FRIEND, FOE, FRENEMY: THE UNITED STATES AND AMERICAN INDIAN RELIGIOUS FREEDOM

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ABSTRACT

In 1990, the Supreme Court decided *Employment Division v. Smith*, in which the Court concluded that a claim that a neutral and generally applicable criminal law burdens religious conduct need not be evaluated under the "compelling interest" test set out by the Court in *Sherbert v. Verner* (1963). The Court relied on two recently decided cases, *Bowen v. Roy* (1986) and *Lyng v. Northwest Indian Cemetery Protective Association* (1988). All three of these cases rejected Free Exercise Clause claims brought by American Indians. Following the *Smith* decision, Congress enacted the Religious Freedom Restoration Act (RFRA) to restore the compelling interest test to all claims that the government has substantially burdened religious exercise.

This Article analyzes and critiques the post-*Smith* responses to Indian religious freedom claims made by two groups: federal government officials making public lands management-related decisions and federal courts addressing claims related to Indian religious freedom. The primary focus is on claims involving sacred sites located on federal lands. These claims are in many ways unique to Indian religions, which, in contrast with mainstream religions, commonly share the belief that particular sites are imbued with sacredness and are consequently the only location at which certain ceremonies can be conducted. The presence of sacred sites on lands that were taken from tribes in the past to satisfy non-Indian resource demands and are today held as public lands can lead to conflicts between Indian religious exercise rights and non-Indian desires to use the lands for commercial or recreational purposes.

First, the Article focuses on cases in which federal officials have taken account of Indian religious exercise needs in developing land management plans and have subsequently faced Establishment Clause challenges to their actions. Second, it examines cases in which officials have made decisions that burden Indian religious exercise on public lands,

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prompting challenges under RFRA. When confronting Establishment Clause challenges to management plans, the Government has emphasized the political and trust relationships between the United States and tribes, and has argued that accommodations appropriately alleviate government-imposed burdens on religious exercise. In responding to Indian claims that government decisions substantially, and unjustifiably, burden the plaintiffs' religious exercise, however, the Government tells a different story. Courts have tended to side with the Government in both kinds of cases. Third, the Article discusses the lessons learned from this analysis about the need for heightened protection of religious exercise at sacred sites and offers suggestions on seeking a path toward ensuring that Indian religious practitioners are able to enjoy the level of religious freedom long provided to other Americans.

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INTRODUCTION

> We also have a religion . . . .[1]

> If we are to exist as humans, we are allowed to have a religion. . . . [W]e are looking at a bleak future . . . in which we do not have the right to practice our religion. . . . The only difference between us and the "other Americans" is that we have dark skin and dark hair.[2]

> Religion is behavior and not mere belief.[3]

The year 2010 marked the twentieth anniversary of the landmark Supreme Court Free Exercise Clause decision *Employment Division v. Smith*.[4] In *Smith*, five Justices concluded that a claim that a neutral and generally applicable criminal law that burdens religious conduct need not be evaluated under the "compelling interest" test set out by the Court in *Sherbert v. Verner*[5] and used by lower courts to evaluate free exercise claims for decades.[6] The Court gave its blessing to the denial of unemployment benefits to two members of the Native American Church who had been dismissed from their jobs for sacramental use of peyote.[7] The *Smith* majority relied on two recently decided cases in which the Court had also rejected American Indian free exercise claims, *Bowen v. Roy*[8] and *Lyng v. Northwest Indian Cemetery Protective Association*.[9] Given that Indian religious claims were at the heart of what Congress[10] and Supreme Court Justices[11] identified in *Smith* as an important change of

1. *Red Jacket, Seneca Chief, Remarks on Indian Religion (1805)*, *in* INDIAN SPEECHES; DELIVERED BY FARMER'S BROTHER AND RED JACKET, TWO SENECA CHIEFS 4–8 (James D. Bemis ed., 1809), *reprinted in* WILCOMB E. WASHBURN, THE INDIAN AND THE WHITE MAN 213 (1964).

2. *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary*, 102d Cong. 27 (1992) [hereinafter *1992 RFRA Senate Hearings*] (statement of William Nouyi Yang on behalf of the Hmong-Lao Unity Ass'n) (commenting on autopsies performed in violation of Hmong religious beliefs).

3. WISDOM FOR THE SOUL: FIVE MILLENNIA OF PRESCRIPTIONS FOR SPIRITUAL HEALING 95 (Larry Chang ed., 2006) (quoting Sarvepalli Radhakrishnan).

4. 494 U.S. 872, 890 (1990).

5. 374 U.S. 398, 403 (1963).

6. *See id.* at 883–84. The other four Justices (O'Connor, Blackmun, Brennan, and Marshall) believed that the compelling interest test should be applied to such claims, although they disagreed as to the result of applying the test in *Smith*. *Compare id.* at 891 (O'Connor, J., concurring in the judgment, joined by Blackmun, Brennan, & Marshall, J.J., as to Parts I and II of the opinion), *with id.* at 907, 909 (Blackmun, J., dissenting, joined by Brennan & Marshall, J.J.).

7. *See Smith*, 494 U.S. at 874, 890.

8. 476 U.S. 693 (1986).

9. 485 U.S. 439 (1988).

10. In enacting the Religious Freedom Restoration Act (RFRA), see discussion *infra* Part II, Congress referred to the *Smith* decision as having "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion" and praised "the compelling interest test as set forth in prior Federal court rulings," which the statute was intended to restore. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2006), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997). The Supreme Court invalidated RFRA as applied to the states in *City of Boerne*, 521 U.S. at 511.

11. In her concurring opinion in *Smith*, Justice O'Connor said that the "holding dramatically departs from well-settled First Amendment jurisprudence." *Smith*, 494 U.S. at 891 (O'Connor, J., concurring in the judgment). Justice Blackmun's dissenting opinion described the Court as effectuat-

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direction in Free Exercise Clause jurisprudence, it seems that any effort to examine this development and its impact would be incomplete without a consideration of Indian religious freedom claims post-*Smith*. Some organizers of law school conferences discussing *Smith*'s impact apparently saw otherwise and left Indian religious freedom cases completely off the agenda.[12] When it comes to the "first liberty," the rights and concerns of the "First Americans" apparently were not considered worthy of attention.

Although conference agendas may alone seem of little import, a more significant concern is whether the omission of Indian religious freedom cases as an important topic of discussion in these settings is indicative of a broader indifference, or even hostility, toward Indian religious rights. At the most basic level, this omission raises the question of whether anyone—besides Indians—cares about Indian religious freedom. To put it another way, have Indian religious freedom claims become so marginalized, despite their central role in the development of contemporary Free Exercise Clause jurisprudence, that they are of concern only to Indians (and Indian law scholars)? And if this is indeed the case, what does these claims' omission from the dominant narrative of American religious freedom law say about their likelihood of success, particularly in a legal landscape in which adherents of non-mainstream religions need to rely on the political process for religious accommodations—a setting in which (as Justice Scalia blithely stated in *Smith*) such adherents are at a disadvantage?[13]

To explore these questions, this Article analyzes the post-*Smith* responses to Indian religious freedom claims made by two groups—federal government officials making public lands management-related decisions and federal courts addressing claims related to Indian religious freedom—to gauge the extent to which these groups are supportive of, indif-

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ing "a wholesale overturning of settled law concerning the Religion Clauses of our Constitution." *Id.* at 908 (Blackmun, J., dissenting).

12. Articles related to the twentieth anniversary of *Smith* were published in the *South Dakota Law Review* in 2010 and in the *Cardozo Law Review* and *Texas Tech Law Review* in 2011. *See* Symposium, *Criminal Law and the First Amendment: Should Free Exercise of Religion Ever Be a Defense to an Otherwise Valid Criminal Law, or Did* Smith *Get It Right?*, 44 TEX. TECH L. REV. 239 (2011); Symposium, *The Twenty Year Anniversary of* Employment Division v. Smith*: Reassessing the Free Exercise Clause and the Intersection Between Religion and the Law*, 55 S.D. L. REV. (2010); Symposium, *Twenty Years After* Employment Division v. Smith*: Assessing the Twentieth Century's Landmark Case on the Free Exercise of Religion and How It Changed History*, 32 CARDOZO L. REV. 1655 (2011). Only the *South Dakota Law Review* conference included a panel addressing Indian religious exercise. *See USD NALSA Chapter Hosts Native American Law Symposium*, UNIVERSITY OF SOUTH DAKOTA (Feb. 17, 2010), http://www.usd.edu/press/news/news.cfm?nid=1882.

13. *See Smith*, 494 U.S. at 890 ("Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. . . . It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred . . . .").

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ferent to, or even hostile toward, Indian religious freedom.[14] This Article's primary focus is on claims involving American Indian sacred sites located on federal lands. These claims are in many ways unique to Indian religions. Although other religions certainly hold particular places, such as temples, churches, synagogues, or mosques, to be holy, they tend not to view the land on which places of worship are located as being itself imbued with sacredness. As a result, if a particular place of worship is no longer available for use, religious practices can be relocated without losing their significance and efficacy. A new site for worship can be consecrated as the old one is deconsecrated—a practice that is usually not possible with Indian religious practices related to specific sacred sites.[15]

The presence of sacred sites on federal lands—lands that were taken from tribes to satisfy non-Indian demands for access to Indian land and resources—can lead to conflicts between the needs of worshippers seeking to enjoy free exercise rights in still sacred areas and the desire of other users to engage in activities allowed under land management plans and policies. Whereas land managers' protection of religious uses at some sites indicates support for religious freedom, the uniqueness of Indians' needs with respect to sacred sites suggests that these needs are vulnerable to being disregarded in the face of competing land use demands.

Part I focuses on four cases in which federal officials have taken account of Indian religious freedom in decision making as to public lands and have subsequently had to defend their actions when non-Indians challenged them on Establishment Clause grounds. Part II examines cases in which officials have made decisions that burden Indian religious exercise on public lands and that are consequently challenged under the Religious Freedom Restoration Act of 1993 (RFRA).[16] Congress enacted RFRA in response to *Smith*, to restore the compelling interest test to all claims that the government has substantially burdened religious exercise.[17] Federal courts have tended to side with the Government in both the Establishment Clause and RFRA cases despite the conflicting stories that the Government has presented in these two categories of cases about its relationship with, and responsibilities to, Indian tribes. Part III discusses the lessons that can be drawn from the analysis in Parts I and II about the impact of RFRA, and of pre- and post-RFRA jurisprudence, on Indian religious freedom claims. The Article concludes by offering final thoughts on the challenges that continue to face Indian religious practi-

14. A future article will examine the response of other religious groups to Indian religious freedom claims.

15. *See* Jane Hubert, *Sacred Beliefs and Beliefs of Sacredness*, *in* SACRED SITES, SACRED PLACES 9, 13–14 (David L. Carmichael et al. eds., 1994).

16. 42 U.S.C. § 2000bb (2006), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

17. *See id.* ("The purposes of this chapter are . . . to restore the compelling interest test . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened . . . .").

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tioners, who are merely seeking the protection for their religious exercise that most other Americans take for granted.

I. ESTABLISHMENT CLAUSE CHALLENGES TO SACRED SITES PROTECTION: THE GOVERNMENT AS FRIEND

> At the centre of the Native American religious system is the affirmation that spiritual power is infused throughout the environment in general, as well as at interconnected special places, and that knowledgeable people are participants in that power.[18]

> [I]n furtherance of Federal treaties, and in order to protect and preserve Indian religious practices, . . . [i]n managing Federal lands, each executive branch agency . . . shall . . . (1) accommodate access to and ceremonial use of Indian sacred sites . . . and (2) avoid adversely affecting the[ir] physical integrity. . . .[19]

In an essay written for a conference marking *Employment Division v. Smith*'s twentieth anniversary, Professor Steven D. Smith began by noting his assumption that religious freedom, "the legally recognized and protected right of people to believe, worship, and live in accordance with their religious faith, subject only to the overriding needs of social order," is "a good thing."[20] This assumption is not, he noted, as "platitudinous, or as secure" as it may seem because "religious freedom has, and always has had, its opponents."[21] Looking at this statement from a historical perspective, it is difficult to think of any group for whom it is truer than the indigenous peoples of the United States. Opponents of American Indian religious freedom long existed both in the government and in society. Indians' traditional religions were targeted for destruction and for replacement by Christianity under government policies that ultimately identified specific practices and ceremonies as punishable "Indian Offenses."[22]

Professor Smith also observed that by the time the Constitution was adopted, "the view that imposed religious orthodoxy was unnecessary, undesirable, and unjust"[23] had come to prevail and the project of "imposed religious orthodoxy was already on its last legs."[24] For American Indians, though, this was not the case. Rather than ending with the adoption of the Constitution or the Bill of Rights, government-supported ef-

18. Dorothea J. Theodoratus & Frank LaPena, *Wintu Sacred Geography of Northern California*, *in* SACRED SITES, SACRED PLACES 20, 22 (David L. Carmichael et al. eds., 1994).

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

20. Steven D. Smith, *Religious Freedom and Its Enemies, or Why the* Smith *Decision May Be a Greater Loss Now Than It Was Then*, 32 CARDOZO L. REV. 2033, 2033 (2011).

21. *Id.*

22. *See* Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 788–89 (1997).

23. Smith, *supra* note 20, at 2035.

24. *Id.* at 2037.

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forts to convert Indians to Christianity gathered steam over the course of the nineteenth century, peaking during the years of President Ulysses S. Grant's Peace Policy.[25] Under the Peace Policy, reservations were assigned to particular religious denominations and groups for the purpose of "Christianizing" the Indians.[26] Although European- and early American-imposed religious orthodoxy had favored particular Christian denominations, Indian policy supported the missionary efforts of a variety of Christian denominations. Only at the end of the nineteenth century did the federal government, swayed by anti-Roman Catholic sentiment, end federal funding for Christian denominations that were running Indian schools—an endeavor in which the waning of Protestant interest had led to Roman Catholic dominance.[27] Thereafter, for the next several decades, religious instruction (of a decidedly Protestant character) of Indian children continued in federally operated Indian schools.[28] For Indians, then, blatant government opposition to religious freedom, and efforts to impose religious orthodoxy, long survived the adoption of the Constitution and the Bill of Rights.

Even today, Professor Smith reminds us, religious freedom has its opponents. Therefore, "if we think religious freedom is a good thing, we cannot be complacent"; we must identify "who or what the threats to religious freedom are, and then make arguments and craft strategies to protect religious freedom against such threats."[29] Accordingly, the first task for supporters of Indian religious exercise rights related to sacred sites is to determine whether the federal government continues to pose a threat to Indian religious exercise by its treatment of Indian sacred sites located on public lands.

A. Pointers Toward Protection from Congress, the Supreme Court, and the President

A number of developments beginning in the 1970s indicated a commitment by the federal government to repudiate the past policies of explicit suppression of Indian religions. In 1978, Congress enacted the American Indian Religious Freedom Act (AIRFA)[30] after receiving extensive testimony by Indian religious practitioners as to the multiple ways in which their constitutional rights continued to be disregarded.[31]

25. *See* Dussias, *supra* note 22, at 778–79.

26. *See id.* at 781.

27. *See id.* at 784–85. Although direct government funding of sectarian schools for Indian children ended, tribes were free to direct that their own trust funds be used to fund sectarian schools, in keeping with their free exercise rights. *See* Quick Bear v. Leupp, 210 U.S. 50, 82 (1908).

28. *See* Dussias, *supra* note 22, at 786–87.

29. Smith, *supra* note 20, at 2034.

30. *See* American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (Aug. 11, 1978) (codified at 42 U.S.C. § 1996 (2006)).

31. *See American Indian Religious Freedom: Hearings on S.J. Res. 102 Before the S. Select Comm. on Indian Affairs*, 95th Cong. III (1978) [hereinafter *AIRFA Hearings*].

Witnesses such as Dale Old Horn spoke of the continuing quest for equal treatment:

> Indian people who have held onto these old ways . . . are still hoping for the formulation of Federal policy so that they can at once be recognized as any religious group . . . in America as having the same freedoms, the same rights, that [are] afforded to all peoples of this country.[32]

Speaking in the Senate hearings preceding AIRFA's enactment, Senator James Abourezk noted the importance of religious rights and the barriers to their enjoyment by Indians:

> One of the most fundamental precepts in the founding of our country is the freedom of religion. As citizens, Indians have an inherent right to the free exercise of their religion. . . . Unfortunately, in recent years, there have been increasing incidents of infringement of the religious rights of American Indians. New barriers have been raised against the pursuit of their traditional culture, of which the religion is an integral part.[33]

Senator Abourezk attributed the imposition of these barriers to the "[l]ack of knowledge, unawareness, insensitivity and neglect [that] are the keynotes of the Federal Government's interaction with traditional Indians' religions and cultures."[34] This situation was exacerbated by skepticism about the legitimacy of Indian religions:

> [M]any non-Indian officials [believe] that because Indian religious practices are different than their own[,] . . . they somehow do not have the same status as a "real" religion, yet, the effect on the individual whose religious customs are violated or infringed is as intense as if he had been Protestant, Catholic or Jewish.[35]

There was a need for recognition of the fact that "America does not need to violate the religions of her native peoples," that "[t]here is room for and great value in the cultural and religious diversity," and that Americans "would all be poorer if these American Indian religions disappeared from the face of the Earth."[36] To prevent this loss from occurring, Congress needed to make "a clear statement . . . that this country will continue to fully respect and protect religious freedom of all" and to require an examination of "our laws, regulations, and enforcement procedures to insure that such a statement becomes a reality."[37] To this end, all gov-

32. *Id.* at 18 (statement of Dale Old Horn, Crow Tribe); *see also id.* at 19 (referring to "the sense of equalness that we feel we should have as Indian people").
33. *Id.* at 1 (statement of Sen. James Abourezk).
34. *Id.*
35. *Id.*
36. *Id.* at 2.
37. *Id.*

ernment agencies needed to be made "responsible for administering the laws that provide for Indian religious freedom," and government personnel were "not to restrict anything under the Government's jurisdiction as a religious site."[38] To put these principles into action, AIRFA provided as follows:

> [I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.[39]

Relevant federal departments and agencies were to evaluate their policies and procedures, in consultation with traditional religious leaders, to determine what changes were necessary to protect and preserve Native American religious rights.[40]

Despite optimistic statements in the AIRFA hearings as to the positive impact that the statute would have on Indian religious freedom and on the development of appropriate agency policies, Indian religious practitioners continued to face obstacles to the enjoyment of their free exercise rights, as evidenced by a series of defeats for Indian free exercise claims in federal district court and courts of appeals.[41] In 1988, the Supreme Court finally weighed in. In *Lyng*, the Court held, in a 5–4 decision, that the Free Exercise Clause did not prohibit the U.S. Forest Service (USFS) from permitting timber harvesting and the building of a logging road in a sacred area in a national forest, even assuming that the road would "virtually destroy the . . . Indians' ability to practice their religion."[42] The USFS's plans affected an area that is held sacred by the Yurok, Karok, and Tolowa Indians.[43] The Court, in an opinion whose tone at times seemed to indicate outrage at the audacity of the plaintiffs in challenging land managers' decision making, treated the free exercise claim as a threat to government property rights[44] and dismissed AIRFA as a source of enforceable rights.[45]

38. *Id.* at 82; *see also id.* at 83 (explaining that bureaucrats "are going to come to realize that the Congress is saying 'you cannot restrict anybody's religious freedom, and that includes Indian religious freedom'").

39. 42 U.S.C. § 1996 (2006).

40. *See* Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996), *reprinted in* 42 U.S.C. § 1996 (2006).

41. *See* Dussias, *supra* note 22, at 823–28 (discussing cases leading up to *Lyng*).

42. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988) (alteration in original) (quoting Nw. Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 693 (9th Cir. 1986)) (internal quotation marks omitted).

43. *See Lyng*, 485 U.S. at 442.

44. *See id.* at 453–54.

45. *See id.* at 454–55.

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At the same time, Justice O'Connor, writing for the Court, stated that the Court's opinion should not be "read to encourage governmental insensitivity to the religious needs of any citizen" and that the government's property rights "need not and should not discourage it from accommodating [Indian] religious practices."[46] Justice Brennan, in dissent, pointed out that it was "difficult . . . to imagine conduct more insensitive to religious needs than the Government's determination to build a marginally useful road in the face of uncontradicted evidence that the road will render the practice of respondents' religion impossible."[47] Given this reality, Justice O'Connor's encouragement of accommodation seemed like an empty gesture.

Subsequent developments, however, have demonstrated that federal land management decisions are at times based on the heightened sensitivity toward, and respect for, Indian religious needs and concerns that the *Lyng* majority opinion encouraged. Such decisions have been prompted by a number of congressional and executive actions. Amendments to the National Historic Preservation Act (NHPA) enacted in 1992 made Indian sacred sites eligible for treatment as "[p]roperties of traditional religious and cultural importance" (commonly referred to as "traditional cultural properties," or TCPs) and required agencies managing federal lands to consult with tribes as to federal undertakings that may affect these properties.[48] In 1996, President Clinton signed Executive Order 13,007, entitled "Indian Sacred Sites" (the Sacred Sites Order), which requires federal land managers to "(1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites."[49] The Sacred Sites Order's provisions are triggered by identification of a site as being sacred by Indians themselves (in contrast to designations of a site as a TCP, which requires federal government involvement). An earlier executive memorandum, signed by President Clinton in 1994, highlighted the obligation to work with tribal governments as sovereigns, requiring all federal agencies and departments to "consult, to the greatest ex-

46. *Id.* at 453–54.

47. *Id.* at 477 (Brennan, J., dissenting); *see also* Dussias, *supra* note 22, at 828–31, 849 (discussing *Lyng*). For a thorough analysis of the *Lyng* litigation and its significance, see Amy Bowers & Kristen Carpenter, *Challenging the Narrative of Conquest: The Story of* Lyng v. Northwest Indian Cemetery Protective Association, *in* INDIAN LAW STORIES 489, 489 (Carole Goldberg et al. eds., 2011); Howard J. Vogel, *The Clash of Stories at Chimney Rock: A Narrative Approach to Cultural Conflict over Native American Sacred Sites on Public Land*, 41 SANTA CLARA L. REV. 757, 759 (2001) (offering an interesting analysis of the *Lyng* dispute as a cultural conflict between communities, in which a rights-based approach is more likely to perpetuate conflict than to lead to an appropriate resolution).

48. 16 U.S.C. §§ 470a(d)(6)(A)–(B), 470f (2006). For a helpful analysis of the NHPA and its role in sacred sites protection, see DEAN SUAGEE & JACK F. TROPE, NATIVE SACRED PLACES PROTECTION LEGAL WORKSHOP: SACRED PLACES TRAINING MATERIALS 22 (2008), http://www.sacredland.org/media/Sacred_places_training_materials.pdf.

49. Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996), *reprinted in* 42 U.S.C. § 1996 (2006). Such actions are to be taken "to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions." *Id.*

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tent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments."[50] Federal officials were directed to undertake activities that affect tribal rights "in a knowledgeable, sensitive manner respectful of tribal sovereignty."[51] The 1996 memorandum was supplemented by Executive Orders 13,084 (in 1998) and 13,175 (in 2000), both entitled "Consultation and Coordination with Indian Tribal Governments."[52] More recently, President Obama's 2009 Tribal Consultation Memorandum directed federal agencies to submit detailed plans as to their implementation of Executive Order 13,175.[53]

Individual federal agencies, acting pursuant to AIRFA, the Sacred Sites Order, and Executive Branch initiatives related to the tribal–federal relationship, have developed detailed policies and procedures for consulting with tribes when considering actions that could impact them, including with regard to sacred sites. The Bureau of Land Management (BLM), for example, has developed "Guidelines for Conducting Tribal Consultations."[54] Other agencies based within the Department of the Interior (DOI), such as the National Park Service (NPS) and the U.S. Fish and Wildlife Service, have taken similar actions. The NPS, for example, established an American Indian Liaison Office in 1995[55] and has developed guidelines for protecting sacred sites and resources and for consulting with tribes when NPS plans or activities may affect sacred

50. Memorandum on from William J. Clinton on Government-to-Government Relations with Native American Tribal Governments to Heads of Exec. Dep'ts and Agencies, 30 WEEKLY COMP. PRES. DOC. 936 (Apr. 29, 1994), *available at* http://www.gpo.gov/fdsys/pkg/WCPD-1994-05-02/pdf/WCPD-1994-05-02-Pg936.pdf.

51. *Id.*; *see also* Memorandum from President George W. Bush on Government-to-Government Relationship with Tribal Governments to Heads of Exec. Dep'ts and Agencies, 2 PUB. PAPERS 2177 (Sept. 23, 2004), *available at* http://www.gpo.gov/fdsys/pkg/PPP-2004-book2/pdf/PPP-2004-book2-doc-pg2177.pdf.

52. *See* Exec. Order 13,084, 63 Fed. Reg. 27,655 (May 14, 1998); Exec. Order 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000).

53. Memorandum from President Barack Obama on Tribal Consultation to Heads of Exec. Dep'ts and Agencies (Nov. 5, 2009), *available at* http://www.justice.gov/otj/pdf/obama-executive-memo110509.pdf; *see also* Memorandum from Cass R. Sunstein, Adm'r, Office of Information & Regulatory Affairs, on Consultation and Coordination with Indian Tribal Gov'ts to Heads of Exec. Dept's and Agencies, and Indep. Regulatory Agencies (July 30, 2010) (providing guidance on the submission of progress reports required by the 2009 presidential memorandum on implementation of Executive Order 13,175), *available at* http://www.whitehouse.gov/sites/default/files/omb/memoranda/2010/m10-33.pdf.

54. U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., H-8120-1, GUIDELINES FOR CONDUCTING TRIBAL CONSULTATION (2004); *see also* SUAGEE & TROPE, *supra* note 48, at 81–87 (discussing BLM procedures relevant to sacred sites protection).

55. *See American Indian Liaison Office*, 23 CULTURAL RESOURCE MGMT. 43, 43 (2000).

sites or restrict access or ceremonial use.[56] The DOI updated its tribal consultation policy in 2011.[57]

The Federal Energy Regulatory Commission (FERC), an independent regulatory agency with authority over a number of subjects related to energy, such as the licensing of non-federal hydropower facilities under the Federal Power Act, issued a "Policy Statement on Consultation with Indian Tribes in Commission Proceedings" in 2003 "to articulate its commitment to promote a government-to-government relationship between itself and federally-recognized Indian tribes."[58] The Policy Statement "recognizes the sovereignty of tribal nations and the Commission's trust responsibility to Indian tribes" and established a tribal liaison position for the hydroelectric licensing program.[59] FERC's hydroelectric licensing process requires that applicants and FERC staff members consult with tribes as to potential impacts of licenses on tribes, tribal lands, and tribal interests.[60]

The U.S. Forest Service is an agency of the U.S. Department of Agriculture (USDA), which has established an Office of Tribal Relations to be the primary contact point within the USDA for tribal consultation.[61] The Office has been working with the USFS, which has issued a *National Resource Guide to American Indian and Alaska Native Relations*, on reviewing sacred sites policy and procedures to examine their effectiveness in protecting sacred sites.[62]

Congressional support for tribal religious activities within national forests was strengthened by the Cultural and Heritage Cooperation Authority provisions of the Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill).[63] These provisions were enacted to "strengthen support for the policy of the United States of protecting and preserving the traditional, cultural, and ceremonial rites and practices of Indian

56. *See* SUAGEE & TROPE, *supra* note 48, at 87–88 (citing OFFICE OF AM. INDIAN TRUST, U.S. DEP'T OF THE INTERIOR, DEPARTMENTAL RESPONSIBILITIES FOR INDIAN TRUST RESOURCES 512 (2012)).

57. *See* KEN SALAZAR, U.S. DEP'T OF THE INTERIOR, ORDER NO. 3317, DEPARTMENT OF THE INTERIOR POLICY ON CONSULTATION WITH INDIAN TRIBES (Dec. 1, 2011), *available at* http://alaska.fws.gov/external/pdf/so_3317_tribal_consultation_policy.pdf.

58. Policy Statement on Consultation with Indian Tribes in Commission Proceedings, 68 Fed. Reg. 46,452, 46,452 (July 23, 2003).

59. *Id.*

60. *See* SUAGEE & TROPE, *supra* note 48, at 92 (citing 18 C.F.R. §§ 5.1(d), 5.2(b)(3), 5.5(b)(8)(v), 5.6(d), 5.7 (2012)); *see also* Christy McCann, *Dammed If You Do, Damned If You Don't: FERC's Tribal Consultation Requirement and the Hydropower Re-Licensing at Post Falls Dam*, 41 GONZ. L. REV. 411, 415 (2006) (discussing the development and implementation of the tribal consultation requirement).

61. *Who We Are*, OFFICE OF TRIBAL REL., U.S. DEP'T OF AGRIC., http://www.usda.gov/wps/portal/usda/usdahome?navid=OTR (last visited Oct. 10, 2012).

62. U.S. FOREST SERV., NATIONAL RESOURCE GUIDE TO AMERICAN INDIAN AND ALASKA NATIVE RELATIONS (1997); *see also Sacred Sites*, U.S. FOREST SERV., U.S. DEP'T OF AGRIC., http://www.fs.fed.us/spf/tribalrelations/sacredsites.shtml (last modified Dec. 20, 2012).

63. *See* Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, §§ 8101–8107, 122 Stat. 1651, 1659 (codified throughout the U.S.C.).

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tribes, in accordance with [AIRFA]."[64] The provisions authorize the temporary closure from public access of an area of national forest land in order "to protect the privacy of tribal activities for traditional and cultural purposes"; allow the provision, free of charge, of trees, portions of trees, and forest products to tribes "for traditional and cultural purposes"; and restrict disclosure of culturally sensitive information.[65]

Acting pursuant to AIRFA and post-AIRFA developments such as those summarized above, federal land managers have developed management plans for a number of public lands that take into account the need to protect Indian religious uses at sites located on the lands. These plans have been developed in consultation with tribes (and other interested parties) and seek to balance carefully the needs and concerns of different users. In several instances, the management plans and other land use decisions have been challenged as violations of the Establishment Clause. The charge that the government is in any sense trying to "establish" any traditional Indian religion's beliefs and practices as a state religion seems ironic, to put it mildly, when viewed against the backdrop of historical government efforts to suppress Indian religious practices and impose Christianity.[66] Four plans designed to take into account Indian religious exercise needs in connection with sacred sites, and the litigation brought to challenge them on Establishment Clause grounds, are examined below.

B. Four Case Studies: Developing Management Plans that Respect Religious Freedom

1. Devils Tower National Monument

> Those who use the butte to pray become stronger. They gain sacred knowledge from the spirits that helps us preserve our Lakota culture and way of life. They become leaders. Without their knowledge and leadership, we cannot continue to determine our own destiny.[67]

64. § 8101(7), 122 Stat. at 2048.

65. § 8104(b), 122 Stat. at 2049–50 (closure); § 8105, 122 Stat. at 2050 (forest products); *see* § 8106(a)(1), 122 Stat. at 2050 (disclosure restriction). The disclosure restriction limits disclosure of information relating to "resources, cultural items, uses, or activities that . . . have a traditional and cultural purpose[] and . . . are provided . . . under an express expectation of confidentiality in the context of forest and rangeland research activities." § 8106, 122 Stat. at 2050. Another provision restricts disclosure under the Freedom of Information Act of information "concerning the identity, use, or specific location . . . of . . . a site or resource used for traditional and cultural purposes by an Indian tribe." § 8106(a)(2), 122 Stat. at 2050. The provisions also allow for reburial of human remains and cultural items in national forests. § 8103, 122 Stat. at 2049.

66. *See supra* notes 25–28 and accompanying text.

67. Brief for Intervenors in Opposition to the Petition for Writ of Certiorari at 1–2, Bear Lodge Multiple Use Ass'n v. Babbitt, 529 U.S. 1037 (2000) (No. 99-1045), 2000 WL 34014041, at *1–2 [hereinafter Intervenor-Appellees Brief, *Bear Lodge*].

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In *Bear Lodge Multiple Use Association v. Babbitt*,[68] a group of plaintiffs challenged a Final Climbing Management Plan (FCMP) developed by the NPS for Wyoming's Devils Tower National Monument.[69] Devils Tower, a popular rock-climbing site, had been damaged and disfigured by recreational climbers, who affixed climbing equipment to the monument's surface.[70] The monument (which was deemed eligible for inclusion in the National Register of Historic Places) is also a sacred site for a number of Northern Plains tribes.[71] In addition to physically damaging the monument, climbers also had taken photographs of Indian religious practitioners participating in ceremonies and removed sacred prayer bundles.[72]

Members of various tribes each refer to Devils Tower by different names "Bear's Lodge" (Cheyenne and Lakota), "Bear's Tipi" (Arapaho), "Bear's House" (Crow), and "Tree Rock" (Kiowa).[73] Each tribe associated with the tower "considers it to be an area of great importance in tribal heritage, culture, and spirituality."[74] Historically it was, and is now once again, the site of the Lakota Sun Dance, which the federal government banned from 1883 until the 1930s.[75]

The FCMP provided that rock climbers would be asked to, out of respect, "*voluntarily* refrain from climbing on Devils Tower during the culturally significant month of June."[76] The FCMP also called for the development of an interpretive education program to explain the religious and cultural significance of the monument and for the placement of signs to encourage visitors to remain on the trail around the tower.[77] The FCMP did not sit well with climbers and commercial guides, several of whom filed suit in the Wyoming federal district court, claiming that the FCMP promoted Indian religion in violation of the Establishment Clause.

68. 2 F. Supp. 2d 1448 (D. Wyo. 1998), *aff'd*, 175 F.3d 814 (10th Cir. 1999).

69. *See id.* at 1449–51.

70. Intervenor-Appellees Brief, *Bear Lodge*, *supra* note 67, at 3.

71. *Id.*

72. *Id.*

73. Brief for the Federal Appellees at 3 n.1, Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814 (10th Cir. 1999) (No. 98-8021), 1998 U.S. 10th Cir. Briefs LEXIS 57, at *3 n.1 [hereinafter U.S. Brief, *Bear Lodge*]. An 1858 map labeled Devils Tower with the Lakota words for Bear's Lodge, "Mato Tepee." *Id.* Prior to discussing the merits of the Establishment Clause challenge in its brief filed in response to the claim, the Government argued that the appellants lacked standing to challenge the FCMP because they had not suffered any injury as a result of it. *See id.* at 16–20.

74. *Id.* at 5; *see also* Intervenor-Appellees Brief, *Bear Lodge*, *supra* note 67, at 1–5 (discussing the significance of Devils Tower, the impact of disturbances from climbing, and FCMP provisions to deal with those impacts).

75. U.S. Brief, *Bear Lodge*, *supra* note 73, at 6 (citing U.S. DEP'T OF THE INTERIOR, REGULATIONS OF THE INDIAN OFFICE 106 (1894)).

76. *Bear Lodge*, 2 F. Supp. 2d at 1450 (quoting NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, FINAL CLIMBING MANAGEMENT PLAN, FINDING OF NO SIGNIFICANT IMPACT: DEVIL'S TOWER NATIONAL MONUMENT, CROOK COUNTY, WYOMING, at i (internal quotation mark omitted)).

77. *Id.* at 1451.

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2. Medicine Wheel National Historic Landmark

> Many diverse Native American tribes and individuals continue to regard the Medicine Mountain complex as one of the most important sacred sites in the nation . . . . [T]raditional ceremonial practices have been continuous, despite the suppression of American Indian religious expression . . . .[78]

In *Wyoming Sawmills, Inc. v. U.S. Forest Service*,[79] a timber company raised an Establishment Clause challenge to the USFS's plan for the management of Medicine Wheel National Historic Landmark.[80] Located on Medicine Mountain in Bighorn National Forest in Wyoming, the Medicine Wheel is a prehistoric circular structure of rocks with a large cairn in the center and radiating spokes of rocks. The Wheel and Medicine Mountain have important historical, cultural, and religious significance for a number of tribes. Archaeologists have concluded that people have lived in the area for at least 7,500 years. Tepee rings, trails, and other archaeological features and artifacts found near the Wheel attest to the longstanding human habitation of the area.[81]

Federal protection of the Medicine Wheel dates to 1957, when an approximately 200-acre area in Bighorn National Forest was withdrawn from mining and virtually all other forms of claims "for the protection and preservation of the archaeological values of the Medicine Wheel and adjacent historic area."[82] A 110-acre area, including the Medicine Wheel, was designated as a National Historic Landmark in 1969.[83] Thus the original impetus for protecting the Medicine Wheel was concern over its archaeological and historic (rather than religious) values. Concern over these values, along with visitor safety concerns, also prompted the development of the Historic Preservation Plan for the Medicine Wheel National Historic Landmark and Medicine Mountain (the HPP). Increased use of the landmark had resulted in the displacement, destruction, and removal of prehistoric features and artifacts. The HPP was developed via a lengthy process that included consultation with, among other interested parties, the Wyoming state historic preservation officer and two intertribal organizations (the Medicine Wheel Coalition for Sacred Sites and the Medicine Wheel Alliance).[84]

78. NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, OMB NO. 1024-0018, NATIONAL HISTORICAL LANDMARK NOMINATION MEDICINE WHEEL/MEDICINE MOUNTAIN 19 (2010).

79. 179 F. Supp. 2d 1279 (D. Wyo. 2001), *aff'd*, 383 F.3d 1241 (10th Cir. 2004).

80. *See id.* at 1292.

81. *Id.* at 1286.

82. *Id.* (quoting 22 C.F.R § 4135 (1957) (internal quotation marks omitted)).

83. *Id.*

84. *See id.* at 1286–87. The Big Horn County commissioner and the Federal Aviation Commission, which was operating a radar site on Medicine Mountain, were also consulting parties. *Id.* at 1287.

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Signed in 1996, the same year in which the Sacred Sites Order was issued,[85] the HPP sought to "ensure that the Medicine Wheel and Medicine Mountain are managed in a manner that protects the integrity of the site as a sacred site and a nationally important traditional cultural property."[86] The HPP established a process to integrate "the preservation and traditional uses of historic properties" with other uses, with priority given to "the protection of the historic properties involved by continuing traditional cultural use[s],"[87] and provided for an operating plan that included use of on-site interpreters, limitations on motorized access, and protection of traditional cultural uses.[88] The USFS implemented the HPP by issuing an amendment (Amendment 12) to the Bighorn National Forest Plan.[89]

Wyoming Sawmills (Sawmills), a commercial timber company that had long been the primary purchaser of timber from the forest,[90] challenged the USFS's approval of the HPP and issuance of Amendment 12.[91] In a suit filed in Wyoming federal district court, Sawmills alleged that the USFS had impermissibly promoted religion because Indian religious concerns were a motivating factor behind the decision to adopt the HPP. Sawmills further alleged that the HPP impermissibly caused the closure of roads that had previously been usable for commercial logging operations and required the expenditure of tax dollars on educating visitors about Indian religion.[92]

3. Rainbow Bridge National Monument

> Neighboring Indian tribes believe Rainbow Bridge is a sacred religious site. They travel to Rainbow Bridge to pray and make offerings near and under its lofty span. Special prayers are said before passing [under] the Bridge . . . . In respect of these long-standing beliefs, we request your voluntary cooperation in not approaching or walking under Rainbow Bridge.[93]

85. *Id.* at 1287; Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (1996).

86. Wyo. Sawmills, Inc. v. U.S. Forest Serv., 383 F.3d 1241, 1245 (10th Cir. 2004) (quoting Brief for Appellants Wyoming Sawmills, Inc. at 9, *Wyo. Sawmills*, 383 F.3d 1241 (2004) (No. 02-8009), 2002 WL 33005127, at *9) (internal quotation marks omitted).

87. Wyo. Sawmills, Inc. v. U.S. Forest Serv., 179 F. Supp. 2d at 1287. In addition to the NHPA and AIRFA, the Archeological Resources Protection Act (ARPA) and a number of other statutes govern the USFS's management of the area. *See id.* at 1287–88. ARPA mandates the establishment of programs to increase awareness of the significance of, and the need to protect, archaeological resources on public and Indian lands. *See, e.g.*, 16 U.S.C. § 470ii(c) (2006). ARPA requires agencies making relevant rules to take AIRFA into consideration. § 470ii(a).

88. *Wyo. Sawmills*, 179 F. Supp. 2d at 1287.

89. *Wyo. Sawmills*, 383 F.3d at 1244.

90. *Id.* at 1245.

91. *Wyo. Sawmills*, 179 F. Supp. 2d at 1288. Sawmills also challenged a USFS decision to withdraw a timber sale that the USFS had proposed for an area within the HPP's coverage area. *Id.*

92. *Id.* at 1292.

93. Brief of Appellees at 11–12 n.3, Natural Arch & Bridge Soc'y v. Alston, 98 F. App'x 711 (10th Cir. 2004) (No. 02-4099), 2003 WL 24031937, at *11–12 n.3 [hereinafter U.S. Brief, *Natural*

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In *Natural Arch & Bridge Society v. Alston*,[94] Earl DeWaal and four other individuals, along with the Natural Arch and Bridge Society (an organization of natural arch enthusiasts), challenged the NPS's management plan for Rainbow Bridge National Monument.[95] The largest natural bridge in the world, Rainbow Bridge has religious and historical significance for the Hopi, Navajo, San Juan Paiute, and other tribes. First protected under federal law by a 1910 presidential proclamation, which set aside the bridge and a 160-acre tract of land as a national monument, Rainbow Bridge National Monument received a major increase in visitors when the adjoining Lake Powell and Glen Canyon National Recreation Area were created as part of a federal dam project. The project was completed following an unsuccessful Free Exercise Clause challenge in *Badoni v. Higginson*.[96]

By the late 1980s, the monument had suffered serious damage, such as soil erosion, vegetation damage, and damage to archaeological sites and petroglyphs caused by visitors who touched and climbed on them and defaced them with graffiti. For members of area tribes such as the Navajo Nation, who regard Tsi-Na-Ne-Ah (arch rock or rock bridge) as a sacred place that should be respected and kept in as much of a natural setting as possible, this amounted to desecration.[97]

Recognizing the need for action to protect the monument, the NPS developed the 1993 General Management Plan for Rainbow Bridge National Monument (the Rainbow Bridge GMP), after decades of study and consideration of public comments. Designed to protect both the natural and cultural resources of the monument, the Rainbow Bridge GMP contemplated discouraging (but not prohibiting) visitor access to the base of the bridge and the area directly underneath it. A sign explained the spiritual significance of the site for Indians and requested that visitors not walk under the bridge out of respect for this perspective. An interpretive prospectus sought to "'help visitors understand that different cultures perceive resources differently, i.e., some neighboring American Indians regard Rainbow Bridge as sacred,' and 'generate visitor interest in the cultures and lifestyles, from prehistoric to present times, of the people of the Rainbow Bridge region.'"[98]

The plaintiffs sued in federal district court in Utah, claiming that the Rainbow Bridge GMP violated the Establishment Clause. They argued

Arch] (quoting *Rainbow Bridge National Monument*, NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, http://www.nps.gov/rabr/index.htm (last updated Feb. 8, 2013) (internal quotation marks omitted).

94. 209 F. Supp. 2d 1207 (D. Utah 2002), *aff'd*, 98 F. App'x 711 (10th Cir. 2004).

95. *See id.* at 1216–19.

96. 455 F. Supp. 641 (D. Utah 1977), *aff'd*, 638 F.2d 172 (10th Cir. 1980).

97. *See Natural Arch*, 209 F. Supp. 2d at 1210, 1213.

98. *Id.* at 1214. *See generally* DAVID KENT SPROUL, A BRIDGE BETWEEN CULTURES: AN ADMINISTRATIVE HISTORY OF RAINBOW BRIDGE NATIONAL MONUMENT *passim* (2003) (describing in detail the history of the management of Rainbow Bridge National Monument).

that it coerced them into practicing the Indian religion associated with the belief about not walking under Rainbow Bridge.[99]

4. Cave Rock

> Lake Tahoe is the place of origin of the Washoe people and . . . the waters of Lake Tahoe, which are sacred, breathe life into the land, plants, fish, birds, animals and people around it. . . . De'ek wadapush, or "standing gray rock," now known as Cave Rock . . . is a place that demands the highest respect.[100]

In *Access Fund v. U.S. Department of Agriculture*,[101] the Access Fund, a climbing advocacy group supported by rock climbers and the recreation industry, challenged the USFS's decision to ban rock climbing at Cave Rock, a natural rock formation located partially within a national forest on the eastern shore of Lake Tahoe.[102] Cave Rock is a sacred site for the Washoe people and "a symbol of their cultural and religious identity."[103] Whereas Washoe religious practitioners have been coming to Cave Rock for over 1,000 years when they feel called to seek power or knowledge there, non-Indians have been going there since the 1980s for rock climbing. These visitors drilled permanent bolts into Cave Rock to aid them in their climbing, expanded climbing routes, and added a masonry floor inside the cave, all without USFS permission.[104]

After Cave Rock was determined to be eligible for inclusion in the National Register of Historic Places as a TCP and archaeological site, the USFS developed a plan to protect Cave Rock and "regulate uses there in a manner that . . . preserves the historic and cultural characteristics that make the property eligible for listing on the National Register."[105] The USFS decided to ban climbing at Cave Rock and to remove the rock climbing hardware because of the adverse effects on Cave Rock's heritage resources. According to the environmental impact statement underlying the decision, the climbing ban was imposed because of these effects, not as a way of "requiring others to conform their conduct to Indian cultural concerns."[106] The USFS also decided, however, to allow hiking, fishing, and sightseeing at Cave Rock despite Washoe objections to such activities at a site that the USFS acknowledged was a "core element in

99. *See Natural Arch*, 209 F. Supp. 2d at 1225.

100. A. BRIAN WALLACE, WASHOE TRIBE OF NEV. & CAL., PROTECTION OF DE'EK WADAPUSH (CAVE ROCK): FEDERAL MANAGEMENT AND LITIGATION UPDATE, http://www.yachaywasingo.org/SC24USAwashoe.pdf (last visited Jan. 2, 2013).

101. 499 F.3d 1036 (9th Cir. 2007).

102. *Id.* at 1039.

103. *Id.*

104. *Id.* at 1040.

105. *Id.* at 1040–41 (alteration in original) (quoting Cave Rock Management Direction, 64 Fed. Reg. 3678 (proposed Jan. 25, 1999)) (internal quotation mark omitted).

106. *Id.* at 1041 (quoting Cave Rock Management Direction, 64 Fed. Reg. 3678 (proposed Jan. 25, 1999)) (internal quotation marks omitted).

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the Washoe culture."[107] The Access Fund challenged the climbing ban in Nevada federal district court, arguing that it violated the Establishment Clause.

C. Defending Management Decisions Against Establishment Clause Challenges

The Establishment Clause challenges to the federal land managers' decisions described above required Government attorneys to come to the defense of these decisions. Explored below are the arguments made in the litigation challenging the decisions, which evidence understanding of the importance of what is at stake for Indians at sacred sites and of the responsibility of federal land managers to take account of the United States' political and trust relationship with tribes.

1. Satisfying the *Lemon* Test

In defending land managers' decisions against claims that they violated the Establishment Clause, the Government's arguments were (necessarily) shaped by the prevailing legal test, set out by the Supreme Court in *Lemon v. Kurtzman*.[108] Under the *Lemon* test, a governmental action does not offend the Establishment Clause if it (1) has a secular purpose, (2) does not have the principal or primary effect of advancing or inhibiting religion, and (3) does not foster an excessive entanglement with religion.[109] Consequently, the Government's first line of defense was to distance the challenged decisions from efforts to protect religious exercise by emphasizing motivations that were unrelated to religion, followed by arguments that the decisions did not result in legally impermissible effects or excessively entangle the agency in question with religious institutions, authorities, or activities.

a. Identifying Secular Purposes for Management Decisions

In *Bear Lodge*, while defending the Devils Tower National Monument FCMP, the Government cited managing the site in "an orderly fashion," accommodating both recreational and religious users,[110] as a permissible secular goal of the FCMP. Similarly, the Government explained in the *Wyoming Sawmills* litigation that the USFS's Medicine Wheel

107. *Id.* (quoting Cave Rock Management Direction, 64 Fed. Reg. 3678 (proposed Jan. 25, 1999)) (internal quotation marks omitted).

108. 403 U.S. 602 (1971).

109. *Id.* at 612–13.Although some Supreme Court Justices have criticized or even rejected the *Lemon* test, it continues to play a central role in Establishment Clause litigation. *See* Nathan P. Heller, *Context Is King: A Perception-Based Test for Evaluating Government Displays of the Ten Commandments*, 51 VILL. L. REV. 379, 388–89 (2006).

110. U.S. Brief, *Bear Lodge*, *supra* note 73, at 25. This would "give [the] group[s] . . . the type of access they need to achieve their purposes." *Id.* at 26. The Government also argued, prior to discussing the merits of the Establishment Clause challenge in its brief, that the appellants lacked standing to challenge the FCMP because they had not suffered any injury as a result of it. *See id.* at 16–20.

National Historic Landmark HPP serves the secular purpose of "manag[ing] federal land in an orderly fashion that protects the area's cultural and archaeological properties."[111] In *Natural Arch*, the Government explained that the Rainbow Bridge GMP serves the secular purpose of preserving the monument's natural and historical value.[112] Much of the text of the Government's brief on appeal in *Natural Arch* matches word for word with the text of its *Wyoming Sawmills* brief, reflecting the fact that the briefs were submitted only a few months apart.[113]

Elaborating on the "secular purpose" prong in *Access Fund*, the Government noted the Supreme Court's statement in *McCreary County v. American Civil Liberties Union*[114] that the *Lemon* test's first prong asks whether the government took the challenged action for "the predominant purpose of advancing religion"[115] and described the secular interest in protecting "historically and culturally significant sites."[116] The rock-climbing ban was adopted for the secular purpose of preserving the character and integrity of, and preventing harm to, Cave Rock, which clearly has cultural, historical, and archaeological significance.[117] Just as with churches of historical significance that are administered by the NPS, the fact that Cave Rock's significance is based in part on its use for religious purposes does not preclude it from federal protection.[118] Additionally, the government's "compelling secular interest in managing its land in a manner that avoids interference with private citizens' religious practices" supports accommodating religious practices, such as Washoe religious uses of Cave Rock.[119] In countering the Access Fund's contention that the USFS cannot have a secular interest in protecting a Washoe sacred site, the Government noted the Ninth Circuit's recent rejection of this

111. Brief of Federal Appellees at 37, Wyo. Sawmills, Inc. v. U.S. Forest Serv., 383 F.3d 1241 (10th Cir. 2004) (No. 02-8009), 2002 WL 33005129, at *37 [hereinafter U.S. Brief, *Wyoming Sawmills*]. The Government first argued that Sawmills lacked standing to pursue the Establishment Clause claim. *Id.* at 31–32.

112. U.S. Brief, *Natural Arch*, *supra* note 93, at 33. The Government noted how the Rainbow Bridge GMP sought to protect vegetation by funneling visitors onto trails and sought to increase visitors' appreciation by educating them about the historical and cultural context. *Id.* The Government also argued that DeWaal and the other plaintiffs lacked standing. *Id.* at 17.

113. The *Wyoming Sawmills* brief is dated October 25, 2002, whereas the *Natural Arch* brief is dated January 17, 2003. One U.S. Department of Justice attorney (David C. Shilton) is named in both briefs. *See* U.S. Brief, Wyoming Sawmills, *supra* note 111, at Caption; U.S. Brief, Natural Arch, *supra* note 93.

114. 545 U.S. 844, 863 (2005).

115. Brief for Appellees at 25, Access Fund v. U.S. Dep't of Agric., 499 F.3d 1036 (9th Cir. 2007) (No. 05-15585), 2005 WL 3517404, at *25 [hereinafter U.S. Brief, *Access Fund*] (quoting McCreary Cnty. v. ACLU, 545 U.S. 844, 863 (2005)) (internal quotation marks omitted).

116. *Id.* Under *McCreary County*, the first prong is satisfied "except in those unusual cases where the claim [of a secular purpose] was an apparent sham, or the secular purpose secondary." *Id.* (alteration in original) (quoting McCreary Cnty., 545 U.S. at 865 (2005)) (internal quotation marks omitted). In *McCreary County*, the Supreme Court concluded that a Ten Commandments display in the McCreary County, Kentucky courthouse violated the Establishment Clause. 545 U.S. at 881.

117. U.S. Brief, *Access Fund*, *supra* note 115, at 25–26.

118. *Id.* at 28.

119. *Id.* at 28–29.

argument. In *Cholla Ready Mix, Inc. v. Civish*,[120] the court upheld an Arizona policy against purchasing aggregate materials that were mined from sacred Woodruff Butte, holding that "the desire to 'carry[] out state construction projects in a manner that does not harm a site of religious, historical, and cultural importance to several Native American groups and the nation' is a legitimate secular purpose."[121]

b. Emphasizing Management Decisions' Permissible Effects

Addressing the *Lemon* test's "secular effect" prong, the Government argued in *Bear Lodge* that any incidental advancement of religion at Devils Tower was not a "forbidden effect"—the FCMP is simply allowing "American Indians to advance their religions" (rather than the government advancing religion).[122] Responding to the plaintiffs' argument that the FCMP coerced park visitors into participating in a religious exercise, the Government noted that no one is *prohibited* from climbing in June. Moreover, even if the FCMP coerced climbers to decide not to climb, this would not be a compelled religious act, but rather simply a decision to respect Indian religious practices.[123] The Government argued in the *Wyoming Sawmills* litigation that consistent with the HPP's permissible secular purposes, the HPP had the permissible primary effects of reasonably managing the landmark "by balancing the competing demands placed on it" and of accommodating Indians' religious needs.[124] It did not have an impermissible coercive effect because it was merely encouraging people to respect religious sensibilities rather than forcing them to participate in a religious exercise.[125]

In *Natural Arch*, the Government noted that the Rainbow Bridge GMP had the permissible primary effects of reasonably managing the monument to balance competing demands and of accommodating religious needs.[126] By simply encouraging respect for religious sensibilities, it did not have an impermissible coercive effect.[127] Moreover, the Gov-

120. 382 F.3d 969 (9th Cir. 2004).

121. U.S. Brief, *Access Fund*, *supra* note 115, at 28 (alteration in original) (quoting Cholla Ready Mix, Inc. v. Civish, 382 F.3d 969, 975 (9th Cir. 2004)). Woodruff Butte is religiously significant to the Hopi Tribe, the Zuni Pueblo, and the Navajo Nation. *Id.* Cholla Ready Mix challenged Arizona's denial of a permit to sell materials mined at the butte to state construction projects because of its status as an important cultural, historic, and religious site. *Cholla Ready Mix*, 382 F.3d at 972.

122. U.S. Brief, *Bear Lodge*, *supra* note 73, at 32.

123. *Id.* at 32–33. The Government distinguished cases like *Lee v. Weisman*, 505 U.S. 577, 594 (1992) (challenging prayers at high school graduation ceremonies), and *Wallace v. Jaffree*, 472 U.S. 38, 61 (1985) (challenging school prayer), in which the Supreme Court found that students "had no choice but to engage in a religious practice." U.S. Brief, *Bear Lodge*, *supra* note 73, at 33. Under the FCMP, any coercion would be "compulsion to forego secular activities," which these cases do not suggest violates the Establishment Clause. *Id.* at 34 (citing *Lee*, 505 U.S. at 594; *Wallace*, 472 U.S. at 61).

124. U.S. Brief, *Wyoming Sawmills*, *supra* note 111, at 17.

125. *Id.* at 40; *see also id.* at 48–50 (considering coercion under the endorsement test and distinguishing Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 310–13 (2000)).

126. U.S. Brief, *Natural Arch*, *supra* note 93, at 40.

127. *Id.* at 40–41 (citing *Lee*, 505 U.S. at 587).

ernment noted that courts have upheld a wide variety of government actions that have allowed religious worship on public property, even where these actions have involved the exclusion of other uses.[128] Analogizing to cases upholding military chaplaincy programs, the Government noted that in the case of both military bases and sites like Rainbow Bridge, religious practitioners "would be unable to engage in their religious activity unless the government affirmatively accommodated that activity."[129]

c. Demonstrating Limited Government–Religion Interaction

Finally, the Government argued in each of these cases that its decisions did not run afoul of the *Lemon* test's "excessive entanglement" prong. In *Bear Lodge*, the Government argued that the FCMP does not result in excessive entanglement between government and religion because of the very limited involvement of the government with religious practices. The FCMP does not, for example, require NPS monitoring of ceremonies' nature or content.[130] In *Wyoming Sawmills*, the Government noted that the excessive entanglement prong requires examination of "the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority"[131] and explained that the HPP assures that the area around the landmark "retains an atmosphere conducive to worship by individual Native American religious practitioners" rather than benefiting religious institutions.[132] Moreover, the aid provided is "neutral and nonideological,"[133] and the USFS has no role in determining the "nature, content or manner of worship" at the site.[134] Finally, the involvement of the Medicine Wheel Coalition and the Medicine Wheel Alliance, which "represent Native American interests, [but are] not exclusively religious organizations," in consultation pursuant to the HPP does not constitute excessive entanglement.[135]

The Government explained in *Natural Arch* that the Rainbow Bridge GMP passes muster under the excessive entanglement prong because, rather than reaching out to aid religious institutions, the government was involved in Indian religious practices only in a very limited, unavoidable way: "Because the United States acquired lands containing Indian religious sites, it necessarily must make decisions regarding how

128. *Id.* at 43.
129. *Id.* at 44.
130. U.S. Brief, *Bear Lodge*, *supra* note 73, at 37.
131. U.S. Brief, *Wyoming Sawmills*, *supra* note 111, at 46 (quoting Lemon v. Kurtzman, 403 U.S. 602, 615 (1971)) (internal quotation marks omitted).
132. *Id.* at 47.
133. *Id.* (quoting Agostini v. Felton, 521 U.S. 203, 232 (1997)) (internal quotation marks omitted).
134. *Id.*
135. *Id.* at 45.

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to manage those areas in a way that complies with various laws that require the government to be sensitive to American Indian religious practices."[136]

In *Access Fund* as well, the Government argued that the Cave Rock climbing ban did not foster excessive entanglement because there was in fact *no* entanglement. The USFS was not participating in ceremonies or in the administration of Washoe religious institutions, nor monitoring religious practice, but merely enforcing "neutral restrictions on harmful activities, while permitting access . . . for permissible uses by both Washoe and non-Washoe people."[137]

2. Responding to the Endorsement Test

The Government also defended land managers' decisions under the requirements of another test for evaluating government actions that are alleged to violate the Establishment Clause, the endorsement test. Derived from Justice O'Connor's concurrence in *Lynch v. Donnelly*,[138] the endorsement test analyzes whether a "reasonable observer," aware of the history and context in which a government action occurs, would view the action as an endorsement of religion.[139] In defending the adoption of the Devils Tower FCMP under the endorsement test in *Bear Lodge*, the Government argued that a reasonable observer would perceive that the FCMP's goals are constitutionally permissible ones, such as "manag[ing] federal land in an orderly fashion [and] balanc[ing] the competing demands placed on the use of the site," rather than endorsing Indian religion.[140] Responding to the challenge to the Medicine Wheel HPP in *Wyoming Sawmills*, the Government asserted that a reasonable observer, aware of the history and context underlying the HPP, would recognize that its goals include managing federal land in an orderly fashion and balancing competing demands on the use of the monument, not advancing or endorsing Native American religion.[141] The observer would understand that the government only sought "to allow Native Americans certain opportunities to practice their religions with minimal disturbances from other visitors and other uses."[142]

136. U.S. Brief, *Natural Arch*, *supra* note 93, at 45.

137. U.S. Brief, *Access Fund*, *supra* note 115, at 39. The Government argued, in conclusion, that the USFS's "decision to protect the cultural, physical, and historic integrity of Cave Rock by restricting rock climbing easily satisfies all three prongs" of the *Lemon* test. *Id.* at 25.

138. 465 U.S. 668 (1984) (O'Connor, J., concurring).

139. *Id.* at 687–94.

140. U.S. Brief, *Bear Lodge*, *supra* note 73, at 39; *see also id.* at 37–39.

141. U.S. Brief, *Wyoming Sawmills*, *supra* note 111, at 49 (citing Zelman v. Simmons-Harris, 536 U.S. 639, 653–57 (2002)).

142. *Id.*

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3. Acknowledging the Nature of Indian Religions and the Impact of History

The efforts to counter Establishment Clause challenges that are described above rely on arguments similar to those made in cases challenging actions alleged to improperly advance other religions. They focus on non-religious goals, and effects, such as management of a site for multiple uses.

Other arguments made in the sacred sites cases, however, drew on the unique needs and experiences of Indian religious practitioners, while also treating protection of Indian religions as in keeping with the protection of mainstream religions—an approach that differed from historical treatment of Indian religious beliefs and practices as superstitions rather than "real" religions.[143] In defending the Devils Tower FCMP, for example, the Government noted that Indians inhabited the Devils Tower area long before European settlers arrived[144] and that each tribe associated with the tower "considers it to be an area of great importance in tribal heritage, culture, and spirituality."[145] By noting the tribes' longstanding presence in the Devils Tower area and the revival in the area of the previously banned Lakota Sun Dance,[146] the Government acknowledged the importance of the site and the past suppression of Indian religious activities there.

In defending the Cave Rock climbing ban in *Access Fund*, the Government situated the actions at Cave Rock within the broader landscape of government protection of other historic and cultural sites. Describing Cave Rock as "a site of unquestioned value . . . as the quintessential symbol of Washoe Indian culture, religion, and history," the Government equated banning rock climbing at Cave Rock with similar bans at places like Mount Rushmore.[147] A holding that the government was unable to ban rock climbing at Cave Rock solely because its significance stemmed in part from its religious importance would evidence a "hostility towards religion" that "would bring us into war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion."[148] Moreover, "the presence of Native Americans on this land since

143. *See, e.g.*, Dussias, *supra* note 22, at 789 (discussing nineteenth-century federal officials' reluctance to recognize ceremonial dances as religious in nature); *see also supra* notes 33–35 and accompanying text.

144. U.S. Brief, *Bear Lodge*, *supra* note 73, at 3 n.1.

145. *Id.* at 5–6; *see also* Intervenor-Appellees Brief, *Bear Lodge*, *supra* note 67, at 5–6 (discussing the significance of Devils Tower, the impact of disturbances from climbing, and FCMP provisions to deal with them).

146. U.S. Brief, *Bear Lodge*, *supra* note 73, at 6–7 (citing U.S. DEP'T OF THE INTERIOR, *supra* note 75).

147. *Id.* at 23.

148. U.S. Brief, *Access Fund*, *supra* note 115, at 23 (quoting Lynch v. Donnelly, 465 U.S. 668, 673 (1984)) (internal quotation marks omitted).

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time immemorial" renders "properties of traditional cultural and religious importance to an Indian tribe . . . *entitled* to protection."[149]

4. *Mea Culpas* for Imposing Burdens on Religious Exercise

Another justification offered by the Government for the challenged decisions was ameliorating burdens on religious exercise that the Government itself had imposed, a consideration that was woven into the Government's arguments in several ways. Moreover, the site-specific nature of Indian religions meant that government imposition of burdens was potentially even more damaging than would have been the case with other religions. Thus, in *Bear Lodge*, the Government identified "removing a government-created obstacle to the exercise of religion," namely the authorization of unlimited, noisy, and visible climbing on Devils Tower,[150] as a secular goal of the FCMP. The Supreme Court has established that governmental action to alleviate interference with ceremonial use created by the government itself does not violate the Establishment Clause.[151] The removal of government-created obstacles to the exercise of religion is a particularly important goal where Indian religions are concerned. Because of the sacred nature of a ceremonial site, "Indians cannot go elsewhere for equivalent religious practices," and their prayers and ceremonies had been subjected to "great disruption" from recreational climbers.[152] The goal of "remov[ing] government-created obstacles to the religious use of the site" would also be recognized by a reasonable observer as a goal of the FCMP.[153]

The Government explained in the *Wyoming Sawmills* litigation that the Medicine Wheel HPP serves the secular purpose of "removing a government-created obstacle to the exercise of religion,"[154] namely "noise, disturbance of objects, and other impacts from visitation" that had previously occurred under the USFS's management of the site and "sometimes had deleterious effects on religious pursuits."[155] The Government referred to the site-specific nature of Indian religions: "[B]ecause the site

149. *Id.* at 26 (emphasis added).

150. U.S. Brief, *Bear Lodge*, *supra* note 73, at 28.

151. *Id.* at 28–29 (citing Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 335 (1987)). The Government's brief explained the effort to alleviate the burden on religious exercise:

> In order to alleviate the interference with the ceremonial use of Devils Tower caused by the government's authorization of recreational climbing, NPS adopted a plan that strikes an appropriate balance between the recreational and ceremonial uses of the monument. Under that plan, all recreational uses including climbing may be conducted throughout the year while an educational campaign seeks to inform the public about the ceremonial uses of the site and to discourage recreational climbing for the month in which the bulk of those ceremonies take place. That limited governmental action to alleviate the obstacle that the government itself created does not violate the Establishment Clause.

Id. at 30.

152. *Id.* at 29–30.

153. *Id.* at 39.

154. U.S. Brief, *Wyoming Sawmills*, *supra* note 111, at 40.

155. *Id.* at 41.

itself is considered sacred, Native Americans cannot go elsewhere for equivalent religious practices."[156] The HPP's adoption struck "a permissible balance between ceremonial and nonceremonial uses of the [landmark]" and its attempt "to foster visitor respect for and [to] protect traditional cultural and religious pursuits" and was constitutionally permissible.[157]

In *Natural Arch*, the Government also cited the removal of "a government-created obstacle to the exercise of religion"[158] as a secular purpose of the Rainbow Bridge GMP. Before the Glen Canyon Dam was built, Rainbow Bridge "was inaccessible to all but a few tourists, and thus the conflicts with the needs of Native American religious practitioners were minimal."[159] By creating the dam, the government "made Rainbow Bridge accessible to thousands of tourists per year, many of whom had no knowledge of Native American customs and sensibilities."[160] The disruptions to worship caused by the increase in these visitors "qualify as *burdens* on the free exercise of Native American religion," which the NPS sought to ameliorate by informing visitors of beliefs as to the bridge's religious significance and asking them to respect these beliefs.[161] These efforts constitute "a measured attempt to alleviate the desecration which many Native Americans feel when visitors pass under the Bridge, and thus at least partially lift this burden."[162]

Finally, in the *Access Fund* litigation, the Government acknowledged that it had imposed a burden on Washoe religious exercise by "taking ownership of Cave Rock and permitting a wide variety of recreational uses despite the Washoe Tribe's use of the site since time immemorial."[163] The Government noted the dispossession of the tribe's traditional territory and its experience with a land-claims process that had not provided for land recovery[164]—a shortcoming of the implementation of the Indian Claims Commission Act.[165] The Government went on to em-

156. *Id.* at 40.
157. *Id.* at 41.
158. U.S. Brief, *Natural Arch*, *supra* note 93, at 36.
159. *Id.*
160. *Id.*
161. *Id.* at 37 (emphasis added).
162. *Id.*
163. U.S. Brief, *Access Fund*, *supra* note 115, at 29 n.5. This argument was made in response to the claim by amicus curiae Mountain States Legal Foundation (in support of the Access Fund) that the government lacks a legitimate interest in accommodating religious practice where the government has not itself burdened religious exercise. In the oral argument before the Ninth Circuit, the Government's attorney explained that because the "government owns this property, the government has exclusive direction and authority to decide who get[s] to use the property. And so it is the government['s] action in allowing or not allowing rock climbing to take place that is going to be posed in the burden here." Transcript of Oral Argument at 8, Access Fund v. U.S. Dep't of Agric., 499 F.3d 1036 (2007) (No. 05-15585) (statement of Sharon Swingle).
164. U.S. Brief, *Access Fund*, *supra* note 115, at 29 n.5.
165. DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 269 (6th ed. 2011) (noting the focus of the Indian Claims Commission on monetary awards, even though the Indian Claims Commission Act did not explicitly limit recovery in successful land claims to mone-

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phasize that its interest in accommodating religious practice is *not* limited to situations in which the Government itself had imposed a burden on religious exercise.[166]

5. Acknowledging Obligations Arising from the Political and Trust Relationships

In addition to acknowledging the responsibilities imposed on the United States because of the deleterious impact of past policies on Indian religious exercise, the Government also cited obligations stemming from the unique relationship between tribes and the United States. In *Bear Lodge*, for example, in identifying the secular goals of the Devils Tower FCMP, the Government noted that the FCMP "serves the secular goal of effectuating the federal government's political relationship with American Indians."[167] Accommodations of Indian religious practices that help to effectuate this relationship "are particularly appropriate" and have been held to "satisfy the Establishment Clause based only on a showing that the accommodation bears a rational relationship to a legitimate governmental interest."[168] In addition, "[f]ulfillment of the federal government's trust responsibility toward American Indian tribes . . . constitutes a secular purpose . . . with the secular effect of promoting tribal sovereignty."[169] Analyzing the FCMP under the *Lemon* test's secular effect prong, the Government explained that the FCMP is "effectuating the federal government's political relationship with American Indians."[170] This relationship also figured in the analysis under the endorsement test: a reasonable observer would perceive "effectuat[ing] the political relationship between the federal government and American Indian tribes" as one of the FCMP's constitutionally permissible goals.[171]

In the *Wyoming Sawmills* litigation, the Government explained that the Medicine Wheel HPP served the secular purpose of "effectuating the federal government's political relationship with American Indians," as recognized by the Sacred Sites Order and AIRFA.[172] Courts have recognized that religious accommodations that effectuate this relationship are "particularly appropriate and satisfy the Establishment Clause based only on a showing that the accommodation bears a rational relationship to a

tary damages, and the fact that just compensation would have required the return of at least some of the taken land).

166. U.S. Brief, *Access Fund*, *supra* note 115, at 29 n.5 (citing Cammack v. Waihee, 932 F.2d 765, 766 n.15 (9th Cir. 1991)).

167. U.S. Brief, *Bear Lodge*, *supra* note 73, at 23.

168. *Id.* at 24 (citing Rupert v. U.S. Fish & Wildlife Serv., 957 F.2d 32, 34–35 (1st Cir. 1992); Peyote Way Church of God v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991)).

169. *Id.* at 25.

170. *Id.* at 23.

171. *Id.* at 33.

172. U.S. Brief, *Wyoming Sawmills*, *supra* note 111, at 38. The brief also cited the Programmatic Agreement that preceded adoption of the HPP for its recognition of the government's trust relationship with tribes. *Id.*

legitimate government interest."[173] The rational relationship standard for evaluating accommodations for Indians "derives from what the Supreme Court has characterized as the 'peculiar semisovereign and constitutionally recognized status of Indians,' which 'justifies special treatment on their behalf when rationally related to the Government's unique obligation toward the Indians.'"[174]

"[E]ffectuat[ing] the government's trust responsibility and political relationships with Tribes" was identified as one of the secular purposes served by the Rainbow Bridge GMP in the *Natural Arch* litigation.[175] In the *Access Fund* litigation as well, the Government referred to its "constitutional role as protector of Native Americans."[176] Its secular interest in accommodating religious and cultural uses "is particularly acute with respect to Native Americans, with whom the government has *a unique legal and historical relationship*."[177] Referring to the constitutional underpinnings of the political relationship between tribes and the United States, the Government noted that "[o]ur Constitution gives the federal government significant latitude to act for the benefit of federally recognized Indian tribes," as recognized by the Supreme Court in *Morton v. Mancari*.[178] The USFS's effort to protect the ability of a federally recognized tribe—in other words, a tribe with a political, government-to-government relationship with the United States—to use Cave Rock for traditional purposes "was consistent with federal law *requiring* federal agencies to attempt to protect Indian sacred sites and to accommodate access to and ceremonial use of the sites by Indian religious practitioners."[179] Courts of appeals' decisions consequently have recognized that "the Establishment Clause permits the government to take special steps to accommodate Indian tribes' cultural and religious traditions."[180]

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173. *Id.* at 38–39 (citing Rupert v. U.S. Fish & Wildlife Serv., 957 F.2d 32, 34–35 (1st Cir. 1992); Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210, 1215–17 (5th Cir. 1991)).

174. *Id.* at 39 (quoting Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 673 n.20 (1979)).

175. U.S. Brief, *Natural Arch*, *supra* note 93, at 34 ("Actions which accommodate tribal culture, including religious practices, effectuate the government's trust responsibility and political relationships with Tribes.").

176. U.S. Brief, *Access Fund*, *supra* note 115, at 21. The Government cited, in addition to *Lemon* and *Lynch*, a number of Supreme Court cases in support of its position, including *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), *McCreary County v. ACLU*, 545 U.S. 844 (2005), and *Corp. of Presiding Bishops of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987). *Id.* at 23–25, 32.

177. *Id.* at 30 (emphasis added).

178. *Id.* (citing Morton v. Mancari, 417 U.S. 535, 551–55 & n.24 (1974)).

179. *Id.* (emphasis added). The Government's brief cited the Sacred Sites Order and AIRFA in support of this statement. *Id.* at 30–31 (citing Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996); 42 U.S.C. § 1996 (2006)).

180. *Id.* at 31. The Government's brief referred to *Rupert v. U.S. Fish & Wildlife Serv.*, 957 F.2d 32, 35–36 (1st Cir. 1992), which rejected an Establishment Clause challenge to a federal law prohibiting possession of eagle feathers, except for Indian tribes' religious use, and *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1217 (5th Cir. 1991), which rejected an Establishment Clause challenge to a ban on peyote use except by Native American religious organizations. U.S. Brief, *Access Fund*, *supra* note 115, at 31–32; *see also id.* at 20–21 (citing 16 U.S.C. §§

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6. Responding to *Lyng* and Other Indian Free Exercise Clause Precedents

In defending against the Establishment Clause challenges, the Government also addressed Free Exercise Clause cases involving Indian religious practitioners, such as *Lyng* and *Badoni*. *Lyng* was cited for its encouragement of religious exercise accommodation and distinguished as to its holding on the plaintiffs' Free Exercise Clause claim. In *Bear Lodge*, for example, the Government noted that the Supreme Court emphasized in *Lyng* that accommodation of Indian religious practices is constitutionally permissible.[181] Similarly, the Government argued in *Wyoming Sawmills* that the "HPP represents precisely the kind of accommodation encouraged by the Court in *Lyng*."[182] The Government's briefs in *Natural Arch* and *Access Fund* also noted *Lyng*'s support for accommodation of tribal religious traditions.[183] The Government noted further in *Natural Arch* that given the similarity between the NPS policies at the monument and NPS free exercise accommodation at many other sites, accepting the theory that the policies violated the Establishment Clause would cast "a large shadow . . . on the many similar efforts by the Park Service and other agencies to accommodate religious practices on public lands."[184]

Addressing the argument that *Lyng*'s rejection of the plaintiffs' Free Exercise Clause claim rendered the challenged land management decision illegitimate, the Government argued in *Wyoming Sawmills* that this aspect of *Lyng* is "readily distinguishable."[185] *Lyng* addressed the issue of what the Free Exercise Clause *requires* of the government, while making clear that the government "has a range of discretion to accommodate religious practices."[186]

The Government also responded to arguments based on *Badoni*, in which the Tenth Circuit rejected a Free Exercise Clause challenge to the Government's management of Rainbow Bridge National Monument.[187] The Government noted in *Bear Lodge* that there was no conflict between the adoption of the Devils Tower FCMP, in which the NPS *chose* to allow Indians to use Devils Tower for ceremonial purposes, and the court's

470(b)(2), 470a(6)(A) (2006)) (noting that federal law recognizes the government's interests in preserving sites of religious importance to Native Americans, which are part of the historical and cultural foundations of the United States).

181. U.S. Brief, *Bear Lodge*, *supra* note 73, at 34.

182. U.S. Brief, *Wyoming Sawmills*, *supra* note 111, at 52.

183. U.S. Brief, *Natural Arch*, *supra* note 93, at 37–38; U.S. Brief, *Access Fund*, *supra* note 115, at *32.

184. U.S. Brief, *Natural Arch*, *supra* note 93, at 31.

185. U.S. Brief, *Wyoming Sawmills*, *supra* note 111, at 50. *Lyng*, along with *Badoni v. Higginson*, 638 F.2d 171 (10th Cir. 1980), were "[t]he principal cases relied on by Sawmills." U.S. Brief, *Wyoming Sawmills*, *supra* note 111, at 50.

186. *Id.* at 52.

187. *Badoni*, 638 F.2d at 179.

decision in *Badoni*, which held that the Free Exercise Clause does not *require* that the government exclude recreational visitors from Rainbow Bridge National Monument to facilitate Indian ceremonial use.[188] Moreover, although dicta in *Badoni* suggested that accommodations that excluded the public from "its normal use of the area" would violate the Establishment Clause, the FCMP did not implicate the dicta because it did *not* exclude the public from climbing. Also, in an interesting comment on the proper characterization of uses of Devils Tower, the Government noted that "it would make no sense to characterize climbing rather than American Indian ceremonies as the 'normal use' of the site, as the ceremonial use of Devils Tower long predate[s] recreational rock climbing on the site."[189] Finally, the Government expressed disagreement with the *Badoni* dicta, explaining that "the government routinely excludes the general public from public lands in order to allow religious practices to occur, and such actions have never been held to violate the Establishment Clause."[190] Examples of such a practice include chapels in military institutions and airports, religious funerals in Arlington National Cemetery, and the issuance of a permit for a Papal Mass on the National Mall.[191]

In *Wyoming Sawmills*, the Government dismissed *Badoni* as being (like *Lyng*) "readily distinguishable."[192] The dicta in *Badoni* indicating that exclusion of tourists would violate the Establishment Clause hypothesized conditions that differ greatly from the management of the Medicine Wheel pursuant to the HPP, which does not exclude the public and is aimed primarily at protecting the landmark's cultural and archaeological resources.[193]

The Access Fund also relied on dicta in *Bear Lodge*, *Natural Arch*, and *Badoni* as support for its argument that the Cave Rock climbing ban had the primary effect of endorsing religion. The Government distinguished these cases as each involving a different factual scenario than was present in the *Access Fund* litigation and thus not undercutting the argument that the climbing ban satisfied the *Lemon* test's "primary effect" prong.[194]

7. Summary of the Government's Arguments

In the cases discussed above, the Government provided detailed defenses of federal land managers' decisions utilizing the kinds of argu-

188. U.S. Brief, *Bear Lodge*, *supra* note 73, at 35 (citing *Badoni*, 638 F.2d at 179).
189. *Id.* at 36 n.12.
190. *Id.* at 36; *see also id.* at 38 ("*Badoni* is incorrect in suggesting that the Establishment Clause prohibits the government from designating public spaces for exclusively religious uses . . . .").
191. *Id.* at 36–37.
192. U.S. Brief, *Wyoming Sawmills*, *supra* note 111, at 50.
193. *Id.* at 51.
194. U.S. Brief, *Access Fund*, *supra* note 115, at 36–38.

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ments and relying on the precedents that would commonly be used to defend religious accommodations in Establishment Clause challenges, indicating a conviction that Indian religious exercise rights fit within the mainstream of religious freedom protection. At the same time, the inclusion of arguments that draw on Indian law principles and precedents indicates recognition that addressing Indian religious needs requires informed, deliberate solicitousness on the part of the government and that this treatment is firmly grounded in longstanding legal principles. Past suppression of religious practices, taking of aboriginal lands, and other actions that have burdened religious exercise necessitate protective actions to ameliorate these burdens, which interfere with ceremonial use—a *normal* use of public land. Indeed, even an exclusion of the public from a site to allow ceremonies to occur is defensible.

The United States' political relationship with, and trust responsibility toward, tribes was acknowledged as a permissible—and in fact crucial—factor in shaping plans to manage public lands on which sacred sites are located. The dilemma faced by Indian religious practitioners was recognized: the site-specific nature of their religions means that they cannot simply go elsewhere to conduct ceremonies and other activities, but they face disruptions from other visitors if they continue their practices at sites on public lands. Plans that are devised to respect and protect these practices do not violate the Establishment Clause. In short, the Government's efforts to defend the management plans developed at the four sites at issue in these cases suggest a rejection of past hostile and discriminatory policies toward Indian religions and a firm commitment to fulfill the obligation to protect the religious needs of their contemporary practitioners.

D. The Judicial Response: Establishment Clause Challenges Rejected

In the *Bear Lodge* litigation, the district court rejected the Establishment Clause challenge to the request that visitors refrain from climbing on Devils Tower during June. The court agreed with the Government that the voluntary climbing "ban" had a secular purpose (removing barriers to worship resulting from public ownership of the tower), did not have the impermissible effect of coercing participation in religion, and did not constitute excessive entanglement between the government and religion.[195] The plaintiffs appealed the decision to the Tenth Circuit, which drew on briefs submitted by the Cheyenne River Sioux Tribe, which had intervened in the litigation, and by amici curiae to discuss the significance of Devils Tower in its 1999 opinion. The court of appeals reviewed past government policy toward Indians, including support for missionaries and violent actions to suppress religious ceremonies, such

195. Bear Lodge Multiple Use Ass'n v. Babbitt, 2 F. Supp. 2d 1448, 1455–56 (D. Wyo. 1998). The court did not address the challenges to the interpretive program or the placement of signs because it held that the plaintiffs lacked standing to pursue these claims. *Id.* at 1453.

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as the 1890 Ghost Dance Massacre at Wounded Knee. The court noted the results of the change in this policy, embodied in developments such as AIRFA, the 1990 Native American Graves Protection and Repatriation Act (NAGPRA), the 1992 amendments to the National Historical Preservation Act, and the Sacred Sites Order.[196]

After this extensive discussion of past suppression—and more recent protection—of Indian religious exercise, however, the court of appeals declined to address the merits of the Establishment Clause challenge to the Devils Tower FCMP. The plaintiffs (who had continued to climb at the site despite the voluntary climbing limit) had not suffered any injury and therefore lacked standing to pursue their claim, the court explained.[197] Although the climbers were, the court noted, "clearly incensed by the NPS'[s] request that they voluntarily limit their climbing," their indignation was no substitute for showing an actual injury.[198] After the court denied the plaintiffs' request for rehearing en banc,[199] they sought Supreme Court review of the panel's decision, but without success.[200] The NPS continues to manage Devils Tower National Monument with a view toward accommodating Indian religious practices, among other uses of the site, and to enrich visitors' experiences by educating them about its significance to those who have long worshipped there.[201]

In *Wyoming Sawmills*, the district court concluded in 2001 that Sawmills lacked standing to pursue its Establishment Clause challenge to the Medicine Wheel HPP[202] and consequently did not address the merits

196. Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814, 817–18 (10th Cir. 1999); *see also* Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814, 817–18 (10th Cir. 1999) (discussing the historical suppression of Indian religion as a basis for ameliorative measures); Brief by Amici Curiae Med. Wheel Coal. on Sacred Sites of N. Am. et al. at 9–10, Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814 (10th Cir. 1999) (No. 98-8021), 1998 U.S. 10th Cir. Briefs LEXIS 62, at *9-10. In the 1890 Ghost Dance Massacre, Sioux men, women, and children who had gathered on the Pine Ridge Reservation were killed in an attack by Seventh Cavalry troops participating in efforts to suppress the Ghost Dance religion. The scattering of the bodies of women and children along a distance of two miles from their Pine Ridge camp indicated that many had been killed while fleeing. *See* Dussias, *supra* note 22, at 794–99 (discussing the Ghost Dance and the massacre).

197. *Bear Lodge*, 175 F.3d at 821–22. The court noted that the individual recreational climbers had been undeterred by the FCMP and that the plaintiff who was a commercial climbing guide had not established any economic injury. *Id.* at 821.

198. *Id.* at 822.

199. Brief for Intervenors in Opposition to the Petition for Writ of Certiorari at 20 n.24, Bear Lodge Multiple Use Ass'n v. Babbitt, 529 U.S. 1037 (2000) (No. 99-1045), 2000 WL 34014041, at *20 n.24.

200. *Bear Lodge*, 529 U.S. at 1037.

201. George L. San Miguel, *How Is Devils Tower a Sacred Site to American Indians*, NAT'L PARK SERV. (Aug. 1994), http://www.nps.gov/deto/historyculture/sacredsite.htm.

202. Wyo. Sawmills, Inc. v. U.S. Forest Serv., 179 F. Supp. 2d 1279, 1292–97 (D. Wyo. 2001). The court concluded that although Sawmills had suffered an injury in fact resulting from the HPP because the HPP caused it to lose the opportunity to bid on timber sales, Sawmills' injury would not be redressed by striking down the HPP because doing so would not guarantee Sawmills the right to log in the Horse Creek area. *Id.* at 1296–97. The court rejected claims that Sawmills had also suffered an injury on the grounds that it was "directly affected" by the U.S. Forest Service's management of Medicine Mountain under the HPP as a sacred site. The court noted that Sawmills relied on previous cases that had involved individual (rather than corporate) plaintiffs who were offended by

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of the claim, a decision that Sawmills appealed to the Tenth Circuit. In a 2004 opinion, the court of appeals acknowledged the overlap, recognized in the HPP, of the cultural, historical, and religious aspects of the landmark for Indians: "The HPP recognizes explicitly that the cultural and historic importance of the Medicine Wheel is, for many Native Americans, an element of their religious tradition."[203] The court noted that the preservation of the Medicine Wheel is consistent with the USFS's responsibilities under the Sacred Sites Order and a number of statutes aimed at protecting archaeological and historical sites and resources.[204] Because the court affirmed the holding that Sawmills lacked standing to pursue its Establishment Clause claim, however, it did not address the claim's merits.[205] The Tenth Circuit denied Sawmills' petition for rehearing en banc,[206] a defeat that was followed by the Supreme Court's rejection of Sawmills' petition for writ of certiorari in 2005.[207]

The landmark was renamed in 2011 as Medicine Wheel/Medicine Mountain National Historic Landmark and expanded to cover an additional area of more than 4,000 acres.[208] The expanded landmark includes the summit of Medicine Mountain, the Medicine Wheel, an adjoining ridge, and other adjacent lands with traditional spiritual and ceremonial significance.[209] Whereas the original landmark designation focused on the area's archaeological value and encompassed only a 110-acre area around the Medicine Wheel, the expanded designation recognizes the Medicine Wheel and Medicine Mountain as having national significance because of their traditional cultural value to many tribes.[210] In short, the federal government's commitment to the protection of the Medicine

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coming in contact with religious symbolism that was being advanced by government action. *Id.* at 1294–95. Finally, the court rejected Sawmills' argument that it suffered a constitutional injury from the use of tax dollars to further Native American religion, relying on the taxpayer standing analysis in *Valley Forge Christian College v. Am. United for Separation of Church State, Inc.*, 454 U.S. 464 (1982). *Id.* at 1295–96.

203. *Wyo. Sawmills*, 179 F. Supp. 2d at 1245.

204. *Id.* (citing the Antiquities Act of 1906, the Historic Sites Act of 1935, the NHPA, the Archaeological and Historic Resources Protection Act of 1974, AIRFA, and the Archaeological Resources Protection Act of 1979).

205. *Id.* at 1249.

206. The Tenth Circuit denied Sawmills' petition for rehearing en banc in December 2004. Petition for Writ of Certiorari at 1, Wyo. Sawmills, Inc. v. U.S. Forest Serv., 546 U.S. 811 (2005) (No. 04-1175), 2005 WL 520493 at *1.

207. Wyo. Sawmills, Inc. v. U.S. Forest Serv., 546 U.S. 811 (2005).

208. *America's Great Outdoors: Secretary Salazar Designates 14 New National Historic Landmarks*, U.S. DEP'T OF THE INTERIOR (June 30, 2011), http://www.doi.gov/news/pressreleases/AMERICAS-GREAT-OUTDOORS-Secretary-Salazar-Designates-14-New-National-Historic-Landmarks.cfm.

209. *Interior Secretary Salazar Announces Renaming of Medicine Wheel National Historic Landmark*, NATIVE NEWS NETWORK (July 6, 2011), http://www.nativenewsnetwork.com/interior-secretary-salazar-announces-renaming-of-medicine-wheel-national-historic-landmark.html.

210. Robert J. Miller, *Medicine Wheel/Medicine Mountain National Historic Landmark*, NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS & CLARK, AND MANIFEST DESTINY (Sept. 17, 2011, 12:53 PM), http://lawlib.lclark.edu/blog/native_america/?p=5037.

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Wheel continues in spite of attacks by those who would place commercial and other interests above religious freedom.

In *Natural Arch*, the district court applied the *Lemon* test and concluded in 2002 that the Rainbow Bridge GMP served the dual secular purposes of promoting visitor understanding of different cultures and "fostering the preservation of the historical, social, and cultural practices of Native Americans."[211] It did not have an impermissible effect because a reasonable observer would not view it as conveying a message of government endorsement of Indian religious beliefs and because requesting visitors to consider not walking under the bridge does not amount to coercion "into practicing the Native American religion associated with the belief" about not passing under it.[212] Finally, the Rainbow Bridge GMP did not create excessive entanglement between government and religion. Not only are the entities (tribes) that benefit from it not primarily religious in nature and the NPS involvement with religious practices very limited, but the NPS–tribal consultation about the bridge's cultural, religious, and social importance was necessary for the NPS "to fulfill its important trust responsibilities to American Indians."[213] The court noted the requirement in the Sacred Sites Order that federal agencies "accommodate access to and ceremonial use" of sites by Indian religious practitioners and "avoid adversely affecting the[ir] physical integrity."[214]

Plaintiff DeWaal, who blamed the NPS's actions at Rainbow Bridge on "treehuggers from the Sierra Club" and "Injuns,"[215] appealed the dismissal of the claim to the Tenth Circuit. Relying on *Bear Lodge*, the court of appeals decided that none of the plaintiffs had standing to challenge the Rainbow Bridge GMP.[216] The court noted the similarity to the *Bear Lodge* facts: in neither case did the plaintiffs suffer any injury from being asked to voluntarily refrain from going to a certain area out of respect for Indians' views on its religious significance.[217] In 2004, the Supreme Court denied DeWaal's petition for writ of certiorari.[218] The NPS

211. Natural Arch & Bridge Soc'y v. Alston, 209 F. Supp. 2d 1207, 1224 (D. Utah 2002). The court concluded that only plaintiff DeWaal had standing to challenge the Rainbow Bridge GMP on Establishment Clause grounds. *Id.* at 1216–19.

212. *Id.* at 1224–25.

213. *Id.* at 1226; *see also id.* at 1224–26. The court rejected DeWaal's additional equal protection claim. *Id.* at 1220.

214. *Id.* at 1226 n.11. The court also cited NAGPRA and the 1992 NHPA Amendments as additional examples of statutes "protecting tribal governments and cultures." *Id.*

215. *Id.* at 1221 n.9 (quoting Ranger Paul Nelson's incident report concerning Mr. DeWaal) (internal quotation marks omitted). DeWaal expressed his theory about the "conspiracy" between the NPS, the Sierra Club, and Indians in an encounter with a park ranger during a visit to the monument. *Id.*

216. Natural Arch & Bridge Soc'y v. Alston, 98 F. App'x 711, 715–716 (10th Cir. 2004). The *Natural Arch* opinion predated the *Wyoming Sawmills* opinion (dated March 23, 2004, and September 20, 2004, respectively).

217. *Id.* at 716.

218. DeWaal v. Alston, 543 U.S. 1145 (2005).

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continues to manage the monument in a way that fosters respect for the religious significance of Rainbow Bridge.[219]

Finally, in the fourth case, the *Access Fund* litigation, the district court held in 2005 that the USFS had not violated the Establishment Clause by imposing a climbing ban at Cave Rock.[220] The Access Fund appealed the decision to the Ninth Circuit. For the first time, a court of appeals reached the merits of, and rejected, an Establishment Clause challenge to a federal land management decision that took into account Indian religious rights. The 2007 Ninth Circuit opinion began with a description of the religious significance of the site, noting that "many Washoe compare Cave Rock to a church."[221] The court held that the Government "easily satisfie[d]" the first prong of the *Lemon* test because the ban "served the permissible secular goal of protecting cultural, historical and archaeological features of Cave Rock."[222] Moreover, even if the climbing ban had been imposed "in part to mitigate interference with the Washoe's religious practices, this objective alone would not give rise to a finding of an impermissible religious motivation" because Cave Rock's status as a Washoe sacred site "does not diminish its importance as a national cultural resource."[223] Nor did the climbing ban have impermissible effects. As a practical matter, the climbing ban could not be perceived as endorsing Washoe religious practices, given that the USFS had rejected the tribe's preferred alternative of banning all activities inconsistent with Washoe belief.[224] Finally, there was no excessive entanglement between government and religion simply because the USFS would need to have a surveillance program to enforce the climbing ban; supervisory oversight of recreational activities at the site is no different from monitoring to ensure that other rules are followed.[225] The court also rejected the Access Fund's reliance on dicta in *Bear Lodge* and *Natural*

219. U.S. DEP'T OF THE INTERIOR, *Rainbow Bridge National Monument, Things to Do*, NAT'L PARK SERVICE (Apr. 5, 2012), http://www.nps.gov/rabr/planyourvisit/things2do.htm ("We ask that visitors respect the religious significance of Rainbow Bridge to neighboring tribes and consider viewing Rainbow Bridge from the viewing area rather than walking up to or under the bridge.").

220. Access Fund v. U.S. Dep't of Agric., 499 F.3d 1036, 1042 (9th Cir. 2007) (noting that the district court relied on *Lemon*); *see also* Jeff DeLong, *Judge Tells Climbers to Keep off Cave Rock*, RENO GAZETTE-JOURNAL (Reno, Nev.), Jan. 31, 2005, at C1 (stating that a federal judge upheld the climbing ban in a January 28, 2005 ruling).

221. *Access Fund*, 499 F.3d at 1039 (describing the site's historical and archaeological significance).

222. *Id.* at 1043–44.

223. *Id.* at 1044 (citing Cholla Ready Mix, Inc. v. Civish, 382 F.3d 969, 972, 975–76 (9th Cir. 2004)).

224. *Id.* at 1045 (noting that the preferred alternative "would have denied non-Washoe access to the TCP and banned hiking and other recreational uses at the rock").

225. *Id.* at 1046. The court noted that recent Supreme Court opinions had discussed the second and third prongs of the *Lemon* test together, although some recent Ninth Circuit cases still discussed entanglement as a separate prong. The court focused its discussion on the first two prongs, "with an eye to potential effects that might result in government becoming impermissibly embroiled in religious affairs." *Id.* at 1043.

Arch, which it noted are out-of-circuit cases that are factually distinguishable.[226]

Judge Wallace concurred in the *Access Fund* result but believed that the climbing ban should be analyzed in accordance with the 2005 plurality opinion in *Van Orden v. Perry*,[227] in which the Supreme Court found that a Ten Commandments monument on the grounds of the Texas State Capitol did not violate the Establishment Clause.[228] Like the religiously and historically significant Ten Commandments monument, the Cave Rock climbing ban has a dual significance: "[A]lthough it may promote the Washoe religion, it also protects a culturally, historically, and archaeologically significant site."[229] Mere promotion of a message consistent with a religious doctrine does not violate the Establishment Clause because there is "no constitutional requirement which makes it necessary for government to be hostile to religion."[230]

Following the *Access Fund* decision, a USFS order was signed to enforce a permanent climbing closure, and the USFS took action to remove the climbing bolts that disfigured Cave Rock. The USFS continues to implement its management plan for Cave Rock—to prevent climbing in or on Cave Rock, manage the site for its "historic, cultural, archaeological and scientific values," and repair the damage done by climbers.[231]

Access Fund's significance is underscored by a 2011 Montana federal district court decision. In *Fortune v. Thompson*,[232] the court rejected a claim that the USFS's travel management plan (TMP) for a portion of the sacred Badger–Two Medicine area (in Lewis and Clark National Forest) violated the Establishment Clause.[233] The TMP created motorized-use restrictions for most of the area to mitigate interference with Blackfeet religious practices, among other reasons.[234] Relying on *Access Fund*, the court found that the TMP passed muster under the *Lemon* test.[235]

226. *Id.* at 1046.

227. 545 U.S. 677 (2005).

228. *Access Fund*, 499 F.3d at 1047 (Wallace, J., concurring) (citing *Van Orden*, 545 U.S. at 690–91).

229. *Id.* at 1048.

230. *Id.* (quoting *Van Orden*, 545 U.S. at 684) (internal quotation mark omitted).

231. U.S. FOREST SERV., CAVE ROCK MANAGEMENT PLAN IMPLEMENTATION 1 (2009).

232. No. CV-09-98-GF-SEH, 2011 WL 206164 (D. Mont. Jan. 20, 2011).

233. *Id.* at *1, *3.

234. *Id.*

235. *Id.* at *2–3. The court noted that the restriction was adopted for "a host of secular purposes, including benefits to air quality, water quality, soil quality, wildlife habitat, and fish habitat" and with consideration to "the Traditional Cultural District located within Badger–Two Medicine Area and to resources governed by the [NHPA], 16 U.S.C. § 470f." *Id.* Also, the principal effect of the TMP neither advanced nor inhibited religion and the TMP did not lead to excessive entanglement with religion. *Id.* For a discussion of traditional Blackfeet religion and the religious significance of the Badger–Two Medicine area, see Jay Hansford C. Vest, *Traditional Blackfeet Religion and the Sacred Badger–Two Medicine Wildlands*, 6 J. L. & RELIGION. 455, 460–84 (1988).

Although the outcomes in cases that have rejected Establishment Clause challenges to the public lands management decisions discussed above are undoubtedly positive from the perspective of religious freedom proponents, it should not be assumed that the land management plans that survived Establishment Clause challenges, either on the merits or on standing grounds, were sufficient to fully protect religious exercise. Washoe Tribal Chairman A. Brian Wallace has noted, for example, that the USFS plan at Cave Rock "permits activities that will continue to adversely affect the Tribe's traditional use." He warned that although some decisions to protect sacred sites are being made and upheld, there are no guarantees that sites will be protected. Consequently, "repatriation of a site to the indigenous people is the only way to ensure proper protection." He expressed the Washoe Tribe's "hope that the recent protections to the site demonstrate the strength and resiliency of indigenous culture."[236] Chairman Wallace's concerns are borne out by tribal challenges based on the Religious Freedom Restoration Act to public lands management decisions that threaten to interfere with religious exercise, and by judicial reactions to them, as discussed below.

II. RFRA CHALLENGES TO INADEQUATE SACRED SITES PROTECTION: THE GOVERNMENT AS FOE

> [T]he American court system, composed largely of non-Indian federal judges, has demonstrated over the years an inordinate difficulty in applying regular principles of the First Amendment to native religions. . . . [J]udges resist applying the same rules of law that they routinely apply in any other religion cases. . . . [T]here are cross-cultural difficulties in understanding . . . why this peyote plant is sacred or why this waterfall or this mountaintop has to be preserved. . . . The courts have had so much difficulty that the U.S. Supreme Court . . . turned over the chore of protecting Native religious liberty to the legislative branch.[237]

> Congress recognized that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise," and legislated "the compelling interest test" as the means for the courts to "strik[e] sensible balances between religious liberty and competing prior governmental interests." We have no cause to pretend that the task assigned by Congress to the courts under RFRA is an easy one. . . .[238]

Examination of the arguments made by the United States in cases in which it defends its actions against accusations that they violate the Es-

236. WALLACE, *supra* note 96.

237. Walter Echo-Hawk, Lenny Foster & Alan Parker, *Issues in the Implementation of the American Indian Religious Freedom Act: Panel Discussion*, 19 WICAZO SA REV. 153, 156 (2004).

238. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 439 (2006) (alteration in original) (citation omitted) (quoting 42 U.S.C. § 2000bb (2006)).

tablishment Clause may create the impression that the government is a zealous defender of Indian religious freedom and sacred sites. A different picture emerges, however, from examining the Government's response to RFRA claims brought by tribes and individual Indians with regard to government conduct, and government approval of conduct by third parties, that threatens worship and other religious activities at sacred sites. Similarly, the above analysis of federal court opinions addressing these accusations suggests that judges understand what is at stake for those who worship at sacred sites when these sites are threatened by competing uses and recognize the need, and the United States' legal responsibility, to protect these sites. The judicial response to RFRA claims based on threats to such sites, on the other hand, belies this impression.

A. RFRA: Putting the Government to the Test

RFRA provides that the government may not "substantially burden a person's exercise of religion" unless it "demonstrates that application of the burden to the person . . . is in furtherance of a compelling governmental interest [and] is the least restrictive means of furthering that compelling governmental interest."[239] Although the Supreme Court held in 1997, in *City of Boerne v. Flores*,[240] that RFRA is unconstitutional as applied to the states, on the grounds that it exceeded Congress's enforcement power under Section 5 of the Fourteenth Amendment,[241] the decision did not invalidate the statute as applied to the federal government.[242] RFRA does not define "substantially burden," but the statute's legislative findings made it clear that Congress disagreed with the limitations that the Supreme Court had imposed on religious freedom claims in *Smith*:

> [L]aws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise; governments should not substantially burden religious exercise without compelling justification; in *Employment Division v. Smith*, . . . the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances

239. 42 U.S.C. § 2000bb(1)(a)–(b) (2006).

240. 521 U.S. 507 (1997).

241. *Id.* at 536. In dissent, Justice O'Connor reasoned that the Court should reexamine its holding in *Smith* and "return to a rule that requires government to justify any substantial burden on religiously motivated conduct by a compelling state interest and to impose that burden only by means narrowly tailored to achieve that interest." *Id.* at 548 (O'Connor, J., dissenting).

242. In *Gonzales*, the Court addressed the merits of a RFRA challenge to federal government action while noting that "[a]s originally enacted, RFRA applied to the States as well as the Federal Government," but in *City of Boerne v. Flores* the Court "held the application to States to be beyond Congress'[s] legislative authority under § 5 of the Fourteenth Amendment." *Gonzales*, 546 U.S. at 424 n.1.

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> between religious liberty and competing prior governmental interests.[243]

Consequently, Congress sought to restore the application of the compelling interest test to actions that *Smith* said, following on the heels of *Lyng* and *Roy*, did not need to meet the test. RFRA's purpose clause identified this goal: "[T]o restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened."[244] Although RFRA resulted from Congress's judgment that *Smith* was wrongly decided,[245] the cases discussed below indicate that Congress's solicitude for Indian religious freedom is not shared by all federal land managers and federal court judges.

B. Case Studies in Inadequate Protection: Undermining Religious Exercise Rights

1. Desecrating the San Francisco Peaks

> From the deepest memories of every Dine person to the core of their being, from the countless songs of innumerable ceremonies, the Dine knows this sacred mountain, Dook'o'Osliid, is holy. I ask that you hear my plea and respond so that the spiritual life of my people can continue unmolested.[246]

In *Navajo Nation v. U.S. Forest Service*,[247] several tribes came together to bring a RFRA-based challenge to a USFS decision to allow snowmaking with treated sewage effluent (referred to by the Government by the more benign-sounding term "reclaimed waste water") as part of an expansion project at the privately operated Snowbowl Resort (Snowbowl) located on Arizona's San Francisco Peaks. To maximize profits from the operation of a ski resort in what is, after all, a desert area, Snowbowl sought a more reliable source of snow, rather than having to depend on the natural snowfall that could be spotty in dry years. The sewage effluent that Snowbowl wished to use for this purpose came from the sewers of Flagstaff and thus contained wastewater not only from homes but also from morgues, mortuaries, and hospitals. Despite treat-

243. 42 U.S.C. § 2000bb(a)(2)–(5) (2006).

244. 42 U.S.C. § 2000bb(b)(1) (2006) (citations omitted).

245. *See supra* note 243 and accompanying text. Congress also responded to *Smith* by enacting legislation aimed at protecting Indian religious use of peyote. *See* 42 U.S.C. § 1996a (2006).

246. Plaintiffs Navajo Nation et al. Response in Opposition to Defendants' Motion for Summary Judgment and Cross-Motion for Summary Judgment on "RFRA" Claim at 9, Navajo Nation v. U.S. Forest Serv., 408 F. Supp. 2d 866 (D. Ariz. 2006) (No. CV 05-1824 PCT PGR), 2005 WL 2835658, at *9 (quoting Navajo Nation President Shirley's statement to the U.N. Educational, Scientific, and Cultural Organization) (internal quotation mark omitted) [hereinafter Navajo Summary Judgment Response].

247. 408 F. Supp. 2d 866 (D. Ariz. 2006) *aff'd in part, rev'd in part and remanded*, 479 F.3d 1024 (9th Cir. 2007) *on reh'g en banc*, 535 F.3d 1058 (9th Cir. 2008) *and aff'd*, 535 F.3d 1058 (9th Cir. 2008).

ment, the effluent still contained traces of fecal coliform bacteria. Snowbowl also sought to build a 14.8-mile-long pipeline in order to be able to pump 1.5 million gallons of sewage effluent, in the form of artificial snow, onto the mountain each day from November to February.[248] The USFS's approval of the plan meant that Snowbowl could become the world's first ski resort to depend entirely on sewage effluent for making artificial snow.[249]

For the plaintiff tribes (the Navajo Nation, the Hualapai Tribe, the Havasupai Tribe, the White Mountain Apache Nation, and the Yavapai-Apache Nation), the San Francisco Peaks are sacred. Spraying the peaks with snow made from sewage effluent would interfere, the tribes explained, with specific practices and substantially burden their exercise of religion.[250] The San Francisco Peaks have been identified as a TCP by the USFS and determined to be eligible for inclusion on the National Register of Historic Places. In addition to the RFRA claim, the tribes brought claims based on (1) failure to comply with the National Environmental Policy Act (NEPA), the NHPA, and the National Forest Management Act; (2) failure to consult properly with the tribes on a government-to-government basis, as required by the Forest Service Manual, NHPA regulations, and executive orders; and (3) violation of trust responsibilities.[251]

The plaintiff tribes explained in their motion for summary judgment on their RFRA claim how the expansion project would substantially burden their exercise of religion. For the people of the Yavapai-Apache Nation, for example, the project would have a devastating impact on their ability to practice their religion and conduct their daily lives. Councilman Vincent Randall explained that "[t]he sacred Mountain is also a conduit for our prayers to travel into the unseen spiritual world"[252] and that the proposed use of sewage effluent would "taint and scar the Mountain, causing it to be ineffective, essentially killing the spiritual force within

248. Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1030–31 (9th Cir. 2007). The commercial enterprise operating the resort is the Arizona Snowbowl Resort Limited Partnership, which operates under a forty-year special-use permit issued by the USFS.

249. Zackeree S. Kelin & Kimberly Younce Schooley, *Dramatically Narrowing RFRA's Definition of "Substantial Burden" in the Ninth Circuit—The Vestiges of* Lyng v. Northwest Indian Cemetery Protective Association *in* Navajo Nation et al. v. United States Forest Service et al., 55 S.D. L. REV. 426, 432 (2010); *see also* Kristen A. Carpenter, Sonia A. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1118–24 (2009) (providing a thoughtful discussion of *Navajo Nation*).

250. *See Navajo Nation*, 535 F.3d at 1099–1106 (Fletcher, J., dissenting) (describing the specific practices of, and the plan's impact on, the various tribes).

251. *See* Response to Defendants' Motion for Summary Judgment at 3, 15, 18, Navajo Nation v. U.S. Forest Serv., 408 F. Supp. 2d 866 (D. Ariz. 2006) (No. CV 05-1824 PCT PGR), 2005 WL 2835663, at *3, *15, *18.

252. Navajo Summary Judgment Response, *supra* note 246, at 8 (quoting Vincent Randall, Dilzhe'e Apache historian and Yavapai-Apache Nation councilman) (internal quotation marks omitted).

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it."[253] Anthony Lee, President of the Dine Hatallii Association (a Navajo medicine men's organization), explained that Navajo "ceremonial songs, prayers, and offerings will be affected negatively . . . and thus, our homes, children, and land will be significantly burdened. Our mountain soil bundles and ceremonies will be tainted and contaminated . . . ."[254] A USFS archaeologist provided a concise summary of how the tribes view the peaks:

> (a) as a home of spiritual beings; (b) a place where significant mythological events occurred; (c) a place where spirits of the dead went to be changed into bringers of rain; (d) personification of gods and goddesses; (e) an area where important societies originated; and (f) as a source of life.[255]

As to the Government's allegedly compelling interest in operating the Snowbowl as a public recreation facility, the plaintiffs noted that the Government had been able to do this for the past 70 years without the proposed expansion and "nothing in this litigation would change that."[256] Finally, the tribes argued that even if there were a compelling interest at stake, the USFS had "selected the alternative that had the *most* significant burden on practitioners of Native American religions"—hardly the least restrictive means of accomplishing a compelling interest.[257] The Forest Supervisor had even admitted that the effects on "traditional values" of the proposal that had been selected were "the most significant and irreconcilable impacts of any proposal presented."[258]

2. Holding Back the Waters of Snoqualmie Falls

> [T]he mists created by the thunderous waters flowing over Snoqualmie Falls connect the heavens and the earth.[259]

In *Snoqualmie Indian Tribe v. Federal Energy Regulatory Commission*,[260] the Snoqualmie Indian Tribe challenged an order of the Federal Energy Regulatory Commission (FERC) granting a forty-year renewal of the license of Puget Sound Energy, Inc. (Puget) to operate a hydroelectric power plant, consisting of a dam and two powerhouses, at the

253. *Id.* (quoting Vincent Randall, Dilzhe'e Apache historian and Yavapai-Apache Nation councilman) (internal quotation mark omitted).

254. *Id.* at 9 (quoting Anthony Lee, president of the Dine Hatallii Association) (internal quotation marks omitted). The Dine Hatallii Association was formerly called the Navajo Medicine Men's Association. *Id.*; *see also* Kelin & Schooley, *supra* note 249, at 435–37 (describing the plaintiffs' testimony about their religious exercise at the San Francisco Peaks and the impact of the proposal).

255. *Navajo Nation*, 408 F. Supp. 2d at 888.

256. Navajo Summary Judgment Response, *supra* note 246, at *10–11.

257. *Id.* at 14 (emphasis added).

258. *Id.*

259. Tribe's Combined Reply and Intervenor's Brief at 1, Snoqualmie Indian Tribe v. FERC, 545 F.3d 1207 (9th Cir. 2006) (Nos. 05-72739, 05-74060), 2006 WL 3856749, at *1 [hereinafter Reply Brief, *Snoqualmie Indian Tribe*].

260. 545 F.3d 1207, 1210 (9th Cir. 2008).

Snoqualmie Falls.[261] The Snoqualmie Falls is located about thirty miles east of Seattle, where the Snoqualmie River "flows down from the Cascade Mountains."[262]

The litigation capped over a decade of efforts by the Snoqualmie Tribe to protect the falls from the impact of the power plant's activities under a new license, for which Puget had applied in 1991.[263] The Federal Power Act (FPA) requires FERC to balance a number of interests, including tribal interests and recommendations, in making licensing decisions.[264] FERC has developed a policy statement on tribal consultation to help it meet this requirement.[265] The Snoqualmie Tribe, joined by environmental and church groups, intervened in opposition to the application, relying on the Free Exercise Clause, AIRFA, and RFRA.[266] The Department of the Interior and the American Civil Liberties Union also expressed concerns about the Snoqualmie Falls project and its effect on Snoqualmie religious rights in comments filed with FERC.[267]

During the license renewal process, the Snoqualmie Tribe explained that the power of the falls for religious observances "derives from the quantity and quality of the Falls' mist and spray, which in turn is determined by the quantity of flow over the Falls."[268] Although natural flows support these practices, a proposal by Puget for a yearly allotment of flows for the tribe's purposes did not. One religious practice, for example, the vision quest, "is by nature an individual and spontaneous practice, not one which can be 'scheduled'" to coincide with Puget's proposed flow allotments.[269]

In issuing the new license in 1994, however, FERC rejected the Snoqualmie Tribe's arguments. Citing *Lyng*, the 1994 FERC license order stated that "[i]ncidental effects of Government which may interfere with the practice of religion, but do not coerce its practitioners into acting contrary to their religious beliefs, do not, within the meaning of the First Amendment, constitute a prohibition on the free exercise of reli-

261. *Id.* The plant consists of a dam and two powerhouses. Although FERC is an independent regulatory agency, rather than an agency with the kind of management authority over public lands held by the NPS and USFS, it is included in the discussion here because of the potential impact of its licensing decisions on sacred sites. *Id.*

262. *Id.*

263. Order Issuing New License, Puget Sound Energy, Inc., 107 F.E.R.C. ¶ 61,331, at p. 62,513 (2004) [hereinafter Puget License Order].

264. Federal Power Act, 16 U.S.C. § 803(a) (2006).

265. Policy Statement on Consultation with Indian Tribes in Commission Proceedings, 18 C.F.R. § 2.1c (2003).

266. Puget License Order, *supra* note 263, at p. 62,514, 62,518.

267. *Id.* at p. 62,518 n.35. The Snoqualmie Tribe's participation in the license renewal process was complicated by the fact that much of the tribe's work to protect the falls coincided with efforts to gain federal acknowledgment as a tribe, a goal that the Snoqualmie achieved in 1997. Final Determination to Acknowledge the Snoqualmie Indian Tribe, 62 Fed. Reg. 45,864 (1997).

268. Puget License Order, *supra* note 263, at p. 62,518 n.33.

269. *Id.*

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gion."[270] FERC was in compliance with AIRFA, the order claimed, as long as it considers Indian leaders' views and "avoids unnecessary interference with Indian religious practices" in implementation of the project.[271] Finally, FERC rejected the application of RFRA, claiming it was not applicable "to situations in which the Government took some action which incidentally affected the quality of an individual's religious experience."[272]

FERC Commissioner Nora Mead Brownell dissented from the decision based on the license order's failure to strike the right balance between Puget's interests and recreational, cultural, and religious interests. The license allowed minimum daytime water flows that were well below those recommended by FERC's own staff in the Final Environmental Impact Statement prepared for the project. She highlighted the differential treatment of tourism-related interests and Snoqualmie religious needs: the order included staff-recommended increased flow requirements for the three-day Labor Day weekend for tourists' benefit while rejecting, without explanation, the staff-recommended minimum-flow increases for the benefit of the tribe.[273]

Following rehearing of the license order, at the Snoqualmie Tribe's request, FERC agreed that the order's water certification flows did "not sufficiently take account of the Tribe's concerns" and issued a new order (the Rehearing Order).[274] Rather than adopting the overall flows recommended by FERC staff, however, the Rehearing Order only required higher water flows over the falls in May and June, the months when the greatest volume of mist (recognized as a "critical component of [the Snoqualmie Tribe's] spiritual experience") naturally occurs.[275] The Rehearing Order met with the disapproval of Puget, which claimed that the flow increases, based on the Snoqualmie Falls' religious significance to the tribe, violated the Establishment Clause.[276] Both the tribe and Puget sought Ninth Circuit review of the issuance of the Rehearing Order.[277]

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270. *Id.* at p. 62,519 (footnote omitted) (citing Lyng v. Nw. Indian Cemetery Prot. Ass'n, 485 U.S. 439. 440, 447–48 (1988); Wilson v. Block, 708 F.2d 735, 741 (D.C. Cir. 1983); Crow v. Gullet, 541 F. Supp. 785, 791 (D. S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983)).

271. *Id.*

272. *Id.*

273. *Id.* at p. 62,541–43.

274. Order on Rehearing and Dismissing Stay Request, Puget Sound Energy, Inc., 110 F.E.R.C. ¶ 61,200, at p. 61,746, 61,749 (2005).

275. *Id.* at p. 61,746. FERC reasoned that "[g]iven the size of the project . . . the relatively small effect on net annual benefit, and the importance of the mist at this site to the Snoqualmie Tribe, raising the flows . . . throughout the months of May and June appropriately balances competing interests." *Id.* One commissioner dissented, noting that he saw nothing to warrant the rebalancing of the interests from the original order. *Id.* at p. 61,749.

276. Order Denying Rehearing, Puget Sound Energy, Inc., 111 F.E.R.C. ¶ 61,317, at p. 62,392 (2005). FERC rejected the Establishment Clause argument. *Id.* at p. 62,390.

277. The Snoqualmie Tribe argued that FERC used the wrong legal standard to review the tribe's RFRA claim as to the Snoqualmie Falls project and that FERC's conclusion that the relicens-

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3. Threatening the Medicine Bluffs "Viewscape"

> Not since the bloody days of the forced captivity of my ancestors have we faced such an ominous threat.[278]

In *Comanche Nation v. United States*,[279] the Comanche Nation and Jimmy W. Arterberry Jr., the tribe's historic preservation officer, sought an injunction against the construction of a warehouse for use by the U.S. Army's Fort Sill, Oklahoma military installation. The proposed warehouse would adversely impact the "viewscape" of Medicine Bluffs, a landform within Fort Sill. As the Army knew, Medicine Bluffs is frequently used by members of the Comanche, Kiowa, and Wichita Tribes "for spiritual cleansings, vision quests, healing ceremonies, and as a place of repose for deceased family member bodies or ashes."[280] Medicine Bluffs was added to the National Register of Historic Places in 1974 for being a unique geological feature and an area of significance to Native Americans.[281]

The plaintiffs brought a claim under RFRA, alleging that the proposed warehouse would impose a substantial burden on the conduct of religious ceremonies and rituals by Arterberry and other practitioners of Comanche traditional beliefs.[282] Arterberry explained that Medicine Bluffs is "the heart of the current Comanche Nation" and that the proposed warehouse site would inhibit his view of the three peaks of Medicine Bluffs, prevent him from orienting himself to the peaks, and prevent him from "having a religious experience central to my way of life."[283] The resulting impact of the proposed warehouse was grave indeed: it "would completely prohibit members of the Comanche Nation from exercising their religion at the base of Medicine Bluffs . . . as they have done for generations."[284]

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ing did not substantially burden the tribe's exercise of religion was not supported by substantial evidence. Snoqualmie Indian Tribe v. FERC, 545 F.3d 1207, 1210 (9th Cir. 2008).

278. Complaint at Ex. 3, 2, Comanche Nation v. United States, No. 5:08-cv-00849-D, 2008 WL 4426621 (W.D. Okla. Aug. 15, 2008) [hereinafter Comanche Nation Complaint] (quoting Letter from Wahathuweeka (William G. Voelker), Chairman, Comanche Nation NAGPRA & Historic Preservation Program, to Major General Peter Vangjel (Feb. 15, 2008)).

279. 2008 WL 4426621, at *1 (W.D. Okla. Sept. 23, 2008).

280. Comanche Nation Complaint, *supra* note 278, at *3–4.

281. *See Oklahoma National Register of Historic Places*, NAT'L PARK SERV., http://www.nps.gov/state/ok/list.htm?program=9F8DA718-155D-4519-3E1CC7FEEE2868BA (last visited Jan. 3, 2013); *see also National Register of Historic Places Inventory—Nomination Form*, NAT'L PARK SERV., http://www.ocgi.okstate.edu/shpo/nhrpdfs/74001659.pdf (last visited Oct. 30., 2012).

282. Comanche Nation Complaint, *supra* note 278, at 4–5. The plaintiffs also brought a claim under the NHPA, alleging that the Army had violated Section 106 of the NHPA by failing to consult with them about the impact of the project on the Medicine Bluffs viewscape. *Id.*

283. *Id.* at Ex. 4, 1–2.

284. Plaintiff's Brief in Support of Emergency Motion for Temporary Restraining Order at 5, Comanche Nation v. United States, No. 5:08-cv-00849 (W.D. Okla. Sept. 23, 2008), 2008 WL 4426621, at *5.

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C. Resisting Religious Freedom Claims Under RFRA

1. Father Knows Best: Denying the Existence of a Substantial Burden

In defending its actions under RFRA's requirements, the Government argued in the cases outlined above that, contrary to the plaintiffs' claims, either no burden was imposed on Indian religious exercise by the challenged action or that the burden was not substantial. It stands to reason that religious practitioners know best what kinds of government actions adversely impact their religious beliefs and practices, and how significant the impact is or will be. The Government's argument in these cases therefore amounts to a claim that the government knows more about Indian religions than Indians do. Given the requirements of RFRA, though, it is not surprising for the Government to argue that a plaintiff's exercise of religion has not been substantially burdened in trying to counter a RFRA claim, regardless of which religion's practitioners are involved in a particular case. In light of the history of government policy toward Indian religions and contemporary government commitments to the protection of Indian religion and sacred sites, however, the argument smacks of arrogance and continuing paternalism when made to counter Indian RFRA claims.

The Government argued for a narrow definition of the "substantial burden" concept in these cases. It sought to limit the concept to the factual situations present in pre-*Smith* and pre-RFRA cases in which the Supreme Court invalidated governmental actions on Free Exercise Clause grounds despite the fact that the language of RFRA does *not* limit its application to these specific situations. Thus, in *Navajo Nation*, in defending against the RFRA-based objection to using sewage effluent for snowmaking before the Ninth Circuit, the Government emphasized that (1) the Supreme Court's pre-*Smith* Free Exercise Clause cases had invalidated governmental actions only when "individuals [were] forced to choose between following the tenets of their religion and either receiving a government benefit or [facing] criminal sanctions"[285] and (2) the *Navajo Nation* plaintiffs were not faced with the choice between their religious beliefs and the receipt of a government benefit or the threat of criminal sanctions.[286] Therefore, the plaintiffs had failed to show that

285. Response Brief of the Fed. Appellees at 20–21, Navajo Nation v. U.S. Forest Serv., 129 S. Ct. 2763 (2009) (No. 08-846), 2009 WL 1304732, at *20–21 [hereinafter U.S. Response Brief, *Navajo Nation*] (citing Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 717–18 (1981); Wisconsin v. Yoder, 406 U.S. 205, 218 (1972); Sherbert v. Verner, 374 U.S. 398, 404 (1963)). The Government also argued that the USFS had complied with NEPA in Defendants' Motion for Summary Judgment at 4, 20–21, Navajo Nation v. U.S. Forest Serv., 408 F. Supp. 2d 866 (D. Ariz. 2005) (Nos. CV 05-1824-PCT-PGR, CV 05-1914-PCT-EHC, CV 05-1949-PCT-NVW, CV 05-1966-PCT-JAT), 2005 WL 6169180, at *4, *20–21 [hereinafter U.S. Motion for Summary Judgment, *Navajo Nation*].

286. U.S. Response Brief, *Navajo Nation*, *supra* note 285, at 21.

their free exercise of religion had been substantially burdened.[287] Moreover, the Government claimed, the plaintiffs' ability to gather sacred objects and conduct ceremonies at the San Francisco Peaks was not being impaired[288] despite the evidence to the contrary presented by the plaintiffs.[289] In the Government's view, actions that would desecrate a sacred site in the eyes of those whose religious exercise rights were at stake would not amount to a substantial burden on these rights.

Expanding on this point, the Government characterized Ninth Circuit precedents' substantial burden analysis under RFRA as requiring a finding that the government's action is either preventing the practitioner from engaging in religious activity (by making that activity impossible or by penalizing that activity through criminal sanctions) or is putting substantial pressure on the practitioner to abandon his or her religiously motivated conduct[290] and argued that the evidence did not support such a finding.[291] In fact, the plaintiffs had offered evidence that the Government's action of allowing the use of wastewater for snowmaking did indeed prevent them from engaging in religious activity. Practitioners would no longer be able to gather materials needed for medicine bundles and other religious purposes if they had been contaminated by the use of wastewater and therefore were no longer usable for these purposes.[292] They would be prevented from engaging in gathering of these essential materials due to the government-sanctioned contamination just as effectively as if the practitioners were physically barred from visiting the peaks. The Government cited additional Ninth Circuit precedents as establishing that a government action imposes a substantial burden if it prevents an individual "from engaging in conduct or having a religious experience which the faith mandates."[293] Here again, it seems that contamination of the sacred San Francisco Peaks by snow made from sewage effluent *would* have this impact on the plaintiffs by preventing them from performing ceremonies or gathering materials at proper places, but the Government denied that this was the case. Finally, the Government rejected the Ninth Circuit's 2004 decision in *San Jose Christian College v. City of Morgan Hill*[294] as affecting the substantial burden analysis or

287. *Id.* at 26.

288. U.S. Motion for Summary Judgment, *Navajo Nation*, *supra* note 285, at 29.

289. The Ninth Circuit panel opinion included an extensive discussion of the specific impacts on sites, ceremonies, and resources described by the plaintiff tribes. Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1034–43 (9th Cir. 2007) (describing Hopi, Navajo, Hualapai, and Havasupai beliefs and practices, and the burdens that the proposed action would impose).

290. U.S. Motion for Summary Judgment, *Navajo Nation*, *supra* note 285, at 25–26 (citing Guam v. Guerrero, 290 F.3d 1210, 1222 (9th Cir. 2002)).

291. *Id.* at 29 ("Plaintiffs have set forth no evidence that any of their members will be substantially burdened by the government's actions . . . .").

292. *E.g.*, Joint Opening Brief of Appellants Hualapai Tribe at 16, Hualapai Tribe v. U.S. Forest Serv., 535 F.3d 1058 (9th Cir. 2006) (Nos. 06-15371, 06-15455), 2006 WL 2429668, at *16.

293. U.S. Motion for Summary Judgment, *Navajo Nation*, *supra* note 285, at 27 (quoting Worldwide Church of God v. Phila. Church of God, Inc., 227 F.3d 1110, 1121 (9th Cir. 2000)).

294. 360 F.3d 1024, 1033–34 (9th Cir. 2004).

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its outcome because the latter case applied the Religious Land Use and Institutionalized Persons Act (RLUIPA) rather than RFRA.[295]

In *Snoqualmie Indian Tribe*, in addressing the tribe's RFRA claim as to the Puget hydroelectric project license order before the Ninth Circuit, FERC argued that in issuing the new license it "did not burden, let alone 'substantially burden,' the Tribe's religious practices under RFRA."[296] This claim was made despite the admission that the flow over Snoqualmie Falls under the license would be less than the tribe had identified as being necessary for religious purposes.[297] FERC argued that a government action does not impose a "substantial" burden on the practice of religion "where the action does not pressure the adherent to take action forbidden by, or prevent the adherent from engaging in conduct mandated by, that religion."[298] FERC also relied on *San Jose Christian College*—rejected by the Government as being relevant in *Navajo Nation*—for guidance on the level of infringement that must be present for a burden imposed by an action to be "substantial": "[T]he . . . action . . . 'must be 'oppressive' to a 'significantly great' extent. That is, a 'substantial burden' on 'religious exercise' must impose a significantly great restriction or onus upon such exercise.'"[299] Although *San Jose Christian College* defined "substantial burden" for the purposes of RLUIPA, FERC noted that RLUIPA substantially tracks RFRA's language and was enacted in response to the partial invalidation of RFRA.[300] FERC argued that the tribe had failed to demonstrate that such a burden existed because the license issuance would not require members of the Snoqualmie Tribe to violate their beliefs nor prohibit their access to the falls.[301] FERC emphasized that the Snoqualmie Tribe was still practicing its religion at the falls and still regarded the falls as sacred, as if a substantial

295. Defendants' Reply in Support of Defendants' Motion for Summary Judgment at 21, Navajo Nation v. U.S. Forest Serv., 408 F.Supp.2d 866 (D. Ariz. 2006) (Nos. CV 05-1824-PCT-PGR, CV 05-1914-PCT-EHC, CV 05-1949-PCT-NVW, CV 05-1966-PCT-JAT), 2005 WL 2835678, at *21 (citing San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1034–35 (9th Cir. 2004)). The Government also argued that even if the Ninth Circuit's current "substantial burden" definition is best described by San Jose Christian College and a subsequent case, *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005), the plaintiffs "had still failed to establish that their religious exercise was 'substantially burdened.'" Response Brief of the Federal Appellees at 31, Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058 (9th Cir. 2008) (en banc) (No. 06-15371), 2006 U.S. 9th Cir. Briefs LEXIS 737, at *31 [hereinafter U.S. Brief, *Navajo Nation*].

296. Brief of Respondent FERC at 11, Snoqualmie Indian Tribe v. FERC, 545 F.3d 1207 (9th Cir. 2006) (No. 05-72739), 2006 U.S. 9th Cir. Briefs LEXIS 851, at *14 [hereinafter FERC Brief, *Snoqualmie Indian Tribe*].

297. *Id.* at 22 n.7.

298. *Id.* at 25 (citing Goehring v. Brophy, 94 F.3d 1294, 1299 (9th Cir. 1996)).

299. *Id.* (quoting San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004)).

300. *Id.* at 25 n.8.

301. *Id.* at 27; *see also id.* at 31–33 ("[T]he religious adherent bears the burden of demonstrating that it cannot accomplish the mandates of its religion because of the government's action.").

burden would exist only if the tribe had been forced to completely abandon worship at the falls.[302]

In *Comanche Nation*, the Government argued that no burden would be imposed on the plaintiffs' ability to exercise their religion by the Army's construction of the planned warehouse at Fort Sill. Having claimed that *no* burden would be imposed, the Government did not offer a definition of "*substantial* burden."[303] The Government argued that "there are numerous other places where the Bluffs can be viewed,"[304] a statement that ignored the evidence that particular viewscapes of the Bluffs are significant in Comanche religious practices. The Government was similarly dismissive of the idea that moving forward with the warehouse construction would cause irreparable harm to the plaintiffs (a requirement for a temporary restraining order), disputing their "claim that the TSC [Training Support Center] warehouse site is the only location to view the Bluffs, practice their sacred ceremonies or ascend up the slop[e] to the top of the Bluffs."[305]

In summary, in these RFRA cases, the Government denied, or minimized, the impact of land managers' actions on Indian religious exercise. On the other hand, in defending government actions against Establishment Clause challenges in the cases discussed in Part I, the Government not only admitted that its actions had negatively impacted Indian religious exercise but also has used this impact as a legal justification—a permissible secular purpose—for the challenged action.[306] Somehow the government has developed myopia, or perhaps willful blindness, as to such impacts in the RFRA context.

2. It's *Our* Land: Privileging Other Interests over Religious Exercise Rights

In the sacred sites cases discussed in Part I, the Government defended its decisions to act in ways that fostered respect for, and were designed to prevent interference with, Indian religious exercise on public lands. Moreover, the Government spoke of the taking of the land containing sacred sites from tribes, and the government's special relationship

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302. *Id.* at 34.

303. Federal Defendants' Motion to Dissolve Temporary Restraining Order with Brief at 25–26, Comanche Nation v. United States, No. CIV-08-849-D, 2008 WL 4426621 (W.D. Okla. Sept. 23, 2008), 2008 U.S. Dist. Ct. Motions LEXIS 97564, at *39 [hereinafter U.S. Brief, *Comanche Nation*]. The court explained the threshold requirements for a RFRA claim:

> Plaintiffs must establish, by a preponderance of the evidence, that the governmental action complained of (1) substantially burdens, (2) a religious belief rather than a philosophy or way of life (3) which belief is sincerely held by the Plaintiffs. Only after Plaintiffs establish these threshold requirements does the burden shift to the government.

Id. at 26 (quoting Swanson v. Guthrie Indep. Sch. Dist., 942 F. Supp. 511, 517 (W.D. Okla. 1996), *aff'd*, 135 F.3d 694 (10th Cir. 1998)) (internal quotation marks omitted).

304. *Id.* at 25 n.14.

305. *Id.* at 26.

306. *See supra* notes 150–65 and accompanying text.

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with tribes, as necessitating the solicitude for Indian religious exercise rights that the challenged management plans reflected. In other words, the fact this was "the government's land" did not relieve the government of responsibilities toward Indian religious practitioners.

Once again, the Government told a different story as to the significance of its property rights in the RFRA cases. While denying that Indian religious exercise was substantially burdened within the meaning of RFRA, the Government went on to argue in the RFRA sacred-sites cases that even a substantial burden would be justifiable because of the other interests tied to public lands that were at stake—interests that were deemed more important than religious exercise. Thus, in *Navajo Nation*, the Government argued that even if the snowmaking plan constituted a substantial burden, the USFS had a compelling interest in providing opportunities for recreation on public lands.[307] The Government rejected the claim (made by amici curiae) that the Government's actual "compelling" interest was ensuring profits for Snowbowl, whose economic viability was dependent on adequate snow, which could not be ensured by reliance on natural snowfall alone in the San Francisco Peaks' desert environment.[308] The USFS had, the Government claimed, "worked hard to protect the natural resources that the tribes value for their religious purposes," but the USFS has to "make hard choices."[309] In this case, the "hard" choice was to treat skiing and other forms of recreation as more important uses of the peaks than religious exercise by allowing desecration of the peaks by snow made from sewage effluent.

In *Snoqualmie Indian Tribe*, FERC maintained that the license order advanced "myriad compelling governmental interests," such as "the provision of needed generation [of power] in the Puget service area; . . . the preservation of recreational benefits; [and] the provision of flood control benefits"[310]—benefits that presumably redounded primarily to non-Indians. According to FERC, the sacrifice of a certain faith's religious practices for "the common good"[311] could be required in order "to maintain an organized society that guarantees religious freedom to a great variety of faiths."[312] As had so often been the case in the past, Indians could be compelled to pay the price of decisions designed to benefit the (non-Indian) public good.

307. U.S. Brief, *Navajo Nation*, *supra* note 295, at 37; *id.* at 44 (identifying provision of public safety by expanding the facilities to reduce alleged overcrowding, also, as a compelling interest).

308. *Id.* at 41.

309. *Id.* at 40. Other changes approved in the expansion plan included increases in the skiable acreage and the creation of a snowplay area. *Id.* at 6–7. The Government identified providing for public safety, by expanding the facilities to reduce alleged overcrowding, as a compelling interest as to these changes. *Id.* at 43.

310. FERC Brief, *Snoqualmie Indian Tribe*, *supra* note 296, at 35–36 (citations omitted).

311. *Id.* at 36 (quoting Goehring v. Brophy, 94 F.3d 1294, 1301 (9th Cir. 1996)).

312. *Id.* at 36 (quoting Goehring v. Brophy, 94 F.3d 1294, 1301 (9th Cir. 1996)) (internal quotation marks omitted).

In *Comanche Nation* as well, the Government argued that even if the court determined that Comanche practitioners were "nominally burdened in their religious practices," the construction of the warehouse was in furtherance of a compelling governmental interest.[313] The warehouse was needed, the Government claimed, to support "an increased mission" at Fort Sill that will result in an influx of new soldiers.[314] The military's claimed needs trumped mere religious needs.

Defending land managers' decisions in the RFRA cases, the Government thus argued that other interests should be privileged over Indian religious exercise. Although accommodation of Indian religious exercise and protection of sacred sites was acknowledged as legally justified—and in some cases even legally compelled—in the Establishment Clause cases examined in Part I, these concerns fell by the wayside, pushed out of the way by (more) compelling interests, in the RFRA cases.

3. We Did the Best We Could: RFRA's "Least Restrictive Means" Requirement

In addressing the "least restrictive means" component of the RFRA test, the Government argued in *Navajo Nation* that the USFS had chosen the least restrictive means to further its compelling interests because it had tried to minimize adverse impacts on tribal culture and religion and had "considered all *feasible* alternative water sources for snowmaking."[315] From the plaintiff tribes' perspective, though, the agency had *not* tried hard enough to prevent desecration of the San Francisco Peaks—clearly an adverse impact—and the water source that it approved for snowmaking—sewage effluent—was not one that the tribes saw as "feasible." Feasibility was judged on the basis of land managers', rather than religious practitioners', sense of what was acceptable at a sacred site. The Government dismissed the testimony of a USFS archaeologist that another alternative, which eliminated the use of sewage effluent, would have satisfied the expansion project's purpose and need, arguing that she did not fully understand the implications of the competing policies being considered.[316]

In *Snoqualmie Indian Tribe*, FERC similarly claimed that the new license order advanced compelling interests using the least restrictive means by preserving power generation while respecting tribal interests.[317] FERC repeatedly insisted that the new license order was actually *beneficial* to the Snoqualmie Tribe's religious exercise, as if FERC officials believed that the tribe was unable to comprehend the benefits that it

313. U.S. Brief, *Comanche Nation*, *supra* note 303, at 30.
314. *Id.* at 8.
315. U.S. Brief, *Navajo Nation*, *supra* note 295, at 45–46 (emphasis added).
316. *Id.* at 46, 54 n.9 (indicating that the alternative mentioned in the testimony, Alternative 3, did not use reclaimed water).
317. FERC Brief, *Snoqualmie Indian Tribe*, *supra* note 296, at 38.

received under the license order, but if reminded of them repeatedly the tribe would eventually understand and stop complaining. Although FERC's argument was based on the fact that the new order undid some of the harm done by the previous license order by restoring water flows beyond what was required under that license, this improvement as compared to past-required flows did not mean that there could not be grounds for concern based on the present flows. In other words, some lessening of burdens does not mean that they no longer exist or are not still substantial. FERC's argument seems akin to reasoning that a prison inmate whom a warden had beaten three times a week has no grounds to complain about being beaten once the beatings are reduced to twice a week.

In *Comanche Nation*, the Government did not explicitly address the least restrictive means element of RFRA. After claiming that it has "more than met the showing required" that the warehouse construction is in furtherance of a compelling governmental interest, the Government simply scoffed some more at the plaintiffs' claim that their religious exercise was burdened. Characterizing the plaintiffs' use of the site "at least annually" (according to plaintiff Arterberry) as "infrequent use,"[318] the Government stressed the alleged harm (financial and other) to the Government from the continuation of the restraining order, compared to the "little if any injury to the Plaintiffs."[319] The public interest, the Government argued, supported lifting the temporary restraining order that had been imposed on the warehouse project:

> It is in the public's interest to have a well-trained and equipped military engaged in the War on Terror [and] to ensure that its environmental laws and historical preservation laws are not 'highjacked' and agencies held hostage, based upon frivolous or specious claims.[320]

This appeal to anxiety over the "War on Terror" as justification for actions that burden religious exercise brings to mind the concern voiced in Justice O'Connor's opinion in *Smith* with regard to what Justice Blackmun termed the "war on drugs."[321] Although Justice O'Connor disagreed with the majority's refusal to apply the compelling interest test, she concluded that the test was satisfied because of the State's compelling interest in confronting drug abuse, "one of the most serious problems confronting our society today."[322] In both situations, so the story

318. U.S. Brief, *Comanche Nation*, *supra* note 303, at 25.

319. *Id.* at 26. In addition to financial costs, other claimed impacts were on the Army's ability to train newly arriving soldiers. *Id.* at 26–29.

320. *Id.* at 29.

321. Emp't Div. v. Smith, 494 U.S. 872, 909–10 (1990) (Blackmun, J., dissenting) (applying the compelling interest test in his opinion, Justice Blackmun explained that "[i]t is not the State's broad interest in fighting the critical 'war on drugs' that must be weighed against respondents' claim, but the State's narrow interest in refusing to make an exception for the religious, ceremonial use of peyote").

322. *Id.* at 903–04 (O'Connor, J., concurring) (quoting Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 674 (1989)) (internal quotation marks omitted). Justice O'Connor concurred in

went, suppression of Indian religious freedom was not too high a price to pay for allegedly greater security against perceived threats.

4. The Long Shadow of *Lyng*

The discussion above has focused on the Government's efforts to respond to specific elements of the RFRA test. It is also instructive to examine the role played in the Government's RFRA defense by some of the more sacred sites-, and Indian-, specific considerations that figured in the Government's arguments in response to the Establishment Clause challenges addressed in Part I. In that context, the Government relied on the *Lyng* majority opinion's encouragement of accommodation of religious exercise on public lands as support for the agency decisions at issue. The *Lyng* holding itself was distinguished as not being on point because a voluntary government accommodation, rather than a Free Exercise Clause claim, was at issue.

In the RFRA cases, *Lyng* played a different (and, from the perspective of the plaintiffs, decidedly less benign) role. In *Navajo Nation*, for example, the Government relied on *Lyng* as support for its argument that the plaintiffs had not established that their free exercise of religion was substantially burdened.[323] The Government described the facts of *Lyng* as being "somewhat analogous to the present case, as both involve free exercise challenges by Indian tribes to a Forest Service project on public lands."[324] The plaintiff tribes were charged with asking the court to permit an action that *Lyng* had rejected: the imposing of "a 'religious servitude' on public lands preventing the government from managing those lands in the public interest"[325]—or at least in the interest of members of the public who did not regard the area in question as sacred.

In *Snoqualmie Indian Tribe*, FERC argued that *Lyng* "remains good law" and that RFRA was not intended to invalidate it.[326] Likening the tribe's claim to that of the plaintiffs in *Lyng*, and using the same indignant tone that characterized parts of the *Lyng* opinion, FERC warned of the threat that the claim posed: "[T]his case involves nothing less than

the judgment in *Smith* on the basis of her application of the compelling interest test. She concluded that the State had a compelling interest in regulating peyote use and that accommodating the Native American Church members' religiously motivated conduct would unduly interfere with the fulfillment of that interest. *Id.* at 907; *see also id.* at 906 ("I believe that granting a selective exemption in this case would seriously impair Oregon's compelling interest in prohibiting possession of peyote by its citizens."). Justice Blackmun pointed out in his opinion, however, the contrast between sacramental peyote use and "the irresponsible and unrestricted recreational use of unlawful drugs" that implicated health and safety concerns. *Id.* at 913 (Blackmun, J., dissenting).

323. U.S. Brief, *Navajo Nation*, *supra* note 295, at 24, 28.

324. *Id.* at 24.

325. *Id.* at 40–41 (citing Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 452 (1988)).

326. FERC Brief, *Snoqualmie Indian Tribe*, *supra* note 296, at 28–31.

the government's authority and responsibility to regulate the public use of its jurisdictional waterways."[327]

5. The Role of the Establishment Clause

In cases discussed in Part I, the Government explicitly argued that it could take into account Indian religious beliefs and practices in making land management decisions without violating the Establishment Clause.[328] In the RFRA cases, on the other hand, the Government argued that one of the justifications for imposing a burden on religious beliefs and practices was compliance with the Establishment Clause. Thus, in *Navajo Nation*, the Government noted that in making land use decisions, the USFS "must be guided not only by its statutory duties, but also by constitutional constraints," such as compliance with the Establishment Clause.[329] The Government insisted that the USFS had "provided a number of accommodations" to the plaintiff tribes during the development of the expansion project, such as eliminating night skiing and lighting, seeking to provide access to religious practitioners during construction, and permitting the gathering of materials for religious practices, consistent with both the Constitution and the USFS's multiple-use mandate.[330] Arguments that additional accommodations could be provided without violating the Establishment Clause were discounted.[331] In short, the attitude displayed toward the tribes was that having received some accommodations, they should be satisfied and not greedily demand more.

In *Snoqualmie Indian Tribe*, however, the Establishment Clause appeared in a different guise. In addition to responding to the tribe's argument that its religious exercise had not received the protection required pursuant to RFRA, FERC needed to respond to Puget's objections to the required increased water flows for the purported benefit of tribal religious exercise under the Rehearing Order. Although Puget had not renewed in the Ninth Circuit proceedings the specific Establishment Clause objection that it had raised in the FERC proceedings,[332] it still objected to the impact of tribal religious needs on setting flow requirements. Puget argued that there was no evidence to support FERC's finding that the flow that FERC ordered "will supply spray and mist sufficient to provide the Tribe with a satisfactory religious and spiritual experience."[333] Defending its decision, FERC explained that it had concluded

327. *Id.* at 37.

328. *See supra* notes 119–21 and accompanying text.

329. U.S. Brief, *Navajo Nation*, *supra* note 295, at 41–42. In its brief to the Ninth Circuit, the Government quoted the statement of the district court that "compliance with the Establishment Clause is an additional compelling governmental interest." *Id.*

330. *Id.* at 42.

331. *Id.* (discounting additional accommodations mentioned by the amici curiae as either similar to the accommodations already given or as not requested by the plaintiff tribes).

332. *See supra* notes 275–76 and accompanying text.

333. FERC Brief, *Snoqualmie Indian Tribe*, *supra* note 296, at 54.

that even though the flow level that it approved "would not provide the full natural flows the Tribe requested, it could still enhance the Falls' cultural value."[334] FERC thus played its Establishment Clause cards in two ways: (1) in defending its conduct against the RFRA claim, it argued that it had been solicitous toward the Snoqualmie Tribe and its religious needs, but (2) in responding to Puget's objection to the flow requirements, FERC downplayed the level of protection that it had provided.

6. Ignoring or Deflecting the Political and Trust Relationships

In the Establishment Clause challenges discussed in Part I, the Government cited its political relationship with and trust responsibilities towards tribes in addressing the secular purpose and secular effect prongs of the *Lemon* test and the endorsement test. In *Bear Lodge*, for example, the Government acknowledged a trust relationship-based need to protect Indian religious exercise even on federal (as opposed to trust) land.[335]

In the RFRA challenges to land management decisions, however, the Government seemed to have developed amnesia with regard to these important aspects of the federal–tribal relationship. In *Navajo Nation*, for example, the Government did not even address the issue of whether the approval of the expansion project violated the Government's trust or political relationship with the plaintiff tribes in its brief to the Ninth Circuit. In the district court proceedings, the Government had addressed the trust responsibility but downplayed it, asserting that the only trust duty that was applicable was the duty to comply "with generally applicable regulations and statutes," which (it claimed) the USFS had done.[336] The fact that the lands affected by the USFS decision were not held in trust for the tribes was also emphasized.[337]

The Government did not refer to the trust responsibility or the United States' political relationship in either *Snoqualmie Indian Tribe* or *Comanche Nation*. Thus, these principles did not enter into the Government's interpretation of the balancing of interests required by RFRA.

D. The Mixed Judicial Response to Sacred Sites RFRA Claims

In contrast to the rejection of the Establishment Clause claims of all of the plaintiffs in the challenges to the land management decisions discussed above (albeit in some cases on the basis of lack of standing rather than on the merits), the judicial response to the tribes' RFRA claims was mixed. There were differences of opinion within circuits not only as between lower courts and appellate courts and between a court of appeals

334. *Id.* at 55.

335. *See supra* note 169 and accompanying text.

336. Defendants' Motion for Summary Judgment at 33, Navajo Nation v. U.S. Forest Serv., 408 F. Supp. 2d 866 (D. Ariz. 2005) (No. 3:05-cv-01824-PGR), 2005 WL 6169180, at *33.

337. *Id.* at 34.

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panel and the full court, but also as between courts in different circuits. As the discussion below demonstrates, the proper interpretation of the term "substantial burden"—left undefined by Congress in RFRA—is a key point of contention.

1. Measuring the Burden Imposed on Religious Exercise

In *Navajo Nation*, the district court rejected the plaintiff tribes' RFRA and other claims,[338] an outcome that the plaintiffs appealed. A three-judge panel for the Ninth Circuit reversed the district court's RFRA decision in 2007.[339] The panel noted that although the appellant tribes' beliefs and practices are not uniform and therefore the precise burden imposed on their religious exercise varied, the burdens fell into two categories: "the contamination of natural resources necessary for the performance of certain religious ceremonies" and the undermining of their "religious faith, practices, and way of life by desecrating the Peaks' purity."[340] Applying Ninth Circuit precedents, the panel concluded that the burden on the exercise of religion imposed by the USFS was a substantial burden, i.e., one that is more than just an inconvenience and that prevents practitioners "from engaging in [religious] conduct or having a religious experience,"[341] and that the Government had failed to show that "approving the proposed action serves a compelling governmental interest by the least restrictive means."[342]

The Ninth Circuit, in an en banc decision, reversed the panel decision in favor of the plaintiffs. The court accepted the Government's restrictive definition of "substantial burden," holding that "a 'substantial burden' is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a government benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*)."[343] Thus the court relied on a narrow definition that is not part of the statutory text, but rather is based on restricting the concept of a substantial burden to the kinds of

338. *Navajo Nation*, 408 F. Supp. 2d at 874–76, 878 (rejecting plaintiffs' NEPA claim); *id.* at 880 (rejecting plaintiffs' NHPA claim); *id.* at 881 (rejecting plaintiffs' National Forest Management Act claim); *id.* at 882 (rejecting plaintiffs' breach of trust claim); *id.* at 906–07 (rejecting plaintiffs' RFRA claim). The district court found (1) that the tribes had failed to demonstrate that the project caused a substantial burden (as the court narrowly defined the term); (2) that the Government had three compelling interests at stake; and (3) that the Government had adopted the least restrictive means to achieve these interests. *Id.*

339. Navajo Nation v. U.S. Forest Serv., 479 F. 3d 1024, 1029 (9th Cir. 2006).

340. *Id.* at 1039, 1041; *see also id.* at 1039 (describing the burdens more fully as "(1) the inability to perform a particular religious ceremony, because the ceremony requires collecting natural resources from the Peaks that would be too contaminated . . . for sacramental use; and (2) the inability to maintain daily and annual religious practices comprising an entire way of life, because the practices require belief in the mountain's purity or a spiritual connection to the mountain that would be undermined by the contamination").

341. *Id.* at 1043 (quoting Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir. 1995)) (internal quotation marks omitted) (describing substantial burden analysis).

342. *Id.* at 1046 (compelling interest test conclusion).

343. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1070 (9th Cir. 2008).

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scenarios that happened to be present in two cases, *Sherbert* and *Yoder*, that were referenced in the purposes section of RFRA.[344] Congress cited these cases (neither of which used the term "substantial burden") in RFRA to indicate the *kind of test* that was to be applied (in place of the *Smith* approach) to government actions that substantially burden free exercise of religion. The language of RFRA does not limit the *kinds of fact situations* in which a substantial burden would be found to exist and the test consequently applies. Applying its narrow definition, the Ninth Circuit held that because the "presence of recycled wastewater [i.e., treated sewage effluent] on the Peaks does not coerce the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions" and does not "condition a governmental benefit upon conduct that would violate their religious beliefs," there was no substantial burden on religious exercise that would necessitate application of the compelling interest test.[345]

Three judges joined in a strongly worded dissent charging that the majority, in holding that "spraying 1.5 million gallons per day of treated sewage effluent on the most sacred mountain of southwestern Indian tribes does not 'substantially burden' their 'exercise of religion,'" committed three fundamental errors: misstating the evidence below, misstating the law under RFRA, and misunderstanding "the very nature of religion."[346] The dissent faulted the majority for adopting a narrow definition of "substantial burden" by wrongly "looking to *Sherbert* and *Yoder* for an exhaustive definition of what constitutes a 'substantial burden.'"[347] The majority showed misunderstanding of the nature of religious belief and practice by emphasizing lack of *physical* harm. In reality, "[r]eligious belief concerns the human spirit and religious faith, not

344. *Id.* at 1068 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963)). In *Sherbert*, the Court upheld the free exercise claim of a Seventh Day Adventist who had been denied unemployment compensation benefits after she was discharged from her job for refusal to work on her religion's Sabbath. *Sherbert*, 374 U.S. at 399, 402. The Court held that the disqualification for benefits imposed a burden on the free exercise of her religion because "[i]f the purpose or effect of a law is to impede the observance of one or all religions . . . that law is constitutionally invalid even though the burden may be characterized as being only indirect." *Id.* at 403–04 (alteration in original) (quoting Braunfeld v. Brown, 366 U.S. 599, 607 (1961)) (internal quotation marks omitted). Furthermore, the Government had not shown that a compelling state interest, which could not be achieved without infringement on her rights, justified the infringement. *Id.* at 409. In *Yoder*, the Court held that the First and Fourteenth Amendments prevented the State from compelling Old Order Amish parents, whose religious beliefs precluded public high school attendance, to send their children to public school up to age sixteen. *Yoder*, 406 U.S. at 207. The Court found that secondary schooling "contravenes the basic religious tenets and practice of the Amish faith" and that the impact of the compulsory attendance law on the practice of the Amish religion was "not only severe, but inescapable." *Id.* at 218. The Court stated that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Id.* at 215.

345. *Navajo Nation*, 535 F.3d at 1067.

346. *Id.* at 1081 (Fletcher, J., dissenting). For the dissent's elaboration on these points, see *id.* at 1085–96 (addressing claimed misstatements of the law under RFRA).

347. *Id.* at 1086 (discussing six reasons why *Sherbert* and *Yoder* should not be looked to for an exhaustive definition of "substantial burden").

physical harm and scientific fact."[348] The dissent suggested a potential source for the majority's misunderstanding:

> Perhaps the strength of the Indians' argument in this case could be seen more easily by the majority if another religion were at issue. . . . I do not think that the majority would accept that the burden on a Christian's exercise of religion would be insubstantial if the government permitted only treated sewage effluent for use as baptismal water, based on an argument that no physical harm would result and any adverse effect would merely be on the Christian's "subjective spiritual experience." Nor do I think the majority would accept such an argument for an orthodox Jew, if the government permitted only non-Kosher food.[349]

The dissent observed that there was a "tragic irony" in the majority's emphasizing that the area at issue is "public park land" that belongs to everyone:

> The United States government took this land from the Indians by force. The majority now uses that forcible deprivation as a justification for spraying treated sewage effluent on the holiest of the Indians' holy mountains, and for refusing to recognize that this action constitutes a substantial burden on the Indians' exercise of their religion.
>
> RFRA was passed to protect the exercise of all religions, including the religions of American Indians. If Indians' land-based exercise of religion is not protected by RFRA in this case, I cannot imagine a case in which it will be. I am truly sorry that the majority has effectively read American Indians out of RFRA.[350]

The plaintiffs filed a petition for writ of certiorari in 2009, urging the Supreme Court to step in to resolve the growing disagreement among the federal circuits as to the proper approach to determining whether a substantial burden exists under RFRA,[351] but to no avail.[352]

The Ninth Circuit's restrictive definition of a "substantial burden" under RFRA in *Navajo Nation* has negatively impacted efforts to protect other sacred sites, such as the efforts of the Snoqualmie Indian Tribe at Snoqualmie Falls. In its 2008 opinion in *Snoqualmie Indian Tribe*, a three-judge Ninth Circuit panel described the falls as being "considered a sacred site by the few hundred enrolled members who today comprise

348. *Id.* at 1098.
349. *Id.* at 1097.
350. *Id.* at 1113–14.
351. Petition for Writ of Certiorari at 12–20, Navajo Nation v. U.S. Forest Serv., 129 S. Ct. 2763 (2009) (No. 08-846), 2009 WL 46999, at *12–20 (noting the three approaches taken to the substantial burden concept). The petition identified the Fourth and D.C. Circuits as sharing the Ninth Circuit's restrictive definition; the Eighth and Tenth Circuits as adopting a much broader conception; and four other circuits (the Third, Fifth, Seventh, and Eleventh Circuits) as taking an intermediate approach. *Id.* at 12–19.
352. Navajo Nation v. U.S. Forest Serv., 129 S. Ct. 2763 (2009).

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the Snoqualmie Tribe," without indicating why the size of the tribe is relevant to the analysis.[353] The court noted a number of aspects of the significance of the falls, such as its central role in the Snoqualmie Tribe's creation story and its being considered the dwelling place of a powerful water spirit (in the plunge pool below the falls).[354] It was in light of these and other considerations that the Snoqualmie Falls has been designated as TCP eligible for listing on the National Register of Historic Places.[355]

The tribe identified a number of ways in which the Snoqualmie Falls project substantially burdened its exercise of religion: "[I]ts operation deprives the Tribe of access to the Falls for vision quests and other religious experiences, eliminates the mist necessary for the Tribe's religious experiences, and alters the ancient sacred cycle of water flowing over the Falls."[356] Tribal members have had a sacred connection with the falls "since time immemorial," and have believed for centuries "that the mists created by the thunderous waters flowing over Snoqualmie Falls connect the heavens and the earth."[357] The project "divert[s] nearly all flows away from the Falls" and has "prevented tribal members from engaging in many traditional religious activities,"[358] imposing a burden on religious exercise that is "monstrous and substantial under RFRA."[359] The Snoqualmie Tribe urged the court to interpret the term "substantial burden" in accordance with its plain meaning and to recognize that the RFRA test applies "whenever a law or an action taken by the government to implement a law burdens a person's exercise of religion."[360]

The Ninth Circuit panel, however, simply looked to *Navajo Nation*, noting that the decision adopted "a narrower definition of that term [i.e., substantial burden] than we had in prior decisions."[361] The court thus highlighted the Ninth Circuit's narrowing of the protection available to religious practitioners under RFRA in *Navajo Nation*, in marked contrast to Congress's intent to ensure that free exercise protection was not narrowly circumscribed.[362] Applying *Navajo Nation*'s narrowed "substantial

353. Snoqualmie Indian Tribe v. FERC, 545 F.3d 1207, 1211 (2008). The court heard arguments in 2007, but recognizing the significance of the then forthcoming *Navajo Nation* en banc decision, waited to make its decision until the *Navajo Nation* en banc opinion was published. *Id.* at 1210.

354. *Id.* at 1211.

355. *Id.*

356. *Id.* at 1213.

357. Reply Brief, *Snoqualmie Indian Tribe*, *supra* note 259, at 1.

358. *Id.*

359. *Id.* at 14.

360. *Id.* at 25 (quoting H.R. Rep. No. 103-88, at 5 (1993)) (internal quotation mark omitted).

361. Snoqualmie Indian Tribe v. FERC, 545 F.3d 1207, 1213 (9th Cir. 2008). The court noted that as defined in *Navajo Nation*, "a substantial burden is imposed only when individuals are forced to choose between following tenets of their religion and receiving a governmental benefit (*Sherbert*) or [are] coerced to act contrary to their religious beliefs by threat of civil or criminal sanctions (*Yoder*)." *Id.* at 1214 (quoting Navajo Nation v. U.S. Forest Serv., 535 F.3d 1070 (9th Cir. 2008)) (internal quotation marks omitted).

362. *Id.* at 1214.

burden" definition, the court said it does not matter if the Puget hydroelectric project interferes with tribal members' ability to practice their religion.[363] Because the court did not see "any evidence demonstrating that Snoqualmie Tribe members will lose a government benefit or face criminal or civil sanctions for practicing their religion," it held that FERC's relicensing decision did not impose a substantial burden on tribal members' ability to exercise their religion.[364] The decision made it clear that the *Navajo Nation* substantial burden interpretation provides courts in the Ninth Circuit, and in other circuits that agree with the Ninth Circuit approach, with a mechanism to head off tribes' RFRA claims without having to evaluate the Government's compliance with the compelling interest test.

The decision in *Comanche Nation*, on the other hand, demonstrates that a different outcome is possible in sacred sites claims under RFRA when a court does not rely on the Ninth Circuit's restrictive approach to identifying a substantial burden. After the district court issued a temporary restraining order against the Fort Sill warehouse construction, the United States sought dissolution of the order.[365] In considering the claim that construction of the warehouse substantially interfered with the exercise of the religious beliefs of the individual plaintiff and other members of the Comanche Nation, the court noted that although RFRA defines "exercise of religion" and courts have recognized the exercise of Native American traditional religions as an "exercise of religion," RFRA does not define "substantial burden."[366] As the Tenth Circuit has defined the term, in order for a governmental action to be considered to substantially burden a religious exercise, it must "'significantly inhibit or constrain conduct or expression' or 'deny reasonable opportunities to engage in' religious activities."[367] The court explicitly rejected the Ninth Circuit definition applied in *Navajo Nation*, noting that the Tenth Circuit has not adopted that definition.[368]

363. *Id.* ("The Tribe's arguments that the dam interferes with the ability of tribal members to practice religion are irrelevant to whether the hydroelectric project either forces them to choose between their religion and receiving a government benefit or coerces them into a Catch-22 situation: exercise of their religion under fear of civil or criminal sanction.").

364. *Id.* at 1214–15. The court also rejected the Snoqualmie Tribe's argument that FERC violated the NHPA by not consulting with the tribe on a government-to-government basis on the grounds that the key documents that were generated pursuant to the NHPA Section 106 process (a cultural plan, an historical plan, and a programmatic agreement) were finalized before the tribe was federally recognized. *Id.* at 1216.

365. Comanche Nation v. United States, No. CIV-08-849-D, 2008 WL 4426621, at *1 (W.D. Okla. Sept. 23, 2008).

366. *Id.* at *3.

367. *Id.* (quoting Thiry v. Carlson, 78 F.3d 1491, 1495 (10th Cir. 1996)). The court relied on a definition from *Thiry*, which was decided prior to the 2000 amendment of RFRA, but noted that Tenth Circuit cases subsequent to the amendment did "not appear to signal a restrictive application of RFRA." *Id.* at *3 n.5.

368. *Id.*

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Applying the Tenth Circuit "substantial burden" definition, the court concluded that the plaintiffs had demonstrated a substantial likelihood of success on the merits of their RFRA claim.[369] The approach to Medicine Bluffs that would be impacted by the proposed warehouse is, and historically has been, a Comanche sacred site and the situs of traditional Comanche religious practices. These practices constitute a sincere exercise of religion; therefore, the construction of the warehouse would impose a substantial burden on Comanche religious practices. Noting that Comanche traditional religious practices "are inextricably intertwined with the natural environment," the court explained that as far as practices in relation to the Bluffs are concerned, "an unobstructed view of all four Bluffs is central to the spiritual experience of the Comanche people."[370] The proposed warehouse site was in an area offering the last open, unobstructed viewscape from the south of the Bluffs and the only available vantage point for viewing all four Bluffs. Moreover, the warehouse would occupy the area representing the central sightline to the Bluffs, in which practitioners center themselves on the gap between two of the Bluffs, known as Sweet Medicine. The obstruction that the warehouse would create in this area, along with the increased, disruptive vehicular traffic that was expected to accompany it, would constitute a substantial burden on the plaintiffs' religious practices.[371]

2. Balancing the Interests at Stake

In *Navajo Nation*, the Ninth Circuit panel, having found a substantial burden on religious exercise, rejected the argument that the approval of the proposed expansion advanced compelling governmental interests. The USFS's interest in managing the forest for multiple uses, including skiing, is the kind of broadly formulated interest that the Supreme Court found to be inadequate in *Gonzales v. O Centro Espirita Beneficent Uniao do Vegetal*,[372] the panel opinion noted.[373] Moreover, even if the survival of the Snowbowl as a commercial ski area depends upon being able to use sewage effluent for snowmaking, this did not necessarily mean that there was a compelling *governmental* interest in avoiding this result. After all, given the San Francisco Peaks' location in a desert, "it is (and always has been) predictable that some winters will be dry"—a fact that

369. *Id.* at *17.
370. *Id.*
371. *Id.*
372. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 431–32 (2006).
373. Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1043 (9th Cir. 2007) (citing *Gonzales*, 546 U.S. at 431). In *Gonzales*, the Court applied RFRA and held that the federal Government had failed to demonstrate a compelling interest in barring sacramental use by members of a religious sect of hoasca, a tea that is brewed from an Amazonian plant that contains a substance listed on Schedule I of the Controlled Substances Act. *Gonzales*, 546 U.S. at 438–39. The Government had conceded that the application of the Act would substantially burden the sect's sincere exercise of religion. *Id.* at 426.

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was known to the previous Snowbowl owners when they expanded it and to the current owners (who now wanted "to change these natural conditions by adding treated sewage effluent") when they bought it.[374] Given the many other recreational activities available on the peaks, authorizing the proposed use of sewage effluent for snowmaking was not justified by the claimed compelling governmental interest in providing for public recreational use.[375]

When the Ninth Circuit considered the case en banc, however, the court's conclusion that there was no substantial burden on religious exercise obviated the need to apply the compelling interest test.[376] The court treated the plaintiffs as if their claims stemmed from having their feelings hurt and from being too quick to take offense, dismissively stating that "the burden of the recycled wastewater can only be expressed by the Plaintiffs as damaged spiritual feelings."[377] Similarly, in *Snoqualmie Indian Tribe*, the Ninth Circuit, having concluded that the tribe's religious exercise was not substantially burdened, did not put FERC to the test of showing that the project serves a compelling interest. FERC was therefore not required to show that its relicensing decision was the least restrictive means of furthering that interest.[378]

In *Comanche Nation*, in examining the evidence of the significance of the government interest at stake, an Oklahoma federal district court concluded that although there was conflicting evidence about the necessity of the proposed warehouse, it would accept military officials' testimony that it was essential to Fort Sill's training mission.[379] Although this amounted to a substantial demonstration by the defendants that the construction of the warehouse was in furtherance of a compelling governmental interest, there was no evidence that construction of the warehouse in its proposed location was the least restrictive means of furthering that interest. Indeed, the evidence showed that officials had identified a much less restrictive alternative location but had not seriously considered it. The defendants had not only failed to consider less restrictive alternatives but had also failed to consider the plaintiffs' religious practices at all. Because it seemed unlikely that the defendants could meet their burden

374. *Navajo Nation*, 479 F.3d at 1045.

375. *Id.* The court also rejected the asserted interest in protecting public safety as justifying the proposed expansion: "[A]lthough the Forest Service undoubtedly has a general interest in ensuring public safety on federal lands, there has been no showing that approving the proposed action advances that interest by the least restrictive means." *Id.*

376. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1068–69 (9th Cir. 2008) (en banc).

377. *Id.* at 1070 n.12.

378. Snoqualmie Indian Tribe v. FERC, 545 F.3d 1207, 1214–15 (9th Cir. 2008).

379. Comanche Nation v. United States, No. CIV-08-849-D, 2008 WL 4426621, at *17 (W.D. Okla. Sept. 23, 2008).

of proof under RFRA, there was a substantial likelihood that the plaintiffs would succeed in their claim.[380]

Having found that the Comanche plaintiffs had demonstrated a substantial likelihood of success on the merits, the court reviewed the remaining requirements for issuance of a preliminary injunction: irreparable harm to the plaintiffs if the injunction were denied, threatened harm to the plaintiffs outweighing harm to the defendants if the injunction were issued, and issuance of the injunction not being adverse to the public interest.[381] The court concluded that construction of a permanent structure that would impose a substantial burden on the plaintiffs' religious practices would constitute irreparable harm and that any monetary damages that the defendants might incur if an injunction were issued "pale[d] in comparison to the prospect of irreparable harm to sacred lands and centuries-old religious traditions that would occur absent injunctive relief."[382] Finally, protection of landmarks like the Bluffs and the traditional practices tied to them, which was "consistent with expressions of public policy such as the RFRA and the NHPA," was not contrary to the public interest.[383] The court consequently issued a preliminary injunction against any further construction-related activities at the site.[384]

Faced with the court's finding that the Comanche Nation was likely to succeed on the merits of its claims, Fort Sill officials decided to abandon the warehouse plan.[385] The Comanche Nation's effort to protect the Medicine Bluffs viewscape thus met with far greater success than did similar efforts by tribes whose efforts were blocked by the Ninth Circuit's cramped approach to identifying substantial burdens on religious exercise in RFRA claims.

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380. *Id.* at *18. The court reached the same conclusion as to the tribe's claim that the defendants had failed to comply with the NHPA. They virtually ignored the viewscape concerns, which were even raised by the director of the Fort Sill Museum prior to the sending out of the Section 106 notice letter, and sent out a letter that buried the details of the project in technical attachments and lacked the detailed disclosure and information required by the Section 106 regulations. Moreover, the requirement that there be *good faith* consultation indicated that the tribes should have been told that the warehouse project was just "the tip of the iceberg," given that there were plans for further construction; proper disclosure would have apprised the tribes of the cumulative impact of the Army's planned construction in the area. The NHPA requires an agency to "stop, look, and listen" before proceeding with a project, but the defendants had "merely paused, glanced, and turned a deaf ear to warnings of adverse impact," thus falling short of "the reasonable and good faith efforts required by the law." *Id.* at *19 (quoting Coliseum Square Ass'n v. Jackson, 465 F.3d 215, 225 (5th Cir. 2006)) (internal quotation marks omitted).

381. *Id.* at *2.

382. *Id.* at *19.

383. *Id.* at *17.

384. *Id.*

385. Nolan Clay, *Comanche Nation Successfully Argued That Medicine Bluff Area Is Sacred; Army Loses $650K*, OKLAHOMAN, Oct. 28, 2009, at A1 (noting the Army's decision to suspend plans to build the warehouse and the request to the district court that the case consequently be dismissed).

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3. The Impact of *Lyng*

In *Navajo Nation*, the Ninth Circuit panel rejected *Lyng* as controlling the case for two reasons. First, the challenge in *Lyng* was brought directly under the Free Exercise Clause, which has a less demanding standard that must be satisfied to justify a burden than does RFRA. Second, the facts of the two cases were materially different. Whereas the Supreme Court in *Lyng* saw no basis for distinguishing the plaintiffs' claim from one that would require exclusion of non-Indians, the tribes in *Navajo Nation* did not seek to prevent use of the San Francisco Peaks by others.[386] The court concluded with a telling observation:

> The Court in *Lyng* denied the Free Exercise claim in part because it could not see a stopping place. We uphold the RFRA claim in this case in part because otherwise we cannot see a starting place. If Appellants do not have a valid RFRA claim in this case, we are unable to see how any Native American plaintiff can ever have a successful RFRA claim based on beliefs and practices tied to land that they hold sacred.[387]

Sitting en banc, however, the Ninth Circuit saw *Lyng* as being on point and supporting the court's decision.[388] The court raised *Lyng*-like policy concerns about the impact of concluding that the plaintiffs' religious exercise had been substantially burdened: "[A]ny action the federal government were to take . . . would be subject to the personalized oversight of millions of citizens."[389] In 2006, in *Gonzales*, however, the Supreme Court rejected a similar slippery-slope argument, dismissing the Government's argument that making one exemption would lead to endless demands for others as "the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions."[390]

4. The Role of the Establishment Clause

In *Navajo Nation*, the Ninth Circuit panel rejected an argument made by Snowbowl that complying with the Establishment Clause was an additional compelling interest furthered by the USFS decision.[391] "Declining to allow a commercial ski resort in a national forest to put

386. Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1047 (9th Cir. 2007).

387. *Id.* at 1048. In addition to holding that the plaintiffs prevailed on their RFRA claim, the court reversed the district court decision as to one NEPA claim (holding that the Environmental Impact Statement prepared for the project did not satisfy NEPA with respect to the possible risks from ingestion of the artificial snow) but upheld the decision as to four other NEPA claims. *Id.* at 1048–59. The court also upheld the district court's grant of summary judgment to the defendants on the Hopi Tribe's claim of lack of proper consultation under the NHPA. *Id.* at 1059–60.

388. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1071–73 (9th Cir. 2008) (en banc).

389. *Id.* at 1063.

390. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 435–36 (2006).

391. *Navajo Nation*, 479 F.3d at 1044–46.

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treated sewage effluent on a sacred mountain," the court explained, "falls far short of an Establishment Clause violation" and "is a permitted accommodation to avoid 'callous indifference' [to religious interests]."[392]

In *Snoqualmie Indian Tribe*, the Ninth Circuit considered, and rejected, Puget's objection to the increased water flow for May and June required in FERC's revised order. Although Puget's objection was not explicitly based on the Establishment Clause at this stage, it still implicated religious exercise. The court concluded that because FERC found that a greater amount of water flow during these months would produce a greater amount of mist, which is important to the Snoqualmie Tribe's religious practice, FERC could reasonably conclude that increasing those months' minimum-flow requirement "would augment the Tribe's religious experience and result in a better balance of interests" under § 10 of the FPA.[393] The court noted further that FERC had "carefully weighed" the impact on the religious experience of the tribe of the decision to require increased water flows against the decision's financial impact on Puget.[394] This aspect of the opinion indicates how other statutes may provide a basis for respect for, and accommodation of, tribal religious rights, in the face of hostility toward tribal rights under RFRA. The balancing of interests called for by the FPA prompted FERC to increase the water-flow requirements for May and June (to the consternation of Puget) for the purpose of increasing religiously significant mist during those months. Although the FPA's balancing of interests approach does not put religious needs front and center as does RFRA, and the FPA's reach is limited to the energy industry, it can still serve as a means for tribal religious concerns to be taken into account in this setting.

III. CONFRONTING THE (FR)ENEMY: ADDRESSING THE UNFINISHED BUSINESS OF PROTECTING (AMERICAN INDIAN) RELIGIOUS FREEDOM

> One thing to remember is the people that came to this country from other countries came here to have religious freedom, and I can't see these same people denying us the freedom that we enjoyed before they came.[395]

What conclusions can be drawn from the above examination of litigation involving Indian religious exercise at sacred sites on public lands and the roles of the Establishment Clause and RFRA in this context? Two conclusions leap to mind: first, the government is not a consistent

392. *Id.* at 1046 (quoting Lynch v. Donnelly, 465 U.S. 673, 673 (1984)).

393. Snoqualmie Indian Tribe v. FERC, 545 F.3d 1207, 1219 (9th Cir. 2008).

394. *Id.* Because Puget's briefs did not raise the Establishment Clause objection to the Rehearing Order that it had raised in the FERC proceedings, the court did not address it. *See supra* note 276 and accompanying text; *see also* Puget Sound Energy, Inc.'s Reply Brief, *Snoqualmie Indian Tribe*, 545 F.3d 1207 (Nos. 05-72739, 05-74060), 2006 WL 5022050.

395. *AIRFA Hearings*, *supra* note 31, at 83 (statement of Frank Tenario, All Indian Pueblo Council).

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friend of Indian religious freedom and, second, the Government always wins (or at least almost always wins). To put it another way, the government's schizophrenic conduct toward Indian religious exercise creates suspicion that it is, in modern parlance, a "frenemy"—an enemy disguised as a friend, who cannot be counted on to act in accordance with its own promises of respect and protection. From this perspective, the conduct of the federal Government vis-à-vis Indian religious exercise claims, and federal courts' response thereto, appears to come down to a simple rule: Indian free exercise rights matter when the government decides they do; otherwise, they do not. Indian religious freedom is protected only as a result of a kind of *noblesse oblige*.

If viewed in this way, the government's attitude toward Indian religions appears to have come full circle. Under explicit policies of an earlier era, traditional Indian beliefs and practices were deemed barbaric and classified as "Indian Offenses."[396] Christianity was favored and promoted as a crucial element of the process of "civilizing" the Indians.[397] This policy was formally repudiated, as reflected in AIRFA and other statutes and in executive actions.[398] In practice, however, engaging in traditional ceremonies and other forms of religious exercise, even if not explicitly forbidden, may be protected on lands subject to federal government decision-making power only when land managers decide that such protection is not contrary to federal goals and therefore deign to provide it. Once again, Indian religious freedom may be subordinated to other federal policies. Moreover, the contours of these policies continue to be shaped by the demands of non-Indians to be able to enjoy and profit from land and other resources taken in the past from tribes, even if their enjoyment infringes on Indian religious beliefs and practices. Multiple use mandates for what is today public land and policies that favor commercial resource exploitation have become mechanisms for denying protection for religious uses of land in favor of recreational and commercial uses.

Further reflection on the cases explored in Parts I and II is necessary, however, to develop a better understanding of what they reveal about "who or what the threats to [Indian] religious freedom are"[399] and, in turn, to formulate strategies for achieving the level of protection promised by the First Amendment, AIRFA, RFRA, and the Sacred Sites Order, as well as by the recently endorsed United Nations Declaration on the Rights of Indigenous Peoples.[400] The first step is to look back to the cases that not only provide the backdrop for contemporary sacred sites claims but also continue to influence land managers' and courts' approaches to these claims: *Lyng* and *Smith*. Secondly, RFRA and its role

396. Dussias, *supra* note 22, at 788–89.
397. *Id.* at 776–87.
398. *See supra* notes 30–40, 48–49, 55–57, 63–66 and accompanying text.
399. Smith, *supra* note 20, at 2034.
400. *See infra* notes 462–69 and accompanying text.

as a potential antidote for *Smith* where sacred sites are concerned should be examined. Part III.D offers preliminary thoughts on moving toward greater protection of religious exercise on public lands—stressing the need for tribal input—in keeping with the political and trust relationships between tribes and the United States.

A. Lyng*: Sword or Shield?*

The cases examined in Parts I and II reveal the continuing importance of a case that predates RFRA by fifteen years: *Lyng*. These cases reveal the two alternative functions that *Lyng* plays in litigation over Indian religious exercise on public lands—justification for accommodation or excuse for infringement (or for denying that infringement has occurred). The first function of *Lyng* has been embraced by federal land managers in making decisions that protect religious exercise and by Government attorneys and courts (in litigation) as evidence of the Court's endorsement and encouragement of such protection as constitutionally permissible. This accommodation principle is embodied in federal legislation and Executive Branch orders and actions. In short, there is ample support for the continuing vitality of this aspect of *Lyng*.

The continuing force of the second aspect of *Lyng*, which has been used as an excuse for actions that are so injurious as to desecrate a sacred site or to threaten to destroy a religion, even after the enactment of RFRA, is puzzling. As Justice Scalia recognized in *Smith* when refusing to apply strict scrutiny, *Lyng*, along with *Roy*, proved to be, in essence, the run up to *Smith*.[401] Just as the majority of the Court declined to apply the compelling interest test to protect Indian religious exercise in *Smith*, the majority failed to do so in *Lyng*. Noting this history in its brief in *Navajo Nation*, the Government observed that the Court's approach in *Lyng* was "consistent with the line of cases leading to the Court's decision in *Smith* and the subsequent passage of RFRA."[402] In other words, *Lyng* was one of a pair of cases that led to *Smith*, which Congress repudiated in RFRA.

Lyng did not receive the same national attention that *Smith* later received when it was decided. *Lyng* involved a scenario (a threat to a sacred site on public land) that did not resonate with adherents of mainstream religions. Before *Smith*, *Lyng*, along with *Roy*, could have been dismissed as "odd ball" cases impacting only Indians. *Smith*'s determination that the compelling interest test would no longer be applied to any burdens imposed on religion by neutral laws of general applicability, on

401. Emp't Div. v. Smith, 494 U.S. 872, 884–85 (1990); *see also* Alex Tallchief Skibine, *Towards a Balanced Approach for the Protection of Native American Sacred Sites*, 17 MICH. J. RACE & L. 269, 279 (2012) (noting that "[t]he *Smith* Court interpreted both [*Roy*] and *Lyng* as not having used the strict scrutiny test"). As Professor Skibine explains, there are difficulties in interpreting *Lyng* and its impact in the RFRA context. *Id.* at 279–82.

402. U.S. Brief, *Navajo Nation*, *supra* note 295, at 27.

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the other hand, was recognized as a threat to all religions, not just to those with vulnerable sacred sites located on public lands. As an evangelical Christian minister stated candidly in testimony to the House of Representatives prior to the enactment of RFRA, if all that the Court had done in *Smith* was to deny Free Exercise Clause protection to Indian religious practices, "we wouldn't be here today."[403] Non-Indians paid so much attention to the Court's decision to, "without benefit of briefing or argument, discard[] decades of precedent and announce[] a sea change in first amendment law[]" in *Smith* because it meant that their "ability to put [their] faith into action [was] now totally subject to majoritarian rule."[404] In other words, *Smith* mattered in a way that *Lyng* had not because non-Indian religious practitioners were now to be treated like their Indian counterparts.

Given *Lyng*'s ties to the decision in *Smith* to abandon the compelling interest test except in rare instances, it should follow that RFRA reinstated the compelling interest test to scenarios like the threat to a sacred site in *Lyng*. After all, the language of RFRA states Congress's intent to restore the test that *Smith* abandoned. Congress noted in RFRA that the *Smith* decision "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion" and praised "the compelling interest test as set forth in prior Federal court rulings," which the statute was intended to restore.[405] The process of abandonment of the compelling interest test in Indian religious freedom cases did not begin with *Smith* but rather with *Lyng* and *Roy*. Nowhere in RFRA did Congress state that the compelling interest test should *not* be reinstated in cases where *Indian* religious freedom was at stake.

In arguing to the Ninth Circuit in *Snoqualmie Indian Tribe* that *Lyng* defeated the tribe's claim, however, FERC argued that "pre-*Smith* case law, including *Lyng*, remains intact"[406] after the enactment of RFRA. FERC quoted a statement made by one legislator:

> RFRA does not [a]ffect *Lyng* . . . because the incidental impact on a religious practice does not constitute a cognizable burden on anyone's free exercise of religion. In *Lyng*, the court ruled that the way in which Government manages its affairs and uses its own property

403. *Religious Freedom Restoration Act of 1990: Hearing on H.R. 5377 Before the H.R. Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 101st Cong. 38 (1990) (statement of Rev. Robert P. Dugan, Jr., Dir., Office of Public Affairs, Nat'l Ass'n of Evangelicals). Reverend Dugan testified in the hearings on the initial predecessor to the bill that was ultimately enacted, in revised form, as RFRA in 1993.

404. *Id.* at 41–42. For a legislative history of the enactment of RFRA, see generally Robert F. Drinan & Jennifer I. Huffman, *The Religious Freedom Restoration Act: A Legislative History*, 10 J. L. & RELIGION 531 *passim* (1994).

405. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb(a)(4)–(5), (b)(1) (2006), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

406. FERC Brief, *Snoqualmie Indian Tribe*, *supra* note 296, at 30.

> does not constitute a burden on religious exercise. Thus, the construction of mining or timber roads over Government land, land sacred to [N]ative American religion, did not burden their free exercise rights. Unless a burden is demonstrated, there can be no free exercise violation.[407]

The statement that *Lyng* is unaffected by RFRA because incidental impacts on religious practice do not constitute cognizable burdens is, however, at odds with RFRA's recognition that neutral, incidental impacts can be just as burdensome as intentional interference with religious exercise and thus *should* be subject to compelling interest scrutiny. Moreover, *Lyng* recognized that the impact on Indian religion from the proposed road construction and timber harvesting might well be severe—in RFRA parlance, might well constitute a substantial burden. The Court held that regardless of such an impact, the Government did not have to meet the compelling interest test.[408] In other words, the *Lyng* Court did not apply the compelling interest test because the adverse impact on religious practice stemmed from the incidental effects of a government land use decision. The Government was not deliberately discriminating against "religions that treat particular physical sites as sacred."[409] RFRA, on the other hand, established that a government action with a significant adverse impact on religious practice is *not* shielded from application of the compelling interest test because such an impact was unintended.

Moreover, RFRA contains no carveout for land use decisions. Indeed, in the oral arguments in *Navajo Nation*, the Government's attorney acknowledged that RFRA does apply to land use decisions with incidental impacts on religious exercise.[410] Certainly the National Historic Preservation Act, as well as National Environmental Policy Act, also make clear Congress's longstanding understanding that tribes are legally entitled to a role in decision making as to public lands in which they hold cultural and religious interests.[411]

Two additional points about *Lyng*'s reasoning and legacy are in order. In addition to relying on the concept that incidental burdens imposed on religious exercise are not subject to compelling interest scrutiny to support the outcome in the case, the majority also relied on an expanded understanding of the Government's property rights and the privileging of these rights over religious exercise rights. Professor Kristen Carpenter

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407. *Id.* at 31 (first alteration in original) (quoting 139 CONG. REC. S14,461, S14,470 (daily ed. Oct. 26, 1993) (statement of Sen. Alan Simpson)) (internal quotation mark omitted). FERC also cited 139 CONG. REC. S14,461, S14,470 (daily ed. Oct. 27, 1993) (statement of Sen. Orrin Hatch).

408. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450–51 (1988).

409. *Id.* at 453.

410. Oral Argument at 34:55, Navajo Nation v. U.S. Forest Serv., 535 F. 3d 1058 (9th Cir. 2008) (en banc) (Nos. 06-15371, 06-15436, 06-15455), *available at* http://www.ca9.uscourts.gov/media/view.php?pk_id=0000001352.

411. *See* SUAGEE & TROPE, *supra* note 48, at 22–24 (NHPA requirements); *id.* at 62–64 (NEPA requirements).

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has written convincingly about the flaws in this approach.[412] In addition, in Establishment Clause challenges to management plans, the Government itself has acknowledged the responsibility that the taking of sacred Indian land imposes upon land managers.[413] This acknowledgment amounts to a rejection of the argument that government property rights automatically trump tribal religious rights.

Finally, the *Lyng* majority also argued that AIRFA was legally impotent as an additional basis for denying the plaintiffs relief. The majority opinion downplayed the statute's significance by quoting a statement by one of its sponsors, Representative Morris Udall, that it "has no teeth in it."[414] Examination of the context for this statement, however, reveals that it was not offered as a broad pronouncement indicating that AIRFA lacked legal significance. Rather, Representative Udall voiced these words in response to a colleague's concerns that AIRFA would apply to *private* land.[415] He sought to ease the minds of House members who, at a time when "we have [American] Indians marching on the Capitol," feared that Congress was "rushing a little bit fast" and taking an action that could "disrupt the normal progress of America" by enacting AIRFA.[416] Representative Theodore Risenhoover also responded by expressing surprise that "we would in any way question the right of a group of people to exercise their freedom of belief" and explained that AIRFA "assure[s] the Indian people the right to practice their religion on . . . Federal property."[417]

In short, there are a number of reasons to conclude that *Lyng* can no longer serve as a precedent supporting the argument that the government need not comply with the compelling interest test as to actions that burden religious exercise. At the same time, there is no reason to believe that the aspect of *Lyng* that calls for government accommodation of religious exercise has lost its force. Rather, it has been strengthened by post-*Lyng* developments.

412. *See* Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061, 1062–67 (2005). Professor Carpenter highlighted the social relations view of property rights, which conceives of property as "a set of 'social relations' among persons with respect to things," as an alternative to the ownership model of property rights. *Id.* at 1088. She explored how, in the sacred sites context, common law property rights for Indians grow out of the relationships between (1) the federal government and Indian nations, under federal Indian law principles; (2) the federal government and individual citizens, under the public trust doctrine; and (3) the United States and indigenous peoples within its borders, under international human rights law. *Id.* at 1100–38. For a discussion of courts' privileging of government property rights, see Dussias, *supra* note 22, at 819–33.

413. *See supra* notes 136, 160–61 and accompanying text.

414. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 454–55 (1988) (quoting 124 CONG. REC. 21,444–21,445 (1978)) (internal quotation marks omitted).

415. 124 CONG. REC. 21,443, 21,445 (1978) (noting that AIRFA "has nothing whatever to do with private property" and that it "addresses property that is all federally owned").

416. *Id.* (statement of Rep. Robert Badham).

417. *Id.* at 21,446 (statement of Rep. Theodore Risenhoover).

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B. Smith*: Repudiated by Congress but Still Potent*

In *Smith*, just as in *Lyng*, Indian religious freedom claims provided the occasion for limiting Free Exercise Clause protection against government action that threatened religious beliefs and practices. The Court sidestepped evaluating the claims in these cases, whether involving (as in *Smith*) a denial of government benefits rooted in religious conduct (sacramental ingestion of a controlled substance) or (as in *Lyng*) interference with worship at a sacred site on public lands by a land management decision designed to facilitate commercial use. In *Smith*, neither side had argued that the compelling interest test did not apply, yet the majority opinion reflected five Justices' decision that the Court should hold that it did not. Given the difficulty that Indian claimants have had in persuading courts to address their claims under RFRA's test, *Smith*'s abandonment of the compelling interest test continues to adversely impact Indians.

1. *Smith* and Hybrid Rights

In *Smith*, in trying to explain why the Court applied the compelling interest test in cases like *Yoder* but now refused to do so in *Smith*, the majority described these cases as involving "hybrid situation[s]."[418] Not only were free exercise rights at stake but so were other important rights, such as parents' rights to direct the upbringing of their children.[419] Professor Michael McConnell has noted, however, that *Smith* itself could have been considered a hybrid rights case that combined free speech rights and free exercise rights: "Smith and Black could have made a colorable claim under the Free Speech Clause that the prohibition of peyote use interfered with their ability to communicate [a] message," namely their "faith in the tenets of the Native American Church."[420] Indian claims couched in Free Exercise Clause language can also implicate rights to freedom of association.

In the case of Indian religious practices, one can argue that other rights, in addition to speech and association rights, are also at stake, such as the right of tribes to have their sovereignty respected, as well as rights flowing from the trust relationship between tribes and the United States. The *Smith* Court referred to the supposed hybrid rights cases as involving the coupling of the Free Exercise Clause with other constitutional protections.[421] Because the federal–tribal relationship also has a constitutional

418. Emp't Div. v. Smith, 494 U.S. 872, 881–82 (1990).

419. *Id.* at 881.

420. Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1122 (1990). The author concludes that the reason why the *Smith* plaintiffs' free speech claim would not prevail as a hybrid with their free exercise claim, "a legal realist would tell us, is that the *Smith* Court's notion of 'hybrid' claims was not intended to be taken seriously." *Id.*

421. *Smith*, 494 U.S. at 881 ("The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections . . . .").

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basis, tribal religious rights claims can be understood as hybrid rights claims. Indeed, the Government cited its obligations pursuant to tribal rights as secular purposes underlying management plans at Rainbow Bridge National Monument and other public lands. Consequently, under the *Smith* hybrid rights doctrine, government actions that burden Indian religious exercise arguably are subject to compelling interest scrutiny even post-*Smith*, without need for consideration of RFRA, on the theory that they burden hybrid rights.

The application of the pre-*Smith* compelling interest test to burdens on Indian religious freedom does not, of course, ensure protection for religious practitioners. A court may well conclude that government interests outweigh religious exercise rights, as courts concluded in pre-*Smith* sacred sites cases like *Badoni*.[422] If strict scrutiny is applied, though, there is at least a possibility that courts will vindicate Indian free exercise rights on the basis of the government's failure to satisfy the compelling interest test. Moreover, the prospect of having to meet the test could encourage land managers to make decisions that are more solicitous of Indian religious freedom.

2. The Impact of *Smith* on Claim Filing and Minority Religions

A 2004 study of free exercise claims during the period between the *Smith* decision and the enactment of RFRA concluded that far fewer free exercise cases were brought, with the rate of cases brought by religious groups dropping by over 50% immediately after the decision. Moreover, the number of rulings in favor of the plaintiffs dropped significantly.[423]

When *Smith* was decided, closing the courts to most free exercise claimants logically could have been expected to have a greater impact on minority religions because of their greater need to rely on the judicial process for free exercise protection. The 2004 study, for example, found that between 1981 and 1997, minority religions combined accounted for nearly 62% of free exercise cases, while making up only 18% of U.S. religious membership.[424] It stands to reason that minority religions will have greater need to turn to the courts to challenge government actions than will mainstream religions whose needs and values are likely to have shaped the drafting of laws and various government decisions in the first place. In other words, because "the majority of Americans adhere to mainstream religious groups, . . . laws of general applicability are likely

422. *See, e.g.*, Badoni v. Higginson, 455 F. Supp. 641, 647 (D. Utah 1977), *aff'd*, 638 F.2d 172, 177 (10th Cir. 1980). The Tenth Circuit concluded in *Badoni* that the Government's interests outweighed plaintiffs' interests. *Badoni*, 638 F.2d at 177.

423. Amy Adamczyk et al., *Religious Regulation and the Courts: Documenting the Effects of* Smith *and RFRA*, 46 J. CHURCH & ST. 237, 242 (2004). The authors determined that the percentage of favorable decisions dropped from 39% before *Smith* to less than 29% between *Smith* and the enactment of RFRA. *Id.* at 248.

424. *Id.* at 245–46.

to be consistent with mainstream religious beliefs."[425] Such laws "are developed on the bases of majority norms, values, and beliefs."[426] To the *Smith* majority, this was not a concern, and effectively closing the courts to those most in need of access, and instead sending them to beg for legislative protection, was deemed acceptable. Discouraging practitioners of minority religions whose free exercise rights were burdened by laws of allegedly neutral laws of general applicability from going to court also meant that courts (and the rest of society) would not readily become aware of the impact of these laws on such practitioners.[427]

3. *Smith* and the Tyranny of the Majority

Justice Jackson wrote in 1943 that

> [t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by courts. One's right to . . . freedom of worship . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[428]

The *Smith* Court's endorsement of putting the free exercise rights of minority religious practitioners to a vote, by abandoning them to the political process, conflicts with this understanding of the Bill of Rights.

Representative Glenn Anderson raised concern about this development in Congress in 1991, observing that "against all original intent of the Founding Fathers and the history of American law, *Smith* allows majorities to trample on individual religious freedoms without any recourse to the courts for constitutional protection."[429] Representative Anderson noted further that the Court's "illogical refusal to examine any State infringements on religious practices is disastrous to those religious practices which may not conform to general law and do not have the popular support to find politically granted exceptions."[430] This refusal could mean that "the drinking of sacramental wine may be forbidden to minors because of State age-related liquor laws," although this seemed unlikely "due to our society's majority Judeo-Christian composition."[431] Justice Blackmun observed in his dissent in *Smith* that the use of peyote as a sacrament by the Native American Church is "closely analogous to the sacramental use of wine by the Roman Catholic Church."[432] Although

425. *Id.* at 253.
426. *Id.*
427. *Id.* at 251.
428. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).
429. 137 CONG. REC. 23,376 (1991) (statement of Rep. Glenn Anderson) (italics added) [hereinafter Rep. Anderson Remarks].
430. *Id.*
431. *Id.*
432. Emp't Div. v. Smith, 494 U.S. 872, 913 n.6 (1990) (Blackmun, J., dissenting).

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this analogy is helpful in understanding the impact of *Smith*, it is worth noting that the comparison between forbidding communion wine to children and forbidding peyote to Native American Church members is not a perfect one and understates the significance of a peyote prohibition. For Roman Catholics, for example, consumption of eucharistic bread (the communion wafer, or host) alone suffices for receiving communion, whereas for Native American Church members, peyote is the only substance that is sacramentally consumed.[433] Prohibiting peyote means denying access to a sacrament entirely.

Moreover, *Smith*'s relegation of religious freedom protection to the political process meant primarily relegation to the *state* political process. In other words, rejecting a judicial role in balancing rights under the compelling interest test means that the courts leave individuals at the mercy of state governments, even though, as Representative Anderson observed, history has "unequivocally demonstrated that it is States which are the greatest trespassers of our constitutional rights, not the greatest protectors."[434] Rather than respecting individual rights, states have sacrificed "the rights of individuals, often poor and powerless, in haste to please the demands of either the powerful or the many."[435] It was in part this unwillingness to protect individual rights that necessitated adoption of the Fourteenth Amendment.[436]

By leaving the protection of the free exercise rights of adherents of minority religions to governments that can be expected to act based on political expediency, the Court abandoned the Judicial Branch's crucial protective role where constitutional rights are at stake. In the view of James Madison, the courts were to serve as "an impenetrable bulwark" in defense of constitutional rights.[437] *Smith* amounted to a statement by five Supreme Court Justices that they no longer cared to play this role where merely *religious* liberty was at stake. Only if other fundamental rights were at stake, perhaps in conjunction with free exercise rights, would the Court be willing to put forth the effort to review government actions for their compliance with the First Amendment.

433. According to Roman Catholic teachings, because Christ is sacramentally present in both the consecrated bread and the wine, ingestion of either alone constitutes receipt of communion.

434. Rep. Anderson Remarks, *supra* note 429, at 23,376.

435. *Id.*

436. *Id.*

437. Madison stated, "[I]ndependent tribunals of justice . . . will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights." 1 ANNALS OF CONG. 457 (1789) (Joseph Gales ed., 1834) (June 6, 1789 statement of Rep. James Madison).

C. RFRA: Restoration of Whose Religious Freedom?

1. RFRA and Majority Religions

Following *Smith*, Congress enacted an amendment to AIRFA to protect sacramental peyote use by members of federally recognized tribes against federal and state prohibitions.[438] This development suggested that appeals to Congress for religious exercise protection are not always doomed to fall on deaf ears. RFRA, enacted the year before the AIRFA peyote amendment, might also be hailed as evidence of the ability of the political branches of government—at least at the federal level—to recognize the needs of practitioners of Native American religions and other minority religions for protection against substantial burdens on their religious exercise. It is interesting, then, to note the dominance of representatives of mainstream religions in the push to enact RFRA (and to shape its language to meet their concerns). Moreover, their involvement did not necessarily arise from an ecumenical spirit but perhaps more from concerns over the threat that *Smith* might pose to their own beliefs and practices. Indian religious practitioners pointed out the inadequacy of RFRA in written submissions to Congress, whereas the congressional hearings that ultimately led to enactment of RFRA focused, for the most part, on testimony from representatives of mainstream religions. RFRA itself was thus largely shaped by majority, rather than minority, voices and concerns.

The 1992 Senate hearing, for example, included testimony from representatives of four Christian denominations, one of whom also testified on behalf of the American Jewish Congress.[439] Only one member of a minority religion, a Laotian immigrant who spoke about Hmong traditional religious beliefs, took part in the hearing.[440] No practitioner of a traditional Indian religion testified in the hearing, although a statement by a coalition of Indian tribes and organizations was submitted.[441] The statement noted Indian support for the RFRA bill because "it is vitally important to restore to all Americans the basic First Amendment freedoms which have been stripped from them by recent Supreme Court decisions," but also stressed the need for separate legislation to protect Indian religious freedom. Additional legislation was needed if Indians "are

438. 42 U.S.C. § 1996 (1978), *amended by* 42 U.S.C. § 1996a (2006). The amendment provided that "the use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion is lawful, and shall not be prohibited by the United States or any State." § 1996a(b)(1). The provision applies only to individuals who fit within the statute's definition of "Indian," namely a member of a federally recognized tribe. § 1996(a)(c)(1), (2).

439. *1992 RFRA Senate Hearings*, *supra* note 2, at iii (listing witnesses and their affiliations); *id.* at 29 (noting that witness Oliver Thomas was testifying on behalf of both the Baptist Joint Committee and the American Jewish Congress).

440. *Id.* at 5–6 (noting statement of William Nouyi Yang).

441. *Id.* at 243. The statement was submitted by "a broad coalition of Indian tribes and organizations and religious, civil rights and environmental organizations." *Id.* at 244.

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to receive the same degree of protection of their religious practices as that accorded other religious traditions."[442] Although separate legislation was passed with regard to sacramental use of peyote, efforts to enact sacred sites-related protection were met with failure.[443]

2. RFRA, Equality, and Neutrality

Much has been written about the differences between the religions of the indigenous peoples of the United States and Christianity.[444] At the same time, there are similarities between Indian religions and mainstream religions like Christianity. There are beliefs and practices of Indian religions that in some way correspond in function or at least in importance with, while differing in form from, Christian beliefs and practices. Indian Free Exercise Clause claimants made this point (albeit with little success) in pre-*Lyng* and pre-*Smith* cases, in which they analogized between their beliefs and practices and those of Christianity, to try to dispel ignorance of Indian religions and make the point that the Government was infringing upon their religious freedom.[445]

To the extent that Indian religious beliefs and practices have counterparts, in terms of such characteristics as function and significance, with those of the predominant American religion of Christianity, then the failure to protect the former while protecting the latter raises the question of whether this approach amounts to a kind of religious preferentialism that past Supreme Court cases have rejected.[446] We might well ask how legal protection of Christian beliefs and practices through legislative, executive, and judicial actions, while Indian religious beliefs and practices of comparable function and significance to their practitioners are not similarly protected, can be reconciled with the principle of neutrality, one of the Establishment Clause's underlying values. How can this disparate treatment be understood as anything other than the kind of denominational preference that Congress also rejected in its most recent religious freedom-related enactment, the Religious Land Use and Institutionalized Persons Act (RLUIPA)? Enacted in 2000, RLUIPA, which requires all governments to meet the compelling interest test in order to impose sub-

442. *Id.*

443. *See, e.g.*, Jack F. Trope, *Protecting Native American Religious Freedom: The Legal, Historical, and Constitutional Basis for the Proposed Native American Free Exercise of Religion Act*, 20 N.Y.U. REV. L. & SOC. CHANGE 373, 384–88 (1993) (discussing efforts to enact legislation to protect sacred sites, as well as sacramental use of peyote and other religious rights). A bill entitled the "Native American Sacred Lands Act," for example, was introduced in the House of Representatives in 2002 and again in 2003 but was not enacted. H.R. 5155, 107th Cong. (July 18, 2002); H.R. 2419, 108th Cong. (June 11, 2003). The Senate bill that was ultimately enacted as the Native American Free Exercise of Religion Act of 1993 originally included provisions to protect sacred sites. S. 1021, 103d Cong. tit. I (May 25, 1993). Only the peyote-related provisions were enacted.

444. *See, e.g.*, Dussias, *supra* note 22, at 811–15.

445. *See, e.g.*, *id.* at 815–19.

446. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) (stating that federal and state governments cannot "prefer one religion over another"). In recent years, the neutrality principle has played a particularly strong role where government funding is at issue.

stantial burdens on religious exercise through land use regulation, prohibits governments from imposing or implementing a land use regulation that discriminates on the basis of religion or religious denomination.[447]

Focusing on sacred sites cases in particular, if RFRA is interpreted and applied in litigation in a way that does not adequately protect Indian sacred sites in most instances, this application of the statute raises the question of why a category of claims is excluded, in effect, from protection under RFRA. Are sacred sites claims not within the purview of RFRA because Indian rights do not matter? The judges who dissented from the *Navajo Nation* en banc decision touched on this problem, observing that the majority's application of RFRA "effectively read American Indians out of RFRA."[448] The tribal coalition statement submitted to Congress in the 1992 RFRA hearings also noted that courts have been "perplexed" in applying the compelling interest test to sacred sites cases and that there is a "need to ensure that the 'compelling state interest' test is refined and made to more adequately 'fit' [Indian] religions."[449] Putting this question in terms of RFRA's substantial burden concept, Are burdens attributable to incidental impacts on sacred sites on public lands not "cognizable" because only Indians are so burdened? Clearly such an exclusion is not apparent in the text of RFRA.

The comments above focus on the abandonment of neutrality that is embodied in legal protection for Christian, but not Indian, beliefs and practices. Neutrality needs to be considered in another way as well. Respect for the neutrality principle justifies sacred sites protection extended by federal land managers. If Christian beliefs and practices are already protected, then efforts aimed at protecting Indian religious exercise are neutral as between religions. In other words, actions that accommodate Indian religious beliefs and practice are not "special treatment." Rather, they are neutral as between religions if they attempt to provide the same level of protection to Indian religions that is provided to Christian de-

447. RLUIPA provides as follows:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—(A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1) (2006). "'[R]eligious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." § 2000cc-5(7)(A). "Land use regulation" is defined to include zoning and landmarking laws, and their application, that limit or restrict land use or development. § 2000cc-5(5). The denominational non-discrimination provision states that "[n]o government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." § 2000cc(b)(2). Additional sections provide protection for religious exercise by institutionalized persons. § 2000cc-1(a). The Supreme Court rejected an Establishment Clause-based facial challenge to RLUIPA's institutionalized persons provisions in 2005. *See* Cutter v. Wilkinson, 544 U.S. 709, 725 (2005).

448. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1113–14 (9th Cir. 2008) (Fletcher, J., dissenting).

449. *1992 RFRA Senate Hearings*, *supra* note 2, at 257.

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nominations. Consequently, measures designed to protect Indian religious practitioners' exercise of their religion do not run afoul of the Establishment Clause. Rather, they are consistent with the substantive neutrality that Congress embraced in RFRA.[450]

Finally, the neutrality principle can be understood as playing yet another role in this context: as support for religious practitioners arguing that a government action has substantially burdened their religious exercise and is indefensible under RFRA's compelling interest test. Definitions like those employed by the Ninth Circuit to define "substantial burden" rely on cases involving burdens on Christian religious practitioners. In *Sherbert* and *Yoder*, the Supreme Court focused on the coercive and potentially punitive impacts of the government actions in question on members of particular Christian denominations. If government actions, however characterized and whatever their form, have as significant an adverse impact on Indian religious practitioners as the challenged actions did on Christians in *Sherbert* and *Yoder*, then the neutrality principle requires recognition that such actions impose substantial burdens. In other words, if the compelling interest test is triggered by seriously adverse impacts on Christian religious exercise, then negative impacts of similar magnitude on Indian religious exercise should also trigger application of the test. If they do not, then Christianity is receiving a form of preferential treatment that is inconsistent with the Establishment Clause.

D. Now What? Envisioning a Path Toward Equalizing Protection of Indian Religions

Part I demonstrated the impact that federal land managers who take seriously their responsibilities to protect Indian religious exercise can have in promoting Indian religious freedom, particularly given the Government's vigorous (and successful) defense of land managers' decisions against Establishment Clause challenges. Part II demonstrated that if land managers instead privilege other interests over Indian religious exercise rights, then efforts to protect religious exercise at sacred sites through RFRA may face an uphill battle, particularly in courts in the Ninth Circuit. Taken together, Parts I and II teach the importance of effective tribal involvement in the development and implementation of management plans related to public lands that contain sacred sites. Optimizing opportunities for meaningful tribal involvement thus appears crucial.

Although an analysis of the current opportunities for tribal involvement in the development of management plans by federal government departments and agencies, and of their effectiveness for tribes, is beyond the scope of this Article, a few general observations can be made. First,

450. *See* Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 23–24 (1994) (rejecting formal neutrality and reenactment of substantive neutrality).

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assessing these opportunities and their effectiveness must start with tribes' perceptions of their experiences. Recent and ongoing efforts of federal agencies to evaluate and update their sacred sites and tribal consultation policies have solicited tribal feedback, which needs to be integrated into policy development and implementation.

The need to have public lands management plans better respond to the expressed needs of Indian religious practitioners was highlighted in the 1992 tribal statement submitted during the process of enacting RFRA. The statement commented that "if our legal system is to serve all segments of society, it should ensure that unique needs of indigenous peoples are addressed and incorporated."[451] Because of the "contorted approaches" that have been taken in trying to apply "concepts developed with the Judeo-Christian tradition in mind to vastly different tribal religious practices," there is a need for "more specific criteria [to] be spelled out" so that federal officials (and federal judges, if it comes to that) "can understand and fairly apply the 'compelling state interest test' in the context of America's unwritten and little understood indigenous religions."[452] Furthermore, the statement explained, "[g]iven the long history of government suppression of tribal religion and the federal trust relationship, Indians are *entitled* to specific standards and assurances" that prevent federal actions from "infring[ing] unnecessarily on their right of worship."[453] Developing firmer and more informative guidelines for federal land managers to turn to in assessing sacred sites impacts is, then, another important task. The damage done to Indian religious freedom by the *Navajo Nation* en banc opinion's application of a narrow "substantial burden" definition, which evidenced misunderstanding of Indian religions, underscores the urgency of carrying out this task.

In developing guidelines for identifying substantial burdens on religious exercise at sacred sites, RLUIPA may provide some guidance. Although RLUIPA's land use provisions apply by their terms to zoning and landmark actions, the statute contains the substantial burden concept. In determining whether denial of permission to build is a substantial burden, courts determine whether the claimant has other sites that are reasonably available and are approved for its desired use.[454] Some scholars have suggested that the RFRA substantial burden inquiry should include an evaluation of whether alternative means of exercising the religion in question exist.[455] In some sacred sites cases, the lack of *any* comparable

451. *1992 RFRA Senate Hearings*, *supra* note 2, at 257–58.

452. *Id.*

453. *Id.* (emphasis added).

454. *See, e.g.*, Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761–62 (7th Cir. 2003).

455. *See, e.g.*, Frederick Mark Gedicks, *Towards a Defensible Free Exercise Doctrine*, 68 GEO. WASH. L. REV. 925, 947 (2000) ("[C]ourts will be required to decide whether there exist ample alternative means of satisfying the claimant's religious obligations."); Skibine, *supra* note 401, at 295.

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site, because of the uniqueness of the site at issue, would weigh in favor of a finding that actions that adversely impact a site or interfere with its use impose a substantial burden. In other cases, although another location exists that is suitable for a particular ceremony or other activity (or for gathering religiously significant materials), such location might be unavailable for the needed use, perhaps because it is located on private land or is otherwise off limits. In such cases, too, a substantial burden exists under this understanding of the term.

As tribal experiences are analyzed and more effective consultation and protection guidelines are developed, it is important to keep in view the connection between tribal religions and tribal sovereignty. Indian religious exercise rights involve not just the rights of individuals but also the rights of political entities, Indian tribes. The United States and tribes have a *sui generis*, centuries-old, government-to-government relationship. Inherent in this relationship is a trust obligation, rooted in treaties by which tribes ceded land to the United States. As Professor Mary Wood has explained, these treaties were "made against a framework of federal promises which guaranteed native separatism and federal protection of the tribes' ability to continue their way of life."[456] Discussing the failure to understand the nature of religious activities at sacred sites reflected in the *Lyng* and en banc *Navajo Nation* opinions, Professor Alex Skibine commented as follows:

> The importance of sacred sites to Indian tribes and Native practitioners is less about individual spiritual development and more about the continuing existence of Indians as a tribal people. The preservation of these sites as well as tribal people's ability to practice their religion there is intrinsically related to the survival of tribes as both cultural and self-governing entities.[457]

As federal officials consider their past and future treatment of Indian religious exercise claims, they need to keep in mind the responsibilities that they owe not just to individuals but also to tribes more broadly. Fulfillment of these responsibilities to tribes, as well as to individuals, must take account of current tribes and individuals and those of generations to come. In short, tribes, and the duties owed to them under the political and trust relationships between tribes and the United States, must be front and center when protection of tribal religious exercise is evaluated.

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456. Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109, 112 (1995).

457. Skibine, *supra* note 401, at 273–74. Professor Skibine noted further that the statements in these opinions seemed to "equate Indians' religious exercises at sacred sites with Western yoga-like practices. . . . [T]his view portrays Native religious activities at sacred sites as only about spiritual peace of mind." *Id.* at 273. Although spiritual peace of mind is part of the practice, it "do[es] not go to the heart of why these sacred places are important to Indian people or why management practices like cutting down trees and spilling recycled sewage water on sacred land are extremely disturbing to many Indian tribes." *Id.*

The significance of the federal–tribal relationship in the protection of sacred sites was appropriately highlighted in a 2006 U.S. Department of Justice legal opinion. Commenting on the federal government's responsibilities under the Sacred Sites Order, the Department's Office of Legal Counsel relied on the "special trust relationship between the federal government and federally recognized Indian tribes"[458] to argue that the legal principles that prohibit the government from "enacting regulations that prefer one religion over others, that foster excessive entanglement with religion, or that lift privately imposed burdens . . . do not apply to regulations that accommodate the religious practices of" such tribes.[459] Moreover, even if ordinary Establishment Clause principles are applied to accommodations related to sacred sites, such principles must be applied with the federal–tribal relationship highlighted in *Mancari* in mind; doing otherwise "is plainly incompatible with the federal government's duty toward the tribes."[460] This special relationship "envisions active assistance from the federal government" where religious exercise is concerned.[461]

Finally, the recent endorsement by the United States of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[462] suggests that the time is ripe to review the compliance of the United States with the developed and developing international law on the protection of indigenous peoples' religious rights in general and of sacred sites in particular. Although the United States was one of the four nations that voted against the adoption of UNDRIP in the U.N. General Assembly in 2007,[463] President Obama announced the United States' changed stance in December 2010.[464] Article 11 of UNDRIP asserts the right of indige-

458. Permissible Accommodation of Sacred Sites, 20 Op. O.L.C. 331, 1996 WL 33101199, at *5 (Sept. 18, 1996).

459. *Id.* at *3.

460. *Id.* at *5. The opinion noted that "in *Morton v. Mancari*, the Supreme Court held that preferences for federally recognized Indian tribes are subject to less exacting scrutiny under the Equal Protection Clause than racial or ethnic preferences" because of the federal–tribal relationship. *Id.* at *4 (citation omitted).

461. *Id.* at *5.

462. U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. GAOR, 61st Sess., Supp. No. 53, 107th plen. mtg., U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter UNDRIP].

463. Robert T. Coulter, *The U.N. Declaration on the Rights of Indigenous Peoples: A Historic Change in International Law*, 45 IDAHO L. REV. 539, 539, 545 (2009). The other nations voting against the adoption of UNDRIP (Australia, Canada, and New Zealand) all changed their positions on UNDRIP prior to the United States' change of position. Gail Courey Toensing, *UN Declaration's One-Year Anniversary: "Much to Celebrate, Much More to Be Done,"* INDIAN COUNTRY TODAY, Dec. 12, 2011, http://indiancountrytodaymedianetwork.com/2011/12/12/un-declaration's-one-year-anniversary-much-to-celebrate-much-more-to-be-done-66108.

464. Press Release, U.S. Dep't of the Interior, Remarks by the President at the Tribal Nations Conference (Dec. 5, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/12/05/remarks-president-tribal-nations-conference [hereinafter Obama UNDRIP Remarks]; *see also* President Barack Obama, Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples: Initiatives to Promote the Government-to-Government Relationship & Improve the Lives of Indigenous Peoples (Dec. 16, 2010),

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nous peoples "to practise and revitalize their cultural traditions and customs," including "the right to maintain, protect and develop" manifestations of their cultures, such as historical sites and ceremonies.[465] Article 12 sets out the right to "manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies" and to "maintain, protect, and have access in privacy to their religious and cultural sites."[466] Article 25 asserts the right of indigenous peoples "to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard."[467] More generally, UNDRIP provides that indigenous peoples and individuals are to be free from discrimination in the exercise of their rights[468] and that before governments adopt and implement legislative or administrative measures that may affect indigenous peoples, there must be consultation with their representative institutions "to obtain their free, prior and informed consent."[469]

Although non-binding on its face, UNDRIP stands as "an official statement by most member countries of the United Nations that these are the legal rights of indigenous peoples in international law" and thus has "considerable political and moral force, creating the basis for it to become binding international law."[470] Some of UNDRIP's specific provisions also reflect existing norms of customary international law.[471] Moreover, UNDRIP as a whole is best understood as a document that elaborates, "in the specific cultural, historical, social and economic circumstances of indigenous peoples," on already recognized "fundamental human rights that are deemed of universal application."[472]

At the conclusion of a 2012 visit to the United States, U.N. Special Rapporteur on Indigenous Peoples S. James Anaya noted that he had "heard many stories about the significance of places that are sacred to indigenous peoples, places like the San Francisco Peaks in Arizona and

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http://www.state.gov/documents/organization/153223.pdf [hereinafter State Dep't UNDRIP Announcement].

465. UNDRIP, *supra* note 462, art. 11, ¶ 1. States are to provide redress with respect to indigenous peoples' "cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs." *Id.* art. 11, ¶ 2. Cultural heritage is also protected by article 31, which sets out the "right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions." *Id.* art. 31, ¶ 1.

466. *Id.* art. 12, ¶ 1. Article 12(1) also protects "the right to use and control of ceremonial objects." *Id.*

467. *Id.* art. 25.

468. *Id.* art. 2.

469. *Id.* art. 19.

470. Coulter, *supra* note 463, at 546.

471. Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, ¶ 41, U.N. Doc. A/HRC/9/9 (Aug. 11, 2008) (by S. James Anaya).

472. *Id.* ¶ 40.

the Black Hills in South Dakota, which hold profound religious and cultural significance to tribes" and that "indigenous peoples reported . . . that they have too little control over what happens in these places, and that activities carried out around them at times affront their values and beliefs."[473] He concluded that continued efforts should be made "to resolve, clarify, and strengthen the protection of" sacred sites.[474] The concerns raised by the Special Rapporteur about U.S. sacred sites protection are not without precedent in the U.N. system. In 2006, for example, the U.N. Committee for the Elimination of Racial Discrimination expressed concern about the impact of gold mining activities on Mount Tenabo in Nevada, which is sacred to Western Shoshone tribes.[475]

Anaya highlighted U.S. support for UNDRIP as an important step and commended the United States "for joining the rest of the countries of the world in its support for this instrument."[476] Although he had heard about federal initiatives that "can be seen as advances towards the implementation of some provisions of the Declaration," it was "evident that more robust measures are needed to address the serious issues affecting Native American, Alaska Native and Hawaiian peoples in the United States, issues that are rooted in a dark and complex history whose legacies are not easy to overcome."[477] To conform to UNDRIP, "[c]ontinued and concerted measures are needed to develop new initiatives and reform existing ones, in consultation and in real partnership with indigenous peoples."[478]

Anaya's comments suggested the promise held out by the adoption of UNDRIP, and by American support for it: "The Declaration provides a new grounding for understanding the status and rights of indigenous peoples, upon which the legal doctrines of conquest and discovery must be discarded as a basis for decision-making by judicial and other authorities."[479] In announcing the new support for UNDRIP, the State Department asserted that "the United States is committed to serving as a model in the international community in promoting and protecting the collective

473. *Id.*

474. *Id.*

475. U.N. Comm. for the Elimination of Racial Discrimination, Int'l Convention on the Elimination of all Forms of Racial Discrimination, ¶¶ 5–7, Decision from its 68th Sess., Feb. 20–Mar. 10, 2006, U.N. Doc. CERD/C/USA/DEC/1 (Apr. 11, 2006). For a discussion of the experiences of the Western Shoshone in the international arena and, more broadly, of the United States' tribal consultation obligations following the endorsement of UNDRIP, see Akilah Jenga Kinnison, *Indigenous Consent: Rethinking U.S. Consultation Policies in Light of the U.N. Declaration on the Rights of Indigenous Peoples*, 53 ARIZ. L. REV. 1301 *passim* (2011). The decision of the BLM to allow an expansion of gold mining activities at Mount Tenabo is the subject of ongoing litigation in the Ninth Circuit. S. Fork Band Council v. U.S. Dep't of the Interior, 588 F.3d 718, 721 (9th Cir. 2009).

476. James Anaya, Statement of the United Nations Special Rapporteur on the Rights of Indigenous Peoples upon Conclusion of His Visit to the United States (May 4, 2012), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12114&LangID=E.

477. *Id.*

478. *Id.*

479. *Id.*

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rights of indigenous peoples"[480] and highlighted the USDA's initiative to review USFS policies and "to examine the effectiveness of existing laws and regulations in ensuring a consistent level of sacred site protection that is more acceptable to the tribes."[481] If the United States is sincerely committed to serving as a role model for protection of indigenous peoples' collective rights—a commitment that would distance the nation from past policies of conquest and cultural genocide—improving protection of sacred sites surely must be part of the commitment.

CONCLUSION

> I encourage all Americans to reach deep inside to try to determine what it is that drives their lives most deeply. . . . [L]et us never believe that the freedom of religion imposes on any of us some responsibility to run from our convictions. Let us instead respect one another's faiths [and] fight to the death to preserve the right of every American to practice whatever convictions he or she has . . . .[482]

> We know that, ultimately, this is not just a matter of legislation, not just a matter of policy. It's a matter of whether we're going to live up to our basic values. It's a matter of upholding an ideal that has always defined who we are as Americans.[483]

In *Employment Division v. Smith*, the Supreme Court rejected a Free Exercise Clause claim by members of the Native American Church in a way that was widely perceived as threatening the religious freedom of all Americans. This perception led to the enactment of RFRA to restore the compelling interest test abandoned by *Smith*. This Article has analyzed post-*Smith* and post-RFRA responses by federal land managers and federal courts to Indian religious exercise claims related to sacred sites on public lands. Federal land managers have developed plans at some sites that provide significant protection for Indian religious exercise and have successfully defended them against Establishment Clause challenges. At other sites, however, land managers' decisions have excessively burdened religious exercise for the benefit of other interests, leading to RFRA-based challenges by religious practitioners. The results of these challenges to date have been mixed, with some of them showing the continuing significance of pre-RFRA cases like *Smith* and *Lyng*.

Recent efforts to evaluate and update policies and procedures for addressing Indian religious exercise needs on public lands, coupled with the 2010 U.S. endorsement of UNDRIP, suggest that the time is ripe for improving agencies' responsiveness to Indian religious freedom claims.

480. State Dep't UNDRIP Announcement, *supra* note 464, at 2.
481. *Id.* at 14.
482. President William J. Clinton, Remarks on Signing the Religious Freedom Restoration Act of 1993, 29 WEEKLY COMP. PRES. DOC. 2378 (Nov. 16, 1993).
483. Obama UNDRIP Remarks, *supra* note 464.

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If this hope becomes a reality, the promise of protection that Congress made over thirty years ago in AIRFA—to "protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the[ir] traditional religions . . . including . . . access to sites"[484]—could at long last be fulfilled.

In closing, it is important to acknowledge how much is at stake in the struggle to protect religious exercise at sacred sites. Speaking at the time of another important anniversary—the twenty-fifth anniversary of the enactment of AIRFA—Judge Carey Vicenti of the Jicarilla Apache Nation commented that the greatest loss that tribes have suffered has been the loss of lands. Although certain rights in the lands were extinguished, a crucial aspect of tribal ties to lands, however, was not lost:

> [T]hat radiant sense of belonging that we had to these lands that we lost. . . . remained in our hands. . . . The people from whom we came still belong . . . to the sacred sites that exist all across the continent.[485]

Maintaining this sense of belonging is, Judge Vicenti explained, inextricably bound up with resisting conquest:

> [W]hat has happened over the past several hundred years has been a constant effort at conquest. This conquest is not complete and won't be complete until eventually that radiant sense of belonging is extinguished. . . . That is, in essence, what we are fighting for . . . : we have to retain . . . that beautiful and radiant sense of belonging to the country from which we come. For this reason we can't stop . . . our efforts to try to protect our religious ceremonies, to protect the sacred sites to which we belong.[486]

From this perspective, it seems impossible to overstate either the significance of what is at stake where sacred sites on public lands are under threat, or the weight of the corresponding responsibility of federal land managers and courts, to protect Indian religious exercise rights at sacred sites and thus not make conquest complete.

484. American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996 (2006).

485. Carey N. Vicenti, Douglas Long & Chief Arvol Looking Horse, *Religious Freedom and Native Sovereignty—Protecting Native Religions Through Tribal, Federal, and State Law*, 19 WICAZO SA REV. 185, 186 (2004).

486. *Id.*