The Spirits Will Leave: Preventing the Desecration and Destruction of Native American Sacred Sites on Federal Land*

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INTRODUCTION

The United States is a society which cherishes secularism and isolates religion from politics.
One unfortunate consequence of this separation is that, for the most part, the government and the general public remain ignorant of the fact that religions are being annihilated. The dark side of secularism is the destruction of the traditional religions of the indigenous peoples of North America. This destruction is occurring on several fronts, one of which is the desecration of the lands upon which Indian religions have been based from time immemorial.2

Sacred sites, which play an integral role in Native American religions, are under assault. Many sacred sites are situated on federal land, such as national forests and lands under the control of the Bureau of Land Management (BLM). Federal managers of sacred lands have proven ignorant of the Indian religious relationship with the sacred places and at times have been antagonistic to Native American religious interests. Sacred places — which cannot be disturbed or the spirits will leave3 — are being ravaged with shovel and ax. Our nation's current legal apparatus affords little hope for preventing the desecration.

The crippling or elimination of any Indian religion is of profound concern. Our society ostensibly is committed to religious freedom and toleration for all; we should act accordingly. Additionally, Indian peoples have a unique ethical claim for preservation of their culture due to the history of aggression against them.

People and religions are national resources as much as petroleum and timber. Indian religions are a well-established part of American culture. A kind of poverty results from the decimation of cultural resources and the reduction of cultural diversity. The death of the religion of any indigenous American people shames and impoverishes our society.

Indian religions in particular are valuable cultural resources. They evince a special relationship with the land, a relationship which is compatible with evolving notions of how people should use and regard the environment. Allowing these Native American religions to survive will entail some changes in our legal system. This Comment proposes a statutory protection scheme for designating sacred sites and ensuring that they are managed for the benefit of Indian religious uses.

Part I of this Comment examines the nature of the threat to sacred sites. Many locations are integral to Indian religions; the religions themselves would be destroyed by the desecration of those places. Frequently such sites are located on public land, and are managed by those who

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1. The terms Indian, Native American, and indigenous American are used interchangeably in this paper.
2. This Comment will focus on the threat to Indian religions posed by desecration of sacred ground on public lands. Other forms of interference with Indian free exercise of religion, such as restrictions on peyote use and the refusal to repatriate cultural artifacts and human remains, are not within the scope of this paper.
3. See infra notes 39 to 42 and accompanying text.
misunderstand the impact of routine land uses such as mining. Part II discusses the possible constitutional protections for Native American sacred places. Part III explores the options available for protection of sacred places under existing statutes. Part IV examines the desirability of preserving Indian religions and discusses the ethical congruence between Indian traditionalism and American environmentalism. Part V offers and explains potential statutory solutions to the problem of desecration of Native American sacred places located within the United States.

I

THE PROBLEM: LAND SACRED TO NATIVE AMERICANS IS THREATENED WITH DESECRATION

In many places across the United States, land held sacred by practitioners of traditional Native American religions is threatened with desecration. This problem has two basic components. First, for most Indian peoples, specific geographical locations are sacred and indispensable to the practice of their religions. Second, many of these sacred places are on federal, not Indian, land. Federal land management policies and actions routinely destroy, or threaten to destroy, the sacred character of these places.

A. The Land Itself Is Sacred and Indispensable to the Practice of Religion

Native American religions are difficult to understand within the doctrinal confines of the major religions of the Western World. In con-

4. This Comment is primarily concerned with those who believe in the traditional Native American religions. It is critical here to distinguish between Native American traditionalists who adhere to the letter and spirit of their traditional religions and tribal governments which may not.


There are perhaps as many Native American religions as there are surviving tribal peoples, because Native American culture and religion are intertwined. See Christopher Vecsey, Prologue to HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM, supra, at 12 (discussing the existence of hundreds of different Native American languages and religious practices); Walker, supra, at 111 (discussing essential link between sacred sites, religion, and culture; adding that sacred sites are fundamental symbols and patterns of Native American culture). Generalizations regarding "Native American religion" are potentially misleading or dangerous, perhaps offensive, and largely simplistic, given the variation in beliefs and practices from one people to another. But there are common threads. One such thread is the sacredness of specific places in the religions of almost all Indian peoples. See AKE HULTKRANTZ, THE RELIGIONS OF THE AMERICAN INDIANS 44-65 (1979); Walker, supra, at 100, 102-03. Thus, to the extent of this commonality, the issue of sacred site desecration is amenable to broad cross-cultural treatment.
Contrast to Western religions, Indian religions do not have a body of sacred literature comparable to the Bible, the Koran, or the Torah. Nor do many Indian religions center around belief in a single, omnipotent Deity. Indian religions often have no charismatic founders or chronologies of significant religious events. Nor do adherents of traditional Indian religions seem to have any compelling desire to convert others or to spread their faith beyond their respective tribes. Indeed, “religion” is an English word without equivalent in many Indian languages, where “religion” is not distinct from “culture.” Most Native Americans would probably find it undesirable and inconceivable to spread their beliefs beyond the limits of their people and territory.

To early Europeans in America, however, Indian religions seemed primitive, static, and pagan. The Europeans viewed Indian religion as

6. This discussion of Indian religion primarily encompasses those traditional religions originating before contact with Europeans. While the Native American Church and other syncretic sects may struggle for free exercise of their faith as well, those religions are generally not encompassed by this Comment.

7. See Vecsey, supra note 5, at 12.

8. Sarah B. Gordon, Comment, Indian Religious Freedom and Governmental Development of Public Lands, 94 YALE L.J. 1447, 1448-49 (1985) (“The Judeo-Christian concept of a supreme and immortal deity, belief in whom may be divorced in many respects from any specific situs or mode of worship, is not applicable to many Indian religions. Native American religions view gods, people, and nature as an integral whole.”).

9. Suagee contrasts traditional Native American religions with other world religions as follows:

The major religions of the world have been described as “commemorative” religions, because adherents trace the origin of their faith back to specific persons or events (Jesus, Mohammed, Buddha, The Exodus, etc.) and the religious practices center on rituals commemorating these people and events (Holy Communion, Passover, etc.). In contrast, tribal religions are described as “continuing” religions because these religions have been practiced continuously since their origins, which are inseparable from the origins of tribal cultures.

Dean B. Suagee, American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth’s Caretakers, 10 AM. INDIAN L. REV. 1, 9 (1982).

10. See Scott Hardt, The Sacred Public Lands: Improper Line Drawing in the Supreme Court’s Free Exercise Analysis, 60 U. COLO. L. REV. 601, 603 (1989) (suggesting that Indian religions are spatially oriented, while Western religions are temporally oriented).

11. Among Native Americans, the boundaries of ethnicity and religion are coterminous. Russel L. Barsh, The Illusion of Religious Freedom For Indigenous Americans, 65 OR. L. REV. 363, 367 (1986). A significant distinction among religions is whether they can spread beyond the sacred geography in which they were born. The assumption for Christianity has always been that it could and should, while that has not generally been the assumption for Indian religions. See VINE DELORIA, JR., GOD IS RED 83 (1973) (describing Native American religions as an “examination of community needs and values, not a progression of conceptual advances”). This discussion of Native American religions does not apply to Pan-Indian religions which are not site-specific and have spread over different geographic areas. See CHRISTOPHER VECSEY, IMAGINE OURSELVES RICHLY 150-51 (1988) (describing the spread of the peyote religion, also known as the Native American Church, throughout North America).


13. “[T]he modern western tendency to break up human life into such categories as religion, politics, economics, etc., is not very useful in describing or understanding traditional Indian life.” Id.; see also Suagee, supra note 9, at 7.
mere superstition, Indian religious leaders as fakirs, and the adherents as savages. 14 From this ethnocentric perspective, conversion of the native peoples to Christianity was seen as not only desirable but inevitable. 15

One aspect of traditional Indian religions which has proven particularly difficult for non-Indians to grasp is the connection between worship and place. 16 Native American religions are inextricably tied to the land. 17 They "exist in relation to, and dictate conduct within, a geographic place." 18 The overwhelming majority of indigenous American religions "cannot be practiced on certain days, inside designated buildings, or through purely intellectual exertions." 19 Rather, the religion — and culture — of most indigenous Americans cannot be divorced from well-defined relationships with specific lands. 20 Under Native American teleology, peoples are placed on the Earth in precisely the proper places; each tribe must live symbiotically with the other creatures, the plants, the rocks and soil, the air and water, and the spirits or gods that share those places. 21 The Native American relationship with the land goes beyond reverence to symbiotic equality: "Just as each place on Earth has its own unique mix of humans and other living beings, each has its own unique operating instructions and rituals." 22

Native American religions revere the natural world in its entirety. 23 Every part of nature contains sacred knowledge, and the relationship of

14. See, e.g., Vecsey, supra note 5, at 15-16; Suagee, supra note 9, at 7-9 ("Since the Judeo-Christian mainstream of the dominant culture tends to view itself as the only true religious tradition, the tendency persists to regard tribal religions as primitive superstitions the Indians must reject if they hope to achieve the Christian afterlife.").
15. See Barsh, supra note 11, at 370-71. Many Christians wrote that the deaths of Indians, whether by disease or violence from colonists, were manifestations of God's will. Suagee, supra note 9, at 8.
17. See generally Brown, supra note 5, at 50-52.
19. Id.
20. Michaelsen, supra note 12, at 60 ("American Indian traditions... have long been associated with particular areas... [A]ll Indians [of the Southwest] held in some form a belief in a sacred and indissoluble bond between themselves and the land in which their settlements were located."); Deloria, supra note 11, at 81 ("The vast majority of Indian tribal religions have a center at a particular place, be it river, mountain, plateau, valley, or other natural feature.").
21. See Barsh, supra note 11, at 366 ("Like animals, human beings are not uniformly distributed. The Creator gave each creature its own place to live, and its own instructions."). From a Western standpoint, indigenous American tribes shifted geographic locations in fairly recent times. For example, the Blackfeet peoples completed their migration from the eastern woodlands to the Great Plains in the lee of the Northern Rockies in the 17th or 18th centuries A.D. John C. Ewers, The Blackfeet: Raiders on the Northwestern Plains 6-7 (1958). Nonetheless, Indians hold a very static view of tribal territory. Native American peoples generally feel each tribe has its own place on the Earth, unchanging, the people indistinguishable from the place. Barsh, supra note 11, at 367.
22. Barsh, supra note 11, at 367.
23. See Deloria, supra note 11, at 176 ("Every part of this soil is sacred in the estimation of my people. Every hillside, every valley, every plain and grove, has been hallowed by
man to every creature and place is one of kinship. The entire earth is sacred; it is the source of life.

Some parts of the natural world, however, are accorded special reverence. While all the animals are brothers and sisters, many indigenous Americans hold some animals in particular esteem. And, while all of a tribe's territory is sacred, there are special places which are more sacred than others. These special places may be where the gods originated or where they live; where the people or animals were born; where individuals communicate with spiritual forces or are cleansed; or where leaders communicate with spiritual forces seeking safety, bounty, or renewal on behalf of their people or, in some instances, of the entire world.

Thus the relationship between North American native people and their lands is central and indispensable to their religion, culture, and way of life. For example, Hopi mythic narratives establish that the Hopi emerged from the underworld and travelled far to their chosen land. The land around Oraibi and Moenkopi in Arizona, where the Hopi remain today, was always their destination. They bypassed other good lands to settle there. Their coalescence into a people is not severable from their settlement of these specific lands.

There are numerous sites in North America which are of special religious significance to Indian peoples. The four sacred ranges of the Navajo mark the boundaries of Dinetah, which is the Navajo homeland and sacred cosmos. The majestic San Francisco Peaks, which mark the southwestern boundary, are not only the dwelling place of Navajo spirits; they are said to form the body of a god. The trees, plants, rocks, and earth are the skin of the deity. From the skin of this god, the Navajo collect the herbs which they believe are essential for healing.

some sad or happy event in days long vanished.” (Statement of Chief Seattle)).

24. Barsh, supra note 11, at 365-66. This view is demonstrated by the customary Lakota Sioux benediction: “[W]e are all related.” Id. at 366, n.18.

25. Id. at 367.

26. See, e.g., Ewers, supra note 21, at 17, 32, 85 (describing Blackfeet regard for beaver and grizzly bear).

27. Barsh, supra note 11, at 367; Gordon, supra note 8, at 1449; Hultkrantz, supra note 5, at 60, 63.

28. See Brown, supra note 5, at 37 (“[W]hat is almost unique in the Indians' attitude is that their reverence for nature and for life is central to their religion: each form in the world around them bears such a host of precise values and meanings that taken all together they constitute what one would call their 'doctrine.' ”); Gordon, supra note 8, at 1449 (“[L]ocation is essential to many aspects of Indian ritual and belief. In Indian belief, the place where an event occurred, rather than the event itself, assumes special significance.”).


31. 708 F.2d at 738.
The Hopi also revere the San Francisco Peaks. They believe that emissaries from the gods — kachinas — reside there for half of every year. While dwelling on the San Francisco Peaks, the kachinas create the rain and snow\textsuperscript{32} without which the Hopi cannot live.

For the Yurok, Karok, and Tolowa of Northern California, Chimney Rock and Doctor Rock are part of the sacred High Country.\textsuperscript{33} There are specific sites within the twenty-five square mile High Country of the Siskiyou Mountains where leaders go to communicate with spirits. From the spirits who dwell at these sites, the religious leaders acquire the medicine necessary for their world renewal rituals.\textsuperscript{34}

Bear Butte, in the Black Hills of South Dakota, is where the Tsistsistas and Lakota believe humans were created and given their first instructions.\textsuperscript{35} It remains the geographic focus of these tribes' religions to this day.\textsuperscript{36}

Thus, the sacred places of many different Indian tribes are located in North America.\textsuperscript{37} The sites mentioned above have already been the source of legal conflict. Many others exist. Some sites, however, have already been desecrated.\textsuperscript{38}

For most Indian peoples, the sacred place must remain in its natural state\textsuperscript{39} or lose its sacred character. Altering the landscape or the use of the location could destroy the site by disrupting the sense of isolation necessary for ceremonies\textsuperscript{40} or by driving the spirits away.\textsuperscript{41} "If an area is

\begin{itemize}
\item \textsuperscript{32} Id.
\item \textsuperscript{34} Id. See also D. Theodoratus, et al., Cultural Resources of the Chimney Rock Section, Gasquet-Orleans Road, Six Rivers National Forest (1979), excerpted in, Petition for a Writ of Certiorari, Joint Appendix, Lyng (No. 86-1013).
\item \textsuperscript{35} Barsh, supra note 11, at 367.
\item \textsuperscript{38} One example of site desecration is the Navajo sacred land which was flooded when Lake Powell was created behind the Glen Canyon Dam. See Barsh, supra note 11, at 398.
\item \textsuperscript{39} By "natural" state, I do not mean to imply that the sacred site is untouched by man. The North American landscape before the arrival of Europeans was significantly altered by Native Americans. See William Cronon, Changes in the Land 13, 43, 48-49 (1983).
\item \textsuperscript{40} See Lyng, 485 U.S. at 462-65 (Brennan, J., dissenting) (endorsing lower court's factual finding that construction of a road through the High Country, and the resulting increase in traffic, would make the place unfit for world renewal rituals).
\item \textsuperscript{41} For example, in bringing suit to enjoin uranium mining in Kaibab National Forest, Arizona, the Havasupai alleged that "if the uranium mine was sunk, the sacred resting and meeting place of the Life Spirit ('Grandson') and the Spiritual Grandmother will be destroyed, the annual renewal of the Earth will not occur, and the Sacred Mother will die." Celia Byler, Comment, Free Access or Free Exercise: A Choice Between Mineral Development and American Indian Sacred Site Preservation on Public Lands, 22 Conn. L. Rev. 397, 397 n.3 (1990). See also Barsh, supra note 11, at 368 ("[E]xtractive land development such as mining and hydroelectric projects not only threaten Indians' sacred places but their entire conception of
destroyed, marred, or polluted, my people say, the spirits will leave the area. If pollution continues, not only will animals, birds, and plant life disappear, but the spirits will also leave."  

Given the site-specific nature of most Indian religions, destruction of the sacred ground destroys the religion. Further, given the complete interconnection of religion and traditional Native American culture and identity, destruction of the religion destroys the culture.

B. Sacred Sites Are Imperiled by Federal Land Management

Many sacred sites are on land no longer "owned" by Indian tribes: "Most of [the sacred] sites not in Indian possession are owned by the Federal Government." Destruction of the federally-owned sites frequently causes bitter and antagonistic disputes. In fact, policies and actions of the federal government threaten many sacred places and have already led to the destruction of others.

Although most of the Indian peoples in this country no longer own their sacred ground, what is now the United States was once the domain of Indian peoples. The indigenous peoples of this continent were divested of their land through duress and treachery. That history should be considered in any analysis of the conflicts between Native American interests and government action and should be reflected in the natural order."

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42. CHIEF JOHN SNOW, THESE MOUNTAINS ARE OUR SACRED PLACES 147 (1977).
43. See VECSEY, supra note 1 at 34-53.
44. Gordon, supra note 8, at 1449. The spirits are inseparable from the land. Destroying the latter drives away or kills the former. See, e.g., Badoni v. Higginson, 638 F.2d 172, 176 (10th Cir. 1980), cert. denied, 452 U.S. 954 (1981) (impounding water in reservoir would drown gods who lived beneath Rainbow Bridge).
45. Michaelsen, supra note 12, at 62-63.
46. This term is used here in accordance with Western notions of property. As Justice Brennan noted, there is a conflict between "the dominant Western culture, which views land in terms of ownership and use, and that of Native Americans, in which concepts of private property are not only alien, but contrary to a belief system that holds land sacred."
47. Lyng, 485 U.S. at 473 (Brennan, J., dissenting).
48. See infra part II.A-B; Gordon, supra note 8, at 1448 n.6. The existence and location of sacred sites may not be revealed outside the tribe until that place is threatened by an outsider. This is problematic because the federal government claims that it is impossible to protect sites without knowledge of their location.
49. See infra part I.B.2.
50. See generally DAVID H. GETCHES & CHARLES F. WILKINSON, CASES AND MATERIALS ON FEDERAL INDIAN LAW 161-62 (1986) (discussing Native American property rights in the United States generally, and noting that Native Americans often do not own fee title to their former lands).
51. Id.
52. Suagee, supra note 9, at 12.
proposed resolutions of the conflicts. Unfortunately, past injustices are rarely considered in the resolution of present legal disputes.

One legal theory that does recognize past injustice is the trust doctrine. The trust doctrine is an outgrowth of the fiduciary relationship that many have suggested should exist between the conqueror and the conquered. The doctrine is of limited usefulness, however, because of its inconsistent application and its paternalistic implications.

1. Federal Law Has No Provisions for Religious Use of Public Lands

Federal ownership of sacred grounds poses a serious threat to Native American peoples because Indian religious practices are rarely considered in federal land management decisions. Federal land managers have never unqualifiedly recognized the sacred character of these lands nor have they committed to protecting them from desecration. Generally, when federal land managers evaluate appropriate uses for a tract of land, that tract's religious significance is a peripheral, non-determinative consideration.

The law governing federal land management does not provide a category for sacred places. Although designations such as national park, national forest, and wildlife refuge might be used to protect sacred sites, no currently existing legal regime offers explicit protection against desecration of sacred ground. National parks, moreover, are created for the

53. See infra part III.D.
54. Gordon, supra note 8, at 1452.
55. See infra notes 183-85 and accompanying text.
56. See infra part III.C.
57. Although such a designation for a reservation would face an Establishment Clause challenge in the United States, see infra part II.C.2, explicit legal protection of sacred places for religious purposes is not unknown. Israel's Protection of Holy Places Law, 5727-1966/67, 21 L.S.I. 76 (1967) safeguards sites significant to Jews, Christians, and Muslims. Gordon, supra note 8, at 1450-51, nn.16 & 17.
58. The American Indian Religious Freedom Act of 1978 (AIRFA) nominally should influence the management of all federal lands. 42 U.S.C. 1996 (1988). The statute's practical effect, however, has been completely vitiated by the courts. See infra part III.A.


The Multiple-Use Sustained-Yield Act of 1960 (MUSYA), 16 U.S.C. §§ 528-31 (1988), which governs the administration of public lands, states: "It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." 16 U.S.C. § 528. Again, religious use is not mentioned.

National parks are created individually by act of Congress. National monuments are created by the President of the United States through executive order; the authority for such orders comes from the Antiquities Act. 16 U.S.C. §§ 431-33 (1988). Not one national park or national monument has been established for the purpose of Indian religious use.
use of the American people and cannot accommodate the needs for privacy and exclusivity of many Indian religions.

Wilderness designation would provide adequate protection for sacred sites. Wilderness areas are protected from development and should offer solicitude and privacy. However, the decision to designate an area as wilderness is within the discretion of Congress and, in such inquiries, the presence of sacred ground in the area is at best a remote factor.

2. Federal Land Management Authorizes and Encourages Uses Which Destroy Sacred Lands

The greatest threat to Native American religion is the use of federal lands for such purposes as mining, reclamation, and intensive recreation. While some sacred sites may be on tracts that the federal government uses more or less compatibly with Native American interests, many sacred places have already been desecrated as the result of federal land management decisions. Additional sites are currently threatened because they are on tracts of federal land that remain available for extractive, ecologically destructive uses.

a. Mining

Mining represents one of the greatest threats to Native American sacred sites located on federal land. Under federal law, mining is a favored use for public land. Mining can be very profitable, and the right to exploit mineral wealth on federal land is relatively easy to acquire. Moreover, mining is probably the use of federal land least compatible with Native American religious beliefs and practices. Few

60. See Walker, supra note 5, at 107 (describing rituals requiring isolation for prayer); Vecsey, supra note 5, at 21-22 (“Our religion requires that we have privacy.”).
62. The goal of the Wilderness Act is to “leave [lands] unimpaired for future use,” 16 U.S.C. § 1131(a), not to preserve lands in their natural state so that Indians may practice their religions. Wilderness management of land may be consistent with Indian religious practice, but the decision to designate in the first place is not affected by the sacred character of the land. See 16 U.S.C. § 1132 (describing considerations in wilderness designation).
63. See supra notes 61-62 and accompanying text.
64. Barsh, supra note 11, at 398-406.
65. See generally Steven C. Moore, Sacred Sites and Public Lands, in Handbook of American Indian Religious Freedom, supra note 5, at 81.
67. See Byler, supra note 41, at 398-409.
68. See id.
69. “Although some mining techniques may not physically destroy the site, and, therefore, may not prevent Native Americans from physical access, all mining techniques destroy the site's spirituality and forever deny Native Americans access to the spirit of the site.” Id. at
forms of mining leave an area undisturbed to the extent necessary to preserve its sacred character.\textsuperscript{70} Mining involves the building of roads which entails the uprooting of trees and the removal of soil. The heavy equipment involved intrudes upon the quiet and solitude of an area. Hence, mineral extraction destroys the serenity necessary for rituals. Mining that makes even slight changes in the landscape disturbs the earth. If the earth is disturbed, many Native Americans believe the gods will depart.\textsuperscript{71}

\textbf{b. Reclamation}

Some of the most contentious disputes over federal lands resulted from federal reclamation projects. Few activities alter the landscape as irreparably as these water projects. Valleys become lakes, riparian zones are inundated, and rivers are shifted from their natural courses.

In addition to the ecological impact, the spiritual impact on sacred ground can be devastating. The original sacred site litigation premised on the First Amendment involved the flooding of Cherokee sacred lands by the Tennessee Valley Authority.\textsuperscript{72} Plaintiffs, two bands of the Cherokee Indian Nation and three individual Cherokee Indians, brought a class action on behalf of all present and future Cherokee Indians who practice traditional Cherokee religion and adhere to Cherokee culture. They unsuccessfully sought to enjoin the completion and flooding of the Tellico Dam which would cause the flooding of "sacred sites, medicine gathering sites, holy places and cemeteries . . . ."\textsuperscript{73}

A second dispute centered on Rainbow Bridge National Monument, in southern Utah.\textsuperscript{74} The Glen Canyon Dam, which created Lake Powell, flooded land beneath Rainbow Bridge, a huge and beautiful sandstone arch that is considered by the Navajo to be the home of some of their gods.\textsuperscript{75} According to the Navajo, filling Lake Powell to the capacity desired by the Bureau of Reclamation drowned the Navajo gods.\textsuperscript{76}

\textbf{c. Recreation}

As stated above, while some recreational uses of federal land are compatible with sacred site preservation, many are not.\textsuperscript{77} While wilder-
ness activities such as backpacking, which leave the landscape largely unchanged, are generally compatible with Indian religious practices, intrusive activities such as boating and water skiing will disturb a sacred site. The traffic and noise of power boats destroys the quietude of a place, rendering that place inadequate for religious practices.

The construction of reservoirs thus can not only denude a sacred place but also lead to increased litter and noise pollution. Ironically, these destructive uses are frequently cited as justification for federal reclamation projects.78

Downhill skiing, another popular type of recreation often found on federal land, exacts a large toll from the host mountain. Trees and brush are cleared from the mountain, and buildings and chair lifts intrude upon the vistas. A sacred mountain's holiness is further spoiled by the influx of fast-moving, noisy skiers.

Land management also restricts a tribe's access to holy places. In *Crow v. Gullet*,79 leaders of the Lakota (Sioux) and Tsistsistas (Cheyenne) peoples sought to enjoin the South Dakota Department of Game, Fish and Parks from making proposed changes to the land at Bear Butte. Bear Butte is where the Lakota originally met with the Great Spirit and is a place where Lakota and Tsistsistas go for instruction and power.80 Bear Butte was owned by the State and managed by the Department of Game, Fish and Parks. The Department embarked on a program of construction to improve access and develop facilities for increased visitation. The Lakota and Tsistsistas alleged that the Department also attempted to limit the availability of the site for ceremonial purposes.81 However, the court found only one instance of restricted access and held that the restrictions left the Native Americans' religious rights unharmed.82

Hence, land management for recreational purposes can limit Native American access to holy places while encouraging non-believers to crowd into such places.

II

CONSTITUTIONAL PROTECTIONS FOR SACRED SITES: CAN THE SPIRITS BE SAVED?

Throughout most of the history of United States-Indian relations, the problem of sacred site desecration was subsumed into the larger dispute over foreign occupation of Native American lands. Nonetheless,

78. See MARC REISNER, CADILLAC DESERT 140 (1986) (describing accounting practices for justifying reclamation practices).
80. 541 F. Supp. at 788.
81. Id. at 788-90.
82. Id. at 789-90.
the desecration and destruction of Native American sacred places begun by the westward expansion of the United States continues through Congressional and federal agency action.\textsuperscript{83}

Native Americans initially sought legislation to protect their sacred places from desecration, but Congress was not receptive.\textsuperscript{84} In the 1970's, responding to the lack of legislative protection, some Native Americans attempted to protect their sacred ground in the courts by resorting to the First Amendment.\textsuperscript{85}

Initially, the courts were unsympathetic to Native American claims. Between 1880 and 1940, the United States government openly sought the extermination of traditional Indian religions.\textsuperscript{86} Not until popular attitudes changed and the United States government began to recognize the right of Native Americans to preserve their traditional beliefs did sacred site protection become a legally cognizable issue.\textsuperscript{87}

This section discusses the courts' application of the First Amendment in sacred site cases. More specifically, the section will explore the applicability of the Free Exercise Clause and the Establishment Clause to these cases.\textsuperscript{88}

83. See supra part I.B.2. Furthermore, the federal regulatory apparatus has authority over Indian land to the same extent as it has over federal land. Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960) (holding that the Power Authority of the State of New York could condemn Tuscarora lands upon payment of just compensation, pursuant to a Federal Power Commission license, as directed by Congress). See generally Getches & Wilkinson, supra note 50, at 195-217.

84. Although on one occasion Congress did respond favorably to a Native American effort to protect sacred ground — when it mandated a special arrangement for Blue Lake, near Taos, New Mexico — it did so reluctantly. Blue Lake is sacred to Pueblo people and was being degraded by federally authorized activities in the area. See Barsh, supra note 11, at 408-09; Michaelsen, supra note 12, at 54 n.31.

85. The failures of free exercise claims in the courts are well documented. See, e.g., Michaelsen, supra note 12; Gordon, supra note 8; Suagee, supra note 9; Byler, supra note 41. Unsuccessful efforts include Sequoyah v. TVA, 620 F.2d 1159 (6th Cir.) (Cherokee plaintiffs could not halt the Tennessee Valley Authority from flooding Chota, an ancient Cherokee community thought to be an ancestral homeland), cert. denied, 449 U.S. 953 (1980); Badoni v. Higinson, 638 F.2d 172 (10th Cir. 1980) (Navajo gods at Rainbow Bridge allowed to be drowned to fill Lake Powell), cert. denied, 452 U.S. 954 (1981); Wilson v. Block, 708 F.2d 735 (D.C. Cir.) (Navajo and Hopi could not prevent the expansion of a ski resort at the San Francisco Peaks, home to gods), cert. denied, 464 U.S. 956 and 464 U.S. 1056 (1983); Crow v. Gullet, 706 F.2d 856 (8th Cir.) (per curiam) (court allowed construction of tourism-related projects at Bear Butte, sacred to Lakota and Tsistsistas peoples), cert. denied, 464 U.S. 977 (1983).

86. Vecsey, supra note 5, at 16.

87. Although the issue has become cognizable, the following discussion suggests that sacred site preservation remains an issue not fully recognized by our legal system.

88. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I. While the Free Exercise Clause guarantees the free practice of religion, the Establishment Clause prohibits state-sponsored religion. See generally Laurence H. Tribe, American Constitutional Law 1155-57 (2nd ed. 1988).
A. An Early Failure — Sequoyah v. TVA

Despite the long history of sacred site desecration, consideration of constitutional claims for protection of Native American sacred lands is a recent phenomenon. The issue of sacred site desecration framed as a First Amendment claim first reached the courts in *Sequoyah v. TVA*, a case concerning the Tellico Dam in the Tennessee Valley. The plaintiffs in *Sequoyah* premised their claim on the Free Exercise Clause, stating that they would "suffer injury by the infringement of their right to worship the religion of their choice in the manner of their choosing by the destruction of sites which they hold in reverence and in denial of access to such sites by the defendant."  

As the first sacred site case, *Sequoyah* illustrates some common features of sacred site litigation. First, and most important, the Indians lost. Those litigating on behalf of Native Americans have lost every sacred site case. Second, in *Sequoyah*, the court misunderstood the critical importance of sacred places to the practice of Indian religions. In rejecting the Cherokee Nation's claim the court stated,

"the claim of centrality of the Valley to the practice of the traditional Cherokee religion . . . is missing from this case. The overwhelming concern of the affiants appears to be related to the historical beginnings of the Cherokee and their cultural development . . . though cultural history and tradition are vitally important to any group of people, these are not interests protected by the Free Exercise Clause of the First Amendment."

Following from this misapprehension, the *Sequoyah* court found that the federal activities did not meaningfully infringe on religion and that the governmental interests were compelling. The court may have viewed plaintiff Sequoyah as a front for the environmentalists who had exhausted other avenues in attempting to stop the Tellico Dam. In *TVA v. Hill*, environmentalists successfully enjoined construction of the Tellico Dam on Endangered Species Act grounds. But advocates of the project successfully overturned the decision in Congress. *Sequoyah* constituted a last-ditch effort to halt the project.

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89. 620 F.2d 1159 (6th Cir.), cert. denied, 449 U.S. 953 (1980). See also supra notes 72-73 and accompanying text.
90. 620 F.2d at 1160.
91. *Id.*
93. 620 F.2d at 1164-65.
94. *Id.* at 1161.
96. *See Sequoyah*, 620 F.2d at 1161 (describing the TVA appropriation after *Hill*).
Native American sacred site litigation reached its nadir in *Lyng v. Northwest Indian Cemetery Protective Ass'n.*[^1] *Lyng,* the only sacred site case to reach the Supreme Court, is the final case in an active decade of sacred site litigation. Unless the composition of the Court should change radically, the case marks the ultimate failure of sacred site claims premised on the First Amendment.

In *Lyng,* members of the Yurok, Karok, and Tolowa tribes sought to prevent the construction of a logging road through the High Country in Six Rivers National Forest.[^8] The High Country is where important tribal rituals must be performed, including power quests and a world renewal ceremony.[^9]

Although the majority opinion acknowledged the site-specific nature of the Indian religions,[^10] the Court determined that

> [t]he Constitution does not permit government to discriminate against religions that treat particular physical sites as sacred, and a law forbidding the Indian respondents from visiting the Chimney Rock area would raise a different set of constitutional questions. Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, its land.[^101]

Under this finding, the most that Native Americans can claim under the First Amendment is access to their sacred ground located on federal land. Nothing limits the uses to which the government can put the land.

*Lyng* has been roundly criticized[^102] as sounding the death knell for traditional Native American religions which are dependent upon sacred sites.[^103] The case has been characterized as a departure from the previous constitutional requirement that there be a compelling government interest before allowing infringement on religious practices.[^104] From the standpoint of traditional Native Americans attempting to preserve their sacred places, however, it is difficult to view *Lyng* as a departure. *Lyng* is

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[^9]: See supra note 34 and accompanying text.
[^101]: *Id.* at 453 (citation omitted).
[^103]: Such is the practical effect of *Lyng* in the eyes of many commentators. See, e.g., Haroldson, *supra* note 102, at 572; Falk, *supra* note 98, at 515.
merely a culmination of the failure of the judiciary to understand Native American religion and to protect Native American religious rights under the First Amendment.

C. Can Sacred Sites Find Protection Under the Religion Clauses of the First Amendment?

1. How Do the Characteristics of Native American Religions Affect the First Amendment Analysis?

*Lyng* leaves no opportunity for defenders of sacred ground to bring a First Amendment claim. Although the Supreme Court majority paid lip service to Indian religious rights by acknowledging that the Constitution should protect all religions, including those "that treat particular sites as sacred," the Court refused to protect religious practices.

Even if we assume that we should accept the Ninth Circuit's prediction, according to which the G-O road 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.

In the context of most traditional Native American religions, elimination of the practices eliminates the religion. Hence the Supreme Court's distinction between religious practices and religious beliefs is meaningless.

Most religions have beliefs dictating that certain practices must be upheld. For instance, Roman Catholics believe, among other things, that members of the Church must be baptized. A law forbidding baptisms would forbid an essential practice. Similarly, destroying the isolation and sacredness of Chimney Rock prevents the world renewal ceremony of the Yurok from taking place. In the *Lyng* framework, the federal action prevents only a practice and not a religious belief. However, because some practices are so vital to the continued existence of a religion that their prevention destroys the religion, attempting to draw a line between practice and belief is antagonistic to Native American interests.

The belief/practice distinction also reflects a bias in favor of religions that are portable. The major world religions have been able to de-racinate from specific places and move elsewhere. Although Christians and Muslims have their holy places, and encourage pilgrimages to those holy places, one can be a Christian or Muslim and never see Jerusalem or Mecca. Such is not the case for a traditional Yurok: elimination of the site eliminates the associated practices that are central to the continuation of the religion. Under current law, no constitutional prohibition protects the sites or the practices. Thus, under *Lyng*, if the federal gov-

106. *Id.* at 451-52 (citation omitted).
ernment wishes to implement land use policies which lead to the complete destruction of a Native American religion, it may do so.

The First Amendment forbids Congress from making a law "respecting an establishment of religion or prohibiting the free exercise thereof." On its face, the First Amendment applies to all religions. In Lyng, the Supreme Court declared: "The Constitution does not permit government to discriminate against religions that treat particular physical sites as sacred . . . ." Nonetheless, it approved the desecration of lands central to the religious practices of the Yurok, Karok, and Tolowa. The Court's action, alongside its declaration that the Constitution "simply does not provide a principle" to preserve sacred sites against development of public lands, indicates that, in actuality, the religion clauses of the Constitution do not protect site-specific religions.

Perhaps the First Amendment only provides a sensible framework for the portable, proselytizing faiths that the founders of the United States inherited from Europe. These were, after all, the religions which the drafters of the Constitution understood and acknowledged. The Establishment and Free Exercise Clauses were designed to liberate the United States from the historical tendency toward strife among Christians. The method of doing so was to remove religion from the political arena and put it in the private sphere. A "thick wall" between church and state was necessary to prevent bitter strife among religious factions competing for power.

Traditional, site-specific Indian religions, however, are not competitive or disputatious, and are unlikely to spread beyond their original adherents. Hence, allowing Indians free exercise of their religion would not substantially disadvantage any other religions. Further, the framers of the First Amendment probably considered religion to be a discrete

107. U.S. CONST. amend. I.
108. 485 U.S. at 453.
109. Id. at 452.
112. See Vecsey, supra note 5, at 12.
113. Ultimately, sacred site claimants seek to preserve the physical status quo. They beg that a place not be drilled, paved, plowed, or otherwise disturbed or marred. They do not ask that anything be built, torn down, or moved. Religions not holding a particular place sacred have no direct, compelling interest in that place one way or the other. Generally, the only interests harmed directly are those of resource extraction concerns, who have no interests in the site other than the profits gained from resource extraction. For an examination of how belief in profit can rise to the level of, or take the place of, religion, see SINCLAIR LEWIS, BABBITT (1922).
element of human life.\textsuperscript{114} This is particularly untrue in the lives of Indian traditionalists.\textsuperscript{115}

While it may not have been obligated to do so, Congress has elected to extend the protections of the Free Exercise Clause to Indians in the American Indian Religious Freedom Act (AIRFA).\textsuperscript{116} Perhaps implicit in this Congressional act is an acknowledgement of doubt as to the applicability or appropriateness of the First Amendment in the context of Indian religion. Interpretation of the First Amendment must prove more malleable if it is to give any force to the guarantees of religious freedom for Indians.

2. \textit{Does the Establishment Clause Foreclose Accommodation of Site-specific Religions?}

In light of the questionable applicability of the First Amendment to Indian religions, it is not surprising that Indian sacred site claims based on the Free Exercise Clause have failed. In addition, at least one court has held that accommodating the Indian claims would violate the Establishment Clause of the First Amendment.\textsuperscript{117} Hence, in formulating any solution to the problem of preserving sacred sites, the constitutional limitations imposed by the Establishment Clause must be taken into account.

There is friction between the two religion clauses of the First Amendment.\textsuperscript{118} Forbidding establishment of religion while mandating its free exercise results in conflict. This tension suggests that a unified approach to religious constitutional questions is appropriate. The Supreme Court has thus far chosen to continue to treat separately questions based on free exercise and on establishment.\textsuperscript{119} Thus it is necessary to analyze whether claims based on the Free Exercise Clause would violate the Establishment Clause.\textsuperscript{120}

\textsuperscript{114} See Shaman, supra note 111, at 349 ("Religion and government will both exist in greater purity the less they are mixed together." (quoting James Madison)).

\textsuperscript{115} Barsh, supra note 11, at 365.

\textsuperscript{116} Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified in part at 42 U.S.C. § 1996 (1988)). AIRFA is silent, however, as to whether the strictures of the Establishment Clause were also extended to U.S.-Indian relations.

\textsuperscript{117} Badoni v. Higginson, 638 F.2d 172, 179 (10th Cir. 1980) (excluding tourists from a Navajo sacred site "would seem a clear violation of the Establishment Clause"), cert. denied, 452 U.S. 954 (1981).

\textsuperscript{118} See JOHN E. NOWAK & RONALD P. ROTUNDA, CONSTITUTIONAL LAW § 17.1 at 1157 (4th ed. 1991).

\textsuperscript{119} Id.

\textsuperscript{120} The Supreme Court uses a three-part test in determining whether a government action violates the Establishment Clause. Id. § 17.1 at 1162. First, the government action must have a secular purpose. Second, it must have a primarily secular effect. Third, it must not involve the government in an excessive entanglement with religion. Excessive entanglement is analyzed by evaluating three factors: (1) the character and purpose of the religious institution to be benefitted, (2) the nature of the aid, and (3) the resulting relationship between the government and the religious institution. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).
Many commentators agree that the preservation of Native American sacred sites may be fashioned so as to stand up to challenges under the Establishment Clause.\textsuperscript{121} A simple analysis of a claim for the preservation of a sacred site under the three-part Establishment Clause test could proceed as follows. First, it would be argued that the protection of the sacred site has a secular purpose such as the preservation of our nation's cultural diversity.\textsuperscript{122} Second, it would be argued that the primary effect of such protection would be secular. The destruction of part of our cultural diversity would be avoided, and amicable relations between Indian traditionalists and our dominant society would be promoted. Third, it would be claimed that preservation of the site would avoid excessive involvement of the government in Indian religion.

Granting complete control over land use decision making for a sacred place to Indian traditionalists, however, would run against the entanglement doctrine as expressed in \textit{Larkin v. Grendel's Den, Inc.}\textsuperscript{123} In \textit{Larkin}, the Court invalidated a zoning law which granted to all churches a veto power over the issuance of liquor licenses for premises within a five-hundred-foot radius of the church. The Court stated that the statute substituted "the unilateral and absolute power of a church for the reasoned decision making of a public legislative body acting on evidence and guided by standards . . . ." and that the statute thus "enmeshes churches in the process of government and creates the danger of '[p]olitical fragmentation and divisiveness on religious lines.' "\textsuperscript{124}

Rather than delegating decision making power to Indian traditionalists, Congress and the federal agencies should give proper regard to the sacred character of the place in making land use decisions.\textsuperscript{125} Although there are excellent cultural and environmental reasons for protecting sacred sites, under such a scheme the sites would be protected, at least in part, because they are considered sacred. Opponents to sacred sites could argue that such protection is, in effect, a denominational preference for Indian religion.\textsuperscript{126} A denominational preference is forbidden unless

\textsuperscript{121} For a step-by-step analysis of how statutory protection of sacred sites for Indian religious purposes can satisfy the Supreme Court's test for Establishment Clause challenges, see Falk, \textit{supra} note 98, at 559-60. Robert Michaelsen has argued that application of the Establishment Clause is inappropriate given the special status of Indians vis-a-vis the United States. See Robert S. Michaelsen, \textit{Law and the Limits of Liberty}, in \textit{HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM}, \textit{supra} note 5, at 116, 119. The status of the Establishment Clause may not be affected by United States government entanglement in Indian religion. The only question is whether the pervasive involvement of the United States government will work to destroy Indian religions or to preserve them. \textit{Id.}

\textsuperscript{122} \textit{See infra} part IV.B.

\textsuperscript{123} 459 U.S. 116 (1982).

\textsuperscript{124} \textit{Id.} at 127 (citing Lemon v. Kurtzman 403 U.S. 602, 623 (1971)).

\textsuperscript{125} \textit{See infra} part V.A.2.

\textsuperscript{126} This argument is dubious. While protective government action on behalf of sacred sites \textit{may indicate preference for Indian religion at that site}, such government action does not promote the religion beyond the sacred site. Such action merely ensures survival and at best
the distinction made by the government is necessary to promote a compelling interest.\textsuperscript{127} Hence, while the Establishment Clause would not necessarily preclude the protection of Indian sacred sites through a statutory mechanism, advocates of sacred site preservation would have the burden of proving that the preservation of a Native American people's religion is a compelling interest.

Although the issues on appeal in Lyng were premised solely on the Free Exercise Clause, other legal arguments were made for the protection of the High Country. First Amendment sacred site cases generally also involve federal statutory claims based on statutes such as the National Environmental Policy Act (NEPA). In addition, arguments are occasionally made based on Indian sovereignty, human rights, or the trust relationship between the United States and Indian tribes. The impact on sacred sites of these statutes and doctrines was not decided in Lyng. The next part of this Comment explores legal avenues for preventing the desecration of Native American sacred places beyond the aforementioned constitutional provisions.

III

OTHER POSSIBLE AVENUES FOR PROTECTION OF SACRED PLACES

After Lyng, what is left for defenders of sacred ground? Free exercise claims for religious sites will most likely fail. Currently, resort to the courts is perilous for Native Americans, for such action risks erosion of what they seek to preserve by establishing case law hostile to Native American religions.

As the following discussion explains, better protection might be found in AIRFA or in statutes concerned with cultural preservation, such as the National Historic Preservation Act or Archaeological Resources Protection Act. Perhaps the best available legal defenses against desecration of sacred places can be found in environmental statutes, such as the Endangered Species Act. Arguments can also be made under the trust doctrine. Finally, claims can be premised on Native American sovereignty and international human rights.

\textsuperscript{127} Nowak & Rotunda, supra note 118, at 1162-63.
A. The American Indian Religious Freedom Act of 1978

AIRFA was primarily a response to three Congressional concerns. First, federal agency decision making accorded little or no weight to Indian religious concerns. Second, in the courts Indian religions received less protection than most major religions. Lastly, guilt over centuries of injustice motivated the passage of AIRFA. AIRFA announces "the policy of the United States to protect and preserve for the American Indians their inherent right of freedom to believe, express, and exercise the traditional religions . . . including but not limited to access to sites . . . ." The Act has no teeth. Its only mandate directed the President and the federal agencies to "evaluate their policies and procedures in consultation with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices." Congress mandated nothing substantial, required no specific agency procedures, and created no remedies for wronged Indian believers. The legislative history includes recommendations for an executive order establishing administrative procedures for implementing the policies expressed. Several agencies resisted these recommendations. Congress has not followed AIRFA with a more specific legislative mandate.

The federal judiciary ultimately declined to construe any enforcement power into the statute. Given the statute's legislative history and remedy-less character, the finding by the Court that AIRFA created no enforceable obligations is not surprising. AIRFA requires only that federal agencies "consider" Indian religious values, and the statute's language is only hortatory. AIRFA could have required a detailed study such as that mandated by the National Environmental Policy Act. Read this way, the Act would require that agency decisions be accompanied by a showing that they are based on adequate information and consideration of religious issues. Instead, AIRFA provides practitioners of

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129. AIRFA REPORT, supra note 37, at i-ii.
133. Letter from Senator James Abourezk to President Jimmy Carter (November 16, 1977), reprinted in AIRFA REPORT, supra note 37, app. A.
134. See Barsh, supra note 11, at 374. Establishment Clause concerns may have crippled Congress's efforts. Id. at 373-74.
135. Lyng, 485 U.S. at 455. For a summary of judicial interpretations of AIRFA, see O'Brien, supra note 131, at 31-43.
Native American religions with no remedies and fails to make any specific procedural demands on governmental decision makers.¹³eight

B. Cultural Preservation Statutes

The United States has a number of statutory schemes designed to safeguard the nation’s cultural resources.¹³nine This Comment argues that the religions of this country’s first inhabitants are among these cultural resources. Thus, statutes such as the Antiquities Act of 1906, the National Historic Preservation Act of 1966 (NHPA), and the Archeological Resources Protection Act of 1979 (ARPA) could be used to protect sacred places. These statutes, however, do not create a logical, comprehensive scheme for the management of cultural resources. Rather, they merely provide for consultation and information gathering. They invest discretion in a non-Indian instrumentality to make the protection decisions and confer no substantive rights on Native Americans to have their sacred sites preserved.¹⁴°

1. Antiquities Act

The Antiquities Act of 1906¹⁴¹ was the first cultural preservation statute. The Act invests the President with authority to protect landmarks and structures located on federal land.¹⁴² By executive order,

¹³eight. For further discussion of AIRFA, see Michaeisen, supra note 12, at 52-54 and Barsh, supra note 11, at 372-74.

¹³nine. “Cultural resources” is an inexact phrase; it has been defined as “the remains of human activity, both historic and prehistoric. Included with the term are: buildings and other structures, ruins, artifacts and other objects made by people, works of art, human remains, and sites and natural features that have been of importance in human events.” Suagee, supra note 9, at 16 (describing a definition from a Bureau of Indian Affairs manual). This definition is too limited. Suagee states that “cultural resources” could also describe more intangible elements of heritage such as language, myth, arts, skills, songs, and dance. Id. at 16 n.63. Since “culture” encompasses religion, “cultural resources” should include religious “resources.” A “resource” is “something that lies ready for use or can be drawn upon for aid; a supply of something to take care of a need.” WEBSTER’S NEW UNIVERSAL DICTIONARY OF THE ENGLISH LANGUAGE 1542 (1977). Resources need not be things past or buried. Under this definition, religion, beliefs, and rituals are resources. Furthermore, people may be resources. The limits of what constitutes a cultural resource are far-reaching, and may include human beings or intangible things such as myths. There would seem to be no difficulty in considering as cultural resources specific places which are sacred to a certain people.

¹⁴°. For a thorough analysis of the significance of the cultural resource preservation statutes and regulations in the context of sacred site preservation, see Suagee, supra note 9, at 17-47.


¹⁴². The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic and scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments . . .

the President may proclaim sites to be national monuments. Such sites are generally managed as part of the national park system.

Native American traditionalists can also seek to have a sacred place declared a national monument. As a practical matter, the National Park Service is desperately overburdened; unless a particular site has a determined, national constituency with power and influence in Washington, designation of a site as a national monument is difficult to achieve. Furthermore, the designation of a sacred site as a national monument may result in a new danger, tourism.

2. National Historic Preservation Act

The National Historic Preservation Act of 1966 (NHPA) details a system for listing historic landmarks and for providing grants to be used for preservation efforts. Through the NHPA, Indian tribes may seek funding for preservation of their "cultural heritage." Unfortunately, the program’s administration has proven largely ineffectual.

The main provisions of the NHPA require consultation and review when a proposed federal action may effect a historic site. As such, they provide procedural but not substantive protection for historic places.

3. Archaeological Resources Protection Act

The Archaeological Resources Protection Act of 1979 (ARPA) was enacted mainly because the Antiquities Act had proven ineffective in

143. Id.
146. Nor would designation as a national monument guarantee success. The criminal provisions in the Antiquities Act have proven inadequate to prevent desecration. Suagee, supra note 9, at 17 n.66. The Act has mostly been superseded by other statutes, in particular the Archaeological Resources Protection Act and the National Historic Preservation Act. Id. at 17-18.
149. 16 U.S.C. § 470(a).
150. Id. § 470a(d).
151. Id. § 470a(d)(3)(B).
152. See Suagee, supra note 9, at 20.
preventing the illegal excavation and removal of archaeological artifacts.\textsuperscript{155} Under ARPA, only persons with permits from the appropriate federal land manager can excavate on public lands.\textsuperscript{156} If the federal land manager receives an application to excavate at a sacred place, that land manager is directed to notify the appropriate tribal government.\textsuperscript{157}

The most troubling aspect of ARPA is its lack of provisions insuring confidentiality. The necessity of preserving the secrecy of some sites is one of the most contentious problems in sacred site preservation.\textsuperscript{158} A religion may require that a certain place be kept secret for any number of reasons. Only certain elders may be permitted to visit the site. Keeping the place secret may protect it from desecration.\textsuperscript{159} Strict taboos prevent many peoples from revealing the locations of their burial places to those outside the tribe or even the family.\textsuperscript{160} The United States legal system does not contain a mechanism to protect unidentified areas. Many of the federal protective schemes require actual inspection and evaluation of the site by people who in no way hold the place sacred.\textsuperscript{161} For some Native American traditionalists, this action is unthinkable. Therefore, they will probably not avail themselves of the possible protections because, from the traditionalist perspective, they provide no protection at all. Because judges "are likely to give greater weight to the sixth amendment requirements of confrontation and public trial" than they give to the privacy interests of Native Americans, those tribes who cooperate with the court or agency must be prepared to have their secrets revealed to the general public.\textsuperscript{162}

No provision in ARPA addresses this conflict. To protect the site, the federal land manager herself must know about its existence. Many traditionalist beliefs prohibit even such a circumscribed revelation. ARPA then allows the federal land manager to reveal the location of the

\textsuperscript{155} Suagee, \textit{supra} note 9, at 24.
\textsuperscript{156} 16 U.S.C. § 470ee(a).
\textsuperscript{157} If a permit issued under this section may result in harm to, or destruction of, any religious or cultural site, as determined by the Federal land manager, before issuing such permit, the Federal land manager shall notify any Indian tribe which may consider the site as having religious or cultural importance.
\textsuperscript{158} See Michaelsen, \textit{supra} note 12, at 70-72.
\textsuperscript{159} Id. at 70.
\textsuperscript{160} See generally Suagee, \textit{supra} note 9, at 52-54.
\textsuperscript{161} See, e.g., 43 C.F.R. § 7.33 (1991) (describing circumstances under which a federal land manager may determine that certain material remains are no longer of archeological interest); see also Secretary of the Interior’s Standards and Guidelines for Archeology and Historic Preservation, 48 Fed. Reg. 36,612 (1983) (providing advice on cultural resource management for state and federal agency personnel pursuant to the NHPA).
\textsuperscript{162} Barsh, \textit{supra} note 11, at 392-94.
site to others if she determines that disclosure will cause no additional harm. But, where the Native American religion requires that the location remain secret, any further disclosure of the location is harmful. Hence it appears that ARPA's provisions are ineffective in the preservation of sacred places. In fact, it can be argued that the Act merely preserves these sites for orderly desecration by archaeologists.

4. Summary of Impact of Cultural Resources Protection Statutes

The pervasive flaw in each of these statutory schemes is their objectification of the things to be protected. The statutes do not protect places for their present, immediate value to devotees of a particular Indian religion but for their value as sources of cultural artifacts. If a site does rise to the level of a cultural resource under the statutory mechanism, it is protected solely for its abstract importance to the larger society. The protections, if instituted, are administered by those without a religious interest in the places.

C. Environmental Protection Statutes

Most sacred site litigation has also involved claims under environmental statutes such as the National Environmental Policy Act and the Endangered Species Act (ESA). While these acts in no way purport to protect land for religious purposes, the goals of traditional Native Americans may nonetheless be advanced by the protections these statutes offer.

NEPA is a procedural statute, which requires federal agencies to collect information and to consider the environmental impact of any proposed major federal action. Interested parties are allowed to comment on these findings, and the responsible agency is required to acknowledge and respond to any comments adverse to the proposed project. The approach of NEPA has been employed in other contexts, particularly the NHPA. Also, the NEPA standards for a significant impact include

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164. Even worse, the statute requires disclosure of the site location upon request by the state governor. Id.
168. For a discussion of the ethical congruence between traditional Native American religious values and modern environmental values, see infra part IV.A.
169. 16 U.S.C. § 470f (requiring federal agencies, before funding or licensing an "undertaking," to consider the effect of that undertaking on property listed in the National Register
consideration of the impact on property that may be listed in the National Register of Historic Places.\footnote{172} While consideration of the impact does not require deference to the environmental interests in preserving the sacred site, the process draws attention to the desecration of sacred lands and may help mobilize political opposition.

Another statute, the Endangered Species Act, is unique among environmental and preservation statutes in providing a nearly absolute veto on behalf of the protected interest.\footnote{173} Its usefulness on behalf of Indian religion, however, is a matter of serendipity. Sacred lands are occasionally the critical habitats of endangered species. Should a sacred lake or mountain be the only remaining habitat for a species, and should that lake or mountain have been designated as critical habitat under the ESA, then any development which will threaten the species cannot take place. The practical effect is to prevent the most common forms of sacred land desecration — mining, timber harvesting, and other major alterations to the landscape.\footnote{174}

As with the cultural preservation statutes, the environmental protection statutes will not protect places based on their religious value to Native American worshippers. Rather, the protections available are justified by the broader environmental values of the citizenry of the United States. Nonetheless, although the religious importance of a place is not a criterion for protection, the environmental statutes can protect a sacred place.

\section*{D. The Trust Doctrine}

Native Americans could seek protection for sacred ground by invoking the trust obligation of the United States government.\footnote{175} The trust doctrine maintains that there is a fiduciary relationship between the United States and Indian tribes. The fiduciary duties of the United States arguably extend to the protection of Native American religious freedom and sacred grounds.\footnote{176}

\begin{itemize}
  \item of Historic Places); \textit{see also} 16 U.S.C. § 470-1 (NHPA policy statement specifically mentioning Indian sites).
  \item \footnote{172} 40 C.F.R. § 1508.27(b)(8) (1992).
  \item \footnote{173} “Each Federal agency shall . . . insure that any action authorized, funded, or carried out by such agency [agency action] . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . . .” 16 U.S.C. § 1536(a)(2) (1988).
  \item Only the “God Committee” can grant an exemption. 16 U.S.C. § 1536(e).
  \item \footnote{174} \textit{See}, \textit{e.g.}, \textit{supra} part I.B.
  \item \footnote{175} For a short history of the trust doctrine, and an argument for its applicability in the sacred site context, see Jeri Beth K. Ezra, Comment, \textit{The Trust Doctrine: A Source of Protection for Native American Sacred Sites}, 38 CATH. U. L. REV. 705 (1989).
  \item \footnote{176} \textit{Id.} at 707.
\end{itemize}
The trust doctrine originated in Chief Justice Marshall's opinion in *Cherokee Nation v. Georgia.* Marshall characterized the Cherokee as a "domestic dependent nation . . . in a state of pupilage . . ."

He stated that the relationship between the Indian tribes and the United States "resembles that of a ward to his guardian."

More recent cases have perpetuated this fiduciary relationship. The courts have held that the federal government is responsible for the protection of Native American interests. The trust doctrine has provided the legal basis for the construction of United States-Indian treaty rights in favor of the signatory tribes. The doctrine has been used by the courts as a basis to rule in favor of Indian claims to land, water, hunting, and fishing rights. Yet the courts are frequently inconsistent in their application of the trust doctrine. As a result of this inconsistency, the doctrine is of questionable practical value in a live dispute. Moreover, the paternalism from which the protections of the trust doctrine are derived can be viewed as disempowering and at odds with the notion of Native American sovereignty. Although any currently available solution to the sacred site desecration problem is likely to suggest some sense of *noblesse oblige,* the trust doctrine can be particularly offensive to Native American interests.

### E. Claims Based on Treaties or Native Sovereignty

Claims based on tribal sovereignty can take two forms. Indian peoples who have treaties with the United States can rely on treaty provisions to support arguments in favor of sacred site protection. Alternatively, tribes without treaties or with treaties that cannot be construed to protect sacred places can rely on international principles of human rights in seeking religious protection.

Formal treaties that cede tribal lands to the United States government may serve as springboards for claims to protect Indian sacred lands. The federal government has acquired ownership of many sacred

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177. 30 U.S. (5 Pet.) 1 (1831) (arguing that the "peculiar and cardinal" distinctions of the relationship between the Indians and the United States imposed special fiduciary obligations upon the federal government).
178. *Id.* at 17.
179. *Id.*
181. *See* Ezra, *supra* note 175, at 725.
182. *Id.* at 724-29.
183. *See id.* at 725.
184. The trust doctrine was argued unsuccessfully in Inupiat Community of Arctic Slope v. United States. 548 F. Supp. 182 (D. Alaska 1982), *aff'd,* 746 F.2d 570 (9th Cir. 1984).
sites through such formal treaties with Indian tribes. Many treaties re-
serve some rights in the ceded property for Native Americans.186 Al-
though these rights usually involve subsistence, some treaties can be
interpreted to reserve the right to worship on the ceded lands.187 Hence,
a tribe whose treaty with the United States reserved some rights in the
ceded lands could attempt to protect the sacred site through enforcement
of the terms of the treaty.

These United States-Indian treaties generally do not define the
rights retained by the tribe with any degree of specificity. To address the
inherent inequity of the parties' bargaining power, the courts have de-
veloped certain canons of treaty construction.188 For example, when treaty
language is susceptible to alternate meanings, the canons of construction
require the treaty to be read as the Indian signatory would read it.189
The canons do not, however, protect the Indians when the federal gov-
ernment is determined to eliminate treaty rights.190

These inconsistent results suggest that the United States legal sys-

tem is not an appropriate forum for resolution of Indian religious claims.
The United States government and the courts seem inherently biased
against Native American religion. Appeals to international principles of
human rights may offer a more optimal solution.191 Providing for Indian
religious freedom could be seen as a means of furthering Indian sover-
eignty.192 Since the United States government often does not seem to
accord much authority to the pronouncements of international tribunals
on what it perceives to be domestic issues193 — United States-Indian rel-
ations — appeals based on international principles of human rights may
be logically compelling but practically ineffectual.

F. Summary: Does the United States Legal System Offer Any
Potential Solutions to the Problem of Sacred Site Desecration?

The United States courts, administrative agencies, and Congress have all proven unable or unwilling to prevent the desecration of Indian

186. See, e.g., Treaty with the Blackfeet, Oct. 17, 1855, 11 Stat. 657, reprinted in 2 INDIAN
AFFAIRS, LAWS AND TREATIES 736 (Charles J. Kappler ed., 1904).
187. See id. art 3.
188. ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW 229 (3d. ed. 1988).
189. Id. (quoting United States v. Winans, 198 U.S. 371, 380-81 (1905)).
190. See Charles F. Wilkinson & John N. Volkman, Judicial Review of Indian Treaty Ab-
rogation: "As Long as Water Flows or Grass Grows upon the Earth" — How Long a Time is
That?, 63 CAL. L. REV. 601 (1975) (advocating an express legislative action test for treaty
abrogation).
191. See, e.g., Christopher P. Cline, Note, Pursuing Native American Rights in Interna-
192. See Barsh, supra note 11, at 411.
193. See Cline, supra note 191, at 629, 632 (describing techniques employed by the United
States to avoid enforcement of international human rights law).
sacred sites. To some degree, this failure is the result of ignorance and insensitivity. Perhaps greater knowledge of Indian religion and its value to our society as a whole will, in time, reverse this trend of disrespect and failure.

It may, however, "be more accurate to view infringements of Indian religious freedom as a function of an ongoing conflict between Indian cultures and the dominant culture." 194 If this is the case, prevention of the desecration of sacred ground will require affirmative steps to settle this conflict. Congress can assume an active role in settling the dispute by offering a comprehensive statute which explicitly protects sacred places. Congress is unlikely to act, however, unless it can be proven that such action would benefit not only Native Americans, but the nation as a whole. An analysis of the foreseeable benefits of statutory protection serves as a basis for constructing an appropriate statutory scheme. Part IV discusses the benefits to both Indian and non-Indian communities derived from integrating the beliefs associated with site-specific religions into the values of American society as a whole.

IV

INDIAN RELIGION AND SACRED SITES: INVALUABLE ASSETS TO AMERICAN SOCIETY

The issue of sacred site desecration extends beyond the special interests of Native Americans. Federal treatment of sacred grounds carries implications for the environment, species preservation, cultural diversity, and policies involving real property. The history of disregard for the protection of sacred lands suggests that the constituency for sacred sites must be expanded to include members of related constituencies. 195 Examining the potential constituency reveals the political limits of a scheme for statutory protection. The following analysis of possible consensus-building tactics helps to define these limits.

Indian defenders of sacred ground can count many environmental groups among their allies. 196 Section A of this part addresses the congruent ethical underpinnings supporting the Native American-environmentalist alliance. Native Americans seeking to expand support for sacred sites should follow the example of groups who muster support from the broader community of environmentalists for causes such as en-

194. Suagee, supra note 9, at 5.
195. Suagee calls for an "alternative formulation of the public interest" to improve Indian support vis-a-vis earth-disturbing uses of the public lands. Id. at 54-55. "[T]he key will likely be found in linkages with other interest groups, such as environmentalists, historic preservationists, and cultural resource professionals whose interests are compatible with those of traditional Indians." Id. at 55.
196. Trebbe Johnson, Native Intelligence: Environmentalists and Native Americans Team up to Protect the Earth, AMICUS, Winter 1993, at 11.
dangered species protection. Religious uses of Native American sacred lands similarly converge with the uses advocated by many environmental interests.

Section B discusses the part Indian religions play in the preservation of our cultural diversity. Section C addresses the overlap between Indian religious interests and the evolving patterns of land use in the United States.

A. Ethical Convergence of Site-Specific Religion and Environmentalism

Champions of site-specific Native American religions and champions of the environment generally seek the same protections for sacred places — exclusion of resource extraction that alters the ecosystem and explicit legal protection of values such as isolation and aesthetic appeal. However, despite the similarities in the goals of the two groups, they have on occasion been in direct conflict regarding issues such as economics and species preservation. Since environmentalists can be strong political allies and because environmental statutes can be helpful to Native Americans seeking to protect their sacred lands, an exploration of the similarities and differences in the motivations of Indian traditionalists and environmentalists is appropriate.

1. Traditional Indian Religious Ethics Compared with Anthropocentric and Utilitarian Environmental Ethics

While both Native Americans and environmentalists advocate the maintenance of certain places in a pristine state, their motivations differ considerably. The differences in the ethical underpinnings of the Native American and environmentalist philosophies are important. Similar goals alone are not sufficient to prevent the conflict that results from vastly different ethical motivations.

The rationale for environmental statutes frequently disregards the spiritual values of the environment to Native Americans. Instead, environmental statutes invariably find justification in the protection of

197. This paper does not adopt a view of monolithic environmentalism. Obviously, different environmental groups differ in their motivations and goals. For purposes of this note, an "environmentalist" is someone who wishes to preserve a place in a condition similar to that which existed prior to European settlement. This term also denotes organizations such as the Sierra Club, the Wilderness Society, the World Wildlife Fund, and the National Audobon Society.

human interests in the environment.\textsuperscript{199} Under the Endangered Species Act, species are preserved for their "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."\textsuperscript{200} In addition, the statute's legislative history emphasizes the human interests in species diversity.\textsuperscript{201} For example, species are preserved that may be valuable in the future for cancer research or other forms of animal testing.\textsuperscript{202} The Congressional rationale for the ESA is both anthropocentric and utilitarian. It rejects any rights resident in species or any intangible, spiritual benefits from species preservation.

In contrast, Native American religious ethics can be seen as de-emphasizing the importance of humans. Self-interest is involved: sacred sites are preserved because Native Americans believe that the lands instill power in their people and allow individuals to be cleansed. The primary reason that sacred sites must be preserved, however, is that the gods have instructed the people to preserve them.

A powerful example of conflict between practitioners of Indian religions and mainstream environmentalists surfaced in the context of endangered species protection. The Indian religious relationship with nonhuman animals can differ dramatically in motivation and action from that of the environmentalist. Some Indian religions dictate that humans must act as caretakers of the Earth. This responsibility includes the protection of all animals.\textsuperscript{203} Although this philosophy may not be antagonistic to the objectives of the ESA, the goal of the ESA — preservation of species diversity\textsuperscript{204} — is not found in traditional Indian belief systems. While non-human animals may be sisters and brothers, or respected elders and teachers,\textsuperscript{205} some animals are killed for religious purposes.\textsuperscript{206} Native Americans may, for example, express the special relationship with animals in ceremonial feasts and by using eagle feathers as "symbols of

\begin{footnotes}
\item[199.] See, e.g., National Environmental Policy Act, 42 U.S.C. § 4331(a) (1988) ("The Congress . . . recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man . . . .'').
\item[201.] Historically humans have demonstrated interest in preserving species which may become valuable or vital resources. See Hearings on Endangered Species Before Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 93d Cong., 1st Sess. 309 (1973) (discussing potential and past value of wild plants).
\item[202.] Id.
\item[203.] Environmental statutes generally are justified for their protection of human interests, not the interests of the environment as a whole. See, e.g., NEPA, 42 U.S.C. § 4331(a) (1988).
\item[204.] See Suagee, supra note 9, at 10-11.
\item[205.] See Barsh, supra note 11, at 366.
\item[206.] Id. at 385 ("[T]he kinship among humans, animals and plants is often expressed in ceremonial feasts of deer, moose, or salmon.").
\end{footnotes}
power and authority." Thus, some Indian religions require that animals be killed for the benefit of the people and of the animals themselves. Where the animals required by Indians for their rituals are protected under the ESA, the conflict is clear.

This conflict was adjudicated by the Supreme Court in *United States v. Dion.* In that case, Indians unsuccessfully argued that they should be allowed to kill eagles for ceremonial purposes. A number of environmental organizations filed amicus briefs against the claims of the Native Americans arguing that the Court should not allow religious exemptions to the ESA and the Bald Eagle Protection Act. The Court held that, by enacting the Eagle Protection Act, Congress overrode any rights to kill bald eagles that the Indians may have been granted under an 1858 treaty.

Conflicts over the killing of protected species illustrate the potential for divergence between Native American traditionalists and environmentalists. In the context of sacred site preservation, however, the potential for conflict is considerably diminished since both Indian traditionalists and environmentalists generally strive to keep the land undeveloped. Even so, the seemingly natural alliance between site-specific religion and environmental protection could be sundered by a difference of opinion over the form which protection should take or over the appropriate uses for such places.

The most fundamental difference of opinion would probably be over control. Most major environmental groups would be uncomfortable allowing Native American traditionalists to determine unilaterally how a site may be used, even where the basis for preservation of the site is the preservation of religious uses. Similarly, Indian traditionalists would be dissatisfied having little or no input into the uses approved for the land should environmentalists be the decision makers.

Moreover, even if these potential conflicts could be resolved, it is not certain that an alliance with environmentalists would serve Native Americans seeking to protect their sacred lands. Native American free exercise claimants have arguably suffered in the past when they have been viewed by the courts as a front for environmentalists. In *Sequoyah,* the free exercise claim was made only after environmentalists failed to prevent construction of the Tellico Dam under the ESA. The court's

207. Id.
208. See HULTKRANTZ, supra note 5, at 59, 63.
210. Id.
211. Id. at 746.
212. For example, an Indian people may believe that the site should be forbidden to others during ceremonies, while environmentalists may maintain that the area should be open at all times to wilderness users.
213. See supra part II.A.
holding that the flooding of Chota would not infringe upon beliefs and practices central to the Cherokee religion\(^2\)\(^1\)\(^4\) may have been influenced by a perception of collusion between the Indian claimants and environmentalists. If the court perceived the issue to be one of ecology rather than religion, it may have believed that the environmental interest groups had no business manipulating the First Amendment to suit their purposes. Similarly, in *Lyng*, Justice O'Connor expressed suspicion toward the Indians' claim that practice of their religion required privacy and isolation at Chimney Rock while, at the same time, they offered no objection to the use of the land for recreation.\(^2\)\(^1\)\(^5\)

Hence, the potential for perceived collusion indicates that the use of environmental legal mechanisms for Native American religious purposes may undermine the legal cogency of the religious claims. As a matter of ethics, moreover, in the view of those who prize the purity of their methods and motivations, employing irreligious means to accomplish spiritual ends is a pretense that subverts the religion or that unacceptably breaches integrity.\(^2\)\(^1\)\(^6\) Nevertheless, this potential for ethical conflict may be alleviated by two considerations. First, Native American religion is largely compatible with environmentalism. In many ways, traditional Native Americans are environmentalists.\(^2\)\(^1\)\(^7\)

216. There is no question of political legitimacy. As a matter of politics, "the art of the possible," Indian traditionalists would be unwise not to ally themselves with the environmental movement and employ environmental legal mechanisms whenever possible.
217. This viewpoint is not without ardent detractors. The most interesting attack on the notion that Native Americans are environmentalists by nature was levied by Professor Calvin Martin. *Calvin Martin, Keeper of the Game* 157-88 (1978). Studying the Indian participation in the slaughter of animals for the fur trade, Martin argues that Indians engaged in retribution against animals, in part because they blamed the animals for diseases brought to America by the Europeans. *Id.* at 107-09, 129-30. Martin observes that "the Eastern Canadian hunters were not conservationist-minded during the heyday of the fur trade, that indeed they were baldly exploitative, because their traditional incentives to conserve wildlife were rendered inoperative." *Id.* at 185. Martin distinguishes between the Indian ideology of land use and the practical results of that ideology. Contrasting the Indian "war" against fur-bearing mammals with other practices that benefitted the ecosystem, Martin concludes that the land use ideology must not be inherently conservationist if it could have such different practical outcomes. *Id.* at 186.

Martin's conclusions are confusing and flawed. Indians became ecologically destructive only after Europeans had irreversibly altered their ecosystem, primarily by subjecting Indians to fatal diseases. Martin himself suggests that prior to the arrival of Europeans, Indians lived in a benevolent stasis with the environment. *Id.* at 18, 35-36. Martin states:

Land-use was . . . not so much a moral issue for the Indian as it was technique animated by spiritual-social obligations and understandings. Ethics were invoked only when either part broke regulations . . . .

There is nothing here to suggest morality; certainly there is nothing to suggest the presumptuous, condescending extension of ethics from man-to-man to man-to-land, as the Leopoldian land ethic implies. Nature, for virtually all North American Indians, was sensate, animate, and capable of aggressive behavior toward mankind. *Id.* at 187. Martin draws another conclusion from the same point, that Indians view nature as
We believe that the Creator made everything beautiful in his time. We believe that we must be good stewards of the Creator and not destroy nor mar His works of creation . . . so that the voices of all living things can be heard and continue to live and dwell among us.\textsuperscript{218}

To the extent that environmental legal tools exist to preserve ecological balance, they facilitate Indian religious purposes. Second, the environmental movement, while routinely relying on scientific and economic arguments in propounding legal and social reforms, is not without its spiritual component. The next part clarifies that, in addition to sharing similar goals, Indian religions and environmental protection do share some underlying motivations.

2. \textit{Spiritual Motivations Within the Environmental Movement}

Much of the writing in the environmental canon is infused with seemingly religious intensity. While environmental protection is sought for the benefit of secular humankind, the defenders of the environment themselves are often as motivated by the spiritual as by the temporal.

Two icons of American environmentalism, Henry David Thoreau and John Muir, approached nature through their own thoughtful spirituality and passionate religion. Thoreau, criticizing the American objectification of nature in the last century, wrote, "The earth I tread on is not a dead, inert mass; it is a body, has a spirit, is organic and fluid to the influence of its spirit."\textsuperscript{219} Thoreau viewed the world holistically and, like many Native Americans, he viewed animals as kinfolk.\textsuperscript{220}

John Muir viewed the world similarly: nature was connected with and animated by God.\textsuperscript{221}

When we try to pick out anything by itself, we find that it is bound fast by a thousand invisible cords that cannot be broken to everything in the universe. I fancy I hear a heart beating in every crystal, in every grain of living and man as inextricably interrelated to nature. However, this is a basis for regarding the Indian way as a source of environmental ethics. Indians view all aspects of nature as related to them. We are always more inclined to love and protect our kinfolk, despite Martin's interesting observation that European microbes once provoked Indians to mistakenly kill their animal brothers and sisters.

\textsuperscript{218} Barsh, \textit{supra} note 11, at 364 (quoting \textsc{Chief John Snow, These Mountains Are Our Sacred Places} 145 (1977)).


\textsuperscript{220} Nash, \textit{supra} note 219, at 37. "[T]he woods [are] not tenantless, but choke-full of honest spirits as good as myself any day." \textsc{Henry David Thoreau, The Maine Woods} 181 (Joseph J. Moldenhauer ed., 1972).

In the midst of a gentle rain while these thoughts prevailed, I was suddenly sensible of such sweet and beneficient society in Nature, in the very pattering of the drops, and in every sound and sight around my house, an infinite and unaccountable friendliness all at once like an atmosphere sustaining me. . . .

\textsc{Henry David Thoreau, Walden, in Walden and Other Writings} 202-03 (Joseph W. Krutch ed., 1962).

\textsuperscript{221} See Nash, \textit{supra} note 219, at 39-40.
sand and see a wise plan in the making and shaping and placing of every one of them. All seems to be dancing in time to divine music.\textsuperscript{222}

Furthermore, Muir worshipped nature as a manifestation of God.\textsuperscript{223} Nature was as inviolate for John Muir as it is for Indian traditionalists.

Both Native American religion and the environmentalism of Thoreau and Muir are permeated with the notion that humans must be the caretakers of the Earth.\textsuperscript{224} Today, the ethics of environmental protection include Christian stewardship which charges humans to protect the world which God has placed in the care of humans.\textsuperscript{225} A similar sense of responsibility may be observed in the relationship of some Native Americans to nature.\textsuperscript{226} Leaders of the Hopi believed that "Hopis are the caretakers for all the world . . . ."\textsuperscript{227} The Hopi believe that by following instructions from the Great Spirit in caring for sacred lands, they keep the entire world in balance.\textsuperscript{228}

The convergence of the goals of Native Americans and environmentalists suggests the possibility of building a legitimate consensus among the two groups. While there would remain areas of potential conflict, the need for a powerful constituency to influence federal action indicates that

\textsuperscript{222} The statement of John Muir is quoted in \textit{Stephen Fox, American Conservation Movement} 291 (1981).

\textsuperscript{223} \textit{Nash, supra} note 219, at 41 ("Nature was his church, the place where he perceived and worshipped God, and from that standpoint protection of nature became a holy war.").

\textsuperscript{224} See \textit{Standing Bear, My Indian Boyhood} 13 (1931) for an Indian perspective:

\textit{Life for the Indian is one of harmony with Nature and the things which surround him. The Indian tried to fit in with Nature and to understand, not to conquer and to rule. We were rewarded by learning much that the white man will never know. Life was a glorious thing, for great contentment comes with the feeling of friendship and kinship with the living things about you. quoted in Barsh, supra note 11, at 366.}

\textit{Allan R. Brockway provides an environmentalist perspective:}

\textit{A theology of the natural world . . . asserts the intrinsic worth of the non-human world. Such a theology declares that the non-human world has just as much right to its internal integrity as does the human world, that human beings transgress their divine authority when they destroy or fundamentally alter the rocks, the trees, the air, the water, the soil, the animals, just as they do when they murder human beings. quoted in \textit{Nash, supra} note 219, at 87.}

\textsuperscript{225} \textit{See generally Nash, supra} note 219, at 87-120.

\textsuperscript{226} \textit{[The Indian]} concern for the natural world can be seen as one of the most significant common attributes of the different tribal religions — they share the realization that human existence is not possible without the natural environment, that the survival of human beings depends upon the survival of other living things. In the belief systems of the tribal religions, the earth is commonly conceived of as a living being. . . . Many rituals and ceremonies are concerned with giving thanks for the food and other subsistence needs that Mother Earth provides to those who hunt, fish, gather, and/or raise crops. There is an element of stewardship in the performance of such rituals because they are seen as necessary to ensure that the plants, animals, birds, and fish will continue to flourish and make themselves available for human needs.

\textit{Suagee, supra} note 9, at 10. \textit{See also Brown, supra} note 5, at 40.

\textsuperscript{227} 

\textsuperscript{228} \textit{Id.}
an alliance would benefit both groups and most particularly Native Americans.

B. Every Traditional Indian Religion Is a Critical Component of Our Cultural Diversity

The myriad of traditional Indian religions offer different ways to understand and relate to the land. Scientists consider species diversity necessary for a healthy ecosystem. Similarly, cultural diversity is salubrious for our society. An Indian religion could benefit an individual of any background in a search for spiritual renewal. It would be not only impious but unwise to allow the disappearance of these religions, any one of which might teach us a better way to live with nature, comfort us in times of trouble, help us to make sense of our increasingly confusing and alienating society, or give us a way to meld ourselves into a society without losing our individual identity. Hence, preserving diversity presents a compelling argument for sacred site protection. The elimination of sacred sites is a step away from diversity and toward a homogeneous society.

The foregoing argument is not unassailable. Just as one can argue that not every species merits preservation, perhaps not every religion should be preserved. The constituency of a particular religion may be too small or the costs to the larger society may be too great to warrant preservation. A sacred site, like an endangered species, would benefit from a vocal or powerful constituency willing to advocate its protection. Many Native American religious beliefs, in addition to maintaining their place as part of a diverse American culture, must capture the attention and imagination of a larger non-Indian constituency. Diversity is, in the end, an abstract idea. Premising the protection of sacred sites on arguments in favor of diversity will prove more compelling if supported by non-Indians as well as Indians.

229. There are counterarguments to a plea for cultural diversity. It could be said that a society needs cohesion and common goals more than it needs accommodation of contrary or exotic creeds. Our constitutional system of government is premised on a society that has some common goals, but these goals are determined through the dynamic tension of the divergent interests which comprise our nation. For those people, such as Indian traditionalists, who are outside the dominant American culture, there are two possible paths toward reconciliation with the dominant culture — assimilation with the mainstream or self-identification with a distinct group separate from the dominant culture. Under our constitutional scheme, both paths should be considered valid. Kenneth L. Karst, Paths to Belonging: The Constitution and Cultural Identity, 64 N.C. L. REV. 303 (1986).

230. BROWN, supra note 5, at 47-49.
C. Linking the Spiritual and the Temporal: Questing for the Contemplative Experience

If Indian religions can help us establish a better relationship with the land, they may also help us find better ways to use the land. While the extraction of natural resources from public lands will continue, our society has already recognized that at least some public lands should be preserved in their natural states. To this end, national parks have been created in some areas considered particularly valuable for their unique natural conditions.231 Traditional Indian religions not only require that land be saved from the depredations of the bulldozer and drill,232 but also illustrate ways in which to cherish the lands we have set aside. These requirements are concentric with the ethical underpinnings of the environmental movement and may be drawn upon to build a consensus among Indian and non-Indian communities. They also suggest the contours of a broader statutory scheme for sacred site protection which could gain support from both of these groups.

Even after the decision to preserve land has been made, conflicting motivations for preservation can result in further dissatisfaction. If the environmental impetus for preservation of a sacred site is itself partly spiritual, as was the impetus which drove John Muir, then an environmental-Native American alliance is likely to protect land in ways that safeguard Native American religions. Conversely, if environmental protection is not driven by a spiritual concern for nature, preservation of sacred sites could be a temporary victory. Sacred sites might share the problems faced by national parks where the land is preserved, but used in ways antithetical to the reasons for its preservation.233

The difficulty of preserving places for religious purposes is exacerbated by the aforementioned secular stance of United States policy. High country may be protected, but only with reference to a secular purpose.234 For example, a sacred site might be removed from the immediate threat of mineral development through designation as a national monument. The site would then be managed by the National Park Service. Park Service management, impressed by the site's aesthetic appeal and popularity with sightseers, might develop an access and service infrastructure, encouraging rather than limiting visitation. Realistically, for a

231. See SAX, supra note 59, at 5-6.
232. Infusing spiritual protection for land into the law may catalyze the evolution of the dominant society's notions of land. Americans are coming to realize that land is a scarce resource. Similarly, American courts and legislatures are increasingly recognizing the public interest in water resources. See JOSEPH L. SAX, ET AL., LEGAL CONTROL OF WATER RESOURCES 513-94 (1991).
233. See SAX, supra note 59, at 13.
234. The clearest legal articulation of the U.S. passion for secularism is, of course, the Establishment Clause. See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").
sacred site to be protected in a spiritually satisfactory way, some middle ground must be found.

Professor Joseph Sax has described an ethic grounded in temporal concerns which supports Native American uses of sacred places. Sax invokes Frederick Law Olmstead’s argument that parks should be managed to exercise the “contemplative faculty” of citizens. Providing for the contemplative experience liberates and elevates the ordinary citizen in a just and democratic society. The liberation and rejuvenation of the ordinary person is accomplished by providing sites that engage the visitor with an “intensity of experience which includes full involvement of the senses and mind.” Some sites, through their awe-inspiring beauty or isolation, provide this desired intensity of experience better than others. Man-made alterations to the landscape, disturbance of the earth, or crowding of the site may detract from the experience that people may be seeking.

The uses proposed by Professor Sax resemble the uses advocated by traditional Native Americans. For example, a vision quest by a Native American is a “meditative” experience which requires isolation in a physically engaging and challenging setting. As with the contemplative experience described by Sax, the proper setting is crucial to the success of the quest. Ultimately, both types of experience are recreation, in the fullest sense of the word. They both refresh and restore the individual and benefit the community at large.

To the extent that Indian religions and the values and concerns that drive the protection of the environment converge, the arguments for protecting sacred sites are strengthened. Protection of the environment enjoys broad-based support in our society. Yet, while founded on a deeper spiritual appreciation for the biosphere, the basis for environmental activism frequently lies with secular concerns. Hence, the potential support of environmentalists for the protection of sacred lands is not limitless.

Part V proposes a statutory scheme for protection of sacred lands which attempts to accommodate the differing interests of Native Americans and environmentalists.

235. SAX, supra note 59, at 20-21.
236. See id. at 29.
237. “[A]n undeveloped forest is more likely to engage our concentration than the cornfield we see everyday.” Id. Nature has “a peculiar power to stimulate us to reflectiveness by its awesomeness and grandeur . . . .” Id. at 46.
238. Id. at 31.
239. BROWN, supra note 5, at 78-79.
SACRED SITE PROTECTION IN A SECULAR SOCIETY

Native Americans have been deprived of most of their land and sovereignty. The economic basis for their way of life has been destroyed. Their religion and culture have been actively attacked. While the United States has discarded its explicit policy of destroying and assimilating the Native American peoples, actions speak louder than words: genocide and assimilation have not ended. As indicated in part I, Indian sacred lands are still being desecrated and their spiritual value destroyed. As described in parts II and III, current constitutional and statutory protections have proven inadequate. Part IV determined the potential for a broader constituency to advocate the preservation of sacred sites. This part advocates change. It includes a proposal and an argument for how the legal system can be changed so that it protects sacred places.

We have seen that in its present composition, the Supreme Court offers little hope for sacred site litigants, that no existing regulatory scheme vests any religious rights in Indian traditionalists, and that federal agencies are at best indifferent and at worst hostile to Indian concerns about public lands. Most commentators recommend Congressional action as the solution. Hence, the issue presented is what form a statutory solution should take. Given the need for broad political support, the form of the solution must take into account the interests of all members of a potential constituency.

A statute dedicated to protecting sacred places for religious purposes must address two primary questions. First, what places are sacred? To answer this question one must decide what is meant by sacred. To the traditional Native American, all land is sacred to some degree. It must be decided where the line should be drawn between sacred and prof-

240. See infra Appendix for the proposed statute.
241. Advocating a statutory solution is partly a rejection of a solution based on U.S. recognition of Indian sovereignty. See supra part III.E. From the Indian standpoint, complete sovereignty over sacred ground may be the most desirable outcome. Some would agree that the ultimate cause of the debilitation in Indian religion is the destruction of Indian sovereignty. See, e.g., Suagee, supra note 9, at 12-15. "T]raditional Native Americans need more than tolerance. They need a homeland." Barsh, supra note 11, at 411. A sacred site protection program alone will not save Indian religion without some "irrevocable national recognition of the perpetual right of tribes to exist as tribes." Suagee, supra note 9, at 15. The focus of the proposed program is to protect sacred sites in a manner which emphasizes the value of those sacred places to the dominant society. Realistically, both the value of Indian culture to the dominant society and Indian claims of right must be considered if any change is to take place.
242. See Moore, supra note 65, at 81.
243. See, e.g., id. at 98; Byler, supra note 41, at 431-35; Noonan, supra note 102, at 1150-51. These commentators all recommend that AIRFA be given "teeth." The Native American Rights Fund has proposed amendments to AIRFA that address, among other things, protection of sacred sites. Native American Rights Fund, Executive Summary of Proposed Amendments to American Religious Freedom Act of 1978 — Coalition Draft Bill (Dec. 9, 1992) (Boulder, Colo.).
fane ground. Second, how should a place be managed once it is declared sacred? Permissible uses of the site must be determined. An agency must be chosen to receive guidance from Native Americans traditionalists, among others, and to decide appropriate uses for protected sites and to arbitrate between competing uses.

A. Designation of Sacred Sites

A scheme for designation of sacred sites requires a substantive basis for making the designation determinations and a procedural mechanism for designation.

1. Substantive Basis for Designation

Sacred sites should be protected only if they are, in fact, held sacred. A statutory solution to the problem of sacred site protection must establish a definition of sacred land.

a. Definition of Sacred Land

Sacred or holy can be defined as that which is dedicated to religious purposes, is entitled to veneration, and should be secure against violation or infringement. Under this definition, land clearly is sacred to indigenous Americans. Considering the interconnectedness of the spiritual with the material for Indian cultures, one could say that all land is sacred. Practically speaking, all land, or even all remaining relatively unspoiled land, cannot be set aside for Indian religious purposes. Even

244. A related question with which the courts and legal scholars have wrestled repeatedly is how one defines religion. See NOWAK & ROTUNDA, supra note 118, at 1212-14. Most legal formulations are narrower than those of scholars of religion. Paul Tillich considered religion to focus on “ultimate concerns.” PAUL TILLICH, THE DYNAMICS OF FAITH 1-4 (1957). Emile Durkheim defined religion as “a unified system of beliefs and practices relative to sacred things, that is to say, things set apart and forbidden — beliefs and practices which unite into one single moral community called a Church, all those who adhere to them.” EMILE DURKHEIM, ELEMENTARY FORMS OF THE RELIGIOUS LIFE 47 (1915). Tillich’s definition comes too much from a Christian, transcendental standpoint to work adequately for Indian religions. Indian religions are characterized by immanence, see supra note 11, and would find “ultimate concerns” all around them in everyday life. Durkheim’s formulation also might functionally exclude Indians, depending on how the qualifier “unified” is interpreted. A more satisfactory definition is offered by Christopher Vecsey. Religion is “beliefs in, attitudes toward, and relations with the ultimate sources of existence.” VECSEY, supra note 11, at 27. Vecsey’s definition is better for two reasons. First, it does not distinguish between transcendent or immanent faiths. It does not focus undue attention on otherworldly or supernatural concerns. Second, Indian religion would fall squarely within the definition. This functional justification for selecting Vecsey’s formulation suggests another way to define religion. Despite generations of antagonism towards Indians, the dominant American society does recognize that Indians do have religions (rather than mere superstition or folklore). Religion, of some kind pervades every society. Every Indian people have, or at least had, a religion. Given the nature of most Indian religions, every Indian people probably have, or at least had, sacred places.

245. See supra notes 16-38 and accompanying text.

246. See supra notes 16-25 and accompanying text.
so, a solution is possible because, while the entire earth is sacred, some places are more sacred than others.247 Thus, the question is narrowed: how does one decide which sacred places warrant absolute protection against desecration?

Narrowing the scope of the term “sacred land” requires summarizing the purposes of protection. Protection maintains cultural diversity by preserving free exercise of traditional Indian religions. At a minimum, sacred sites essential to the continued viability of religions must be designated. The goal of cultural diversity, however, suggests more than mere survival of religions. Rather it stresses the importance of robust, vital traditionalism. The process by which sacred sites are selected should avoid sorting through Indian “liturgy” or making determinations of “centrality,” as both exercises are relatively meaningless in the context of Indian religion.248

One approach suggests that the designated sites should be those which are integral to the recurring, sincere practices and beliefs of Indian traditionalists. The “integrity” standard was conceived by Deward E. Walker, Jr.249 In contrast to the centrality standard, the integrity standard strives to protect sacred places before a religion is close to extinction. Integrity is “consistent with scholarly standards concerning what is essential for the practice of American Indian religions.”250

Requiring integrity, rather than necessity, for site protection is more sensible because neither devotees nor scholars analyze particular rituals in terms of their relative necessity to religious practices. From the standpoint of one adherent to the religion, all rituals are necessary. Unnecessary rituals would not be performed.251 Instead, one should ask whether meaningful alternatives exist.252 This factual inquiry would avoid the ineffectual, pseudo-theological wrangling over “centrality” and “indispensability” that has characterized the judicial battle.253 Politicians, regulatory agencies, and judges are generally inept anthropologists and theologians.

247. “The whole earth is sacred because it is the source of life. There are also designated points on the landscape where renewal and communication with spiritual forces can be achieved.” Barsh, supra note 11, at 367.
248. See supra text accompanying note 7.
249. See Walker, supra note 5, at 112-14.
250. Id. at 112.
251. Id. at 113.
252. Other factors include whether “the affected practice [is] held by members . . . to be an essential part of their religion” and whether “removal or alteration of the affected practice would impair or prevent other essential practices . . . .” Id.
253. Id. This type of analysis would avoid Justice O'Connor's concerns, in Lyng, that courts are not equipped to evaluate the sincerity of beliefs or to weigh adverse effects against the indispensability of religious practices. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 449-50 (1988). Rather than evaluating the sincerity of believers or debating theology, the courts would evaluate expert testimony and determine whether alternatives to rituals at specific sites are presently available.
If an integrity standard is applied, the regulatory or judicial evaluation of whether a site should be designated sacred might proceed as follows: Suppose Indian traditionalists petition to designate a particular densely forested mountain, isolated deep inside a National Forest. The claimants state that the area is a vision quest site and a place where sacred plants are gathered. The agency or reviewing court determines whether alternative sites exist, relying on information submitted by petitioners and by appointed scholars. For the purposes of this example, the scholars agree that this site is used for its isolation and the availability of certain species of plants. The agency or court then determines whether there is another similarly isolated place, used by these practitioners, which offers these plants. If alternative locations do not exist — perhaps all other nearby high ground has been logged or is in close proximity to roadways — then this site should be designated. If many similarly unspoiled places exist — perhaps several others nearby are designated as wilderness and would be equally desirable as sites for vision quests — then designation should not occur.254

As another example, suppose the nominated site is again an isolated, sacred mountain. This mountain contains a cave from which the people are said to have issued from the underworld. Leaders of the people must approach this cave to speak with the spirits and to acquire wisdom and power, without which the people will perish. In this case, the scholars concur that this mountain, considered the people’s place of origin and the home of their gods, cannot be replaced. No alternative location exists for these rituals. The site must be designated.

This methodology is simple: traditionalists nominate their sacred sites, scholars are consulted to concur or differ, and agencies and courts decide. The reliance on anthropologists, however, raises potential problems. Anthropologists are usually nonbelievers. This detachment troubles Native American traditionalists who question the right of a stranger to determine whether a particular mountain is sacred enough to be preserved. However, while the consultants would be instrumentalities of the dominant society, academic “experts” in Indian religion have not always proven unsympathetic or hostile to Indian claims.255 The Theodoratus Report,256 a study commissioned by the Forest Service prior to deciding to build the G-O Road (which culminated in Lyng), provides a good example: the agency’s own expert strongly recommended that certain sites be protected.257

254. The reverse cumulative impacts of nondesignation should be considered. A site may be one of several available, but each individual petition should not be denied because there are other possible sites. Some must be protected.

255. Of course, this may change. Once a sacred site protection scheme is in place, and money is at stake, scholarly disagreement may increase.

256. Theodoratus, supra note 34.

257. Lyng, 485 U.S. at 462-63 (Brennan, J., dissenting).
b. Drawing the Physical Boundaries of Sacred Sites

Congress can list a site as sacred or an agency can grant a petition to that effect. Specification of the metes and bounds of a sacred site, however, should be delegated to the federal land manager. The goal of administrative regulation must be setting the boundaries of a designated site in a way which does not vitiate its protection.

Regulation is much more difficult than designation. Scholars may agree on what sites are sacred, but scholars are not surveyors. The notion of physical boundaries for the sacred area overwhelms the believer and challenges the protector.\textsuperscript{258}

At a minimum, the boundaries must encompass the sacred site. In delegating responsibility to establish boundaries, Congress should require that designated sites include sufficient land to accomplish the purposes of the designation. For example, an isolated mountain where Native Americans bury their ancestors must include all existing burial land and plenty of surrounding space to prevent the intrusion of noise and to allow for future burial.

2. Designation Procedures

Identification of the sites, by a committed United State Government, would seem to be an easy task. There are a limited number of Indian tribes. The United States recognizes less than 300 of approximately 400 tribes which are said to exist,\textsuperscript{259} each of which could be asked to list its sacred sites. Leaders, elders, and scholars, Indian and non-Indian, could sort the sites and exclude those not meriting special protection under the substantive law. The remaining sites would then be declared "protected."

In contrast, creating and passing legislation will not be easy. The greatest resistance to a sacred site protection statute will most likely come from parties with strong economic interests in the public lands: companies that extract natural resources from the land as well as state and local governments that rely on income derived from public lands. These interests most likely would fight hard against a sacred site protection statute. Further, the interests would display particular hostility if such a statute provided for designation of sacred sites by Indians and confirmation by anthropologists. Congress can be proprietary about federal lands and could easily be persuaded to reject the statute.

\textsuperscript{258} See Michaelsen, \textit{supra} note 121, at 116-17, 132-33 (suggesting that the indomitable Roman god of boundaries, Terminus, is a proper symbol for United States law and that Western law is about bulwarks and staking claims, while Indians see things in terms of gift and exchange).

\textsuperscript{259} STEPHEN L. PEVAR, \textsc{The Rights of Indians and Tribes}, 14 (2d ed. 1992) (citing \textsc{American Indian Policy Review Comm'N., Final Rept. 461 (1977)}).
Sacred site identification by Native Americans also raises the problem of selecting legitimate designators. The traditional spiritual leaders of an Indian people are often not the leaders of the tribal government. Designation by tribal governments could produce selections which have little to do with Indian religion. Simply ignoring the tribal governments and turning to Indian traditionalists leads to similar problems: there must be an appropriate mechanism for selecting the traditionalists who would nominate the sites.

Ultimately, the federal government must employ some mechanism to consider the various interests of tribal governments, Indian traditionalists, non-Indians, and secular actors such as local governments. Congressional specification of the sacred sites designated for protection would resolve existing disputes and would provide a legislative history to guide future designation of sites. A fairly comprehensive initial list in the statute itself could avoid lengthy, costly administrative and judicial battles. Chimney Rock and Bear Butte, for example, could be protected by Congressional designation, thus avoiding protracted wrangling and greatly limiting the role of the Supreme Court in sacred site preservation decisions.

However, for all the advantages of legislative designation, it is unlikely that Congress would be able to designate all sacred sites. Some mechanism must be included for adding to the list. Three such mechanisms are possible: First, akin to the establishment of national parks, Congress could subsequently designate other sites legislatively. Second, similar to the designation of national monuments under the Antiquities Act, the President could add sacred sites to the list by executive order. Finally, Congress could delegate its authority to expand the list to an administrative agency. Some combination of all three may be desirable, and that is the approach advocated in this Comment.

**B. Management and Permissible Uses of Sacred Sites**

Protection of sacred sites also requires a scheme for determining the appropriate uses of the designated lands. First, Congress must vest responsibility for managing sacred sites in some agency or agencies. Second, those agencies must establish permissible use standards that will preserve the sacred nature of the land.

260. This is not surprising. The present tribal governments were forced on Indian peoples and rarely reflect the traditional patterns of tribal leadership and decision making. Tom Holm, *The Crisis in Tribal Government*, in *American Indian Policy in the Twentieth Century* 135, 136 (1985).

261. See infra Appendix.
1. Sacred Site Management

Since sacred sites are likely to lie entirely within the boundaries of national parks or national forests, there are many advantages to vesting authority for managing sacred sites in the federal land manager already responsible for the larger division of public land. Like wilderness designation, sacred site protection could be an overlay on the public lands. For example, if the sacred site is located within a national forest, ultimate management responsibility could remain with the forest's superintendent. Vesting such authority in BLM, the Forest Service, the Park Service, and other agencies would be expedient. In such a scheme, sacred site protection would take advantage of the existing land management infrastructure and Congress could avoid creating a new agency.

Interagency behavior suggests a second reason to vest designation authority in existing managers. The federal government and the agencies managing the public lands can be somewhat proprietary over their lands. A national forest superintendent may not welcome enclaves within her forest which must be managed pursuant to specific guidelines; she is even less likely to welcome such enclaves if they are managed by another agency with whom she must coordinate and compete. Inevitably, the interests of the superintendent will occasionally conflict with those of the outside agency.

Vesting ultimate authority for sacred sites in a federal land manager would also avoid the entanglement problem raised by Larkin v. Grendel's Den, Inc. While one would hope that the federal government would manage its lands in a way that accommodates Native American religions, such management would require the surrender of some control over the sacred lands to the government agency. Vesting complete management authority or veto power in an Indian religious organization, however, would most likely be an unconstitutional delegation of authority under the Establishment Clause doctrine. Structuring sacred site management as an overlay on existing land management programs, similar to wilderness designation, would avoid this problem.

A sacred site management system similar to that used for wilderness protection is consistent with the notion that public lands should have multiple uses. A statute should state that preserving sacred places furthers the goal of keeping public land available for a multiplicity of federal uses. If sacred sites are desecrated, then one potential use of the sacred lands, the Indian traditionalist religious use, becomes forever impossible. Reliance on existing agencies is not without its potential problems. Federal land managers have proven relatively unsympathetic to Indian reli-

262. 459 U.S. 116 (1982); see supra notes 123-24 and accompanying text.
263. 459 U.S. at 126.
Perhaps the various agencies simply feel that AIRFA and the federal land management statutes do not authorize generous, substantive agency consideration of Indian religious claims. If this is the case, an explicit statute such as the one envisioned here could dramatically change agency behavior. Agency resistance to Indian claims, however, may not be overcome by a new statute. Unlike mining companies or large environmental organizations, Indian traditionalists do not represent a powerful constituency in the eyes of the federal land management agencies. Presumably, explicit statutory protection will give Indian traditionalists the power to overcome recalcitrant agencies, particularly if vigorous judicial review is available.

2. Permissible Uses of Sacred Ground

Unless Indian religious uses are given some primacy in prioritizing uses, a sacred site protective scheme would prove ineffective. Problems of access and evaluating potentially compatible uses would interfere with the Indian traditionalist use. Furthermore, uses of the land outside the boundaries of the sacred site could result in desecration of the site itself.

Access is potentially the most difficult problem in determining what uses are permissible. Certainly, those who hold the site sacred should use it. But how is a federal land manager to distinguish believers from non-believers? Controlling access can put the managing agency in an awkward position. Sacred site access management could result in BLM or Forest Service superintendents evaluating whether a certain group of Indians are in fact “traditionalists.” Federal land managers might find themselves arbitrating disputes over conflicting uses between Indian religious groups. Furthermore, since the rationale for protecting the sites includes exposing the dominant society to Indian religion, sacred site managers cannot completely close the site to non-believers. Secular access, albeit respectful of Indian religious use, must be permitted.

264. See Suagee, supra note 9, at 29
265. A complementary method of recognizing Indian traditionalist interests is to require formation of committees for each sacred site composed of the federal land manager, a representative of the traditionalist community (perhaps appointed by the Secretary of the Interior), a member appointed by the appropriate tribal government, representatives of local governments, and representatives of the primary users of the surrounding area (such as recreational organizations). The committee would be responsible for developing site-specific use regulations.
266. This is the problem described by Professor Sax with regard to the national parks. "While intrusive private activities have increased all around them, park managers have stood by nervously, sensing they were caring for helpless giants." Sax, supra note 147, at 241. The policy solution for sacred sites should be similar to that for parks. Sax advocates giving significant regulatory authority to the Park Service over private land within a given park’s boundaries and even over private land outside the park’s boundaries to the extent necessary to restrain activities which create a nuisance in the park. Id. at 258-73.
267. See supra part IV.
Finding a proper balance in managing access while restricting traffic to avoid desecration produces the "irony of victory" described by Professor Roderick Nash.\textsuperscript{268} To protect a sacred site, the tribe must reveal its location. The desire to experience the place may attract so many visitors that the place is no longer peaceful. It simply becomes too crowded. Non-Indian backpackers should be welcomed into the High Country so that they may know its quiet splendor; however, too many backpackers, or even one at the wrong time, could be a religious disaster.

Limiting access is just one component of the permissible use issue. The manner of use or visitation should be restricted as well. Obviously, mining, timber harvesting, and flooding would be utterly inappropriate for most sacred sites. Loud activities such as dirt biking and snowmobiling would also desecrate a sacred place where isolation and meditation are demanded by Indian religion. If the site is in demand among nonbelievers, then quiet, non-disruptive wilderness uses should be the preferred secular uses. If religious taboos forbid photography, then no photography should be permitted. Federal land managers must permit only those secular activities which do not desecrate sacred ground.

Low-impact secular uses are desirable not only because they are compatible with Native American religions. They also provide an opportunity for the liberating "contemplative experience"\textsuperscript{269} that "reflects the aspirations of a free and independent people."\textsuperscript{270}

CONCLUSION

The foregoing discussion has demonstrated the necessity for action to prevent the destruction of traditional Indian religions through the desecration of sacred sites. Protection of sacred sites is desirable, from both Indian religious and mainstream environmental standpoints. Preserving sacred places promotes our nation's spiritual and secular wealth and diversity. This Comment has discussed the feasibility of statutory protection. The ultimate question remains: Will the political apparatus of the dominant society take action to preserve sacred ground? As a matter of ethics, we should take action. As a matter of cultural well-being, we must take action.

\textsuperscript{268} Roderick Nash, Wilderness and the American Mind 316-17 (3d ed. 1982).
\textsuperscript{269} See supra notes 235-39 and accompanying text.
\textsuperscript{270} Sax, supra note 59, at 111.
§ 1. Congressional findings and declaration of purposes and policy
(a) The Congress finds and declares that —
   (1) federal actions and management of the public lands have infringed upon the free exercise of traditional Indian religions, and the American Indian Religious Freedom Act has proven ineffective in preventing this infringement;
   (2) the free exercise of many traditional Indian religions is dependent upon:
      (A) the worship at and veneration of specific sacred sites; and
      (B) the preservation of these sacred sites in a state as pristine and unspoiled as possible;
   (3) traditional Indian religions are integral parts of the cultures of the Indian peoples, without which the latter should not be expected to survive;
   (4) every traditional Indian religion is critical to our Nation’s cultural diversity and wealth as a people; and
   (5) requiring management of the public lands to preserve the sacred character of Indian sacred sites on the public lands is essential to safeguarding the free exercise of Indian religion and to preserving, for the benefit of all citizens, the Nation’s cultural diversity and heritage.
(b) The purpose of this Act is to provide a means whereby the sites that traditional Indian religions hold sacred and depend upon for the continued vitality of their beliefs may be preserved in the state required by these Indian religions.
(c) It is further declared to be the policy of Congress that all federal departments and agencies shall seek to protect sacred sites from desecration and shall use their authorities in furtherance of the purposes of this Act.

§ 2. Definitions
For the purposes of this Act—
(1) The term “traditional Indian religion” shall mean an interconnected grouping of beliefs, attitudes, standards for conduct, and rituals as held, believed, or practiced by an indigenous people or Indian tribe since before the formation of the United States, or as a matter of long-standing tradition pre-dating extensive contact with European influences.
(2) The term “sacred site” shall mean a specific geographical location that is:
(A) revered or worshipped by adherents of a traditional Indian religion;
(B) used for recurring rituals integral to a traditional Indian religion;
(C) considered to be especially important, because Indian traditionalists believe it to be their place of origin, the home of spirits or gods, or a place where unique spiritual refreshment, renewal, or power can be achieved; or
(D) held to be of special religious importance or particularly inviolable from earth-disturbing action, in the opinion of both adherents to traditional Indian religions and experts in the field of Indian religion or culture.

(3) The term “desecration” shall mean actions that have the effect of altering a sacred site so as to divest that site of its hallowed nature from the perspective of the traditional Indian religion(s) that consider the site to be sacred.

(4) The term “Secretary” shall mean the Secretary of the Interior or the Secretary of Agriculture, whichever has been delegated responsibility for management of the public lands on which the sacred site or nominated site in question lies.

(5) The terms “public lands” or “federally owned lands” shall mean lands in which the United States Government holds fee title, regardless of whether those lands have been withdrawn, reserved, or are properties in which private parties hold a property interest less than fee title.

§ 3. List of sacred sites

(a) The United States Congress finds and declares that the following places are sacred sites for purposes of this Act:

   (1) [The sacred sites initially to receive protection would be listed here.]

(b) The Secretary shall promulgate regulations establishing the boundaries of the sites listed above and sites that are listed through the petitioning process in paragraphs (c)(2)-(4) of this section. The boundaries must all lie within federally owned lands, but may cross boundaries between lands managed by different departments or agencies. The boundaries shall encompass the entirety of the sacred site, and shall be established so as not to undermine the purposes of this Act.

(c)(1) It is not the intent of Congress that the list in subsection (a) shall be exhaustive.

   (2) Any holder of traditional Indian religious beliefs or any representative of a tribal government may petition the Secretary to list a place on the public lands as a sacred site.
(3) The Secretary shall respond to a petition by deciding whether the nominated place should be listed as a sacred site. The Secretary's decision shall be made:

(A) after public notice of the petition in the Federal Register and in appropriate newspaper(s) in the vicinity of the nominated site;
(B) in a timely manner; and
(C) affording participation in the consideration of the petition to all interested parties, including appropriate tribal, state and local governments, Indian traditionalists, and the general public.

(4) The decision to list a sacred site is a major federal action for purposes of the National Environmental Policy Act.

The Secretary shall decide whether the nominated site is a sacred site by determining whether the nominated site possesses the characteristics of a sacred site as defined in section 2(2) of this Act. The Secretary may rely on information included with the petition, submitted by those participating in the consideration of the petition under subsection 3(c)(3)(C), and requested by the Secretary from petitioners, participants, and academic experts in the field of Indian religion. The Secretary shall respond in writing to written materials submitted by those participating in the consideration of the petition before or at the time of deciding whether to list the nominated site.

§ 4. Management of sacred sites

(a) Responsibility for sacred site management shall remain with the department or agency which has been delegated the general responsibility for management of the division of the public lands on which the sacred site is situated.

(b) The Secretary who is responsible for a sacred site shall, for each site, appoint a committee composed of the appropriate federal land manager, at least one representative of the Indian traditionalist community which reveres this particular site, and such representatives of nearby tribal peoples, local communities, and experts in the field of Indian religion, as the Secretary determines are appropriate. These committees shall be responsible for:

(1) determining permissible and forbidden uses of the sacred site and assisting the Secretary in promulgating appropriate regulations and in managing the site;
(2) advising the Secretary when disputes concerning the sacred site arise;
(3) becoming and remaining fully informed as to the characteristics of the site considered to be sacred, the uses of the site which are required by the appropriate traditional Indian religion, the uses which are incompatible with the site's sacred characteristics and uses, and the actual management and use of the site; and
(4) submitting an annual report to the Secretary describing the condition of the sacred site and how its management relates to the furtherance of the goals of this Act.

(c) The department or agency responsible for management of the sacred site shall ensure that it is managed in a manner which:

(1) ensures access to the site for adherents to the traditional Indian religions that consider the site to be sacred;
(2) preserves the characteristics of the site which are believed to make the site sacred;
(3) forbids earth-disturbing activities that Indian traditionalists believe will desecrate the site, including but not limited to mining, intensive recreation, and reclamation.

§ 5. Judicial review

Any person may file a petition in the District Court within whose jurisdiction the sacred site or nominated site lies, or in the District Court of the District of Columbia for review of the Secretary's decision (1) to list or not to list a nominated site, (2) promulgating any regulations to establish sacred site boundaries or to govern the permissible and restricted uses of sacred sites, or (3) authorizing or failing to take action against any activities that are likely to desecrate a sacred site.