Hell On Earth: The Desecration of Sacred Indian Land Needs a Final Solution

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THE DESECRATION OF SACRED INDIAN LAND NEEDS A FINAL SOLUTION

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We, the great mass of the people think only of the
love we have for our land, we do love the land
where we were brought up. We will never let our hold
to this land go, to let it go it will be like throwing
away (our) mother that gave (us) birth.
Letter from Altooweyah to John Ross,
Principal Chief of the Cherokees

To Indians, land is religion.¹ This spiritual concept is foreign to that of most other
Americans who have been instilled, instead, with the Western concept of land as something

¹ Lyng v. Northwest Indian Cemetery Protective Ass’n, 485 U.S. 439, 460 (1988) (Brennan, J., dissenting) ("Where dogma lies at the heart of Western religions, Native American faith is inextricably bound to the
use of land. The site-specific nature of Indian religious practice derives from the Native American
perception that land is itself a sacred, living being.").
that is merely “owned.” The Western tradition of land ownership and fee simple absolute came from England, along with a Christian value system that separates the sacred from the secular.² The Indian and Western traditions represent two diametrically-opposed perceptions of the secular versus spiritual value of land. Throughout the historical clash between Indians and whites; this difference has been prevalent in a legal system dealing with a government that owns land and the Indians who worship it.

This article will explain the nature of the Indian “religious” concept of land, the unsuccessful use of the Free Exercise Clause of the First Amendment³ in protecting sacred Indian sites, the limited impact of congressional response, the now failing “agency” approach to sacred site protection, and the current trend of using international law and human rights resolutions to enforce sacred site protection. The article will end by suggesting a statute modeled after Israeli law for protecting holy places as a final solution.

II. LAND AS RELIGION: THE INDIAN CONCEPT

There must be some attempt to understand the nature of the Indian belief system to grasp the reason why a judicial system based on Western beliefs has not been able to adequately adjudicate the protection of Indian sacred land. In a very general sense, Indian beliefs center around a philosophical conception of space as opposed to a focus on time.⁴ In

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³ U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”).

other words, Indians hold their land as having the highest possible meaning, “and all their statements are made with this reference point in mind.” 5 Whereas the Western perception of the United States begins with the “discovery” of America, the colonial conquest and immigration of Westerners creating a view that European exodus was a progression of essentially righteous intervention, “thereby placing history—time—in the best possible light. When one group is concerned with the philosophical problem of space and the other with . . . time, then the statements of either group do not make much sense when transferred from one context to the other . . . .” 6

Indians do not have religion in the Western sense of the word. Black’s Law Dictionary defines religion as “[a] system of faith and worship involving belief in a supreme being and containing a moral or ethical code.” 7 To Indians, a system of faith is not separated from other areas of life, but is inextricably bound to their culture, attitude, outlook, and land. Most tribal languages do not have a word that would translate into “religion.” 8 As Jimmie Durham, a Cherokee, stated at a congressional hearing in 1978 to protect sacred land from being flooded by the Tennessee Valley Authority: “In the language of my people . . . there is a word for land, ‘eloheh.’ This same word also means history, culture and religion. So when we speak of land, we are not speaking of property, territory, or even a piece of ground upon which our houses sit and crops are grown, we are speaking of something truly sacred.” 9 It is these opposite points

5 Id.
6 Id.
7 BLACK’S LAW DICTIONARY (8TH ed. 2004).
8 Sharon L. O’Brien, Freedom of Religion in Indian Country, 56 MONT. L. REV. 451, 453 (1995) (“Most Indian languages do not possess a word translatable as ‘religion.’ Rather, the concept of religion permeates one’s existence and is indistinguishable from one’s cultural, political, and economic existence.”).
of view that create a mass divide in adjudicating issues of land and religion when it concerns Indians.\textsuperscript{10}

It is difficult for judges raised with Christian precepts to understand the Indian concept of land as religion. The rough analogy between a sacred site and a church does not work, because “a Christian can practice that religion in many churches around the country, [but] many Indian religious ceremonies can only take place in one particular geographical location.”\textsuperscript{11} This land remains as a “permanent fixture in their cultural and religious understanding.”\textsuperscript{12} In this context, it is easy to see why paving a timber road or developing a mine on a particular site could effectively destroy a tribe’s “religion.” The development of a strip mine inside the Sistine Chapel would not destroy Catholicism in the same way that a mine on a particular hill in Arizona might completely eliminate a particular tribe’s religion. The Western equivalent of a sacred Indian site might be a Holy Place within Jerusalem or Mecca. As this article will point out later, making this analogy proves helpful in fashioning law that will serve as a final solution to the problem of protecting sacred Indian land.

This final solution is needed as other sources of protection have failed, beginning with a lack of protection on constitutional grounds.\textsuperscript{13} In a series of cases culminating in a misguided Supreme Court opinion, the majority held constitutional claims involving the free exercise of

\textsuperscript{10} Lyng v. Northwest Indian Cemetery Protective Ass’n, 485 U.S. 439, 473 (1988) (Brennan, J., dissenting) (This case “represents yet another stress point in the longstanding conflict between two disparate cultures—the dominant Western culture, which views land in terms of ownership and use, and that of Native Americans, in which concepts of private property are not only alien, but contrary to a belief system that holds land sacred.”).

\textsuperscript{11} COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 940 (2005).

\textsuperscript{12} DELORIA, supra note 3, at 67. See also DEWARD E. WALKER, JR., PROTECTION OF AMERICAN INDIAN SACRED GEOGRAPHY 100 (1991) (“American Indian culture . . . entails actually entering sacredness rather than merely praying to it or propitiating it.”).

\textsuperscript{13} Lyng, 485 U.S. at 439–40 (“This case requires us to consider whether the First Amendment’s Free Exercise Clause prohibits the Government from permitting timber harvesting in . . . a portion of National Forest that has traditionally been used for religious purposes by members of three American Indian tribes in northwestern California. We conclude that it does not.”).
religion do not apply to protecting a sacred Indian site on public land from governmental destruction.\textsuperscript{14}

III. IF YOU’RE AN INDIAN, THE CONSTITUTION DOES NOT APPLY

The Free Exercise Clause of the First Amendment unequivocally bans any government action that “prohibits the free exercise” of religion, but this does not apply to an Indian making a claim to protect a sacred site on government land.\textsuperscript{15} In 1988, the U.S. Supreme Court decided \textit{Lyng v. Northwest Indian Cemetery Protective Ass’n}.\textsuperscript{16} This case arose from the “High Country” in Northern California, when the United States Forest Service planned to build a six-mile logging road right through the middle of ground held sacred by the Yurock, Karock, and Tolowa Tribes.

The opinion left “Native Americans with absolutely no constitutional protection against perhaps the gravest threat to their religious practices,”\textsuperscript{17} by holding that the Free Exercise Clause of the First Amendment does not provide a cause of action to protect sacred Indian sites from governmental destruction.\textsuperscript{18} Scores of articles have been written about this case, as it shocked the conscience of many and the Court’s opinion outlines a stark contrast between a judiciary that understands land as a purely secular and administrative entity versus the conception of land as “a sacred living being . . . unique [with] specific sites possess[ing] . . .

\textsuperscript{15} \textit{U.S. CONST. amend. I}; see \textit{Lyng}, 485 U.S. at 439–40.
\textsuperscript{17} \textit{Lyng}, 485 U.S. at 459 (Brennan, J., dissenting).
\textsuperscript{18} \textit{Id.} at 458.
different spiritual properties and significance.”  

This was a complete abandonment of the Court’s previous precedents requiring a compelling state interest in order to overcome a strict scrutiny analysis of any governmental action infringing on a group’s freedom to exercise their religion. Historically, the Free Exercise Clause was strong medicine for any religious group making a claim, as only the most paramount interests of the government, described by the Court as interests of the “highest order,” could trump an infringement on free exercise. What is remarkable about Lyng, is the Court’s acknowledgment of the possible “grave” effect the decision will have on the Indian’s practice of their religion and the minimal interest gained by the building of a six-mile timber road through the sacred high country peaks that served as a cultural and spiritual center to some five-thousand Indians.

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The case not only reflected the prevalent inclination to view land as property, but powerfully consolidated the ancient bias. In its refusal to accord constitutional protection to tribal belief and practice, the Supreme Court ultimately prevented religion from celebrating, reverencing, and thus effectively liberating land as a sacred reality to be protected and preserved, not merely owned and exploited.

Id.

20 *See* Wisconsin v. Yoder, 406 US 205 (1972) (“[I]t must appear either that the State does not deny the free exercise of religious belief . . . or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause . . . . [O]nly those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion.”). See BROWN, *supra* note 19, at 177 (“[T]he Supreme Court nevertheless dispensed the government from the prescribed rubric of demonstrating a compelling interest of paramount significance that might otherwise justify so destructive an impact on the Yurock, Karock, and Tolowa religions.”).

21 Id.


[T]oday’s ruling sacrifices a religion at least as old as the Nation itself, along with the spiritual well-being of its approximately 5,000 adherents, so that the Forest Service can build a 6-mile segment of road that two lower courts found had only the most marginal and speculative utility, both to the government itself and to the private lumber interests that might conceivably use it.
Needless to say, the decision had a devastating effect on the Indian’s ability to protect sacred land. Some have argued that the reasoning in Lyng is flagrant discrimination as "persons practicing Western religious traditions are protected from even relatively minor burdens on their religious practices, while American Indians are not protected from government actions that essentially destroy entire religious traditions." Twenty three years after Lyng, roads have been built, bringing scores of tourists into the sacred high country located in the national forest land. Now the area of Chimney Rock Peak is complete with paved parking lots, portable toilets, and hotdog stands amidst the rumble of motor vehicles and chainsaws. Though Indians still make pilgrimages into the High Country, much of the sanctity of the area has been lost. This sacred land has now been Americanized.

Because of Lyng and other Rehnquist Court opinions that worked to the detriment of both tribal sovereignty and tribal culture, Indians knew they had to find an authority from sources other than the Constitution to protect their sacred sites. This led Indians to a misplaced reliance on Congress.


25 See Nabokov, supra note 23, at 296.

26 See id.

27 G. William Rice, Federal Indian Law Cases in the Supreme Court’s 2004-2005 Term, 41 TULSA L. REV. 341, 343 (2005) ("During the nineteen years of Rehnquist’s tenure as Chief Justice of the Supreme Court, the Court ruled in favor of Indian interests on nine occasions, ruled against such interests on twenty-six occasions. The Court held unanimously against tribes on twelve occasions.").
IV. Holes in the Congressional Response

Immediately following Lyng, the American Indian Religious Freedom Coalition was formed.\(^{28}\) The Coalition pushed Congress to pass a statute to expressly overturn Lyng and, though Congress failed to do so,\(^{29}\) it did amend two sections of the National Historic Preservation Act (NHPA) to lend support for sacred site protection.\(^{30}\) As part of the preservation scheme NHPA engenders, Indian tribes who are able to navigate the rigorous process can establish Tribal Historic Preservation Offices (THPOs).\(^{31}\) Federal agencies must then consult with THPO’s for undertakings affecting historic properties on tribal lands.\(^{32}\) If a tribe objects to a government intrusion, there is a process in place to address the grievance. Since the conception of this program in 1992, thirty-nine Indian tribes have established THPOs which have had some limited success in halting devastating governmental development.\(^{33}\) The problem with the NHPA option is that it only mandates a system for accommodation, which is not always advantageous for Indians and their sacred land and only applies to the select sites that have been approved.\(^{34}\) The fact that there are literally thousands of sacred


\(^{29}\) Id. (“One major goal of the Coalition was overturning the constitutional holding in the Supreme Court’s Lyng decision. Congress failed to overturn Lyng.”).


sites all over the entire United States demands a sweeping protection that is as vast as the land in need of protection.\textsuperscript{35}

Two years after \textit{Lyng}, Congress responded to \textit{Employment Division v. Smith}\textsuperscript{36} with the Religious Freedom Restoration Act (RFRA).\textsuperscript{37} \textit{Smith} involved the ritual use of peyote by Indians, who were then fired for violating Oregon law. The Court held that the Free Exercise Clause did not bar denial of state unemployment compensation to Smith, a member of a religious Indian Peyote Society.\textsuperscript{38} In doing so, the Court had effectively repealed the requirement that the government show a compelling state interest when state action creates a substantial burden on the practice of a particular group’s religion.\textsuperscript{39} RFRA directly reinstated the compelling interest test “where free exercise of religion is substantially burdened by government.”\textsuperscript{40} However, this only applies to laws of general applicability. For example, if a criminal law applies to all citizens, but it substantially burdens a few religious adherents, they may have a claim. Unfortunately, RFRA’s narrow application does not seem to protect sacred sites from destruction at the hands of Federal agencies that ultimately make the decisions concerning land management.\textsuperscript{41}

\textsuperscript{35} Yablon, \textit{supra} note 2, at 1625 (“The difficulty of the issue is compounded by its magnitude. There are literally tens of thousands of sacred sites. For example, in South Dakota’s Black Hills alone, there are hundreds and estimated thousands of sacred sites.”).
\textsuperscript{36} 494 U.S. 872 (1990).
\textsuperscript{38} Employment Division v. Smith, 494 U.S. 872 (1990) (“Because respondent’s ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondent’s employment compensation . . . .”).
\textsuperscript{39} Id.
\textsuperscript{40} 42 U.S.C. § 2000bb (b)(1).
\textsuperscript{41} \textit{See} City of Boerne v. Flores, 521 U.S. 507, 509 (1997).
The relatively few legislative actions taken by Congress specifically effecting protection of sacred sites following *Lyng* and *Smith* were boosted by an Executive Order issued by President Clinton in 1996.\textsuperscript{42} Titled “Indian Sacred Sites,” the Order provides:

Section 1. Accommodation of Sacred Sites. (a) In managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (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. Where appropriate, agencies shall maintain the confidentiality of sacred sites.\textsuperscript{43}

This Order is important because it marked a shift in policy for handling protection of sacred Indian land. The province of protection was no longer in the hands of the Court or the legislature, but bestowed upon the land management agencies themselves. This leads to the now failing “agency approach.”

V. FAILURE OF THE AGENCY APPROACH

One serious problem with the agency approach is a lack of legal obligations for government agencies to provide for protection and access to Indian sacred sites.\textsuperscript{44} President Clinton’s Executive Order was lauded as a “hortatory and aspirational expression of

\textsuperscript{43} Id.
\textsuperscript{44} See Exec. Order No. 13,007, 61 Fed. Reg. 26,771:

This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies, officers, or any person.

Id. See also Yablonska, supra note 2, at 1646 (“Like the congressional statutes, Executive Order 13,007 may not create onerous legal duties.”).
government policy,” but without any teeth.45 This created an even more insidious problem. Federal agencies are influenced by the larger policy agenda of the current administration. In circumstances in which a previous administration might have vigorously advocated the protection of Indian sacred sites, an incoming administration may decide to “scale back” protection, instead.46 This is certainly true under the Bush Administration.47

One glaring example is the Glamis Gold decision.48 Clinton’s Secretary of the Interior, Bruce Babbitt, oversaw a Bureau of Land Management (BLM) decision to deny a gold mining permit to the Glamis Corporation to mine in the California Desert Conservation Area, infringing on parts of the Quechan Indian Nation’s sacred ancestral lands.49 Glamis had spent six years lobbying for the permit, but Babbitt denied it on the grounds that it would have a devastating cultural impact on the Quechan Indians in the area.50 Ten months later, when Secretary Gale Norton replaced Babbitt under the Bush Administration, the BLM granted the permit.51

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46 Yablon, supra note 2, at 1656.
47 See Christine Knight, Comment, A Regulatory Minefield: Can the Department of the Interior Say “No” to a Hardrock Mine?, 73 U. COLO. L. REV. 619, 621 (2002). Editorial, Sacred Lands are a Serious Issue, Indian Country Today, June 21, 2002 available at http://www.indiancountry.com/content.cfm?id=1024666482 (“For the Quechan of Arizona, it is the Quechan Indian Pass, now threatened by a proposed open-pit gold mine. President Clinton had decided to protect Quechan Pass, but the incoming Bush administration reversed the decision.”).
48 Yablon, supra note 2, at 1656.
49 Id.
Opponents contended that the project would irreparably damage part of the Quechan Tribe’s religiously significant Trail of Dreams and cause massive disruption to the area, leaving “an open pit deep enough to swallow Devils Tower National Monument” and “waste rock piles as tall as 30-story buildings.” Yet, for all the destruction it would require, Glamis’ own estimates reportedly reveal that the mine would produce only one ounce of gold for every 280 tons of rock disturbed. The Advisory Council on Historic Preservation, an independent federal agency that advises the President and Congress on historic preservation matters, concluded that the project would be so damaging that “the Quechan Tribe’s ability to practice their sacred traditions as a living part of their community life and development would be lost.” California Senators Barbara Boxer and Dianne Feinstein have openly opposed the project.
51 Yablon, supra note 2, at 1638.
The *Glamis Gold* incident is consistent with Bush’s agenda for the “wise use of natural resources” on Federal land. Secretary Norton successfully “eased regulations to speed approval of [oil and mineral] drilling permits, particularly in New Mexico, Colorado, and Wyoming,” by pressuring long-time agency employees to see things her way. Norton continued to advocate the Bush agenda and influence agency decisions until March, 2006, when she resigned in the aftermath of the Abramoff scandal.

Another serious problem with the agency approach is “the majority of such [sacred] sites will only be protected if federal land management agencies decide that they should be.” One scholar has noted, “such accommodation is to be had only at the sufferance of the dominant culture, which does not go very far in honoring and respecting diversity found in Native American Culture.” Thus, the harm comes from the often culturally-insensitive agencies that have been granted complete discretion.

Not all agencies are prone to deny protection. The National Park Service has a salutary record for conferring with tribes and accommodating sacred site protection, whereas the

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53 Id.
54 Id.
55 Yablon, *supra* note 2, at 1638.
Bureau of Land Management (BLM) has a dismal history. But herein lies another problem with the agency approach. Indians have no consistent, overarching uniform policy to rely upon, so the protection of one particular tribe’s sacred site is dependant on the ‘luck of the draw,’ based on the geographic location of the site and the identity of the agency with the power and discretion to preserve or destroy it. Additionally, even if an agency is currently pro-protection, this attitude is not guaranteed to last indefinitely, as management personnel of the agency change, along with their approaches. As the following example will show, the wholesale absence of domestic protection for sacred Indians sites has led to a new tactic of using international human rights law as an alternative.

VI. THE BATTLE OVER BEAR BUTTE

There is a hill in western South Dakota where a cultural battle has raged for over two-hundred years. It is a laccolith, which, in geological terms, means a volcano that never managed to reach eruption, “as if still storing its energy within.” It is a fourteen-hundred foot bulge, dotted with pine trees and known from the “Mandan to the Lakota . . . as the power place among power places.”

The Cheyenne tell a story about their ancestors, who were close to starvation, and sent a shaman named Sweet Medicine to the hill. He was greeted by “keepers of the animal

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58 See COHEN, supra note 11, at 942 (“The National Park Service has, in some instances, endeavored to accommodate Indian site-specific religious practices in its management of federal land.”); compare with Native American Sacred Places: Hearing Before the Senate Comm. on Indian Affairs, 108th Cong. 57 (2003) (statement of Suzan Harjo, President, The Morning Star Institute, accusing the BLM of “permitting desecration and destruction of sacred places.”).
59 See NABAKOV, supra note 23, at 217.
60 Id.
61 Id.
spirits” who granted him permission to hunt and released game that saved the tribe.\textsuperscript{62} From the time that oral testimonies have been passed from generations, the Cheyenne have told their children that this hill was their birth-place. Tribal members still make pilgrimages there every year.

The place is also considered sacred by the Lakota, who tell stories about the hill being created by a great bear, where mysterious child-like spirits dwell and spirit eagles circle the summit.\textsuperscript{63} In 1857, the hill served as the meeting place for the Sioux for the \textit{Oyate Kiwitaya} ("Great Reunion of the People").\textsuperscript{64} This was the occasion when Crazy Horse pledged to resist any more white encroachment upon their land. Other well-known Indian leaders like Black Elk and Sitting Bull have had visions on this hill.\textsuperscript{65}

It is estimated that, each year, nearly 8,000 Indians from 30 different tribes visit this hill.\textsuperscript{66} While this hill is known by some as "\textit{Mato Paha},"\textsuperscript{67} it is known by the rest of us as Bear Butte State Park, located in Meade County, South Dakota.

Bear Butte well reflects the consequences that arise out of the law’s traditional lack of protection of Indian sacred sites. In treaties signed in 1851 and 1868, the United States government originally recognized and confirmed that the Lakota and Tsistsistas tribes\textsuperscript{68} had occupancy and possession rights to Bear Butte.\textsuperscript{69} Indeed, the Treaty of 1868 granted the entire western half of South Dakota to the Sioux, however, on “March 2, 1889, Congress

\begin{footnotes}
\textsuperscript{62} Id.
\textsuperscript{63} BROWN, supra note 19, at 93 (Uncontested evidence submitted by the Lakota Nation suggests their presence at Bear Butte since 901 A.D.).
\textsuperscript{64} Id.
\textsuperscript{66} Id.
\textsuperscript{67} Id.
\textsuperscript{68} NABAKOV, supra note 23, at 219.
\textsuperscript{69} 11 Stat. 749; 15 Stat. 635.
\end{footnotes}
enacted legislation carving seven individual reservations out of the area and Bear Butte was not included.”

South Dakota turned the 1,845 acre area encompassing Bear Butte into a park in 1962. Roads and parking lots were paved. A campground and visitor’s center were built, along with viewing platforms and signs “that indicated where Indians could be spotted fasting for visions.” In 1982, the park superintendent, Tony Gullet, sent a letter to Cheyenne and Lakota leaders claiming the Indians could no longer gather sage, hackberry, or wild rose, and that the area they used for sweat baths was being paved for expanded visitor parking. In addition, Gullet stated that any fasting or praying on the mountain would require a permit.

Frank Fools Crow, an enrolled member of the Lakota Sioux Tribe, filed suit against Tony Gullet, claiming a violation of the Free Exercise Clause, the American Indian Religious Freedom Act of 1978 (AIRF), Article 18 of the Universal Declaration of Human Rights, and Article 18 of the International Covenant on Civil and Political Rights. The case worked its way to the United States Court of Appeals for the Eighth Circuit, where the court ruled that the plaintiffs failed to establish any infringement of a constitutionally cognizable first amendment

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70 NABOKOV, supra note 23, at 219.
With extraordinary insensitivity, Bear Butte, which had been recognized by former treaties as immemorially occupied and possessed by the Lakota and Tsistsistas Nations, was not incorporated into any one of the seven reservations nor included as one of the three named exceptions, and subsequently passed into private ownership until 1962, when it was purchased for $50,000 by the State of South Dakota from one Harold Bovee.

Id.
71 Id.
72 Id.
73 Id
74 NABAKOV, supra note 23, at 219.
75 BROWN, supra note 19, at 96.
Contesting the district court’s assertion that the registration and permit requirements were harmless regulations for the control of visitor traffic at the state park, the tribal appeal proposed that similar restrictions be placed on all churchgoers in South Dakota: that they be stopped at a roadblock, fill out a form, and await a discretionary permit before they be allowed to proceed to their church building to pray for a predetermined number of hours as limited by the permit.

Id.
76 Crow v. Gullet, 706 F.2d 856, 858 (8th Cir. 1983).
right.” The court further reasoned that AIRF was only intended as a “general statement of federal policy,” and not intended to support a cause of action against states, and that the international human rights Articles plead do not apply beyond any Constitutional rights recognized under the First Amendment.

What was ironic about the opinion was the court’s effort to balance the State’s interests as if there was a “cognizable first amendment right,” by recognizing the state’s compelling interest in “preserving the environment . . . [of] this unique geological and historic landmark.” It may seem odd that the State’s plan of “preservation” included “constructing an access road to and a parking lot near the area of the Butte traditionally used by the Indians as a ceremonial ground.” Nonetheless, South Dakota had solidified and legitimatized the plan to “market Bear Butte as a tourist attraction precisely in its identity as the holiest mountain and most active site of worship for the Lakota and Tsistsistas Indian Nations represent[ing] a new level of crass insensitivity to and exploitation of tribal religious freedom.”

Now, twenty years later, it gets worse. Imagine nearly 80,000 motorcycles rumbling up to Bear Butte on a short detour from the annual Sturgis Bike Festival to party at a 600 acre mega-plex campground and biker bar, complete with a multi-million dollar concrete

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77 Id.
79 Crow, 706 F.2d at 858; see also BROWN, supra note 19, at 103 (“[T]he judge utterly failed to address the tribal contention that the very alteration of the natural features of Bear Butte diminished the sacred power of the ceremonial ground and constituted a violation of the tribal religions. The judge made no response to the central issue of the complaint: the notion of land as a religious entity.”).
80 BROWN, supra note 19, at 103.
81 Id.
82 Id.

Bear Butte, which had revealed itself to the Lakota and Tsistsistas Nations as the “axis of the world,” the living altar of the most efficacious and powerful contact with the Great Spirit and those beings who would respond in visions to those who sought wisdom and healing, had become for the courts a legal purchase by South Dakota to be added to its state park system and managed as a tourist attraction.

Id. at 177.
ampitheater headlining super rock bands. An isolated Lakota praying at the summit is enveloped in a veil of manmade sound, everything from drunken revelry, screaming tailpipes, and an overly amplified set by Aerosmith. Adding insult to injury, the biker campground is named “Sacred Ground” with a stone statute of an Indian looking up at Bear Butte, just nearly a mile away. This is reality as a private owner obtained land immediately bordering the sacred land located in Bear Butte State Park, leaving the Sioux to challenge state action in permitting the development of the biker bar and campground despite the substantial burden the complex will create on the Indian’s use of the sacred land.

The mega-plex is already under construction and challenges to the county’s award of a liquor and beer license to the owner of the biker bar have yet to be successful. The attorney, who filed a complaint on behalf of the Cheyenne River Sioux Tribe to halt the development of the biker bar on the edge of Bear Butte, had no cause of action based on the Constitution or federal statutes. Instead, the attorney was forced to base the Tribe’s action on South Dakota State law as it applies to administrative procedures in granting liquor licenses.

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83 Carter Camp, Call for Action to Protect Traditional Land, NATIVE AMERICAN TIMES (Ok.), Jan. 26, 2006 Vol. 12, issue 4 (“[O]ur sacred mountain will be surrounded by noise and drunken partying. Mega speaker systems, giant TV screens, fireworks and 800,000 roaring motorcycles will drive animals, Indians and spirits away from the mountain. They will destroy the land and dirty the water.”); See Judy Peres, Of Sacred Sites and Biker Bars: Native Americans Say the Famed Sturgis, S.D., Rally is Infringing on Their Peace and Quiet, CHICAGO TRIBUNE, Aug. 3, 2006.

84 Scott Canon, Sturgis Motorcycle Rally: Legions of Bikers Thunder into Town, KANSAS CITY STAR, Aug. 6, 2006 at A1.

It’s the clang of vulgarity, the development of mega-campgrounds and jumbo taverns . . . that . . . spoil wild country and defile sacred land. By the hundreds of thousands they come. [S]ome will bare their breasts; most will tilt a few beers. A dozen will find their prized motorcycles have gone missing. About 600 will probably pass through the tiny Meade County jail. Dozens will crash their bikes. Five or six—if experience is any indicator—will die on the road.

Id.

85 See Camp, supra note 83 (“Even more insulting was the promoters plan to name it “Sacred Ground” and construct a giant statue of an Indian facing Bear Butte!”).

86 See Peres, supra note 83 (“[The owner] confirmed . . . that construction crews are putting final touches on a 22,500-square-foot bar at his new . . . campground. Plans for the future include more bars, more RV hookups and a 30,000-seat amphitheater overlooking Bear Butte.”); see also David Melmar, Bear Butte Liquor License Dispute Headed for State Supreme Court, INDIAN COUNTRY TODAY, Jan. 31, 2007.

87 See Melmar, supra note 86.
argued that a public referendum on the liquor license was required if requested by citizens of 
the county, but that the Meade County Commission erroneously rejected calls for a 
referendum based on a misunderstanding of their administrative decision-making discretion.\(^88\) 
After the circuit court denied the Tribe’s writ of mandamus, which would have compelled 
Meade County to hold a county-wide popular vote on the issuance of the liquor license, the 
Tribe filed an appeal on January 4, 2007 to the South Dakota Supreme Court.\(^89\) The outcome 
of the appeal is far from promising as “[i]t is not clear whether a new referendum would 
overturn the county commission’s decision.”\(^90\)

As Carter Camp, a leader of the Intertribal Coalition to Defend Bear Butte, stated: “The 
courts and the various acts which are supposed to protect us are total failures.”\(^91\) If there is no 
protection from domestic sources, the only option left seems to be international human rights 
law.

VII. SACRED SITES ARE HUMAN RIGHTS

There are two major sources of international law that support protection of indigenous 
peoples’ sacred sites based on the underlying premises of religious freedom, cultural heritage, 
land rights, and self-determination. One is the well established International Labour 
Organization Convention (ILO) concerning Indigenous and Tribal Peoples in Independent 
Countries requiring that “measures shall be taken in appropriate cases to safeguard the right of 
the peoples concerned to use lands not exclusively occupied by them, but to which they have

\(^{88}\) Id. 
\(^{89}\) Id. 
\(^{90}\) Id. 
\(^{91}\) E-Mail from Carter Camp, The Defend Bear Butte Coalition, to Joseph E. Hardgrave (Feb. 12, 2007, 
5:39 p.m. EST) (on file with author).
traditionally had access for their . . . traditional activities.”\textsuperscript{92} The United States, along with sixteen other countries, is party to this treaty which further provides: “The social, cultural, religious and spiritual values and practices of these peoples shall be recognized and protected.”\textsuperscript{93} This sounds good in practice, but just like the problematic nature of the agency approach, there is no enforceable cause of action or remedy provided by the treaty.

More promising is the recent United Nations Declaration on the Rights of Indigenous People.\textsuperscript{94} Article 12 states: “indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies . . . [and] the right to maintain, protect, and have access in privacy to their religious and cultural sites” and requires that “[s]tates shall seek to enable the access” to sites.\textsuperscript{95} Article 11 further addresses sacred sites by providing that: “indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites . . . .”\textsuperscript{96}

The Inter-American Commission on Human Rights, an independent source for international law making, recently approved the American Declaration on the Rights of Indigenous Peoples which contains parallel provisions to that of the United Nations

\textsuperscript{93} Id. at art. 5.
\textsuperscript{95} Id. at art. 12.
\textsuperscript{96} Id. at art. 11.
At first blush, these forceful and direct declarations of indigenous peoples’ rights concerning the access and protection of sacred sites would seem to be a solution to the problem. Unfortunately, this is not the case.

To put it simply, these declarations are non-binding on U.S. courts. And while it is not uncommon for courts to review authority that is merely persuasive, given the Bush administration’s current trend of rejecting international law as a source or model to shape U.S. law, the use of this law to support protection of sacred sites is less than promising. This is underlined by the fact the U.S. stringently opposed the adoption of the United Nations Declaration on the Rights of Indigenous People. In a joint statement issued with New Zealand, another country with a large number of indigenous people, the United States stated its fear that the U.N. resolution grants too much power to a minority of people, under the guise of bolstering indigenous people’s self-determination. It is unlikely that a nation that opposed

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97 The draft American Declaration on the Rights of Indigenous Peoples was approved by the Inter-American Commission on Human Rights on February 26, 1997 and has been under consideration by the members of the Organization of American States since that time. Article XIX (formerly XIV) provides that: “Indigenous peoples have the right to assemble on their sacred and ceremonial sites and areas, and for this purpose, they shall have free reasonable access, use and administration of these sites and areas.” Article XV (formerly X) provides that: “The States shall adopt the necessary measures, in consultation with the indigenous peoples, to preserve, respect, and protect their sacred sites and objects, including their burial grounds, human remains, and relics.” See Proposed American Declaration on the Rights of Indigenous Peoples, OAS Working Group, “Record of the Current Status of the Draft American Declaration on the Rights of Indigenous Peoples as of 25 March 2006 (Results of the Seven Negotiation Meetings held by the Working Group)” GT/DADIN/doc.260/06, 25 March 2006.

98 A letter from Condoleezza Rice, Seceretary of State, to Kofi A. Annan, Secretary-General of the United Nations pulled the U.S. from an optional protocol giving the International Court of Justice jurisdiction (March 7, 2005). This stirred considerable controversy among the international community as well as domestically. “The US’s decision to withdraw now is thus on the one hand a blow against the very idea of international law with binding effect, an attempt to take some issues off the table before oral argument, and a crude attempt to let states go on violating our international obligations.” Discourse.net, available at http://www.discourse.net/archives/2005/03/us_announces_withdrawal_from_consular_convention.html.

99 Valeria Taliman, United States Opposes Declaration on Native Rights, INDIAN COUNTRY TODAY Nov. 21, 2006 (“The nations opposing the declaration are the United States, Canada, Australia, Russia and New Zealand - countries with large populations of indigenous peoples who own significant land and resources, including the 562 federally recognized tribes in the United States.”).

100 Id.
this particular resolution to begin with, will give it much accord once it is in effect. Combine this with the history of "the United States, which . . . has not looked to other nation's legal treatment of their indigenous peoples or to international human rights law for guidance" and the picture is bleak.101

As the battle continues to rage over the biker campground near Bear Butte, protestors this past summer carried signs reading “Sacred Sites Are Human Rights.”102 Given the history of domestic treatment of sacred Indian sites, it is no wonder that advocacy groups such as the Indian Law Resource Center and the Intertribal Coalition to Defend Bear Butte have turned to international law. Unfortunately, none of these sources are authoritative, nor do they suggest a domestically acceptable cause of action or remedy.103 This is perhaps why some battles over sacred sites are still referring to settled notions of statutory and constitutional principles in vain. One such fight is taking place outside of Flagstaff, Arizona. Detailing the tactics used to protect the San Francisco Peaks will expose the need for a final and lasting solution to the plight of Indian sacred land.

VIII. THE SAN FRANCISCO PEAKS

The San Francisco Peaks, a mountain range just outside of Flagstaff consisting of four promontories, plays a pivotal role in the everyday lives of Navajo and Hopi.104 An integral part of the Hopi spiritual tradition involves monitoring their natural surroundings.105 An

101 GETCHES, ET AL., supra note 28, at 1029.
104 See NABAKOV, supra note 23, at 136; see also BROWN, supra note 19, at 62.
105 See NABAKOV, supra note 23, at 136.
archeological dig of an ancient Hopi village dating back to A.D. 800 uncovered a kiva\textsuperscript{106} with a “photographic reproduction of the skyline of the peaks.”\textsuperscript{107} There are dots and notches on various parts of the outline that mark various positions of the sun through the seasons, signaling a Hopi calendar of rituals and traditions.\textsuperscript{108} Twelve hundred years later, the Hopi still conduct many of these same rituals centered on the peaks.\textsuperscript{109} For the Navajos:

[T]he San Francisco Peaks is one of four sacred mountains marking the boundaries of their ancestral homeland; together, the four mountains form a traditional “Hogan” or house, protecting and sheltering the entire Navajo nation. But the San Francisco Peaks are especially revered as the physical embodiment of one of the Holy Ones or Navajo gods, with various parts forming the head, shoulders, and knees of a body reclining and facing the east, and the trees, plants, rocks, and earth making up the skin. The Navajos pray directly to the peaks as a living, sacred being to whom they are intimately related.\textsuperscript{110}

It is no small wonder these Indians are upset at the U.S. Forest Service, which encouraged the development of a ski resort on the mountain, and that now plans on expanding the resort and allowing fake snow made from sewer water to cover the peak.\textsuperscript{111}

\textsuperscript{107} Id. at 137.
\textsuperscript{108} Id.
\textsuperscript{109} Id. at 138.
\textsuperscript{110} BROWN, supra note 19, at 62.
SAVE THE PEAKS CALL TO ACTION: Protest Arizona Snowbowl's Proposed Cultural & Environmental Destruction! Saturday, February 17th [2007]
8:30 a.m.
1/2 mile before Snowbowl turnoff on Highway 180. We are holding a protest to draw attention to concerns with Snowbowl's proposed expansion and Snowmaking with wastewater. Snowbowl's plan threatens public health, would cause environmental destruction & extreme desecration of the Sacred San Francisco Peaks. Join us and take a stand for culture, environment and public health! We are gathering at 8:30 a.m. on Highway 180 right before Snowbowl Rd. There is a parking turnout 1/2 a mile before Snowbowl Rd on the right hand side. Look for people holding banners! Dress warmly! The Ski Area recently closed for 3 days and has rescheduled to
The history of the Peaks’ fate at the hands of the U.S. government reads much like the story of Bear Butte. Beginning in the 1930s, a small ski club from Flagstaff used a log cabin on the peak as a base camp. A small ski lift was installed in 1958, but by 1977, the U.S. Forest Service issued permits to Northland Recreation, Inc., allowing five new ski lifts, clear-cutting acres of trees and reshaping slopes, the building of a lodge capable of holding about 1,000 people, and the paving of new roads and an eight-acre parking lot.

The Hopi and Navajo filed suit in 1981 in protest. The complaint named John R. Block, secretary of agriculture; R. Max Peterson, chief forester of the U.S. Forest Service; and the United States of America as defendants. Relying on arguments based on the guardian-ward relationship between the Federal government and Indians, RFRA, and the First Amendment, the Indians lost at the district court level. The U.S. Court of Appeals for the District of Columbia affirmed the district court decision in Wilson v. Block which served as one of the precursors to the Supreme Court’s Lyng opinion.

open for this President’s day weekend. In a recent release Snowbowl’s manager stated, “With good conditions, Snowbowl anticipate[s] approximately 10,000 skiers for the holiday weekend.” In the face of climate change Snowbowl is attempting to make fake snow with 180 million gallons of treated sewage effluent per season on the San Francisco Peaks. The Peaks are held sacred by more than 13 Native American Nations. Lawsuits have been filed to address human health, environmental and cultural impacts. Protect Sacred Sites & our Environment! Defend Human Rights!

Id.

112 BROWN, supra note 19, at 62.
113 Id. at 63.
114 Id.
115 Id.
117 708 F.2d 735 (1983).

In view of this overwhelming evidence of congressional intent, it is clear that the AIRFA imposes no substantive limit upon agency action and therefore provides no authority for overturning the decision of a federal agency on the ground that the agency failed to accord sufficient weight to Indian religious interests. Accord Wilson v. Block, 708 F.2d 735, 745-747 (D.C. Cir.).

Id.
Just like with Bear Butte, the situation has since grown worse in what is a perfect example of the utter failure of the agency approach. The new proposal for the ski resort expansion includes:

- 1.5 million gallons of reclaimed wastewater a day for snowmaking on 205 acres - Approximately 180,000,000 gallons of wastewater for the entire season. The wastewater has recently been analyzed and found to contain organic contaminants such as pharmaceuticals and hormones.
- 10,000,000 gallon wastewater storage pond (Approximately 3.5 acres surface area).
- 14.8 miles of buried pipeline to transport wastewater from Flagstaff to Snowbowl.
- 74 acres "clear-cut" for new trails
- Approximately 50 snowmaking guns audible over 1.5 miles away (that will operate 24 hours a day if conditions allow)
- "Approximately 87 acres" are proposed to be "stripped of topsoil resources, reshaped and contoured", "rocks and stumps protruding from the surface would be pushed into concentration areas and buried or hauled off site"
- 47 acres of "tree thinning"
- 7 acres snowplay tubing area
- 3 acres “teaching area”
- 4 surface lifts
- 10,000 gallon underground water storage tank
- 10,000 gallon underground water storage tank (additional)
- 10,000 square feet new facility
- 6,000 square feet hart prairie lodge size increase
- 5,000 square feet guest service facility with additional water storage tank
- 4,000 square feet snowmaking control unit
- 3,000 feet new Humphrey’s lift
- 2,500 square feet Native American Cultural Center

The Forest Service approved the plans after executing the required environmental impact statement, and in response, the Navajo and Hopi filed suit in the United States District Court of Arizona on July 13, 2005. Judge Rosenblatt reasoned that, because the Forest Service had complied with statutory requirements, the fiduciary duty owed Indians was fulfilled. The Indian plaintiffs relied on executive orders, including the aforementioned order issued by President Clinton, but the court simply shrugged this off by stating: “Executive

121 Id. at 882 (“Because this case does not involve tribal property, the Forest Service’s duty to the tribes is to follow all applicable statutes.”).
Orders are not independently enforceable . . . such claims have no merit. They are . . . intended only to improve the internal management of the executive branch and do not create any trust responsibility or right to judicial review.”

The Indian plaintiffs also relied heavily on a violation of RFRA argument, but the court was able to cast this aside, because the plaintiffs could not show that the expansion of the ski resort would completely bar their access to the mountain or prohibit their beliefs. This type of reasoning has grown from the progeny of *Lyng* to the point where any governmental action is permissible, short of explicitly banning what Indians believe or chaining Indians down so as to not allow them access to the now desecrated land. What is lost in the translation from western perception to the mythical realm of the Indian is that building parking lots and pumping sewer water on top of the land is essentially the same thing as banning their beliefs. All that the Indians are left with is the freedom to believe that the U.S. government has destroyed their religion.

The Navajo nation filed an appeal with the U.S. Court of Appeals for the Ninth Circuit on May 13, 2006. The appellate brief argues the point that the district court misapplied facts and misconstrued the Indians beliefs in finding that no substantial burden to their religious practice exists. In an argument that has been reiterated to courts time and again, the appellants try to explain that:

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122 Id.
123 Id. (“[T]here is no evidence that the decision will exclude tribal practitioners from the peaks, no evidence of diminution of access . . . and no prohibition on holding religious ceremonies anywhere on the peaks.”).
124 Which cases?
126 Id. at 32.
The Navajo consider the Peaks to be a living entity... To alter the landscape then would harm this living being. The amount of harm is not an issue; any harm to the Peaks will affect all the living things that reside there (Dr. Propper, FS archeologist, confirming that the tribes view the San Francisco Peaks as a single being or entity and that the tribes' believe that you cannot hurt or harm a piece of the Peaks without affecting the whole entity...

Here, the lower court acknowledges Plaintiffs’ beliefs and proceeds to ignore/discount them. As summarized by Vincent Randall (Yavapai-Apache Nation Councilman), “[p]eople wonder why we are upset, because after all we can still use part of the Mountain... We do not see the Mountain as a pie to divide up into segments. The Mountain is a whole entity like a pregnant woman or a large mature tree...” 127

A nation of Indians is holding its breath awaiting the outcome of this appeal, because if history is any indicator, deference will be accorded to the Forest Service under the now prevailing and failing agency approach. This is why there needs to be a final solution to the problem of protecting sacred Indian land.

IX. A FINAL SOLUTION

There needs to be a permanent solution or else the problem will only worsen as sacred sites such as Bear Butte and the San Francisco Peaks slowly diminish across the United States. The problem must be solved at the roots. This means that the western conception and conquest of property needs to be reversed as far as sacred Indian sites are concerned. Any other temporary fix may ultimately yield to a growing nation set on development and resource depletion. There is not a law on the books that may be able to stop the government from doing as it pleases with the land it owns or has power over. Condominiums, ski resorts, and oil drills are all looming in the background.

127 Id. at 32 (citations omitted).
A drastic problem needs a serious solution. Can one imagine the development and
desecration of Jerusalem? Contrast the treatment of the Indian sacred sites in the United
States with Israel’s protection of their holy places. Israel Law states:

1. The Holy Places shall be protected from desecration and any other
violation from anything likely to violate the freedom of access of the members of
the different religions to the places sacred to them or the feelings with regard to
those places.
2. (a) Whosoever desecrates or otherwise violates a Holy Place shall be liable to
imprisonment for a term of seven years. (b) Whosoever does anything likely to
violate the freedom of access of the members of the different religions to the
places sacred to them or their feelings with regard to those places shall be liable
to imprisonment for a term of five years.\footnote{128}

Something can be taken from this conception of a holy place. It is untouchable, except
to those who intend to worship it. The same reverence for Indian sacred sites can be
accomplished in the United States by statute.

To understand the applicability of such a proposed statute, an understanding of Israel’s
approach is needed and as one scholar has noted, “tribes have proven most successful in
protecting their rights . . . when they have successfully translated . . . their practices into
Christian analogies.”\footnote{129} Israel’s approach serves as an excellent model for fashioning
protection of Indian sacred sites, because the principle of religious freedom as applied to
protecting holy places in Israel applies to all religions.\footnote{130} This protection extends to religions in
the minority and even when the beliefs of a religion are vehemently opposed by the majority.

The steadfast and permanent protection of holy places in Israel begins with the 1948
Declaration on the Establishment of the State of Israel (Declaration) which states: “[The State]
will guarantee freedom of religion, conscience, language, education and culture; it will

\footnote{128} Israel’s Protection of Holy Places Law of 5727 (Sefer ha-Chukim 1967).
\footnote{129} O’Brien, supra note 8, at 466–67.
\footnote{130} Ruth Lapidoth, Symposium: The Fundamental Agreement Between the Holy See and the State of
Israel, 47 CATH. U. L. REV. 441, 447 (1998).}
safeguard the Holy Places of all religions . . . .”131 Adding strength to the Declaration is the fact that it is not a constitution or statute which would leave it open to judicial interpretation.132 Instead, the Israeli Supreme Court views the declaration as the nation’s vision and credo and in making decisions; the Court adheres to the declaration’s spirit and principles.133 In this respect, the Court can not avoid credible claims regarding protection of holy places because of ambiguity in a constitution or ambiguity in legislation.134

The Declaration is further buttressed and enforced by statute, criminal sanctions, and case law specifically regarding protection of holy places. A legislative text that was enacted in 1922, which is still considered good law states: “All persons in Palestine shall enjoy full liberty of conscience and the free exercise of their forms of worship . . . .”135 Based upon this principle of reverence for religious freedom and protection, the modern Court of Israel recently stated:

Every person in Israel enjoys freedom of conscience, of belief, of religion, and of worship. This freedom is guaranteed to every person in every enlightened democratic regime, and therefore is guaranteed to every person in Israel. It is one of the fundamental principles upon which the State of Israel is based . . . . This freedom is partly based on the Palestine Order, and partly it is one of those fundamental rights which are not written in the book, but derive directly from the nature of our State as a peace-loving democratic state. Every law and every power will be interpreted as recognizing freedom of religion and worship.136

This unwavering and unequivocal principle can be captured by statute and applied to protection of Indian sacred sites in the United States.

132 Lapidot, supra note 130, at 445.
135 Palestine Order in Council, 1922, 3 Drayton, Laws of Palestine 2587 § 83 (1934).
Congress can use its well-recognized plenary power over Indian affairs to enact a statute beyond the reach of the Supreme Court. In this respect, a claim for protection would not rest on First Amendment grounds, or international law, or even an "ambiguous" statute. The purpose and language of the statute would have to be clear, something along these lines:

**Protection of Indian Sacred Sites**

To protect the culture, integrity, and spiritual heritage of Indians, all sacred Indian sites located on government land, recognized by the guidelines set forth in this statute, will be protected and preserved to the full extent of the law. Once a federally recognized tribe has established the status and boundaries according to the guidelines, the protected area will be void of any governmental activity other than efforts to preserve and protect. Any other governmental action that would infringe upon the access to or sanctity of the protected area will be unlawful. Access to the site will be unlimited for the Indians who worship there and access by others is only valid based on Indian approval. Title of the land will be held in trust by the United States and exclusive right of use will be granted to the tribes who petitioned for its protection.

Of course workable guidelines for establishing sacred sites and boundaries would have to be implemented in the statute, but once the process is completed, the site is protected indefinitely. Now, to address the most likely argument against this proposed legislation which would be in the form of the Establishment Clause of the First Amendment.137

To begin with, the Establishment Clause argument against legislation protecting Indian sacred sites is sardonic in light of the historical backdrop of an explicit governmental policy to prohibit the practice of Native American religions from 1880 until 1930.138 Nonetheless, the First Amendment's guarantee against governmental establishment of a state religion will be the predominate argument by those wishing to strike the bill.

One only needs to refer back to the reasoning of the majority in *Lyng*. The *Lyng* opinion is based on the idea that the issue for Indian Sacred sites is rooted in land and not religion.

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137 U.S. CONST. amend. I, cl. 1 (“Congress shall make no law respecting an establishment of religion . . . .”).
Hence, it was easy for the Court to premise its decision on the fact that when government land is involved “the government has the prerogative to decide what to do with its own land.”\footnote{Lyng v. Northwest Indian Protective Ass’n, 485 U.S. 439, 455 (1988)} Furthermore, the First Amendment religious aspect of the argument was voided by \textit{Lyng}, because if desecrating sacred sites is not considered a sufficient burden on religion to give rise to a free exercise of religion claim, then preserving these sites should not be considered a benefit to religion under the Establishment Clause.\footnote{Anastasia, \textit{supra} note 138, at 1318.} In fact, Congress used the reasoning that \textit{Lyng} stood for the idea that the First Amendment cannot be invoked to challenge the government’s use of its real property for the reason why they did not decide to overturn \textit{Lyng}.\footnote{1993 U.S.C.C.A.N. at 1898.} The Senate Report states that “strict scrutiny does not apply to government actions involving only management or the use of the Government’s own property.”\footnote{Id.} If this is correct, then a Government action that preserves land should not be given a strict scrutiny analysis.

Recent Establishment Clause Jurisprudence has drawn a distinction between accommodating religion and actually endorsing religion.\footnote{Anastasia, \textit{supra} note 138, 1318.} Even if the proposed legislation is not likened to the unsuccessful Establishment Clause challenges arising out of government sponsorship of public university scholarships for Christians, the preservation of old churches on historical sites or donating Forest Service land for a Christian Summer Camp,\footnote{See U.S. v. Means, 627 F. Supp 247, 267 (8th Cir. 1988) (Forest Service successfully defended the granting of a special use permit to the United Church of Christ).} then better yet, the preservation of land for Indian Sacred sites could be viewed as neutral. This was the stance taken by the Ninth Circuit in \textit{Northwest Indian Cemetery Protective Ass’n v. Peterson}.\footnote{764 F.2d 581 (9th Cir. 1985).} The Court in \textit{Peterson} rejected the Establishment Clause argument, because preserving land in its natural state is not endorsement or advancement of religion; it is only
neutral. Whether viewed as accommodation or neutral, the Establishment Clause argument must fail based on the property-central reasoning in *Lyng* and common Establishment Clause jurisprudence that allows for governmental accommodation of religion. The proposed legislation is further supported by congressional plenary power when dealing with Indians and any concerns of special treatment for Indians can be explained by the Trust Doctrine.

The bedrock of this statute would be the Trust Doctrine. There is an “undisputed existence of a general trust relationship between the United States and the Indian people.” The Trust Doctrine obligates the United States to take measures, which, as trustee, will ensure continued tribal existence. The core of this existence for particular tribes is often a sacred site. This doctrine, which is often described as a fiduciary relationship, requires the United States government to apply at least a “punctilio of an honor” in their dealings with Indian sacred land.

The focus of the statute is to prevent destruction. A remedy is almost non-existent in the circumstance of development or desecration, except perhaps monetary compensation. Once a sacred site is tainted, animals and spirits cannot be enjoined by courts to return.

X. CONCLUSION

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146 Id. at 586.
148 *O’brien*, *supra* note 8, at 485.
149 Meinhard v. Salmon, 164 N.E. 545, 548 (N.Y. Ct. App. 1928) (From Judge Cardozo’s famous description of fiduciary relationships: “Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard.”).
There are few aspects of the history of the United States that are as shameful as the government’s treatment of Indians. Of all the promises broken, the policies bent on terminating Indian identity and culture, and the land taken, there is nothing as inhumane and horrendous as taking the Indian spirit. Whenever the government allows the desecration and development of land that has been held sacred by Indians from time immemorial, this is exactly what happens.

Once this land is gone, Indians are left with out religion. In some circumstances, the government’s actions are only justified by an interest in tourism and recreation, by allowing the development of biker bars and ski resorts, making an insulting mockery of ancient Indian spiritual tradition. Once this happens, Indians are forever left in limbo, or even worse, something more akin to a western notion of hell.