medicine controversy involves land in the territory Na'pi gave to the Piegan.

Historians have documented an encounter with the Piegan in the disputed area. In 1830, the trader Jacob Berger met Piegan at the head of Badger Creek near their winter encampment. If their encampment was nearby, it is safe to assume that the Piegan were hunting in the area, seeing Na'pi's power in everything and fulfilling ritual obligations for the obtained powers.

During the treaty ratification procedures prior to the Agreement of 1896, a native participant stated that "young men . . . were chopping wood in the mountains and getting game." The symbiotic relationship with Na'pi's world was being continued.

94. Ewers, supra note 83 at 163.
95. Id. at 56-57.
96. Minutes of the Proceedings prior to the Final Ratification of the Agreement of June 10, 1896 as
Hunting and gathering activities occurred within the Badger/Two Medicine; Na'pi's power was present in everything. The Piegan established a relationship with the local nonhuman powerholders; they took animals and plants and reciprocated with the necessary rituals and ceremonies. There should be no question as to whether or not the Piegan have traditional "religious rights" in the area.

The Piegan people used the Badger/Two Medicine in the past for traditional religious practices and continue to use it today for the same reasons. Today, Piegan traditionalists use the area more commonly for the individual power quest, instead of for traditional hunting practices. Power to live a successful life is sought from the "other than human" persons which occupy Na'pi's world. Success is now defined in modern terms, to fit today's world. Regardless, the original "religious" basis for the ritual still exists.

Unnecessary development does not fit into the traditional tribal religious use of the land because it shows disrespect and offends the "other than human" persons; it destroys the human/land relationship. The "other than human" persons may decide to leave and their powers are then lost—possibly forever. The Piegan people can no longer communicate with the powerholders to maintain the health of their world and to obtain success in life—their traditional lifeway is destroyed. Their world, as created by Na'pi, falls apart.


The Differences Between World Views of
Tribal and Western Cultures

As can be seen from the four preceding examples, tribal land views and territorial conceptions are different from those of the dominant Western culture. Tribal territory is an animated landscape in which tribal people are direct participants. The landscape, its "other than human" inhabitants, and humans are indivisible. Tribal people have a symbiotic social relationship with the nonhuman inhabitants who possess the potential to make the land productive. This relationship permits the tribe to use available resources to survive, but also assures that those resource uses are not abused. Tribal people maintain their land uses at a low energy consumption level.

Since Western society no longer depends on subsistence activities, but on world markets, territorial conceptions and views of land use differ from those of tribal people. Territory is no longer where one directly obtains his food; the substances that Western culture "needs" to "survive" are from all over the world. For the individual, territory is now more closely associated to one's personal space, work environment and personal property; it is not a large contiguous geographic place as it is in tribal cultures.

The dominant belief system of Western society did not originate out of a hunting/gathering lifestyle and it created a landscape which is not animated. By deanimating the world, and by separating people from direct dependence upon the land, humans can not establish a social relationship with the environment. Therefore, Western society can wantonly extract resources for a high energy consumption lifestyle, and not fear retribution from "other than human" persons who possess the potential to make the land productive.

These different conceptions of landscape make it difficult for Western society to understand the detrimental impact land development may have in the tribal world. This is why
there is a problem obtaining support for protection of "wild lands" important to tribal environmental religions. Are there solutions? I will explore possibilities in the conclusion.
CONCLUSION:
Possible Solutions To Provide Protection
for Undeveloped Public Lands
Essential to Tribal Religious Practices

The establishment of Indian reservations in the 1800s failed to take into account the tribal relationship with the land. In this relationship, "other than human" persons inhabit a tribe's territory and possess the "original" power to make the land productive. Traditional Native Americans must show respect to these powerholders by performing appropriate rituals and ceremonies. These rituals and ceremonies are the means for communicating with the "other than human" persons in order that traditional Native Americans can obtain the power to use the land's resources.

The success of some religious practices requires the land's protection from any human developments. If powerholders are disturbed by unnecessary or disrespectful human activities, they may leave an area. Ceremonies become ineffective and the land no longer regenerates.

The federal government severely disturbed the tribal relationship with the powerholders when it dispossessed tribal people from their "original" territories and placed them in reduced static government-established territories, with no concern for tribal subsistence practices. Tribal people were no longer able to manage the areas that possessed power to make their land productive. Government officials who managed the "public" lands failed to understand the respect the land needed. Lands essential to religious practices were mismanaged and shown disrespect. Consequently, tribal people were losing their power to hold the land; the dominant culture was destroying the tribal lifeway.
The Lack of Legislative Protection

Congress passed the American Indian Religious Freedom Act (AIRFA) in 1978; it declared that it is the policy of the United States to protect and preserve American Indian's rights to Free Exercise of religion, and it directed federal government agencies to consider the effects public land management decisions would have on tribal religious practices. Read with a broad interpretation, the Act authorizes, when at all feasible, the protection of lands important to those religious practices. This includes protecting specific "wild" lands from unnecessary government development.

Unfortunately, as court decisions demonstrate, AIRFA provides no support for the actual protection of federal public lands essential to tribal religious practices. As interpreted by the courts, the Act only requires federal government agencies to confer with tribal religious practitioners when developing land management plans. Since the federal government manages its lands for multiple use, tribal religious use is only one use to be considered among many. Impacts of a proposed governmental action on all possible uses are evaluated prior to making a final management decision. After considering the different uses and related impacts, the Forest Service (or Bureau of Land Management) decides how lands should be managed to best serve the public. Their decisions often exclude tribal religious use, which is seen as valuable to a limited number of people and is not "economically productive." Most public land use plans are concerned with resource extraction.

Due to AIRFA's weakness, Native Americans have attempted to gain protection of certain federal public lands through their First Amendment Free Exercise of religion rights. Free Exercise rights mean the tribes should be allowed to continue their religious practices which link their culture to the land. If the federal government develops certain lands, the powerholders may leave the area and the tribal religion might be destroyed. If the federal government prevents religious
practices by destroying a religion's land base, it is violating individual Native American's rights to the Free Exercise of their religious beliefs and practices.

The Supreme Court decision on the G-O road case in California destroyed Native American Free Exercise claims on public lands; it stated that the government had the right to use its lands as it deemed best, provided it did not discriminate against individuals when making its decisions. The government cannot prevent Native Americans from practicing their religion; but, in the Court's view, the fact that a governmental action may render religious practices ineffective is incidental and therefore not unconstitutional.

This ruling results from the dominant culture's insensitivity to and lack of understanding for the traditional Native American relationship with the land.

Since tribal religious practices require that certain federal public lands be maintained in an undeveloped state, the Wilderness Act has been referred to as a possible means for protection in several court cases. Congress passed the Wilderness Act in 1964 to protect "wild" public lands from development. The Act's intent seems to coincide with tribal religious needs for solitude and undisturbed land. Wilderness protection, by supporting land management policy for other interest groups, would also conform to the federal government's multiple-use land management policy. Unfortunately, the Wilderness Act has no provisions to protect cultural or religious areas, and therefore does not lend support to protecting the integrity of tribal religious lands. Due to specific restrictions, it can only protect bits and pieces. It is another ineffective piece of legislation for tribal public land/religious use concerns.

Currently, no legislation exists under which Native Americans can gain complete protection of federal public lands essential to their religious practices. These lands are the origin
of ceremonies which insure the culture's survival and the land's future productivity. Where are tribal people to turn for their protection?

Possible Solutions

It is possible for the United States to return specific public lands to their original "holders," as in the Taos/Blue Lake case. Tribal people could then manage their own cultural religious lands, but this is unlikely to happen. Land claim cases between Native Americans and the United States government are usually based on illegal takings. The government has the ability to justify the legality behind a questionable treaty or agreement. It can also financially compensate a tribe for an illegal land taking, even though the tribe desires the land and not the money.\(^1\) In many cases, disputed areas have already been developed by private or public interests. It would be difficult to undo the damage and the government is not likely to spend money to buy back private lands that are rightfully owned by tribal people. It is also unlikely the government will return lands from which it is benefitting economically. Therefore, most tribes will not regain their lands by this method.

Tribal people could appropriate funds to buy specific areas, as in the case with the Cheyenne and Bear Butte.\(^2\) They could also perform a land transfer, in which they could exchange part of their lands for a disputed religious area. This is a solution, but an unjust one.

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1. This is the situation with the Sioux and the Black Hills of South Dakota. The decision of the Indian Claims Commission compensated the Sioux for lands that were determined to have been illegally taken. The Sioux refused the money and demanded the land back. The government considered the issue closed when it set up an account for the Sioux' compensation money. Currently the unaccepted money remains in the account accumulating interest. The Sioux have had legislation introduced to Congress in which all federal lands in the Black Hills would be returned to them, but they have not yet been successful in their efforts. Nick Chevance, BIA Realty Officer, Aberdeen, South Dakota, Telephone Conversation with author April 23, 1991.

2. The Cheyenne acquired funds through the tribe to buy Bear Butte—an important site in their oral history. Part of Bear Butte is now owned and managed by the Cheyenne. They bought the land from a private party, so this case is not an excellent example for tribal acquisition of public land. The government rarely gives up public land which has economic value.
Native Americans were usually forced to sell their lands in the first place; settlers destroyed tribal subsistence culture and the people needed money to survive in the new culture to which they were forced to adapt. It does not seem right that tribal people should have to buy back the lands they were forced to give up. Unfortunately, if the government will not return the lands, Native Americans may have no other choice. But... there is no guarantee the government will sell the lands—especially if they have "high" monetary value. In addition, most tribes are already suffering from economic problems and would not be able to afford such actions. Finally, reservation lands often have so little economic value that tribes would have to relinquish a major portion of their reservations to receive smaller areas possessing more economic value.

For previously discussed reasons, most disputed tribal religious areas will remain federal public land. AIRFA officially includes traditional Native American religious use in multiple use public land management policy, but multiple use discourages exclusive use by any one interest group. Therefore, Native Americans will always be forced to share their religious public lands with other uses by the general public. The problem returns to Native American religious rights being offended by unnecessary development of these lands.

The federal government can manage public lands essential to Native American religious practices for uses that are more compatible than resource extraction or development, such as fish and wildlife habitat management, passive recreation, and wilderness. These concepts may conflict with tribal religious views—recreationists may disturb ceremonies—but the fact remains that public lands are for public use.

Unfortunately, the federal government currently gives very little weight to Native American religious concerns when making land management decisions; it often permits unnecessary activities which offend tribal religious practices. Obviously, protection of public lands essential to
tribal religious practices requires strong legislative support.

Congress could amend AIRFA to give greater support to the protection of undeveloped public lands for traditional religious practices, thus making the policy a solid Congressional mandate, as it should be, instead of being a matter left for the courts to decide.

Amendments have been introduced in Congress, but not enacted. The latest amendment is S. 110, introduced in Congress on Jan. 3, 1991. It would strengthen AIRFA by requiring the judiciary to apply the analysis of the case law which had determined most Native American public land/Free Exercise cases prior to the Lyng decision. The government would have to show a compelling interest to develop an area proven to be important to tribal religious practices; upon demonstrating a compelling interest, the government would have to pursue its action in a manner that would be least destructive to the affected tribal religion. The court system would remain the arbitrator of Free Exercise/public land disputes.

A proposal for a Religious Freedom Restoration Act was submitted to the House of Representatives in September 1990 with similar provisions. It stated that the government may restrict any person's Free Exercise of religion only if it can show that such restriction is necessary to further a compelling government interest and that the governmental action is the least restrictive means of furthering that interest. Neither the amendment nor the proposal would be adequate to ensure the protection of lands essential to tribal religious practices; they would leave a large loophole for the government to justify development. S.110 attempts to diminish this loophole, but it still exists. The amendment's proposed language lacks the strength to guarantee support for cultural/religious area protection because it does not define the concept of a tribal religious area and how extensive tribal use is, whether it be direct or indirect.

Since the weaknesses of AIRFA have been a debated topic for almost a decade, an
amendment will probably eventually be passed. How much more support it will lend to the Native American cause is debatable. The government is unlikely to relinquish its power to control its own lands as it deems "best."

Since the Wilderness Act was included in Free Exercise/public land protection cases, it might be sensible to seek an amendment to this Act which would include protecting undeveloped or easily reclaimable lands for tribal cultural/religious use. This would give the Act strength to support protection of an entire cultural/religious area, rather than bits and pieces of such an area. The problem here is that some tribal people might not want wilderness protection, because they may want to manage their own religious lands. Whether or not giving them management power would change their minds is uncertain. It would be another compromise situation for them, one in which they would not have the final word in how the religious lands should be managed; the federal government would still retain the final decision making power.

Tribal people do retain power in management decisions on some federal public lands. Tribes which possess reserved hunting and fishing rights on undeveloped public lands may be able to seek relief for protection of the lands for religious use if they can demonstrate that their hunting was originally a religious concept because it involved ritual obligations to the powers that controlled the land's productivity. If hunting rights were reserved in the 1800s, it is very likely they were reserved with this religious concept in mind. Consequently, religious use in the area would be a reserved right, and any activity which destroyed the religious use would be a violation of reserved rights. This is an unexplored possibility and many tribes probably could not use this approach because of a lack of reserved rights in affected areas.

The final legislative solution for public land/tribal religious use protection may be the enactment of a Spiritual Area Protection Act, in which federal public lands used for religious
purposes could be given protection from development. Problems with establishment could occur, but such arguments would be unjust. The government would not be advocating one religion over others; it would only be supporting individuals' rights to freely exercise their religion by protecting the religion's land base. The breadth of such an Act could be a problem. Many people, including tribal traditionalists, consider all land to have "religious" value. Federal land managers might fear that too much land would be included in such an Act, but definitions could be made by a contingent of affected individuals to determine what areas could be included. Protection provided by such an Act would probably be far reaching, and more supportive of tribal religious concerns. Israel passed a Protection of Holy Places Law in 1967 which stated:

1) Holy Places shall be protected from desecration and any other violations and from anything likely to violate the freedom of access of the members of the various religions and to places sacred to them or their feelings with regard to those places, and
2), whoever desecrates or otherwise violates a Holy Place shall be liable to imprisonment for a term of seven years.3

This type of legislation is a possible alternative for protecting specific public lands in the United States, but it may not be a solution agreeable to tribal people. They may prefer an Act specifically protecting their religious lands, including protection from too much non-native traffic.

In the end, since it is tribal religious practitioners who will be affected by any new legislation, concerned federal government officials should sit down with them and determine what type of legislation would best fit their needs for protection of lands essential to their religious practices. It is unfair for Anglo-American culture to make decisions for Native Americans, or to force them to accept legislative protection with which they may not philosophically agree—tribal

people have too often been forced to conform to the dominant culture.

In any communication with tribal religious practitioners, it must be noted that tribal religions often require that religious practices and sites be protected by secrecy to maintain their power and integrity. The government should not force practitioners to reveal secrets to protect an area; this would offend the religion. Also, because an area’s power is intangible and cannot be grasped by non-natives, inferences of a lack of credibility of the Native Americans are common. This is unjust. Since tribal traditions maintained the health of the land for centuries, and since these traditions are the religious use which is being protected, their power and the practitioner’s word should be respected.

The Need For Understanding

The only way that effective legislation will ever be passed is if the dominant culture tries to understand the tribal land/religion relationship and respect it.

Any legislation to protect federal public lands for tribal religious use must stress the fact that ceremonies exist because of the environment tribal people live in. Changes in the environment cause changes in the religion; human actions which are disrespectful to the environment may destroy the religion. Cultures adapt to changes, as do traditions. Unfortunately, the problem chronicled in this paper is that one culture is forcing another culture to change its beliefs; the process is not one of gradual adaptation to environmental changes.

It is not our right to destroy that which we do not understand or practice. Some may consider the traditional land/religion relationship to be folklore, because it is not their own belief system, but nobody knows the entire truth behind the human/land existence. Individuals only know their own reality, and it is not for anyone, except tribal religious practitioners, to decide whether development of public land will affect the health of the land and tribal religious practices.
Nonpractitioners do not know.

Tribal religions may not be exactly as they were a century ago, but they still maintain part of the original philosophy—namely, the land is inhabited by "other than human" persons who possess power; humans must respect that power through obligatory/reciprocal relationships. Proper respect is shown through rituals, ceremonies, and sensitive management practices. If disrespect is shown, the power leaves, and the land is no longer hospitable to humans. Perhaps we would all be wise to take heed of these words. Western society is "intentionally" destroying the land base which sustains us. In the end we may all suffer...
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Introduction


Chapter 1


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Chapter 2


**Chapter 3**


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Chapter 4


Aside from previously mentioned journal articles, there have been many others regarding the inadequacy of AIRFA and the Free Exercise clause in protecting Native American religious needs on federal public lands.


COLORADO

Sierra Blanca

Shiprock

Farmington

Gallup

Mt. Taylor

Albuquerque

NEW MEXICO

(Figure 1)
ARIZONA

(Figure 2)

- Navajo Reservation Boundary *
- Hopi Reservation Boundary
- Original Navajo Territorial Boundary *
- Original Hopi Territorial Boundary

*Extends to Figure 1