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A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners

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A PROPERTY RIGHTS APPROACH TO SACRED SITES CASES: ASSERTING A PLACE FOR INDIANS AS NONOWNERS

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Although the Free Exercise Clause prohibits governmental interference with religion, American Indians have been unsuccessful in challenging government actions that harm tribal sacred sites located on federal public lands. The First Amendment dimensions of these cases have been well studied by scholars, but this Article contends that it is also important to analyze them through a property law lens. Indeed, the Supreme Court has treated the federal government's ownership of public lands as a basis for denying Indian religious freedoms claims. This Article contends that such holdings rely on an "ownership model" of property law wherein the rights of the owner trump all other interests and values. As scholars have argued, however, the ownership model represents a view of property law that is neither descriptively accurate nor normatively attractive. In theory and practice, property law also recognizes the rights of nonowners in furtherance of human values and social relations.

Accordingly, this Article contends that, even as nonowners, Indians may have enforceable property rights to use, and maintain the physical integrity of, sacred sites. Examining sacred sites problems through common law, federal Indian law, public lands law, and human rights law, the Article identifies and analyzes property rights arguments that may be available to Indian litigants even where the government is the undisputed owner of the land. While this approach will not secure Indian religious freedoms in every case, the Article concludes that Indian nations should consider property rights arguments as part of a multipronged legal strategy in sacred sites cases.

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INTRODUCTION

> I realized that it was understood by all our people that this location was our connection to the Great Spirit. All my people know it's there. The Government has tried for many years and by many different methods to take this away from us. But this is one thing they cannot take from us. By knowing who you are, this is the power of our people. When we go to Tellico, even for a visit, the realization that this is our connection to our own ancestors and to the Great Spirit, comes all back to us, and it's like going home. Each of us comes back a better person, a better Cherokee, for having gone there. If the Tellico Dam is completed all this will be lost to us forever.
>
> —Richard Crowe, Eastern Band of Cherokees[1]

For practitioners of religions throughout the world, certain places are sacred. Well-known examples include Mecca, Jerusalem, and Mt. Calvary, places where religious adherents come to pray, sacrifice, heal, and contemplate.[2]

1. *See* BRIAN EDWARD BROWN, RELIGION, LAW, AND THE LAND: NATIVE AMERICANS AND THE JUDICIAL INTERPRETATION OF SACRED LAND 15–16 (1999) (quoting Cherokee plaintiff Richard Crowe, Eastern Band of Cherokees).

2. *See* Sarah B. Gordon, Note, *Indian Religious Freedom and Governmental Development of Public Lands*, 94 YALE L.J. 1447, 1450 n.14 (1985).

These are locations in the physical world where humans revere, recognize, and experience the supernatural, and try to understand its meaning in their lives. Indigenous peoples, too, have sacred places that are essential to their religions and cultures. For them, the sacred is often part of the natural landscape.[3] Tribal cultures, from the time of their creation, have been formed, shaped, and renewed in relationship with mountains, mesas, lakes, rivers, and other places that are imbued with the spirituality, history, knowledge, and identity of the people. Today, at numerous sacred sites in the United States, American Indians conduct ceremonies that revitalize their communities and keep their world in balance.

This Article is about a special problem that American Indians face in practicing their religious and cultural activities at sacred sites—many Indian sacred sites are now located on lands owned by the federal government and the government has the legal power to destroy them. In the major case of *Lyng v. Northwest Indian Cemetery Protective Ass'n*,[4] for instance, the United States Forest Service decided to build a road and harvest timber on sacred lands where tribal people conducted ceremonies. Northern California Indians challenged the project, but the Supreme Court held that the federal government's project did not violate the First Amendment's Free Exercise Clause, even though the construction and logging would "virtually destroy the Indians' . . . religion."[5]

Lyng presents a formidable bar to the legal protection of American Indian religious freedoms. It effectively denies the availability of First Amendment relief in many, if not most, cases in which religious activities take place on public lands.[6] While the free exercise implications of this case have been well-studied by scholars,[7] this Article contends that a deeper

3. *See generally* ANDREW GULLIFORD, SACRED OBJECTS AND SACRED PLACES: PRESERVING TRIBAL TRADITIONS (2000); SACRED LANDS OF INDIAN AMERICA (Jake Page ed., 2001).

4. 485 U.S. 439, 442–43 (1988).

5. *Id.* at 447–51.

6. For post-*Lyng* cases, see, for example, *United States v. Means*, 858 F.2d 404, 405 (8th Cir. 1988), holding that the Forest Service did not violate the First Amendment when it denied a group of Sioux Indians a special use permit that would have allowed them to occupy national forest land that they believed was sacred. *See also* Charlton H. Bonham, *Devils Tower, Rainbow Bridge, and the Uphill Battle Facing Native American Religion on Public Lands*, 20 LAW & INEQ. 157, 165 (2002) ("The decision in *Lyng* effectively marked the end of Native American attempts to employ the Free Exercise Clause to protect Native American religious sites on public lands.").

7. *E.g.*, S. Alan Ray, Comment, Lyng v. Northwest Indian Cemetery Protective Association: *Government Property Rights and the Free Exercise Clause*, 16 HASTINGS CONST. L.Q. 483, 490–510 (1989); *see also* Ira Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 944–46 (1989); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1486 (1990);

understanding of property law is also essential to understanding *Lyng*. Indeed, the Supreme Court treated *Lyng* as a case about both religion and property. First, the Court held the federal activity did not transgress the Free Exercise Clause because it would not "coerce" the Indians into violating their beliefs.[8] Second, the Court held: "Whatever rights the Indians may have to the use of the area, . . . those rights do not divest the Government of its right to use what is, after all, *its* land."[9]

This second prong of *Lyng* is a property law holding—it provides that the federal government's rights *as an owner* trump any interests that the Indians have in using their sacred sites. Despite this very robust, or even extreme, formulation of the government's ownership rights, this holding has gone largely unchallenged. To the extent scholars have discussed property law in sacred sites cases,[10] they typically have lamented the fact that property rights prevail over religious freedoms[11] or have accepted the inability of Western legal systems to protect Indian property interests.[12]

Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 125–26 (1992) [hereinafter McConnell, *Religious Freedom*]; Peggy Healy, Casenote, Lyng v. Northwest Indian Cemetery Protective Association: *A Form-Over-Effect Standard for the Free Exercise Clause*, 20 LOY. U. CHI. L. J. 171 (1988); J. Brett Pritchard, Note, *Conduct and Belief in the Free Exercise Clause: Developments and Deviations in* Lyng v. Northwest Indian Cemetery Protective Association, 76 CORNELL L. REV. 268 (1990); Kathryn C. Wyatt, Note, *The Supreme Court, Lyng, and the* Lone Wolf *Principle*, 65 CHI.-KENT L. REV. 623, 625 (1989).

8. *Lyng*, 485 U.S. at 450–51.

9. *Id.* at 453.

10. This is not to minimize the significance of Professor Brian Edward Brown's book, *Religion, Law, and the Land*. As a professor of religious studies, Brown offers a nuanced discussion (often missing from legal analysis) of the "sacred" and closely examines how each of the major Indian sacred sites cases treats "land as property." *See* BROWN, *supra* note 1, at 5, 7. For helpful legal commentary on property in sacred sites cases, 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, 823–33 (1997), arguing that "federal courts have subordinated the free exercise rights of Native American plaintiffs to property rights."

11. *E.g.*, BROWN, *supra* note 1, at 7; Dussias, *supra* note 10, at 823–33; *see also* Note, *Neutral Rules of General Applicability: Incidental Burdens on Religion, Speech, and Property*, 115 HARV. L. REV. 1713, 1713 (2002) (arguing the "[Supreme] Court has elevated property rights above First Amendment rights in the incidental burdens context").

12. *See* Marcia Yablon, Note, *Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land*, 113 YALE L.J. 1623, 1638, 1634–38 (2004) (asserting that "*Lyng* was right," in part, because of the "limited ability of western property law to protect American Indian land rights").

This Article[13] takes a different approach.[14] It argues that Indian nations can use property law to challenge the absolutist version of ownership espoused by the Court in *Lyng*.[15] Indian nations can assert that even as nonowners, they may have enforceable rights at sacred sites located on federal public lands. And they can argue that despite the government's status as the owner, it may have enforceable obligations at sacred sites. The Supreme Court does not appear to have seriously entertained these possibilities in *Lyng*, perhaps because the parties argued the case primarily in free exercise terms.[16] When property arguments did appear in the briefs, they were made as generalized or ancillary points, without detailed analysis.[17] Looking forward to future cases in which Indians seek to use, or protect the physical integrity of, sacred sites on public

13. This Article is one of several in a multipart research project that examines the role of property law in American Indian sacred sites cases. In this present Article, I am primarily interested in using property law to support the *rights* of Indians as "nonowners." Follow-up projects will consider the feasibility of Indian nations' recovering ownership of sacred sites for themselves and the role of property in developing stronger federal policy in favor of accommodating Indians' sacred site usage.

14. Several scholars have called for common law property claims in sacred sites cases. *See, e.g.*, Lupu, *supra* note 7, at 973 (generally arguing that government conduct at sacred sites should be held "burdensome" if it violates a common law right and specifically advocating a "prescriptive easement" approach to *Lyng*); Kevin J. Worthen, *Protecting the Sacred Sites of Indigenous People in U.S. Courts: Reconciling Native American Religion and the Right to Exclude*, 13 ST. THOMAS L. REV. 239, 241–56 (2000) (arguing for the expansion of the "right to exclude" such that Indians could exclude others from sacred sites); *see also* John W. Ragsdale, Jr., *Individual Aboriginal Rights*, 9 MICH. J. RACE & L. 323, 363–64 (2004) (evaluating individual aboriginal title claims in sacred sites cases).

15. *See, e.g.*, JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 6–9 (2000) (critiquing the "ownership model" of property law); *see also* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 18–46 (1991) (critiquing an absolute view of property owners' rights).

16. *See, e.g.*, Brief for the Petitioners at 2, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (No. 86-1013), 1987 WL 880342 ("This case concerns the limitations imposed by the Free Exercise Clause of the First Amendment upon the federal government's authority to manage the public lands."); Brief for the Indian Respondents at 2, *Lyng* (No. 86-1013), 1987 WL 880352 ("Indian respondents . . . seek to protect from governmental interference their fundamental right to freely practice their traditional religion."); *see also* Brief for Respondent, *Lyng* (No. 86-1013), 1987 WL 880350; Reply Brief for the Petitioners, *Lyng* (No. 86-1013), 1987 WL 880360.

17. For example, the federal government argued that the Indians "claim the destruction of conditions necessary for effective religious practice by virtue of something the government has done in managing its own procedures or property . . . . What respondents assert is essentially a constitutionally compelled easement entitling them to limit the uses of a substantial area of publicly-owned lands." *See* Reply Brief for the Petitioners at 11, *Lyng* (No. 86-1013). But neither the government, nor the Indian parties, made any detailed argument about the existence of an easement. Property language also appeared in questions of federal authority over land management. But the government made only the general argument that any accommodation of Indian religion was discretionary because the "United States 'no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.'" Brief for the Petitioners at 38, *Lyng* (No. 86-1013) (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 800 (1985)).

lands, this Article aims to identify and analyze potential property rights arguments that may be available to Indian litigants even where the government is the undisputed owner of the land.[18]

Admittedly, this approach is counterintuitive in a couple of ways. First, courts have often failed to recognize Indian property rights, perhaps in part because the very idea of *property* has often seemed antithetical to indigenous values regarding land or because courts have used property law to legitimate the dispossession of American Indian lands.[19] Second, a *rights* argument may appear to diverge from the current trend of exhorting Indians to seek negotiated accommodations of their religious interests, especially through the federal administrative process.[20] But the law's inability to recognize Indian property rights has been overstated,[21] and relying on the hope of administrative accommodation alone leaves Indian religious freedoms vulnerable to fluctuating federal policy.[22] Thus, the assertion of property rights at sacred sites is both possible and important in bolstering Indian claims in sacred sites cases. Basing claims on property law does not ensure victory; parties still have

18. There are, of course, other possible approaches, also informed by property law, to the problem. Another approach would be to argue for the reversal of *Lyng* on grounds that the rights of owners should not include the right to destroy the religious sites and practices of American Indians. *Cf.* State v. Shack, 277 A.2d 369, 371–72, 374–75 (N.J. 1971). In *Shack*, the court stated:

> [U]nder our State law the ownership of real property does not include the right to bar access to governmental services available to migrant workers . . . .
>
> Property rights serve human values. They are recognized to that end, and are limited by it. . . .
>
> . . . .
>
> [These workers' rights of] privacy . . . dignity[,] and association[ ] . . . are too fundamental to be denied on the basis of an interest in real property and too fragile to be left to the unequal bargaining strength of the parties.

Id.; *see also supra* note 13 (describing follow up projects).

19. *See generally* Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 40–51 (1991). *See, e.g.*, ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 313–17 (1990).

20. *See, e.g.*, Yablon, *supra* note 12, at 1629 ("In foreclosing judicial protection, the *Lyng* Court shut off one method of protecting sacred sites, but suggested another, more feasible method in its place—agency accommodation."); *see also* MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE?, at xi, 144–72 (2003) (calling for "pragmatic compromise" in indigenous cultural property disputes, including sacred sites cases). *See generally* Bonham, *supra* note 6, at 163–74.

21. *See, e.g.*, Stacy L. Leeds, *The Burning of Blackacre: A Step Toward Reclaiming Tribal Property Law*, 10 KAN. J.L. & PUB. POL'Y 491, 493 (2001). Leeds wrote:

> The common misconception suggesting [Cherokees did not own and value property] is merely an imperialistic mechanism aimed at soothing the collective white conscience. If individual Cherokees and other Indian tribes do not own or covet real property, then it is not as egregious if their property is taken from them outright or exchanged for inferior lands or cash.

Id.

22. *See infra* notes 482–489 and accompanying text (describing that while the Clinton Administration took substantial steps to accommodate Indians' use of sacred sites, the Bush Administration has taken an opposite tact).

to persuade courts and navigate jurisdictional variations. Stated most optimistically, however, property law may help create affirmative Indian rights to use sacred sites on public lands, something even the First Amendment seems incapable of doing.[23]

Part I of the Article provides some background on the topic of sacred sites. Part II traces a line of federal cases, culminating in *Lyng*, that denied Indian religious freedom claims by treating the federal government like a property owner with near absolute rights to exploit its lands, even when such exploitation would destroy Indian religious sites and practices. Part III argues that the *Lyng* property holding was flawed, at least on a theoretical level, because property law does not offer absolute protection to *any* owner. Rather, owners' rights are often limited by duties and the rights of nonowners. Part IV identifies and evaluates several categories of enforceable rights and duties that Indian nations and people may be able to assert even as nonowners in future sacred sites cases. Finally, Part V responds to potential critiques of a property rights approach to sacred sites cases.

I. SACRED SITES

The term "sacred site" encompasses many different places with cultural and religious meaning for American Indians. Vine Deloria identifies several categories of sacred sites.[24] Included in the first category are places where an historical event occurred, such as Wounded Knee, South Dakota, where Lakota religious practitioners were massacred by the United States cavalry. Such sites "instill a sense of social cohesion in the people," reminding them of

23. *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988) ("[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government."); *see also* Morton J. Horwitz, *Conceptualizing the Right of Access to Technology*, 79 WASH. L. REV. 105, 106 (2004) ("[T]he prevailing view of the U.S. Constitution is that its pronouncements are largely negative and meant only to prevent government from overstepping its bounds, not positive, thereby creating constitutional duties in the government to maximize the welfare of the citizenry.").

24. VINE DELORIA, JR., GOD IS RED 275–78 (Fulcrum Publ'g 2003) (1973); *see also* GULLIFORD, *supra* note 3, at 70–91 (setting forth a "typology" of sacred sites and sacred landscapes including: (1) religious sites associated with oral tradition and origin stories, (2) trails and pilgrimage routes, (3) traditional gathering areas, (4) offering areas—alters and shrines, (5) vision quest and other individual-use sites, (6) group ceremonial sites—sweat lodges, dances, and sings, (7) ancestral habitation sites, (8) petroglyph and pictographs—ceremonial rock art, (9) individual burials and massacre sites, and (10) observatories and calendar sites); *cf.* THOMAS F. KING, "SACRED SITES" PROTECTION: BE CAREFUL WHAT YOU ASK FOR (2002) (arguing the term "sacred sites" fails to encompass all of the land and resources that are spiritually significant to Indian peoples), *at* http://www.sacredland.org/resources/bibliography/thomas_king.html.

events shared by the tribal community over generations.[25] A second category includes sites with "a deeper, more profound sense of the sacred," because "something mysteriously religious . . . has happened or been made manifest" there.[26] An example is Buffalo Gap in the Black Hills, where the buffalo emerged in the spring to initiate the ceremonial year of the Lakota and other Plains peoples. In the third category are "places of overwhelming holiness where the Higher Powers, on their own initiative, have revealed Themselves to human beings."[27] These places where "the highest spirits dwell" include Bear Butte on the Plains, Taos Pueblo's Blue Lake, and the High Country of the *Lyng* case.[28] At these locations, "[p]eople have been commanded to perform ceremonies . . . so that the earth and all its forms of life might survive and prosper."[29] According to Deloria, there also exists a final category of sacred sites yet to be revealed by higher spiritual powers. The possibility of such revelations reminds human beings that the deities are alive.[30]

Other scholars emphasize the values that emerge from indigenous peoples' experiences with sacred sites.[31] They observe that indigenous peoples have "an understanding of the relatedness, or affiliation, of the human and nonhuman worlds."[32] This relatedness gives rise to "moral responsibilities and obligations" to and for the natural world.[33] Further, indigenous peoples have a common and central concept of "respect" for the "inherent . . . value which something has insofar as it inheres in, or belongs to, the natural world."[34] It is important not to overgeneralize, but these values—of relatedness, moral obligation, and respect—often guide indigenous approaches to resource management, economic development, and religious practice.[35]

Sacred sites are integral aspects of tribal worldviews and identities; they figure in contemporary self-determination as well as political, cultural, and economic survival.[36] They are holy, irreplaceable places without which many

25. DELORIA, *supra* note 24, at 276.
26. *Id.* at 276–77.
27. *Id.* at 275–79.
28. *Id.* at 279.
29. *Id.*
30. *Id.* at 281.
31. *See, e.g.*, Laurie Anne Whitt et al., *Belonging to Land: Indigenous Knowledge Systems and the Natural World*, 26 OKLA. CITY U. L. REV. 701, 722 (2001).
32. *Id.* at 704–05.
33. *Id.* at 705.
34. *Id.*
35. *Id.* at 732–43.
36. *See* BROWN, *supra* note 1, at 16.

tribal religions cannot exist.[37] At some sacred sites, entire tribes, societies, or families gather for ceremonies and rituals, while at others, a solitary medicine person or a teenager may be present. Even a ceremony conducted by one individual can benefit the entire tribe by restoring the community's balance and relationship with the natural world. In some instances, tribal practitioners may be charged to perform activities on behalf of all of humankind and even the entire earth.[38]

II. OWNERSHIP IN SACRED SITES CASES

One might wonder why a discussion of places with such religious and cultural import has any place in a law review article. Sacred site legal issues grow out of the fact that many sacred sites are now owned by the government, which acquired them from Indian nations either by purchase or conquest.[39] Quite often, the federal government's management of its lands threatens the sacred quality they hold to indigenous peoples—and the parties wind up in lawsuits.

A. Cases in the Lower Federal Courts

Sacred site cases typically concern the federal government's management of sacred sites located on federal public lands.[40] These lands include national parks and forests, monuments, and historic sites, owned by the federal government and managed through agencies such as the National Park Service and United States Forest Service.[41] The development of natural resources on these lands, such as timber harvesting and energy projects, has long threatened the physical and spiritual integrity of the sites, as well as

37. For tribal views on the sacred sites in *Lyng*, see SARA NEUSTADTL, MOVING MOUNTAINS 179–207 (1987), and Abby Abinanti, *A Letter to Justice O'Connor*, 1 INDIGENOUS PEOPLES' J.L. CULTURE & RESIST. 1 (2004).

38. *See, e.g.*, DELORIA, *supra* note 24, at 271–85.

39. *See* Bob Armstrong, *Our Federal Public Lands*, 12 NAT. RESOURCES & ENV'T 3, 4 (1997) ("The 265 million acres of public lands today (an area larger than France and Germany combined) are the remaining legacy of the 1.8 billion acres of public domain acquired through treaty, purchase, or conquest by the federal government on behalf of all Americans.").

40. While most of the major cases concern federally owned lands, there are exceptions. *See, e.g.*, Crow v. Gullet, 706 F.2d 856 (8th Cir. 1983) (management of a sacred site at a state park); United States v. Platt, 730 F. Supp. 318 (D. Ariz. 1990) (tribal access to sacred path located on private property). For an account of sacred site accommodation on lands owned by a city, see Robert Retherford, *A Local Development Agreement on Access to Sacred Lands*, 75 U. COLO. L. REV. 963 (2004). For the most part, this Article concerns sacred sites on federally owned lands.

41. *See* ROBERT L. GLICKSMAN & GEORGE CAMERON COGGINS, MODERN PUBLIC LAND LAW 1–14 (2d ed. 2001).

Indians' abilities to practice their religions.[42] In the 1970s–1980s, a number of Indian nations and individuals brought lawsuits challenging federal management of development projects on public lands, arguing that the projects would infringe on the Indians' freedom of religion in violation of the Free Exercise Clause of the First Amendment. This subpart discusses the function of government ownership in these cases.

In *Sequoyah v. Tennessee Valley Authority*,[43] Cherokees challenged the federally funded development of Tellico Dam on the Little Tennessee River Valley. Beginning in 1967, the Tennessee Valley Authority (TVA), a federal agency, began acquiring privately owned land along the river as part of a Roosevelt New Deal development project.[44] The TVA aimed to flood the Valley and build a dam and reservoir for navigation, flood control, electric power generation, defense, recreation, and other purposes, including "the proper use of marginal lands."[45] Controversial from the start, the hundred million dollar plus project had been the subject of numerous lawsuits brought by environmental groups and others over the course of a decade. But powerful interests in Congress were determined that the project would be finished, and in 1979, Representative John Duncan attached a rider to an appropriations bill providing, "Notwithstanding . . . [the Endangered Species Act] *or any other law*, the corporation is authorized and directed to complete construction, and maintain the Tellico Dam."[46] The bill passed and was supposed to ensure the completion of the dam come hell or high water (so to speak). As the Sixth Circuit understood: "No law is to stand in the way of the completion and operation of the dam."[47] Only an issue of constitutional magnitude could possibly stop the project.[48] The Cherokees believed they had such a constitutional claim.

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42. *See generally* CHARLES WILKINSON, FIRE ON THE PLATEAU: CONFLICT AND ENDURANCE IN THE AMERICAN SOUTHWEST (1999).

43. 620 F.2d 1159 (6th Cir. 1980).

44. *See generally* Joe W. McCaleb, *Stewardship of Public Lands and Cultural Resources in the Tennessee Valley: A Critique of the Tennessee Valley Authority*, 1 VT. J. ENVTL. L. 1, 1–2 (1999). McCaleb states:

> Congress gave TVA unprecedented powers of eminent domain to acquire lands for dams, reservoirs, power production, navigation projects, public recreation, and industrial development for "the economic and social well being of the people." Congress also restricted how and for what purposes TVA could dispose of land after being acquired in the name of the United States of America.

Id. (footnotes omitted).

45. *Id.* at 2.

46. BROWN, *supra* note 1, at 11–12 (detailing the "treacherous" political history of the TVA project and the "deceitful . . . maneuvering" of key political players).

47. *Sequoyah*, 620 F.2d at 1161.

48. *Id.*

The Tennessee River Valley was located within the traditional territory of the Cherokee Nation and was, in many ways, the center of Cherokee life. As plaintiff Richard Crowe stated, "This is where WE begun."[49] Burial sites were located there, as was the ancestral town of Chota. Indeed, the entire Valley was imbued with Cherokee spirituality. When the Valley was in balance, so too were the Cherokee people.[50] Although the federal government had forcefully relocated much of the Cherokee Nation to Indian Territory in the 1830s, the Valley retained its significance to remaining Eastern Band Cherokees and to some of the relocated Oklahoma Cherokees as well. They described: "It is difficult to translate into Anglo-American concepts the meaning of a sacred place to American Indians. It is not merely the symbol of something sacred or merely a place to bring forth memories of past persons or events. It is *itself sacred*, itself the source of sacred power."[51] In the Cherokee worldview: "[T]he sacred character of the river valley was not derivative from any human activity within it. Rather, the river valley itself was the primordial reality investing life-enhancing energy, which sustained a meaningful existence for the human community it nurtured."[52] Some Cherokees believed the destruction of the Tennessee River Valley would mean the end of the Cherokees as a people.[53]

Not surprisingly, then, Cherokees protested the project from its inception. In 1965, they presented a petition to Supreme Court Justice William O. Douglas describing their opposition, and in 1966, they made a statement to Congress decrying the "final desecration of their ancient homeland if Tellico Dam is built."[54] In 1972 and 1974, they joined lawsuits brought by the Environmental Defense Fund opposing the project. These efforts were unsuccessful, but when the Cherokees filed their First Amendment lawsuit in 1979, the TVA had not yet inundated the Tennessee River Valley. Brought by individual medicine people, the Eastern Band of Cherokees, and the United Keetoowah

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49. *Id.* at 1162.
50. *See* BROWN, *supra* note 1, at 15.
51. *Id.* at 14 (emphasis added).
52. *Id.*
53. *Id.* at 15. The affidavit of Cherokee plaintiffs Lloyd Sequoyah, Emmaline Driver, Willie Walkingstick, and Lloyd C. Owle provided:

> When this place is destroyed, the Cherokee people cease to exist as a people. . . . The white man has taken nearly everything away from us, our heritage, culture, traditions, and our way of life that is our religion . . . and I'm afraid of what will become of us and our children if we allow the TVA to cover our sacred land with water. . . . [A]s the water backs over the once Cherokee land, our people will feel a great pain. The earth will cry . . . as water covers this beautiful, fruitful valley, members of our tribe will be in silence.

Id.
54. *Id.* at 26.

Band of Cherokees, the lawsuit claimed the project would violate the Free Exercise Clause of the First Amendment and other laws.[55] More specifically, their complaint argued that the flooding would destroy "sacred sites, medicine gathering sites, holy places and cemeteries, . . . disturb the sacred balance of the land . . . [and cause] irreversible loss to the[ir] culture and history."[56] As a remedy, the parties requested injunctive relief against the impoundment.[57]

The federal district court quickly dispensed of most of the Cherokees' arguments. On the First Amendment issues, the court held that the Free Exercise Clause required a showing of government "coercion" of actions contrary to religious beliefs. Impoundment of the Tellico Reservoir, in the court's view, had "no coercive effect" on the Cherokees' religious beliefs or practices "other than preventing access to certain land."[58] Thus, the only issue was whether the government violated the Free Exercise Clause by denying the Cherokees access to land that was "sacred and necessary" to their religion.[59] The court observed that the federal government "uses the land it owns" for many purposes that "require limiting or denying public access to the property."[60] This case was no different in the court's view because the Cherokees had no independent "legal right of access" to the land.[61] Where "[t]he free exercise clause is not a license in itself to enter property, government-owned or otherwise," the Cherokees had not stated a claim.[62]

The Sixth Circuit took a different approach when it heard *Sequoyah* on appeal. It disagreed with the district court's treatment of the Cherokees' lack of ownership as dispositive, and instead held that ownership was only one factor to be evaluated in context. In this case, the court held that the Cherokees' lack of any property interest[63] "should not be conclusive in view of the history of the Cherokee expulsion from Southern Appalachia followed by the 'Trail of Tears' to Oklahoma and the unique nature of the plaintiffs' religion."[64]

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55. Sequoyah v. Tenn. Valley Auth., 480 F. Supp. 608, 610–11 (E.D. Tenn. 1979) (alleging violations of the First, Fifth, and Ninth Amendments; the American Indian Religious Freedom Act, 42 U.S.C § 1996; the National Historic Preservation Act, 16 U.S.C. § 470–470x-6; and state statutes), *aff'd*, 620 F.2d 1159 (6th Cir. 1980).

56. *Sequoyah*, 620 F.2d at 1160.

57. *Id.*

58. *Sequoyah*, 480 F. Supp. at 612.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. The court seems to have equated lack of "ownership" with "lack of any property interest" even though the question of whether the Cherokees might have retained a lesser property interest, such as an easement, was not discussed in the opinion.

64. Sequoyah v. Tenn. Valley Auth., 620 F.2d 1159, 1164 (6th Cir. 1980).

Despite this potentially expansive recognition of the historical circumstances surrounding the Cherokees' loss of the property, the Sixth Circuit had doubts about the land's religious significance. At least some contemporary Cherokees hadn't known the exact location of Chota until TVA started excavating, and for the one hundred years prior to the TVA acquisitions, other private parties had owned the property. While the land may have had cultural or historical value, the court held, it was not sufficiently "central" to the Cherokees' religion to sustain their free exercise claim.[65] The court did not question the sincerity of Cherokee beliefs or practices but opined that "most people to a greater or lesser extent" revere the places where their ancestors were buried.[66] According to the court, the Cherokees' attachment to the Valley was more a matter of "personal preference"[67] than it was a "conviction shared by an organized group."[68]

A dissenting judge would have remanded on the centrality issue, noting the Cherokees may neither have clearly understood, nor had an opportunity to brief, the centrality standard. He argued that when the district court held that the Government's ownership precluded the Cherokees' free exercise claim, the court had failed to "develop or find any facts concerning the role that this particular location plays in the Cherokee religion."[69] But the majority disagreed, holding the Cherokees could not establish that the Valley was central to their religion.[70]

A federally owned sacred site was also at the heart of *Badoni v. Higginson*,[71] in which Navajo religious practitioners and others challenged the federal government's management of Rainbow Bridge National Monument. The Navajos argued that the flooding of Lake Powell was drowning their gods and that tourists were disturbing prayer offerings, defacing canyon walls, and intruding on ceremonies with their noise. In their view, the federal land managers were thus violating the Navajos' First Amendment rights to "the free and uninhibited exercise of their religious beliefs and practices."[72] They requested that the district court order the Bureau of Reclamation, the National Park Service, and other federal entities "to take appropriate steps to operate Glen Canyon Dam and Reservoir in such a manner that the important

65. *Id.*
66. *Id.* at 1163.
67. *Id.* at 1163–64.
68. *Id.*
69. *Id.* at 1165 (Merritt, J., dissenting).
70. *Id.* at 1164–65.
71. 455 F. Supp. 641 (D. Utah 1977), *aff'd*, 638 F.2d 172 (10th Cir. 1980).
72. *Id.* at 643.

religious and cultural interests of plaintiffs will not be harmed or degraded."[73] They also requested "rules and regulations to prevent further destruction and desecration of the Rainbow Bridge area by tourists."[74] Such steps, the Navajos hoped, would include prohibitions on alcohol consumption at the monument and closures during ceremonies.[75]

Although the Navajo plaintiffs brought their suit under the Free Exercise Clause, the court first analyzed the relative property rights of the parties and determined that the Navajos had none.[76] Indeed, the court was quick to point out that the Navajos did not even allege any property interest in Rainbow Bridge National Monument.[77] The district court acknowledged that the Monument indisputably was situated within the boundaries of Navajo Reservation, but the court asserted that it had "never actually been a part" of the reservation.[78] According to the court, the Monument was established by a proclamation of President William H. Taft and has since been owned by the federal government and managed by the National Park Service.[79] The court mentioned that "various uses of the area have fluctuated over the years," but it concluded that none of these uses "purported to affect the monument."[80] On the question of who owned this property—located within the Navajo's traditional territory—before it became a National monument in 1910, the court concluded, without further factual support: "[A]ny aboriginal proprietary interest that the Navajos may have held in this land *would have been* extinguished by the entry of the white man in earlier years."[81]

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73. *Id.* at 644.

74. *Id.*

75. *See* BROWN, *supra* note 1, at 52.

76. *Badoni*, 455 F. Supp. at 644.

77. *Id.*

78. *Id.* The Navajos did not contest this point, although there may be historical evidence suggesting the land was once inside the Navajo Reservation. *See* BROWN, *supra* note 1, at 44–45 (explaining that the Treaty of 1868 established the Navajo Reservation; 1884 federal action added the "Paiute Strip," including Rainbow Bridge to the reservation; 1892 federal government reclaimed Paiute Strip; and several subsequent transfers culminated in the government's 1958 acquisition of Navajo lands necessary for Glen Canyon Dam and its reservoir, Lake Powell).

79. *See* Lloyd Burton & David Ruppert, *Bear's Lodge or Devils Tower: Inter-cultural Relations, Legal Pluralism, and the Management of Sacred Sites on Public Lands*, 8 CORNELL J.L. & PUB. POL'Y 201, 232 (1999) (critiquing judicial decisions that "ignore the nineteenth century history of forcible removal of indigenous peoples from . . . sacred landscapes").

80. *Badoni*, 455 F. Supp. at 644.

81. *Id.* (emphasis added); *cf.* Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481, 482 (1994) (criticizing the views that "Indian title can be extinguished by the 'increasing weight of history'" and that "the longer tribal rights are ignored, the greater the reason for construing the federal government's failure to protect Indian interests as an affirmative intent to extinguish Indian title").

In the district court's view, the parties' property rights were "determinative" of the First Amendment issue.[82] The court held that without any "property interest in the land," the Navajos' claim "does not come within a country mile of any cognizable legal theory upon which relief can be granted."[83] Recognition of Navajo religious freedoms in the absence of Navajo property rights would, in the court's view, disturb the property rights of others. And particularly where the disturbed "other" was the government, such a holding would lead to "unauthorized and very troublesome results" akin to the pandemonium that would result if an individual successfully claimed the Lincoln Memorial was a sacred shrine requiring the exclusion of all visitors.[84]

Even if the Navajos had a cognizable claim under the Free Exercise Clause, the court determined that the government's interest in the dam and reservoir as a major water and power project would outweigh the Navajos' religious freedoms. Counting up medicine men who had visited the site, and finding their numbers small, the court held that the ceremonies occurring there were not sufficiently "organized" or "intimately related to the daily living" of the group to merit First Amendment protection.[85] Testimony that attempted to explain how Navajo practices and shrines at Rainbow Bridge were of "central importance" to Navajo people, who suffered "severe emotional and spiritual distress" from the desecration of their gods incarnate, was unavailing.[86]

When the Navajos appealed, the Tenth Circuit, like the Sixth Circuit in *Sequoyah*, did not treat the ownership factor as determinative.[87] Rather, the court held that property rights were only "a factor" in weighing free exercise and compelling interests. And, importantly, the Tenth Circuit recognized that ownership rights are not limitless, stating: "The government must manage its property in a manner that does not offend the Constitution."[88] Despite the fact of federal ownership, the court explained it must still "look to the nature of the government action and the quality of plaintiffs' positions" on the First Amendment issue.[89] Ownership did not, at least in theory, give the federal government the right to violate the Free Exercise Clause.

The Navajos still lost. Unlike the district court, the Tenth Circuit recognized the "central importance" of the sacred sites to the tribal religion, but

82. *Badoni*, 455 F. Supp. at 644.
83. *Id.* (quoting the defendant's language and agreeing that plaintiffs have "no cognizable claim").
84. *Id.* at 645.
85. *Id.* at 646.
86. *Id.* at 643–44.
87. Badoni v. Higginson, 638 F.2d 172, 176 (10th Cir. 1980).
88. *Id.*
89. *Id.*

it agreed with the lower court that the government had compelling interests in maintaining the water level at Lake Powell.[90] These included maintaining the dam and reservoir as a multistate water storage and power generation project for irrigation, for mineral and natural resource development, and for water provision to municipal and industrial interests.[91] Although the court refused to decide the case explicitly on the fact of federal ownership, it still ultimately chose to protect the federal government's right to use its property for development purposes over the Navajos' religious interests. Because it found the government interest "compelling," the court decided it unnecessary to reach the issue of whether the government action infringed on the Navajos' free exercise of religion.[92]

Leading up to *Lyng*, one additional free exercise claim arose involving federally owned lands,[93] and because it closely followed the above precedents, it can be discussed briefly. In *Wilson v. Block*,[94] the D.C. Circuit affirmed the lower court's rejection of tribal attempts to stop private interests from expanding and developing the government-owned Snow Bowl ski area on the San Francisco Peaks in the Coconino National Forest near Flagstaff, Arizona. The Hopis argued that the San Francisco Peaks were the home of their kachinas and that the newly proposed expansion of the ski area would destroy "the natural conditions necessary for the performance of ceremonies and the collection of religious objects."[95] Applying *Sequoyah*, the D.C. Circuit described the case as a "conflict between the government's property rights and duties of public management, and a plaintiff's constitutional right freely to practice his religion."[96] If the Hopis wanted to "restrict government land use in the name of religious freedom," they would have to "demonstrate that the government's proposed land use would impair a religious practice that could not be performed at any other site."[97] Despite the Hopis' testimony about the relationship between the place and their practices, the court found that they failed to meet this standard.

90. *Id.* at 177.
91. *Id.*
92. *Id.* at 177 & n.4.
93. For a case involving *state* parklands, see *Crow v. Gullet*, 541 F. Supp. 785, 791 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983) (per curiam), where the court rejected Free Exercise Clause claims involving construction projects and restrictions on access to the sacred Bear Butte located on a state park, in part because the Lakotas had "no property interest in Bear Butte or in the State Park."
94. 708 F.2d 735 (D.C. Cir. 1983).
95. *Id.* at 742.
96. *Id.* at 744.
97. *Id.*

B. The Supreme Court's Decision in *Lyng*

The *Lyng* case concerned an area of land in California that the Yurok, Karuk, and Tolowa called "Medicine Rocks" or the "High Country." Dating back to the early nineteenth century, if not before, tribal people visited the area to "use 'prayer seats' located at Doctor Rock, Chimney Rock, and Peak 8 to seek religious guidance or personal 'power' through 'engaging in emotional and spiritual exchange with the creator.'"[98] In addition, some participants in the White Deerskin and Jump Dances visited the High Country "to purify themselves and to make 'preparatory medicine'" before the ceremonial dances.[99] As a federal study attested, these activities had broad meaning and effect:

> The religious power these individuals acquire in the high country lends meaning to these tribal ceremonies, thereby enhancing the spiritual welfare of the entire tribal community. Medicine women in the tribes travel to the high country to pray, to obtain spiritual power, and to gather medicines. They then return to the tribe to administer to the sick the healing power gained in the high country through ceremonies such as the Brush and Kick Dances.[100]

These ceremonies and dances provided the "World Renewal" essential to the tribes' religious belief system.[101]

California Indians lost most of their traditional lands through a series of federal legislative and executive acts during the California Gold Rush.[102] By the time of the *Lyng* litigation, the High Country was owned by the United States and managed by the United States Forest Service. The High Country, including Chimney Rock, was located within the northeastern portion of Forest Service lands called the "Blue Creek Unit." This 67,500 acre roadless area contained about 31,000 acres of virgin Douglas Fir forest. It adjoined other roadless areas and encompassed Blue Creek, a tributary to the Klamath River and an important spawning habitat for several species of salmon.

In the 1970s the Forest Service proposed a major timber harvesting project that would harvest over 733 million board feet of timber over the

98. Nw. Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 591 (N.D. Cal. 1983), *aff'd*, 795 F.2d 688 (9th Cir. 1986), *rev'd sub nom.* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

99. *Id.*

100. *Id.*

101. *Id.* at 591 n.4.

102. *See, e.g.*, Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1408–09 (1997). *See generally* Bruce S. Flushman & Joe Barbieri, *Aboriginal Title: The Special Case of California*, 17 PAC. L.J. 391 (1986).

course of eighty years. Moreover, the project would require the construction of 200 miles of logging roads in the areas adjacent to the Chimney Rock area. In particular, a section road (the "G-O road") would "dissect" the High Country, separating the sacred Chimney Rock from the sacred Peak 8 and Doctor Rocks.[103] The Forest Service estimated that, in furtherance of the project, around seventy-six logging and ninety-two other vehicles would travel through the Chimney Rock area every day.

Through all stages of the *Lyng* case, it was uncontested that the High Country was the only place where the Indians could conduct the practices at issue, and these practices were the heart of their religion and culture. The district court found: "For the Yurok, Karok, and Tolowa peoples, the high country constitutes the center of the spiritual world."[104] Thus, "[d]egradation of the high country and impairment of . . . [the] training [of young tribal members] would carry a 'very real threat of undermining the tribal communities and religious practices as they exist today.'"[105]

Aware of the area's sensitivity, the Forest Service commissioned studies on both the environmental and cultural impacts. The resulting "Theodoratus Report" recommended that the G-O Road not be completed because it "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples."[106] The Forest Service rejected this recommendation. Instead, its final plan created "one-half mile protective zones" around particular sites but allowed for the harvesting "of significant amounts of timber" from the sacred area.[107] Much of the project had been completed by the time of the *Lyng* litigation, but the Forest Service had not yet built the six-mile section of road.

The plaintiffs in the case included individual Indian religious practitioners, the Northwest Indian Cemetery Protective Association, as well as environmental groups and others, who sued the secretaries of the Forest Service and Agriculture. The Indian plaintiffs alleged that the completion of the road would violate the Free Exercise Clause by degrading the sacred qualities of the High Country and impeding its use for religious purposes. More specifically, the

103. *Peterson*, 565 F. Supp. at 592.

104. *Id.*

105. *Id.* at 594. In the early stages the first-listed defendant was R. Max Peterson, Chief of the United States Forest Service, while in later stages it was Richard E. Lyng, Secretary of the Department of Agriculture. The case has become famous as "*Lyng*." Thus, the body of the Article refers to the case at all stages as "*Lyng*" for purposes of simplicity while citing the official name in the footnotes.

106. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 442 (1988).

107. *Id.* at 443.

plaintiffs argued that the visibility of the road, the noise associated with it, and the resulting environmental damage would all "erode the religious significance of the areas" and "impair the success of religious and medicinal" activities.[108]

Unlike the courts in *Sequoyah* and *Badoni*, the district court in *Lyng* reached the question of whether the government action would infringe on the Indians' religion. Distinguishing *Sequoyah*, the district court observed that here the Indians had demonstrated the area was indispensable and central to their religion, and that the government use would seriously interfere with their religious exercise. The court noted that the Forest Service's "own study concluded that 'intrusions on the sanctity of the Blue Creek high country are . . . potentially destructive of the very core of Northwest Indian religious beliefs and practices."[109] Citing the Supreme Court's major free exercise cases, the court concluded that the Forest Service's actions in the High Country would substantially infringe on the Indians' religion. Moreover, the government interests in the six-mile road project were not demonstrably "compelling."[110] Having failed the Free Exercise Clause test, the government's plan to build a road through the sacred High Country was struck down as violative of the First Amendment.[111]

Notably absent from the district court's opinion was any contention that the government's ownership of Blue Creek Unit precluded the Indians' claim under the Free Exercise Clause. By contrast, the court emphasized that the Indians' lack of a property interest in the High Country did "not release [the governmental] defendants from the constitutional responsibilities the First Amendment imposes on them."[112] Indeed, the district court was highly focused on the "public" nature of the property and the public's interest in it. Following the Supreme Court's decision in *Sherbert v. Verner*,[113] the district court wrote: "[T]he government must attempt to accommodate the legitimate

108. *Peterson*, 565 F. Supp. at 592.

109. *Id.* at 594–95.

110. *Id.* at 596. According to the court, the available timber in the Blue Creek Unit was too small to affect timber supplies, and the timber industry would not suffer significantly without the project. Even if the government could demonstrate a compelling public interest, the court held that there were "means less restrictive of [the Indians'] First Amendment rights" than the government's proposed management plan for Blue Creek Unit.

111. *Id.* at 595–96. The district court also decided claims under the Establishment Clause and numerous federal statutes.

112. *Id.* at 594 & n.8. The court allowed that the Constitution did not convey absolute use rights, explaining for example, that there would be no First Amendment right to "assemble in a busy traffic intersection . . . or on a public sidewalk thronging with pedestrians." *Id.* But the court was concerned with striking a balance between public safety and the freedom of religion, not on the owner's absolute rights to exploit the property.

113. 374 U.S. 398 (1962).

religious interests of the public when doing so threatens no public interest, even when those religious interests involve use of public property."[114] The implication was that to burden religion in a *public* place, the government would need a compelling *public* interest, such as public safety. While the district court did not discount the possibility that the road and timber projects might also benefit the public, the evidence about the minimal projected benefits of the G-O project suggested they were insufficient to justify the extreme burden on religion. Thus focusing on the public's interest in public lands, the opinion did not even describe the government as an "owner."

Interestingly, the only other discussion of property in the district court opinion concerned *Indian* property rights. The Hoopa tribe claimed that the government's activities would violate their reserved water and fishing rights, as well as the government's trust responsibility to protect those rights.[115] Finding the project would "significantly decrease the quantity of anadromous fish" in the sections of the Klamath River flowing through the Hoopa Reservation, the court agreed that the project would violate the federal government's trust duties to the tribe.[116]

The Ninth Circuit heard the *Lyng* case twice, first on appeal[117] and then on rehearing.[118] Both times, the panel affirmed the district court's holding that the road construction and timber project would impermissibly burden the Tolowa, Yurok, and Karok peoples' religious freedoms.[119] Judge Canby reviewed and upheld the district court's findings that the G-O Road would substantially infringe the Indians' religion. On the compelling governmental interest prong, he went somewhat further than the district court, observing that the government "makes little attempt to demonstrate that compelling interests . . . require the completion of the paved G-O Road or the logging of the high country."[120] Although forest management would be "made easier by the road,"[121] statewide employment rates would not change and improvement in recreational access would be modest. The evidence did not show the compelling interest needed to justify the infringement of the Indian religious freedoms.[122]

114. *Peterson*, 565 F. Supp. at 594 n.8. In the district court's view this was particularly true when, as in the Forest Service's proposed project for the High Country, the government "threatens religious conduct *per se*" as opposed to "merely inconveniencing that conduct through the imposition of restrictions reasonable as to time, place, or manner." *Id.*

115. *Id.* at 605.

116. *Id.*

117. Nw. Indian Cemetery Protective Ass'n v. Peterson, 764 F.2d 581 (9th Cir. 1985).

118. Nw. Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688 (9th Cir. 1986).

119. 764 F.2d at 585–86; 795 F.2d at 692–94.

120. 795 F.2d at 695.

121. *Id.*

122. *Id.*

The Ninth Circuit followed the district court in evaluating and deciding the claims on the merits; neither court considered whether the government's ownership should trump the Indians' religious freedoms claims. The Ninth Circuit did vacate the portion of the district court opinion having to do with the Hoopa water and fishing rights and federal trust duties on the ground that the Hoopa Valley Tribe was not a party to the case. For the most part, the parties' property rights were thus a non-issue in the case.

Only a dissenting opinion in the Ninth Circuit opinion on rehearing began to suggest a property rights analysis. Dissenting Judge Beezer's view of the case was that "[t]he Indian plaintiffs are attempting to use the free exercise clause to bar the development of public lands."[123] Judge Beezer's concerns hinged, in part, on his understanding of the government's rights as an owner. He was "not convinced that the district court has thus far given proper respect to the government's ownership rights in public lands."[124] While the district court had focused on the G-O Road's potential benefit to the public, Judge Beezer disagreed, stating, "the issue is not whether the *public* has a compelling interest, but whether the *government* has a compelling interest."[125] He acknowledged that "the government has many obligations that are not shared by private land owners," but still felt that "the government retains a substantial, perhaps even compelling, interest in using its land to achieve economic benefits."[126] For this reason, he would have remanded, requesting the district court to reconsider the threat of development to the Indians' religion in light of "the strength of the government's interest in developing the high country."[127]

Thus, in the early stages of *Lyng*, a federal district court and two panels of the Ninth Circuit held that building a road through, and harvesting timber in, the Indians' sacred site would substantially infringe the Indians' freedom of religion. These courts further held that the government had failed to show a compelling interest in the project. Only one dissenting opinion suggested that the government's interests *as a property owner* were even relevant to the case.

When the Supreme Court granted certiorari, it reversed the lower courts in a two-pronged decision. In the first prong of *Lyng*, the Court dealt with

123. *Id.* at 699 (Beezer, J., dissenting in part). While allowing that Indians generally had standing to bring First Amendment claims, Beezer's tone belied his incredulity. He described that in one case, where "[t]he tribe . . . asserted that development would impair their ability to pray, to conduct ceremonies, and to gather sacred objects such as fir boughs," the court (properly in Beezer's view) dismissed the Indians' Free Exercise Clause claims. *Id.* at 700.

124. *Id.* at 704.

125. *Id.* (emphasis added).

126. *Id.*

127. *Id.*

the free exercise issue. Justice O'Connor, writing for the majority, admitted the government's road construction would "virtually destroy the Indians' ability to practice their religion" but held there was no Free Exercise Clause violation because the government was not coercing Indians into religious beliefs.[128] O'Connor allowed that "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment."[129] But, O'Connor explained: "[T]his does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions."[130] Under this standard, activities of the government that destroy tribal religions do not trigger the compelling interest test, so long as they do not coerce belief.

Many have noted that by requiring a showing of government "coercion" irrespective of the extent to which the government action impaired the religious practice, the *Lyng* majority substantially narrowed the Court's previous free exercise standards.[131] Writing in dissent, Justice Brennan stridently criticized this constricted application of the First Amendment.[132]

> "[T]he Free Exercise Clause," the Court explains today, "is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." Pledging fidelity to this unremarkable constitutional principle, the Court nevertheless concludes that even where the Government uses federal land in a manner that threatens the very existence of a Native American religion, the Government is simply not "*doing*" anything to the practitioners of that faith.[133]

In Brennan's view, the majority's error stemmed, in part, from its senseless imposition of Western norms on Indian religions.[134] The Court's approach to free exercise jurisprudence might protect practitioners of Judeo-Christian religions, based on individual belief in God, but it offered no protection for practitioners of Indian traditions wherein belief is often inseparable from practice, and community engagement with specific sacred places keeps the

128. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450–51 (1988).
129. *Id.* at 450.
130. *Id.* at 450–51.
131. *See* sources cited *supra* note 7.
132. *Lyng*, 485 U.S. at 458 (Brennan, J., dissenting).
133. *Id.* (quoting Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)) (emphasis added).
134. *Id.* at 459–60.

culture and religion alive.[135] As Brennan pointed out, the Indians lost in *Lyng* neither because the religious practices at issue were not central, nor because the government's interest in its project was so compelling. The Indians lost in *Lyng* because the majority effectively held that the Free Exercise Clause did not apply to their religion.[136]

In addition, the Indians lost in *Lyng* because the Court used the federal government's ownership as a basis for denying their claim.[137] In the second prong of *Lyng*, Justice O'Connor was particularly concerned that the Yurok, Karok, and Tolowa Indians' religion required "undisturbed naturalness" in the sacred High Country, located within the National Forest.[138] In the Court's view, this claim challenged the federal government's right to use the land according to its own plans. Justice O'Connor explained: "No disrespect for these practices is implied when one notes that such beliefs could easily require de facto beneficial ownership of some rather spacious tracts of public property."[139]

The dissent pointed out that the Indians were not claiming ownership rights; for example, the Indians had not asked the Forest Service to exclude other people from the area.[140] Nor had the Indians even come close to demanding that the government return the property to the tribes—this was not a land claims suit. Instead, the Indians requested that the government manage its lands in a way that would provide the "privacy and solitude" necessary for

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135. Justice Brennan's impassioned dissent noted:

> In marked contrast to traditional Western religions, the belief systems of Native Americans do not rely on doctrines, creeds, or dogmas. Established or universal truths—the mainstay of Western religions—play no part in Indian faith. Ceremonies are communal efforts undertaken for specific purposes in accordance with instructions handed down from generation to generation. Commentaries on or interpretations of the rituals themselves are deemed absolute violations of the ceremonies, whose value lies not in their ability to explain the natural world or to enlighten individual believers but in their efficacy as protectors and enhancers of tribal existence. 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.

Id. at 460–61.

136. *Id.* at 476. As Justice Brennan lamented:

> Today, the Court holds that a federal land-use decision that promises to destroy an entire religion does not burden the practice of that faith in a manner recognized by the Free Exercise Clause. [The Court has] thus stripped respondents and all other Native Americans of any constitutional protection against perhaps the most serious threat to their age-old religious practices, and indeed to their entire way of life.

Id. For scholarly commentary on the free exercise prong of *Lyng*, *see* sources cited *supra* note 7.

137. *See* Dussias, *supra* note 10, at 823–30.

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

139. *Id.*

140. *Id.* at 476 (Brennan, J., dissenting).

Indian religious practices.[141] But, in Justice O'Connor's view, finding for the Indians would cause an inappropriate "diminution of the Government's property rights, and the concomitant subsidy of the Indian religion."[142] O'Connor based her conclusion on the fact that the district court's order permanently enjoined road construction or timber harvesting on 17,000 acres of public land. She did not, however, consider whether the government still had available to it any *other* uses for the land or what the value of such activities might be.[143] Further, O'Connor noted that while the Indians did not *presently* object to recreational users in the area, they might "seek to exclude all human activity but their own from sacred areas of the public lands" at some point in the future.[144]

However incomplete and speculative O'Connor's concerns, they were sufficient to raise the specter of interference with the government's rights as an owner. The upshot was that, "[w]hatever rights the Indians may have to the use of the area, . . . those rights do not divest the Government of its right to use what is, after all, *its* land."[145] The Court placed virtually no limit on what the government could do on its property—save for the *possibility* of a constitutional problem (presumably equal protection) if the government excluded only the Indians from sacred sites.[146]

The Supreme Court's decision in *Lyng* has cleared up the role of ownership in these cases. While the lower courts had struggled to reconcile federal ownership with Indian religious interests, *Lyng* explained that the government's ownership could be dispositive. Whereas Judge Beezer had been concerned that Indians were trying to use the Free Exercise Clause to stop the development of public lands, Justice O'Connor made clear that the federal government's ownership rights justified the destruction of Indian religious practices.

Justice Brennan pointed out, again in dissent, that the majority thus adopted the government's position that "its prerogative as landowner should always take precedence over a claim that a particular use of federal property infringes religious practices."[147] Since *Lyng*, the courts have allowed the federal government to use its ownership as a shield against Indian free exercise

141. *Id.*
142. *Id.* at 453.
143. Notably, for Takings Clause claims, the U.S. Supreme Court requires private owners to show to what extent they are deprived of "all economically viable use of their land." *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992).
144. *Lyng*, 485 U.S. at 452–53.
145. *Id.* (emphasis added).
146. *Id.*
147. *Id.* at 465 (Brennan, J., dissenting).

claims in a number of cases.[148] The federal government's status as "the owner" currently stands as a potential bar to Indian free exercise claims involving sacred sites located on federal land.[149]

III. UNDERSTANDING AND RESPONDING TO OWNERSHIP

While the decision in *Lyng* was devastating for American Indians and other religious adherents, it was not unusual in its focus on the rights of the property owner.[150] Our society maintains a deeply held belief that "[p]roperty is about rights over things and the people who have those rights are called owners."[151] Therefore, this part first identifies and then deconstructs the "ownership model."

A. Identifying the Ownership Model

The ownership model appears throughout the development of Anglo American property law.[152] In the eighteenth century, Blackstone's *Commentaries on the Laws of England* glorified property as "that domination which one man claims and excludes over the external things of the world, to the exclusion

148. *E.g.*, Dussias, *supra* note 10, at 831–33 (citing United States v. Means, 858 F.2d 404 (8th Cir. 1988) (rejecting, on basis of government's ownership, Lakotas' claim that Forest Service's denial of a permit for the use of an area in the Black Hills National Forest as a religious, cultural, and educational community violated their free exercise rights)); Havasupai Tribe v. United States, 752 F. Supp. 1471 (D. Ariz. 1990), *aff'd sub nom.* Havasupai Tribe v. Robertson, 943 F.2d 32 (9th Cir. 1991) (rejecting, on the basis of the government's ownership, a Havasupai claim of free exercise violation involving the Forest Service's plan for a uranium mine in an Arizona national forest); Manybeads v. United States, 730 F. Supp. 1515 (D. Ariz. 1989) (rejecting, on the basis of the government's ownership, a Navajo claim that relocation from the Hopi Reservation under the provisions of the Navajo-Hopi Land Settlement Act violated their free exercise rights).

149. Indian free exercise claims are further limited by *Employment Division v. Smith*, 494 U.S. 872 (1990), which declined to apply the compelling governmental interest test in a case where members of the Native American Church challenged a state statute denying unemployment benefits for dismissal based on religious peyote use. *See also* Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1152–53 (1990) ("The Smith decision is undoubtedly the most important development in the law of religious freedom in decades."). Some scholars argue that the Supreme Court's ever-narrowing approach to the Free Exercise Clause reduces the religious freedom not only of American Indians but also of other minorities. *E.g.*, McConnell, *Religious Freedom*, *supra* note 7, at 139; *cf.* Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (finding that city ordinance prohibiting animal sacrifice was motivated by animosity toward the Santeria religion and therefore violated the Free Exercise Clause).

150. *See* SINGER, *supra* note 15, at 28 ("The traditional concept of property is ownership.").

151. *See id.* at 2; *see also* JOSEPH WILLIAM SINGER, THE EDGES OF THE FIELD: LESSONS ON THE OBLIGATIONS OF OWNERSHIP (2000).

152. Anglo Americans were not the first to articulate an ownership approach to property law. *See, e.g.*, RICHARD PIPES, PROPERTY AND FREEDOM 11 (1999) ("Roman jurists were the first to formulate the concept of absolute private ownership, which they called *dominum* . . . . The rights implicit in *dominum* were so absolute that ancient Rome knew nothing of eminent domain.").

of every other individual."[153] While this strident rhetoric may not have reflected reality even in Blackstone's time,[154] the concept of property as confirming absolute rights in owners has influenced the development of property law.[155]

Today's scholars often describe ownership as a "bundle of rights" including the rights to use, transfer, and exclude others from one's property.[156] Cases like *Lyng* highlight the power of the owner to deploy that bundle of property rights, in the aggregate or individually, for economic development. As Richard Pipes surmises: "[P]roperty refers to the right of the owner or owners, formally acknowledged by public authority, both to exploit assets to the exclusion of everyone else and to dispose of them by sale or otherwise."[157] These rights seem to allow the owner even to destroy his property or "us[e] it all up."[158]

Contemporary politics also invoke the ownership model, particularly in debates over governmental regulation of private property. Organizations advocating "wise use" and "property rights,"[159] for example, contend that "landowners possess inherent rights" to use their property "intensively, free of restraint, so long as they avoid visibly harming anyone else."[160] In their view, owners have "always" had such extensive rights, and they resist what they

153. Robert P. Burns, *Blackstone's Theory of the "Absolute" Rights of Property*, 54 U. CIN. L. REV. 67 (1985).

154. *See generally* Carol M. Rose, *Canons of Property Talk, or Blackstone's Anxiety*, 108 YALE L.J. 601 (2000) (arguing that Blackstone himself seems to have had some awareness of the limited nature of ownership rights); *see also* David Schultz, *Political Theory and Legal History: Conflicting Depictions of Property in the American Political Founding*, 37 AM. J. LEGAL HIST. 464, 466 (1993) ("[O]n the rhetorical level property rights were described in 'absolutist' terms (circa 1776–1800) while during this time the legal treatment of property in case law and legislation suggested much less than an absolutist treatment of property.").

155. *See generally* Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 281 (1998) (discussing "absolutism" as the "intuitive" view of property in Anglo American law and politics).

156. *See* CAROL M. ROSE, *Seeing Property*, *in* PROPERTY AND PERSUASION 267, 278–85 (1994) (discussing the "bundle of sticks" metaphor of property).

157. PIPES, *supra* note 152, at xv.

158. Edward J. McCaffery, *Must We Have the Right to Waste?*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 76, 76 (Stephen R. Munzer ed., 2001).

159. Some of the organizations that are often associated with the "wise use" movement include the Center for the Defense of Free Enterprise, Alliance for America, American Land Rights Association, Cato Institute, Center for the Defense of Free Enterprise, the Heartland Institute, and Property and Environment Research Center. *See generally* LET THE PEOPLE JUDGE (John D. Echeverria & Raymond Booth Eby eds., 1995). A notable entity is the Mountain States Legal Foundation, a legal advocacy organization that generally pursues property rights and wise use in litigation. *See* Mountain States Legal Found., Homepage, *at* http://www.mountainstateslegal.org. Mountain States Legal Foundation has specifically challenged federal agencies' decisions to accommodate Indian sacred site usage in several cases. *See, e.g.*, Wyo. Sawmills Inc. v. United States Forest Service, 383 F.3d 1241 (10th Cir. 2004); Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814 (10th Cir. 1999); Natural Arch & Bridge Soc'y v. Alston, 209 F. Supp. 2d 1207 (D. Utah 2002).

160. ERIC T. FREYFOGLE, THE LAND WE SHARE 2 (2003).

characterize as the recent tendency of regulatory agencies to curtail such rights in the name of environmental protection or other societal goals.[161]

The concerns of these scholars, political organizations, and individual owners are reaching the courts.[162] The Supreme Court seems to be particularly sympathetic to the ownership model, and *Lyng* is not the only example.[163] The Supreme Court's recent jurisprudence on takings law, for example, reveals a substantial number of cases expanding constitutional protection for owners' rights,[164] perhaps beyond what the framers intended in the Fifth Amendment.[165] Professor Joseph Singer points particularly to the Court's treatment of ownership in the recent case of *Palazzolo v. Rhode Island*.[166] In 1971, the Commonwealth of Rhode Island had enacted a regulatory system for limiting the development of coastal wetlands.[167] Seven years later, Mr. Palazzolo became the owner of property in Rhode Island, and still some years after that, he applied for a permit to fill eighteen acres of coastal wetlands for the construction of a beach club. The state regulatory commission denied the application, and Palazzolo sued for compensation under the Takings Clause. The Rhode Island Supreme Court held that, in light of the state law, Palazzolo had no reasonable expectation of developing the land when he took title to the property, and therefore no taking had occurred.[168] The U.S. Supreme

161. *See* John D. Echeverria, *The Politics of Property Rights*, 50 OKLA. L. REV. 351, 351–52 (1997) ("The property rights position also represents a new normative argument against the assertion of regulatory power to protect the environment: the preservation of individual dignity and autonomy depends upon reining in regulations that protect the environment.").

162. *See* FREYFOGLE, *supra* note 160, at 9.

163. *See* Joseph William Singer, *Canons of Conquest, the Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641, 661 (2003) ("In recent years, the Supreme Court has been increasing constitutional protection for property rights."); *cf.* GLENDON, *supra* note 15, at 31 ("Although the heyday of the absolutist property paradigm came and went more than fifty years ago, the paradigm persists in popular discourse and still occasionally receives lip service from the Supreme Court.").

164. *See, e.g.*, Babbit v. Youpee, 519 U.S. 234 (1997); Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); Hodel v. Irving, 481 U.S. 704 (1987); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

165. *See, e.g.*, GLENDON, *supra* note 15, at 25. Glendon states:

> The framers' efforts to directly and indirectly protect the interests of property owners were never meant to preclude considerable public regulation of property. The Fifth Amendment expressly recognized the federal eminent domain or "takings" power. . . . In the nineteenth century, the takings authority was liberally invoked . . . to promote economic development, and notably to aid railroads in acquiring land.

Id.

166. 533 U.S. 606 (2001); *see also* Singer, *supra* note 163, at 661.

167. *Palazzolo*, 533 U.S. at 614.

168. Palazzolo v. State, 746 A.2d 707, 716 (R.I. 2000).

Court reversed, holding that Palazzolo could assert his takings claim even though he had purchased the property after the regulation's effective date.[169]

The U.S. Supreme Court's decision was grounded, in part, on the principle that as an owner, Palazzolo was justified in the expectation that he could develop the property even though state law was clearly to the contrary.[170] *Palazzolo*, like *Lyng*, is a case of the ownership model taken to an extreme.[171] In *Palazzolo*, one owner's beach club project trumps society's interest in balancing real estate development with environmental protection, an interest expressed through state law.[172] In *Lyng*, the owner's logging project destroys religious freedom, a value expressed in our First Amendment. In a legal world based on the ownership model, the owner always wins, no matter what else is at stake.

B. Deconstructing the Ownership Model

Despite the pervasiveness of the ownership model, it is only one approach to property law and perhaps not the best one. As scholars have argued, property is not just about the absolute dominion of people over things.[173] It is not only about the rights of titleholders or owners. In the Legal Realists' view, for example, property is more correctly viewed as a set of "social relations" among persons with respect to things.[174] Advancing the work of the Realists, contemporary critics suggest that a narrow focus on *the*

169. *Palazzolo*, 533 U.S. at 616. The U.S. Supreme Court did not allow Palazzolo's claim that he faced a complete taking because of evidence he could build residences on property even under regulation.

170. *See* Singer, *supra* note 163, at 661–62 (arguing that *Palazzolo* seems to indicate that some property rights are above the law).

171. Despite the U.S. Supreme Court's decision, the Rhode Island Supreme Court seems unwilling to take the ownership model to its extreme. *See* Palazzolo v. State, 785 A.2d 561 (R.I. 2001) (remanding to the superior court for findings on the economic value of Palazzolo's "lost" property and also to consider whether the public trust doctrine affected his reasonable investment backed expectations about the property).

172. Even the U.S. Supreme Court could not escape noticing that "[t]he details [of the proposed beach club project] do not tend to inspire the reader with an idyllic coastal image, for the proposal was to fill 11 acres of the property with gravel to accommodate 50 cars with boat trailers, a dumpster, port-a-johns, picnic tables, barbecue pits of concrete, and other trash receptacles." *Palazzolo*, 533 U.S. at 615. Contrast this project with citizens' interests in the undeveloped wetlands and beachfront property for purposes including military defense, boating, fishing, shellfishing, and recreation. *Id.* at 612–15.

173. *See, e.g.*, Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917). Beyond the property context, see GLENDON, *supra* note 15, at 13, stating that "from the very beginning, the United States Supreme Court has acknowledged implicit limits on our constitutional rights and has imposed obligations on citizens to respect each other's rights. Jurists are also well aware that ordinary private law—contracts, torts, domestic relations—is replete with reciprocal duties."

174. *See* Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 361 (1954).

owner obscures the full panoply of interests and obligations of *other* individuals and communities with regard to land and valuable assets.[175]

If we take into account these other property law concerns, an "ownership model" becomes neither a descriptively accurate, nor a normatively desirable, approach to property law. At the descriptive level, it is difficult to ignore that property law has long protected the rights of nonowners.[176] Thus, a narrow focus on the identity and interests of the owners tells only part of the legal story. Property law actually allocates property rights and obligations among various parties—owners and nonowners. A more comprehensive approach would recognize property as a "system" that distributes resources and structures relations among members of society.[177]

From a normative perspective, this "social relations" view of property reframes legal issues and dictates new standards for decisionmaking. Property law problems should address not only the owner's rights, but also "the conflicting interests of everyone with legitimate claims" to the land or other resources at issue.[178] Moreover, when it comes time to choose legal rules, we should consider how they express societal and human values.[179]

Some scholars would argue that a social relations approach to property law is, at best, representative of an unrealized "ideal."[180] And, indeed, the previous subpart of this Article highlighted the resilience of the ownership model. On the other hand, the law is replete with challenges to the ownership model—instances in which property law protects the rights of nonowners and imposes obligations on owners. In these instances, the law's allocation of rights and obligations structures social relations and expresses human values.

In landlord tenant law, for example, the landlord owns the property while the tenant has rights to enjoy a habitable apartment, to receive visitors, and to be secure from eviction during the term of his lease. The landlord retains her right

175. *See generally* Stephen R. Munzer, *Property as Social Relations*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY, *supra* note 158, at 36, 36–37 (surveying the works of social relations theorists Felix S. Cohen, Robert L. Hale, Joseph William Singer, Duncan Kennedy, C.B. Macpherson, and Jennifer Nedelsky).

176. Munzer puts it a different way, saying that "[T]he full bundle of rights called ownership may be split up into smaller bundles held by different entities such that no single 'owner' exists." *Id.* at 62.

177. *See generally* SINGER, *supra* note 15; Angela R. Riley, *Indian Remains, Human Rights: Reconsidering Entitlement Under the Native American Graves Protection and Repatriation Act*, 34 COLUM. HUM. RTS. L. REV. 49 (2002); Rebecca Tsosie, *Land, Culture, and Community: Reflections on Native Sovereignty and Property in America*, 34 IND. L. REV. 1291, 1301 (2001).

178. SINGER, *supra* note 15, at 91 (calling this approach to property an "entitlement model").

179. *See id.* at 37.

180. *E.g.*, Munzer, *supra* note 175, at 65 ("The suggestion is to see Singer's 'social relations approach' as an ideal type. It is not so much that current property law *is* in accordance with this approach. Rather, it is that it *could become* so.").

to take possession of the property at the end of the lease.[181] Both parties have duties—the landlord must keep the premises in good repair and refrain from interfering with the tenant, and the tenant has to pay the rent and avoid damaging the premises. Our landlord tenant law thus balances owners' interests in using their property profitably with nonowners' interests in shelter and privacy.[182]

In copyright law, the owner has exclusive rights to use certain property, but only for a limited time period and with exceptions for fair use.[183] In this way, the law attempts to accommodate competing values—it fosters invention and authors' creativity on the one hand, while promoting the free exchange of ideas and marketability of intellectual property on the other.[184]

In the area of public accommodations, statutes prevent owners of property open to the public from excluding on the basis of race, color, religion, or national origin—but this law does not apply to purely private property.[185] Moreover, the law still recognizes the common law right to exclude, as long as the exclusion does not violate a statutory protection.[186] Our public accommodations law thus balances, perhaps imperfectly, owners' security against nonowners' interests in access, in furtherance of equality and more harmonious relations among majority and minority groups.[187]

Even when we go to the very root of common law property, we see that the feudal system itself disaggregated and distributed various sticks in the property law bundle among different actors in the feudal hierarchy. As Joan Williams writes: "[There were] many persons [in the feudal system] who could say each with as much justification as the other, That is my field."[188] Williams's analysis of the feudal system perhaps exposes how Anglo American property has *always* been as much about social relations as ownership:

> Hierarchical and (in theory) unchanging social roles were designed around interdependent and mutual responsibilities between unequal

181. *See generally* DAVID S. HILL, LANDLORD AND TENANT LAW 1–8 (2004).

182. *See* SINGER, *supra* note 15, at 79–80.

183. 17 U.S.C. §§ 106, 107, 302 (2000).

184. *See* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03 (2004). *But cf.* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 285 (1996) (discussing the "precarious balance" between "public access and private ownership" in copyright law).

185. 42 U.S.C. § 2000a–2000a-6 (2000).

186. *See* Madden v. Queens County Jockey Club, 72 N.E.2d 697 (N.Y. 1947) (upholding an absolute right to exclude an individual, mistakenly believed to be a bookmaker, from a racetrack because the racetrack had not discriminated on statutorily prohibited grounds of race, religion, color, or natural origin); *cf.* Uston v. Resorts Int'l Hotel, Inc., 445 A.2d 370 (N.J. 1982) (rejecting the absolute right of exclusion in favor of the public's reasonable right of access under the common law).

187. *See generally* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996).

188. Williams, *supra* note 155, at 291 (quoting MARC BLOCH, FEUDAL SOCIETY 113–16 (L.A. Manyon trans., 1970)).

> social actors: from vassal to lord, to intermediate lord, to higher lords, to the king, and ultimately, to God. Each inferior was entitled to protection or other benefits from his superiors; in return, he owed them services as well as deference. These social relationships were expressed through property. A limited number of approved estates in land cemented a limited number of "estates," *i.e.*, social positions. The formalism of the system of estates represented feudal society's resistance to social change, its vision of virtue as fulfilling one's place in the Chain. Because these relationships were envisioned as permanent interdependencies, the key estates in land awarded simultaneous rights in a tenant, his lord, and on up the Chain. Exclusive ownership was virtually unknown; instead, the estates carved up property rights into various interlocking bundles of sticks.[189]

This look at the feudal system through modern eyes reminds us that property has the power to ingrain values and relationships that are unappealing by today's standards—such as the concentration of wealth and power in ruling classes. Our current system of estates and future interests has somewhat reformed the feudal version, in part to reflect a modern preference for marketability of property.[190]

The theorists' contention that property has always been about more than protecting owners' rights seems well-grounded in the reality of property law. And this seems to be true whether we are talking about property law defined primarily by statute (as in copyright and public accommodations), contract (as in leaseholds), or common law (as in the feudal system's present estates and future interests). In historical and contemporary times, nonowners have had rights and owners have had obligations. Legal decisions about the allocation of property interests have shaped social relationships and expressed human values. Even if cases like *Palazzolo* and *Lyng* suggest continued adherence to the ownership model, the competing strength of the social relations model offers a platform for rethinking property law cases.

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189. *Id.* at 290 (footnote omitted). Williams sees the feudal system as an illustration of how Anglo American property differs from the Roman version:

> The word "ownership," as applied to landed property, would have been almost meaningless (in feudal society), for nearly all land and a great many human beings were burdened at this time with a multiplicity of obligations differing in their nature, but all apparently of equal importance. None implied that fixed proprietary exclusiveness which belonged to the conception of ownership in Roman law.

Id. at 290–91 (quoting BLOCH, *supra* note 188); *cf.* PIPES, *supra* note 152, at 11 (discussing Roman notions of absolute ownership).

190. An example might include most American states' abolition of the "fee tail," an estate designed to keep property in a single family for generations. *See* John F. Hart, *"A Less Proportion of Idle Proprietors": Madison, Property Rights, and the Abolition of the Fee Tail*, 58 WASH. & LEE L. REV. 167 (2001).

IV. THE RIGHTS OF NONOWNERS

What sort of property rights might nonowners have in cases like *Lyng*? Following Professor Singer's pathbreaking work in social relations theory, this part considers this question by examining *Lyng* through the lens of relationships at issue in the case.[191] The goal of situating the case in the context of the relationships between the parties is to better understand the legal rights and obligations between them.[192]

Justice O'Connor seems to have treated *Lyng* as a case about the relationship between an owner and a nonowner. Starting with O'Connor's conceptualization, this section argues that even in the nonowner to owner context, Indians may have common law property rights at sacred sites owned by the government. But this part next suggests that O'Connor overlooked other relationships at issue in the case. *Lyng* also implicates the relationship between the federal government and Indian nations, the relationship between the federal government and individual citizens, and the relationship between a conquering nation-state and the indigenous peoples within its borders. This portion of the Article identifies and analyzes potential property law arguments growing out of each of these relationships. It does not try to reargue *Lyng*, where few property arguments were raised or briefed. Instead, it raises property arguments that may apply in future cases in which Indians try to protect their access to, and the physical integrity of, sacred sites located on federal public lands.

A. The Common Law Context

Justice O'Connor appears to have viewed *Lyng* as a case about an owner's desire to use his property free from limitation.[193] Asserting the government's right to "use what is, after all, *its* land,"[194] O'Connor evokes an individual who faces the unwelcome intrusion of interlopers onto his property. The reader of the *Lyng* opinion may think sympathetically: *Well, I wouldn't want a bunch of Indians coming into my backyard and telling me what to do with it, either.* That reader might be somewhat relieved when O'Connor expansively protects the

191. SINGER, *supra* note 15, at 209 ("We cannot define obligations without having some sense of what people owe each other, and we cannot think sensibly about what people owe each other *without understanding their relationship with one another.*" (emphasis added)).

192. *See* Munzer, *supra* note 175, at 65 (arguing that we can "encourage judges to be sensitive to [the variety of fully situated social] relationships in rendering decisions").

193. This approach may be somewhat consistent with the "proprietorship" model of federal land ownership described below. *See infra* notes 361–366 and accompanying text.

194. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 453 (1988).

owner from "whatever rights"[195] those pesky intruders might be claiming. The opinion confirms that within the confines of his[196] property,[197] the owner has the near absolute and sole "right to do whatever he wants."[198]

To a certain extent, O'Connor's model requires us to suspend the knowledge that the government's ownership is more complicated than that of an individual person. But even if we treat the federal government like any other owner, the possibility still remains that the Indians as nonowners might have property rights. Common law easements, profits, and other doctrines quite often establish the right of a nonowner to use property owned by someone else. Thus, establishing a common law "use" right may greatly strengthen Indians' claims to use sacred sites on public lands. It may also help to challenge the notion that the Indians' claim in *Lyng* amounts to an attempt "to exact from the Government de facto beneficial ownership of federal property."[199] In the normal course of property law, the assertion of use rights does not typically require, or even involve, a claim of ownership.

Perhaps the most common legal right to use property owned by another is the "easement."[200] An "express easement" is an interest in land, granted in writing, signed by the grantor, that delineates the purposes and conditions under which a nonowner may use an owner's property.[201] If the easement benefits the grantee in the enjoyment of its own land, it will be binding on successive owners of the burdened parcel—even decades or centuries later. Moreover, the owner of the burdened property cannot terminate the easement or change its scope, unilaterally.[202] An easement holder may enforce his easement against third party interference, with available remedies including declaratory judgment, compensatory, punitive, and nominal damages, injunctions, restitution, and the imposition of liens.[203]

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195. *Id.*

196. *See* GLENDON, *supra* note 15, at 27 (discussing legal rhetoric that "tended to reinforce beliefs of most white male Americans that they were entirely free to contract for, hold, and devise property as they saw fit" (internal quotations and citations omitted)).

197. *See id.* at 52 ("The common law has always recognized a man's house as his castle, impregnable, often, even to its own officers engaged in the execution of its commands." (quoting Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890))).

198. *Id.* at 8 (describing a common American view that "the flag stands for the fact that this is a country where we have the right to do what we want").

199. *Lyng*, 485 U.S. at 458 (Brennan, J., dissenting) ("The Court believes that Native Americans who request that the Government refrain from destroying their religion effectively seek to exact from the Government *de facto* beneficial ownership of federal property.").

200. *See generally* EMORY WASHBURN, A TREATISE ON THE AMERICAN LAW OF EASEMENTS AND SERVITUDES (2003).

201. *See* JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY 210–12 (2d ed. 2005).

202. *See id.*

203. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 8.3 (2000).

Like any other individual or entity, an Indian person or nation may negotiate an express easement reserving or granting it permission to use another's property. There are many such agreements between the United States and Indian nations expressly reserving to the Indians rights to use their ceded aboriginal territory for activities like hunting—these agreements are called "treaties" and are discussed in the next section.[204] Even outside of the treaty context, however, Indian people may negotiate an affirmative right to use property owned by someone else. In contemporary property transactions, Indian nations quite often negotiate easements, sometimes to use lands in their traditional territories that have been lost in some stage of conquest and colonization.[205] In one recent example, the Eastern Band of Cherokees secured an easement to use lands owned by the Tennessee Valley Authority for an economic development project.[206] Similarly, tribes might consider seeking affirmative easements to use sacred sites today.[207]

Throughout much of history, however, Indian nations often lacked the knowledge and negotiating power to bargain expressly for easements. Thus, when they lost possession of traditional lands, they did not necessarily reserve an express right to continue using sacred sites located on them. But the common law recognizes that, in some instances, easements may be created nonexpressly—through the intent and conduct of the parties. Examples of such easements include easement implied by prior use, easement by necessity, easement by estoppel, and easement by prescription.[208] Once established, these implied easements are enforceable property interests.[209]

In at least one instance, as Dean Kevin Worthen has demonstrated, an Indian tribe has successfully established a common law right to use lands for

204. *See, e.g.*, Singer, *supra* note 19, at 6 (describing reserved treaty rights as "easement-like" rights of access to lands now owned by the federal government).

205. *See, e.g.*, Lenore Rutherford, *District, Tribe Make Land Deal*, UNION DEMOCRAT.COM, Sept. 9, 2004, *at* http://www.uniondemocrat.com/news/story.cfm?story_no=15147 (reporting that Tuolumne Band of Me-Wuk Indians acquired 6.2 mile former railroad easement in land swap deal with local government).

206. *See* indianz.com, Eastern Cherokee Band's $49M Resort Plan Approved, *at* http://www.indianz.com/News/2004/003504.asp (July 22, 2004) (explaining that the Cherokees have been granted a forty-year commercial recreation easement on forty acres of Tennessee Valley Authority land for the purpose of developing a resort). This example may challenge the notion that recognizing tribal rights will always result in economically unproductive use of those lands. *But see* Yablon, *supra* note 12, at 1631.

207. *See, e.g.*, Koerner v. Bock, 100 So. 2d 398 (Fla. 1958) (upholding devise of land for use as a county park where the devise carried with it a perpetual easement to use the land and the lake adjacent thereto for Christian baptismal purposes).

208. *See* SINGER, *supra* note 201, at 186–210.

209. *See, e.g.*, Pascoag Reservoir & Dam, LLC v. Rhode Island, 217 F. Supp. 2d 206, 211–12 (D.R.I. 2002).

religious purposes through a nonexpress easement claim.[210] In *United States v. Platt*,[211] the Zuni Tribe sought legal protection for its access to a path stretching hundreds of miles from New Mexico to Arizona. Every four years since at least 1540, forty to sixty religious leaders had used this path to make a pilgrimage to Zuni Heaven.[212] The path was within the Zunis' aboriginal territory, but the tribe had lost the property through an 1877 Executive Order. Although subsequent legislation allowed the Zunis to acquire certain property rights for religious purposes, the reacquired rights did not provide access to Zuni Heaven in the traditional manner.[213]

At the time of the suit, rancher Earl Platt owned the lands and had declared his intention to prevent the Zunis from crossing his land. Because *Lyng* had just been decided and seemed to foreclose First Amendment relief, the tribe decided to try a property argument instead.[214] The Zuni Tribe argued that, by its longtime usage of the path, it had established a limited right to use property in the form of a prescriptive easement. Arizona law requires a claimant seeking a prescriptive easement to show its "actual, open and notorious, continuous and uninterrupted" possession of the property for a period of at least ten years.[215] The court found that the Zunis demonstrated actual possession[216] by using the route for religious pilgrimages for several days every four years and by not recognizing any other claim to the land. Even "man made obstacles will not cause the Zuni pilgrims to deviate from their customary path. This was evidenced by the fact the pilgrims cut or take down fences in their way."[217] The Zunis established continuous possession for the statutory period of ten years by "continually us[ing] . . . the defendant's land for a short period of time every four years at least since 1924 and very probably for a period of time spanning many hundreds of years prior to that year."[218] Their use was open and notorious in that they made no attempt to hide it, and the surrounding community had common knowledge of the pilgrimage, including the route and lands that it crossed.[219] Thus, the court granted the Zuni Tribe a

210. *See* Worthen, *supra* note 14, at 248 (discussing the *Platt* case).
211. 730 F. Supp. 318 (D. Ariz. 1990).
212. *Id.* at 319–20.
213. *Id.* at 319 n.1
214. *See* Hank Meshorer, *The Sacred Trail to Zuni Heaven: A Study in the Law of Prescriptive Easements*, *in* READINGS IN AMERICAN INDIAN LAW 318, 319–20 (Jo Carillo ed., 1998).
215. *Platt*, 730 F. Supp. at 321–23.
216. *Id.* at 322. Although we usually think of easements in terms of parties' "use" of the property, the *Platt* court spoke in terms of the Zunis' "possession" because of the similarity of adverse possession and easement by prescription in Arizona law.
217. *Id.* at 320.
218. *Id.* at 322.
219. *Id.*

prescriptive easement to use a fifty-foot wide path on lands owned by Earl Platt for the pilgrimage to Zuni Heaven once every four years.[220]

The *Platt* case is helpful in several regards. It underscores the theoretical point, missed by Justice O'Connor in *Lyng*, that Indian nations can claim a right to *use* sacred lands without claiming to own the property. In doctrinal terms, *Platt* suggests that when Indian nations seek to establish a legal right to use a sacred site, they might look to the common law of property as a basis for their claims. In addition to the easement by prescription, there exist other potentially helpful and related "use" rights that may arise from the parties' intent and conduct, such as the easement implied by prior use and the easement by necessity.[221] All of these easements establish an affirmative right to use property owned by someone else. An Indian tribe that establishes such an affirmative easement will have a claim if the servient owner interferes with the tribe's use, such as by developing the property.[222] In other words, the owner will have an enforceable duty to accommodate the tribe's use right.[223] This duty is not without limits.[224] In particular, the servient owner has no obligation to permit access beyond the scope of the original easement[225] and may not be required to allow access that unreasonably burdens his land.[226]

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220. *Id.* at 323–24.

221. *See generally* JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES AND PROCEDURES (2002) (describing additional common law doctrines recognizing property interests in nonowners including various types of express and implied easements, the constructive trust doctrine, and other forms of court ordered equitable relief). In a very interesting series of cases, successors to original settlers of a Mexican land grant sued a landowner who had fenced adjoining mountain property, seeking rights of access for grazing, hunting, fishing, timbering, firewood, and recreation. The Colorado Supreme Court found in favor of the claimants, granting access rights to the "Taylor Ranch" for reasonable use of pasture, firewood, and timber through implied easements by prescription, prior use, and estoppel. Lobato v. Taylor, 70 P.3d 1152 (Colo. 2003). The case was heavily tied to a written agreement among the original parties—and may be especially helpful in cases where tribes consider the interplay between treaties and the common law.

222. By contrast, attempts to secure a *negative* prescriptive easement preventing a property owner from developing his own property, in the absence of any affirmative easement, are likely to fail. *See, e.g.*, Fontainbleau Hotel v. Forty-Five Twenty-Five, Inc., 114 So. 2d 357 (Fla. Dist. Ct. App. 1959) (no negative prescriptive easement for light and air). While this Article is not focused on statutory relief, having a sacred site designated for protection under the National Historic Preservation Act may work as the functional equivalent of a negative easement—limiting the owner's ability to develop the site.

223. *See, e.g.*, Granite Properties Ltd. P'ship v. Manns, 512 N.E.2d 1230 (Ill. 1987) (enjoining servient owner from interfering with easement implied by prior use); Finn v. Williams, 33 N.E.2d 226 (Ill. 1941) (preventing servient owner from denying existence of easement by necessity); Cmty. Feed Store, Inc. v. Ne. Culvert Corp., 559 A.2d 1068 (Vt. 1989) (declaring existence of easement by prescription where servient owner attempted to bar access).

224. *See* SINGER, *supra* note 201, at 217–23.

225. *See* Cox v. Glenbrook Co., 371 P.2d 647 (Nev. 1962).

226. *See* Green v. Lupo, 647 P.2d 51 (Wash. Ct. App. 1982).

The limits on the enforceability of easements illuminate some of the challenges associated with using common law property doctrines in Indian sacred sites cases. Recently, for example, some courts have allowed the owner of the servient parcel to relocate the easement without the consent of the easement holder, although the traditional common law rule did not permit unilateral relocation.[227] If the easement is for the use of a particular place that is sacred to Indians, providing access to another location of the owner's choosing may not meet the Indians' religious needs. An additional limitation is that typically only individuals can obtain prescriptive easements, which may be problematic in many cases where the tribe itself, as opposed to individual Indian religious practitioners, seeks to establish a right to use the sacred site.[228] As Dean Worthen has argued, "sacred sites claims of Native Americans do not always fit neatly into the categories recognized by traditional U.S. property law."[229] Professor Joseph Singer goes further arguing that common law property doctrines are not "neutral" but were "explicitly intended to exclude American Indian claims to land and to justify settlement of the New World and dispossession of its inhabitants."[230] Still, some courts have recognized common law entitlements in cases involving indigenous patterns of land use.[231] Thus, the advocate has a delicate role. She should consider raising common law property claims in the narrow set of cases where they are available. But must be careful to present any such argument in a way that does not allow Anglo American categories to diminish further or change the character of indigenous land use patterns.[232]

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227. *See* SINGER, *supra* note 201, at 222–23 (and cases cited therein).

228. *See, e.g.*, Dep't of Natural Resources v. Mayor & City Council, 332 A.2d 630 (Md. Ct. App. 1975) (rejecting the argument that the public could acquire an easement by prescription).

229. *See* Worthen, *supra* note 14, at 249.

230. Joseph William Singer, *Property and Coercion in Federal Indian Law*, 63 S. CAL. L. REV. 1821, 1836 (1990) (critiquing the notion that property rights are "neutral").

231. *See id.*; *cf.* Nome 2000 v. Fagerstrom, 799 P.2d 304 (Alaska 1990) (establishing Alaska Native possessory rights to seasonal subsistence site through the doctrine of adverse possession); *see also* Grantland M. Clapacs, Note, *"When in Nome . . .": Custom, Culture and the Objective Standard in Alaskan Adverse Possession Law*, 11 ALASKA L. REV. 301 (1994).

232. One scholar suggests a specialized approach, combining the common law doctrine of estoppel with First Amendment law, in a way that reflects American Indian historical experience. *See* Gordon, *supra* note 2, at 1466–67 n.90. Gordon states:

> The free exercise clause provides constitutional relief from development, the argument runs, where native worship predates European settlement or extinguishment of aboriginal title. Even where Indian religious practices at sacred sites began after installation on reservations, the government should be estopped from denying the application of the free exercise clause where the tribal presence is the result of unwilling migration or treaty compliance.

Id.

In addition, the common law property arguments raised above are usually applied by *state* courts in *private* lands disputes.[233] If Indian nations try to use them in federal public lands cases, they will need to research the applicability of the particular doctrine in a federal forum. For example, prescriptive easement and adverse possession claims typically are not actionable against governments, but there is a narrow statutory exception to this rule, allowing certain claims against the federal government.[234] Further, courts have recognized the possibility of establishing implied easements on federal public lands.[235]

If an easement is deemed enforceable, various remedies may be available. Indian nations might seek a declaratory judgment of their ongoing right to use the property. They may also be able to seek monetary damages, even though, as Professor John P. LaVelle has persuasively shown, monetary compensation is not an adequate remedy for discontinued access to a unique sacred site.[236] The spiritual and cultural relationships, community vitality, and religious experience associated with sacred sites cannot be bought. But the law of easements also affords various equitable remedies that may help to prevent interference with access to scared sites.[237] In cases

233. *See* Lake Pleasant Group v. United States, 32 Fed. Cl. 429 (1994) (considering an easement by necessity argument with respect to state trust lands).

234. 43 U.S.C. § 1068 (2000) (allowing or requiring the Secretary of the Interior to issue a patent to a tract of public land, up to 160 acres, where claimant proves certain elements); *see also* SINGER, *supra* note 221, at 221 (stating that the law is becoming more amenable to adverse possession claims against governments (citing Paula R. Latovick, *Adverse Possession Against the States: The Hornbooks Have It Wrong*, 29 U. MICH. J.L. REFORM 939 (1996) and several state statutes)).

235. *E.g.*, Kinscherff v. United States, 586 F.2d 159 (10th Cir. 1978) (finding that the party stated a claim regarding the existence of an easement by necessity to cross public lands); United States v. Dunn, 478 F.2d 443 (9th Cir. 1973) (reversing summary judgment on the issue of whether defendants had an easement to cross public lands).

236. *See* John P. LaVelle, *Rescuing* Paha Sapa: *Achieving Environmental Justice by Restoring the Great Grasslands and Returning the Sacred Black Hills to the Great Sioux Nation*, 5 GREAT PLAINS NAT. RESOURCES J. 40, 64–69 (2001) (amassing powerful testimony in support of the contention that an award of monetary compensation for the taking of the Black Hills "failed to deliver justice to the Great Sioux Nation"); *see also* Richard Pemberton, *'I Saw That It Was Holy': The Black Hills and the Concept of Sacred Land*, 3 LAW & INEQ. 287 (1985). In some rare instances, perhaps, tribes can use monetary awards to reacquire sacred sites or invest in cultural revitalization programs. Vine Deloria perhaps implies that monetary awards should be used carefully when he says, about the Black Hills case, that "The purpose of the suit was to regain as much of the sacred land as possible and a money award, while distasteful, is still a means to that goal. Per capita distribution and the subsequent expenditure of over $100 million on consumer goods, however, would be a clear signal that the Sioux people have adopted the white man's wasteful ways." *Id.* at 304 (citing Vine Deloria, Jr., L.A. TIMES, June 25, 1980, *in* PETER MATTHIESSEN, IN THE SPIRIT OF CRAZY HORSE 606 (1983)).

237. *See, e.g.*, Page v. Bloom, 584 N.E.2d 813 (Ill. App. Ct. 1991) (enjoining servient landowner's interference with prescriptive easement); *see also supra* note 203 and accompanying text.

where interference with Indian rights will case "irreparable harm," courts may grant injunctive relief against harmful practices at sacred sites.[238]

When the federal government interferes with a property interest, as opposed to a private owner like Platt, Indians may also have a takings claim. The oft-stated rule is that "when the government physically takes possession of an interest in property for some public purpose, it has a categorical duty under the Takings Clause to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof."[239] As a general matter, easements are real property interests cognizable under the Constitution and therefore compensable under the Takings Clause.[240] Beyond the Indian law context, there is political and scholarly interest in the question of what, if any, private property interests held in federal public lands will be held compensable under the Takings Clause. Parties have been successful in Takings Claims for specialized property interests in public lands like grazing permits, mining claims, and water rights.[241]

238. *See* Deeper Life Christian Fellowship v. Bd. of Educ., 852 F.2d 676 (2d Cir. 1988) (granting church's request for a preliminary injunction where school board had denied permit to use public school facilities during nonschool hours for religious services); *cf.* Steven Sutton, Greater Yellowstone Coalition v. Flowers: *Clearing the Irreparable Harm Hurdle in the Tenth Circuit to Protect Yellowstone Bald Eagles*, 15 VILL. ENVTL. L.J. 435, 445–58 (2004) (irreparable harm in a species protection case).

239. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 (2002) ("The Court's jurisprudence involving condemnations and physical takings involves the straightforward application of *per se* rules, . . . while its regulatory takings jurisprudence . . . is characterized by essentially ad hoc, factual inquiries designed to allow careful examination and weighing of all relevant circumstances.").

240. *See* First Unitarian Church v. Salt Lake City Corp., 308 F.3d 1114, 1122 (10th Cir. 2002) (holding that government condemnations of easements are takings under the Fifth Amendment and entitle the holder to compensation); United States v. 10.0 Acres, 533 F.2d 1092 (9th Cir. 1976) (stating that exclusive easement was a property right subject to a takings claim when government purchased servient property); Donnell v. United States, 834 F. Supp. 19 (D. Me. 1993) (holding that easements are property interests subject to strictures of the Fifth Amendment). Other servitudes may also be compensable. *See* Daniels v. Area Plan Comm'n, 306 F.3d 445 (7th Cir. 2002) (stating that under Indiana law, a restrictive covenant constitutes a constitutionally protected property interest and may only be taken for a public purpose).

241. *See* United States v. N. Am. Trans. & Trading Co., 253 U.S. 330 (1920) (holding an unpatented mining claim is property compensable under the Fifth Amendment); *see also* Turntable Fishery & Moorage Corp. v. United States, 52 Fed. Cl. 256 (2002) (holding that a boat club had a compensable property interest under the Fifth Amendment in structures and improvements it constructed on federal land pursuant to a special use permit expressly providing for compensation "in the event public interest requires public ownership thereof"). *But see* Hage v. United States, 51 Fed. Cl. 570 (2002) (holding that ranch owners did not hold a valid property interest in grazing permits which could be the basis of a takings claim); Holden v. United States, 38 Fed. Cl. 732 (1997) (holding that absent determination as to validity, mining claims did not constitute compensable property interest so holders did not state a takings claim with respect to mining claims that were located within a closed area of public land); White Sands Ranchers v. United States, 16 Cl. Ct. 13 (1988) (considering takings claims of ranchers whose grazing privileges were taken for purpose of establishing a missile range).

By asserting a compensable property interest such as an easement, an Indian nation should have the opportunity to seek judicial review of the government's taking. The Fifth Amendment imposes two conditions on the exercise of the government's eminent domain powers: (1) the taking must be for a public purpose, and (2) just compensation must be paid to the owner.[242] The question of whether a specific project developing federal public lands would constitute a "public purpose" is an inquiry for another day, but at least Indian nations would have the opportunity to raise such questions in a legal forum.[243]

This is a different scenario than the one in *Lyng*, where the government had no need to recognize any specific Indian interest in using a sacred site (aside from the barest allusion to equal protection). The government will have to appear in court, justify its condemnation of the property interest, and perhaps pay the Indian nation just compensation.[244] Although damages cannot meaningfully compensate for the loss of a sacred site, such awards may deter the government from future actions. Perhaps the government will decide that a future project does not merit paying compensation to the Indian nation and decide against disturbing the sacred site. It may decide to negotiate an amended land use plan that accommodates the Indian property interest. In some cases, it will probably still go ahead with the project, and pay just compensation; this will usually be an unsatisfactory result, and rarely "just" in any indigenous sense of the word, given that sacred sites cannot be valued in monetary terms.[245]

The particular result will of course depend heavily on the facts of the case. But, if an Indian nation can establish a common law property right such as an easement, it will generally be in a more powerful position to litigate or negotiate usage of sacred sites on federal lands than were the plaintiffs in *Lyng*.

B. The Federal Indian Law Context

The above subpart analyzed sacred sites cases in terms of common law property claims that *any* nonowner might consider when he or she wants to

242. *See* Brown v. Legal Found. of Wash., 538 U.S. 216, 231–32 (2003).

243. Admittedly, the threshold for determining a "public purpose" is so low that it may not prove much of a barrier for the federal government, *see* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984), but the U.S. Supreme Court may revisit this standard in several cases this term, *see, e.g.*, Chevron USA, Inc. v. Bronster, 363 F.3d 846 (9th Cir. 2004), *cert. granted*, 125 S. Ct. 314 (2004); *see also* Micah Elazar, *"Public Use" and the Justification of Takings*, 7 U. PA. J. CONST. L. 249 (2004).

244. *See Haw. Hous. Auth.*, 467 U.S. 229 (holding that the Fifth Amendment does not prohibit the State of Hawaii from taking, with just compensation, title in real property from native Hawaiian lessors and transferring it to lessees in program to reduce concentration of fee simple ownership).

245. See LaVelle, *supra* note 236 and sources cited therein.

establish a right to use property owned by someone else. However, the sacred sites cases implicate rights and responsibilities beyond such generic common law property doctrine. Because the nonowners in these cases are members of federally recognized Indian nations and the owner is the federal government, sacred sites cases must also be examined in the context of federal Indian law.[246] This body of law governs the centuries-old relationship between Indian nations and the United States, and it gives rise to particularized property rights and responsibilities beyond the common law doctrines described above. In particular, treaties, the federal Indian trust doctrine, and tribal law may all be sources of Indian rights and federal responsibilities at sacred sites on public lands.[247]

1. Treaties

Between 1789 and 1871, the United States and Indian nations negotiated and executed hundreds of treaties. In most instances, tribes agreed to cede huge tracts of land in exchange for the federal government's promise that it would protect tribal government, culture, and lifestyles on the smaller tracts of retained lands.[248] In addition to setting aside these "reservations," treaties reserved other tribal property rights, including rights to use lands outside of reservations.[249] While these off-reservation "use" rights have been thoroughly analyzed and litigated in the hunting and fishing context,[250] they may also be helpful in some sacred sites cases.[251] More specifically, Indian nations might argue that, when they ceded possession of traditional lands to the government, they reserved the right to use these lands for religious and cultural purposes.

246. *See generally* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (Rennard Strickland et al. eds., 1982).

247. Another line of argument might be that Indians retain use rights based on aboriginal title. *See, e.g.*, Ragsdale, *supra* note 14, at 363–64 (regarding individual aboriginal title claims in sacred sites cases). The viability of aboriginal title claims will be considered in a subsequent article on recovering ownership of (versus use rights to) sacred sites.

248. *See generally* VINE DELORIA, JR., BEHIND THE TRAIL OF BROKEN TREATIES (1974); ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW & PEACE, 1600–1800 (1997).

249. *See* JUDITH V. ROYSTER & MICHAEL C. BLUMM, NATIVE AMERICAN NATURAL RESOURCES LAW 490 (2002) (describing off-reservation usufructuary rights as property rights).

250. *See, e.g.*, COHEN, *supra* note 246, at 456–70.

251. Robert Charles Ward, *The Spirits Will Leave: Preventing the Desecration and Destruction of Native American Sacred Sites on Federal Land*, 19 ECOLOGY L.Q. 795, 822–23 (1992) (discussing treaty arguments in sacred sites cases); Worthen, *supra* note 14, at 250–51; *cf.* Tom I. Romero, *Uncertain Waters and Contested Lands: Excavating the Layers of Colorado's Legal Past*, 73 U. COLO. L. REV. 521, 570 (2002) (describing Mexican American rights of property, language, religion, and culture in Treaty of Guadalupe-Hidalgo).

Following a long line of precedents,[252] the Supreme Court has recently confirmed the ongoing vitality of off-reservation reserved treaty rights in contemporary circumstances. In *Minnesota v. Mille Lacs Band of Chippewa Indians*,[253] the Court upheld contemporary Indian rights to use aboriginal lands in Wisconsin and Minnesota even though the Indian nation had transferred title to these lands to the United States through an 1837 treaty. This treaty had reserved to the Chippewa "the privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded."[254]

Over the next 145 years, Chippewas continued to use the ceded lands according to the terms of the 1837 Treaty—despite an 1850 Executive Order purporting to revoke those rights, an 1855 Treaty ceding further lands in Minnesota, and an 1858 Act admitting Minnesota to the Union. The litigation arose in the 1990s when the Mille Lacs Band of Chippewas sought a declaratory judgment of their usufructuary rights under the 1837 treaty and an injunction preventing the State of Minnesota from interfering with those rights.[255]

The Supreme Court held that the Mille Lacs Band retained its treaty rights to use its aboriginal lands.[256] Despite all of the historical events that, in the state's view, had terminated these use rights, the Court held that they had never been terminated explicitly by Congress. Thus, *Mille Lacs* stands for the proposition that reserved treaty rights to use off-reservation lands remain unimpaired until Congress explicitly abrogates them. Such rights are not terminated by ambiguous or unauthorized federal actions.

An analogous argument is applicable in cases in which tribes want to use ceded aboriginal lands for ceremonial purposes. Where a treaty conveyed to the government fee simple title to lands encompassing Indian sacred sites, but reserved tribal rights to use the lands, the treaty should be interpreted as preserving a tribal religious use.

To make a successful treaty-based argument in sacred sites cases, however, tribes often will have to go one step further than the Chippewas did in *Mille Lacs*. It is a rare treaty that will mention *specifically* tribes' rights to use ceded territory for religious or ceremonial purposes. Treaties more often reserve the

252. *See* United States v. Winans, 198 U.S. 371 (1905) (upholding the right of Yakima fishermen to take salmon at off-reservation locations along the Columbia River pursuant to an express reservation of fishing rights in the Yakima Treaty); *see also* Menominee Tribe v. United States, 391 U.S. 404, 412–13 (1968) (holding that treaty-guaranteed hunting and fishing rights survived the Termination Act's extension of state law to former reservation lands).

253. 526 U.S. 172 (1999).

254. *Id.* at 177 (citing Treaty with the Chippewa, July 29, 1837, art. 5, 7 Stat. 536, 537).

255. *Id.* at 172.

256. *Id.* at 195–97.

right to use land for hunting, fishing, gathering, or subsistence purposes. Even though the treaty may not use the words "religion" or "ceremony," however, tribes may still have legitimate reserved rights claims.[257] As Justice O'Connor explained in *Mille Lacs*, the Court's reading of treaties is guided by certain canons of construction. Under these "Indian canons," courts are to interpret treaties as the Indians would have understood them, liberally in favor of the Indians, and as preserving Indian rights.[258]

The judicial development of the Indian canons supports their application to sacred sites cases. In *Worcester v. Georgia*, Chief Justice Marshall held that treaty language reserving land to the Cherokee Nation for a "hunting ground" should not be construed literally or narrowly. Rather, "the term 'hunting ground' should be construed as the Indians would have understood it—complete land possession and control—rather than as non-Indians would have—at most an exclusive license to hunt."[259] Marshall seems to have understood that, to the Cherokees, treaty language describing a "hunting ground" may have meant more than place to shoot deer. It may have meant a homeland where the Cherokee people could continue to live and govern themselves, a place apart where they could maintain their own culture. Given the circumstances of the treaty negotiations, Marshall interpreted the treaty liberally in favor of the Indians' reserved property and sovereignty rights.[260]

Admittedly, off-reservation rights are construed more narrowly than the on-reservation rights described in *Worcester*.[261] But, in cases where tribes have explicitly reserved off-reservation use rights, courts are still called on to

257. *See* H. Scott Althouse, *Idaho Nibbles at Montana: Carving out a Third Exception for Tribal Jurisdiction Over Environmental and Natural Resource Management*, 31 ENVTL. L. 721, 745 (2001) ("[E]ven for those tribes that did not bargain for off-reservation usufructuary rights, the Court applies the liberal canons of Indian treaty construction to create the implied reservation-of-rights doctrine set forth in *United States v. Winters*[, 207 U.S. 564 (1908)].").

258. *See* Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time is That?*, 63 CAL. L. REV. 601, 623–34 (1975) (describing the Indian canons of construction).

259. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 400 (1993).

260. *See id.* at 396–402 (describing that the United States had the upper hand in negotiations which were conducted in English (not Cherokee) and, as the owners and proprietors of the land, the Indians would have no reason to understand the treaty as a grant of rights *from* the United States. Rather, the Cherokee Nation would understand that they were making a limited grant of its own property and governance rights *to* the United States).

261. *See* Jana L. Walker & Susan M. Williams, *Indian Reserved Water Rights*, NAT. RESOURCES & ENV'T, Spring 1991, at 6, 6 ("With respect to off-reservation areas, a treaty effects a total cession unless the treaty explicitly reserves rights in the ceded area, such as hunting and fishing. Conversely, for on-reservation areas, tribes reserve all original rights except those expressly ceded by the treaty.").

determine the ongoing existence and scope of these rights,[262] and the Indian canons guide such decisions.[263] The federal promise that a tribe would have a continued right to use its traditional lands was often a key factor inducing tribes to convey title to the United States. As Michael Blumm has argued in the context of Northwestern tribes, the right to fish was so important that tribes relinquished most of their traditional territories in exchange for small homelands and the right to fish.[264] To tribal peoples, these off-reservation activities were inextricably linked to certain lands. For example, while Northwestern tribes "agreed to share access to the fish resource, they wanted to retain their property rights to their traditional fishing *places* regardless of land ownership."[265]

Moreover, in the eighteenth and nineteenth centuries, tribal negotiators would probably have expected that a right to hunt, fish, and gather on traditional lands would include a right to use the property for activities that often went hand in hand with subsistence activities—even if they were unstated in the treaty. These might include the right to be on the land, to move across it, to set up lodging, to sleep at night, to drink from water sources, to clean and prepare the fish and game they caught, to be with their relatives, and to give thanks for the food. Many tribes might also have understood that they had the right to conduct the ceremonies that were interwoven with hunting, fishing, and gathering.[266] As a Hoopa woman testified before Congress in 1954:

> To most people, hunting and fishing is [sic] a sport. To the American Indian it is part of a religious custom. . . . [E]ven the taking of food was a religious sacrament in a way, particular [sic] in regard to the hunting of deer. We had a set custom that we followed in the conserving of it and the way we used the meat and our sharing it with others and so forth.[267]

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262. United States v. Washington, 384 F. Supp. 312, 343 (W.D. Wash. 1974) (determining that the treaty phrase "the right to take fish . . . in common with all citizens of the Territory," meant that tribal fisherman had the treaty right to take up to 50 percent of the harvestable amount of fish at off-reservation locations).

263. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 193–200 (1999).

264. Michael C. Blumm & Brett M. Swift, *The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. COLO. L. REV. 407, 429 (1998).

265. *Id.* at 432–33 (emphasis added).

266. *See* Shelley D. Turner, *The Native American's Right to Hunt and Fish: An Overview of the Aboriginal Spiritual and Mystical Belief System, the Effect of European Contact, and the Continuing Fight to Observe a Way of Life*, 19 N.M. L. REV. 377, 393–422 (1989) (cultural significance of hunting and fishing for Indian peoples); *see also* Nicole Adams, *The Wenatchapam Fishery: The Lost Reservation of the Wenatchi Indians*, WINDS OF CHANGE, Summer 2004, at 24, 24 (providing a contemporary story of the interrelationship between land, fishing, tribal members, and ceremony—where tribal property rights have been lost).

267. *Hearing on H.R. 7322 and S. 2749 Before the Joint Subcomm. on Indian Affairs*, 83d Cong. 453 (1954) (cited in Dorothea Theodoratus, *Cultural Resources of the Chimney Rock Section*,

It may be helpful to examine such claims in the context of actual treaty language. For example, an 1803 treaty with the Kaskaskia provided: "As long as the lands which have been ceded by this treaty shall continue to be the property of the United States, the said tribe shall have the privilege of living and hunting upon them in the same manner that they have hitherto done."[268] An 1831 treaty with the Menominee Nation provided:

> The Menomonee [sic] tribe of Indians shall be at liberty to hunt and fish on the lands they have now ceded to the United States, on the east side of Fox river and Green bay, *with the same privileges they at present enjoy*, until it be surveyed and offered for sale by the President; they conducting themselves peaceably and orderly.[269]

Both articulations of tribal rights to use ceded lands are relatively broad. They could be fairly understood by tribal people to include rights to use their traditional lands as they always had, including for religious or cultural purposes. On the other side of the negotiations, the federal government was, in some instances, aware of broad tribal uses of off-reservation lands. When it became displeased with such uses, the government was fully capable of terminating such rights.[270]

While every treaty's terms were different, Indians often reserved rights to use land off the reservation, and the government promised to protect these use rights.[271] The off-reservation rights typically persisted so long as the United States

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Gasquet-Orleans in Lyng v. Northwest Indian Cemetery Protection Ass'n, *in* READINGS IN AMERICAN INDIAN LAW, *supra* note 214, at 302, 302).

268. Treaty with the Kaskaskia, Aug. 13, 1803, art. 6, 7 Stat. 78.

269. Treaty with the Menomonies, Feb. 8, 1831, art. 6, 7 Stat. 342, 345 (emphasis added).

270. *See, e.g.*, Treaty with the Middle Oregons, Nov. 15, 1865, art. 1, 14 Stat. 751. The treaty states:

> It having become evident from experience that the provision of [a previous treaty] which permits said confederated tribes to fish, hunt, gather berries and roots, pasture stock, and erect houses on lands outside the reservation, and which have been ceded to the United States, is often abused by the Indians to the extent of continuously residing away from the reservation, and is detrimental to the interests of both Indians and whites; therefore it is hereby stipulated and agreed that . . . the right to take fish, erect houses, hunt game, gather roots and berries, and pasture animals upon lands without the reservation set apart by the treaty aforesaid are hereby relinquished by the confederated Indian tribes and bands of Middle Oregon, parties to this treaty.

Id.

271. *See, e.g.*, Conference Between the United States of America and the Sioux Nation of Indians, Sept. 23, 1805, art. 3, *reprinted in* LAWS OF THE UNITED STATES RELATING TO INDIAN AFFAIRS, 1883, at 316 (never proclaimed by the President) ("The United States promise[s] . . . to permit the Sioux to pass, repass, hunt or make other uses of the said [ceded] districts, as they have formerly done, without any other exception, but those specified in article first."); *see also* Treaty with the Osages, Nov. 10, 1808, art. 8, 7 Stat. 107 ("And the United States agree that such of the Great and Little Osage Indians . . . shall be permitted to live and to hunt, without molestation, on all that tract of country, west of the north and south boundary line, on which they . . . have usually hunted

maintained ownership of the ceded lands, the tribes maintained peaceful relations with the United States, or game remained available.[272] Indians therefore may have understood that they retained an enduring and broad right to use ceded lands. Particularly in cultures in which ceremonies are linked to hunting

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or resided."); Treaty with the Chippewas, Sept. 24, 1819, art. 5, 7 Stat. 203–06. The Chippewa treaty provides:

> The stipulation contained in [an earlier treaty], relative to the right of the Indians to hunt upon the land ceded, while it continues the property of the United States, shall apply to this treaty; and the Indians shall, for the same term, enjoy the privilege of making sugar upon the same land, committing no unnecessary waste upon the trees.

Id. at 204; Treaty with the Chippewas, Etc., July 29, 1829, art. 7, 7 Stat. 320, 322 ("The right to hunt on the lands herein ceded, so long as the same shall remain the property of the United States, is hereby secured to the nations who are parties to this treaty."); Treaty with the Chippewas, Sept. 30, 1854, art. 11, 10 Stat. 219, 221 ("[T]he Indians shall not be required to remove from the homes hereby set apart for them. And such of them as reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President."); Treaty with the Crow Indians, May 7, 1868, art. 4, 15 Stat. 649. The Crow Indian treaty provides:

> The Indians herein named agree, when the agency house and other buildings shall be constructed on the reservation named, they will make said reservation their permanent home, and they will make no permanent settlement elsewhere, but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts.

Id.; Treaty with the Blackfoot Indians, Oct. 17, 1855, art. 3, 11 Stat. 657, 658. The Blackfoot treaty provides:

> The Blackfoot Nation consent and agree that all that portion of the country recognized and defined by the treaty of Laramie as Blackfoot territory . . . shall be a common hunting-ground for ninety-nine years, where all the nations, tribes and bands of Indians, parties to this treaty, may enjoy equal and uninterrupted privileges of hunting, fishing and gathering fruit, grazing animals, curing meat and dressing robes. They further agree that they will not establish villages, or in any other way exercise exclusive rights within ten miles of the northern line of the common hunting-ground, and that the parties to this treaty may hunt on said northern boundary line and within ten miles thereof.

Id.

272. *See, e.g.*, Treaty with the Ottawas, Aug. 24. 1816, art. 1, 7 Stat. 146, 147 ("[T]he said tribes shall be permitted to hunt and to fish within the limits of the land hereby relinquished and ceded, so long as it may continue to be the property of the United States."); Treaty with the Northern Cheyenne and Northern Arapahoe, May 10, 1868, art. 2, 15 Stat. 655 ("[T]he Northern Cheyenne and Arapahoe Indians do hereby relinquish, release, and surrender to the United States all right, claim, and interest in and to all territory outside the two reservations above mentioned, except the right to roam and hunt while game shall be found in sufficient quantities . . . ."); Treaty with the Quapaws, Aug. 24, 1818, art. 3, 7 Stat. 176, 177 ("[T]he individuals of the . . . tribe . . . shall be at liberty to hunt within the territory by them ceded to the United States, without hindrance or molestation, so long as they demean themselves peaceably, and offer no injury or annoyance to any of the citizens of the United States . . . ."); Treaty with the Wyandots, Etc., July 4, 1805, art. 6, 7 Stat. 87, 88 ("The said Indian nations, parties to this treaty, shall be at liberty to fish and hunt within the territory and lands which they have now ceded to the United States, so long as they shall demean themselves peaceably.").

and subsistence activities, Indian nations may be able to argue that they retain a treaty right to use their traditional lands for cultural and religious purposes.[273]

In actions against states and private parties, treaty rights are enforceable property interests that give rise to declaratory, injunctive, and monetary relief.[274] As with the enforcement of common law property rights, tribes will have to examine carefully the availability of specific claims against the federal government. Tribes may also sue the federal government for the taking of treaty rights under the Fifth Amendment, although the law departs from classic takings analysis in that the government may be able to defeat an Indian claim for just compensation by showing of "good faith" in its treatment of Indian property.[275] Even "successful" cases for government takings of Indian treaty rights typically result only in awards of monetary damages.[276] As described in the discussion of common law remedies, here too, monetary awards almost always fail to restore the losses that Indian nations and peoples suffer from the taking of their sacred sites.[277] For this reason, some advocates seek more comprehensive redress of sacred sites violations through legislation, administrative, and other legal processes.[278] Outside of litigation, treaty-based

273. Tribes will have a more difficult argument, perhaps, in instances where the government used treaties to promote tribes' adoption of Christianity as part of a larger effort to stamp out tribal religions, suggesting that the federal negotiators did not intend for Indians to maintain their own religions and cultures. *See, e.g.*, Treaty with the Kaskaskia, Aug. 13, 1803, art. 3, 7 Stat. 78 (allocating federal funds for a Catholic priest and Church).

274. *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) (awarding declaratory and injunctive relief in favor of Indian off-reservation use rights); *see also* Shelby D. Green, *Specific Relief for Ancient Deprivations of Property*, 36 AKRON L. REV. 245 (2003) (remedies for treaty violations).

275. *See, e.g.*, United States v. Sioux Nation, 448 U.S. 371 (1980) (awarding compensation for the government's taking of the Black Hills, reserved to the Sioux Nation by treaty); *see also* Nell Jessup Newton, *Compensation, Reparations, & Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453 (1994) (discussing the Indian Claims Commission Act, authorizing lawsuits against the United States for the redress of Indian claims, including treaty-based claims); Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753 (1992); Nell Jessup Newton, *The Judicial Role in Fifth Amendment Takings of Indian Land: An Analysis of the Sioux Nation Rule*, 61 OR. L. REV. 245, 250 (1982).

276. *See* Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 81–82 (1996).

277. *See supra* note 236.

278. *See, e.g.*, Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 205 (2001) (describing the legislative restoration of Blue Lake to Taos Pueblo and Kaho'olawe to the Native Hawaiian people); LaVelle, *supra* note 236 (calling for environmental restoration and land reform—including a management role for Sioux tribes—in the Black Hills); Yablon, *supra* note 12, at 1629 (on agency accommodation of sacred site usage); Sandra B. Zellmer, *Sustaining Geographies of Hope: Cultural Resources on Public Lands*, 73 U. COLO. L. REV. 413, 417 (2002) (outlining "constitutional principles, statutory requirements, and federal policy governing the use and preservation of cultural resources").

claims bolster tribal arguments that federal parties should fulfill their historic obligations to recognize tribal property rights, including off-reservation use rights. If tribes do not have a treaty with the United States, it may be appropriate to examine Congressional legislation or Executive Orders for such retained usufructuary rights.[279]

2. The Federal Indian Trust Doctrine

The federal Indian trust doctrine provides another potential source of Indian property rights and federal obligations at federally owned sacred sites.[280] First recognized by the Supreme Court in the 1831 case of *Cherokee Nation v. Georgia*,[281] the federal trust doctrine grows out of the historical relations between Indian nations and the United States[282] and requires special solicitude toward Indian rights.[283] The Supreme Court explained in *Seminole Nation v. United States*[284] that when the government entered into treaties with Indian nations to acquire their land, it also "charged itself with moral obligations of the highest responsibility and trust."[285] The government's trust duty is to protect Indian peoples, assets, and resources with "the most exacting fiduciary standards," through "policy decisions and management actions."[286] Tribes can argue that ensuring access to off-reservation sacred sites, and protecting the

279. Of potential relevance to the *Lyng* case, see, for example, Amy C. Brann, Comment, Karuk Tribe of California v. United States: *The Courts Need a History Lesson*, 37 NEW ENG. L. REV. 743 (2003), explaining that although eighteen treaties were negotiated with California Indian tribes, the Senate refused to ratify them, instead passing the Act of April 8, 1864, authorizing the creation of four reservations in California to accommodate all of the Indians of the state. *See also* ROYSTER & BLUMM, *supra* note 249, at 79–80 (stating that after Congress extinguished Native aboriginal title in Alaska, it enacted the Alaska National Interest Conservation Act, establishing a federal priority for subsistence activities on public lands, recognizing that such activities were "essential to Native physical, economic, traditional and social existence").

280. *See* Mary Christina Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies*, 39 TULSA L. REV. 355, 358 (2003) (describing the federal Indian trust duty as a "property law concept").

281. 30 U.S. (5 Pet.) 1 (1831).

282. *Id.* at 17.

283. *See* United States v. Mitchell, 463 U.S. 206, 225 (1983).

284. 316 U.S. 286 (1942).

285. *Id.* at 297.

286. DAVID E. WILKINS & K. TSIANINA LOMAWAIMA, UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW 65 (2001).

physical integrity of those sites,[287] is essential to fulfilling the government's trust duty to Indian nations.[288]

Mary Christina Wood has identified a number of cases in which Indians have successfully used the trust responsibility to claim that federal land managers must protect Indian off-reservation resources.[289] In *Klamath Tribes v. United States*,[290] Klamath Tribes challenged timber sales on U.S. Forest lands that served as a habitat for mule deer, on which the Klamaths depended for their "subsistence and way of life."[291] The Klamath Tribes argued that, in deciding to allow logging without consulting the tribes, the Forest Service had breached its trust responsibility to ensure that the former reservation lands are managed so as to protect the tribes' treaty rights. The district court agreed, finding the government had a "substantive duty to protect 'to the fullest extent possible' the Tribes' treaty rights, and the resources on which those rights depend."[292]

Similarly, in *Pyramid Lake Paiute Tribe v. Morton*,[293] a federal district court held that the Secretary of Interior's decision to divert water away from a tribal lake and fishery violated the trust responsibility.[294] In *Northern Cheyenne Tribe v. Hodel*,[295] another federal district court rejected a Bureau of Land Management proposal to lease federal lands for coal development near the Northern Cheyenne reservation because of the adverse environmental, social, and economic effects on the tribe.[296] The court stated: "[A] federal agency's trust obligation to a tribe extends to actions it takes off a reservation which uniquely impact tribal members or property on a reservation."[297] Importantly, these cases provide that the federal trust duty to Indians applies even when the government is faced with competing interests such as energy development or agriculture.

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287. *See generally* Ward, *supra* note 251, at 821; Jeri Beth K. Ezra, Comment, *The Trust Doctrine: A Source of Protection for Native American Sacred Sites*, 38 CATH. U. L. REV. 705 (1989).

288. *See* Wood, *supra* note 280, at 356–57 ("In exchange for receiving Indian lands, the government would protect tribes on their retained lands, or reservations, and in some cases would extend protection to traditional uses on off-reservation lands.").

289. *Id.* at 362–63 (discussing claims of injunctive relief against federal agencies for violating federal Indian trust responsibility); *see also* Adele Fine, Comment, *Off-Reservation Enforcement of the Federal-Indian Trust Responsibility*, 7 PUB. LAND L. REV. 117 (1986) (assessing enforcement of trust responsibility, especially concerning "the preservation of Indian culture").

290. No. 96-381-HA, 1996 WL 924509 (D. Or. Oct. 2, 1996).

291. Wood, *supra* note 280, at 362 (citing *Klamath Tribes*, 1996 WL 924509, at *7–*10).

292. *Id.* (quoting *Klamath Tribes*, 1996 WL 924509, at *8).

293. 354 F. Supp. 252 (D.D.C. 1972).

294. *Id.* at 258.

295. 12 Indian L. Rptr. 3065 (D. Mont. May 28, 1985).

296. *Id.* at 3071, 3074.

297. *Id.*

Like the Klamath deer habitat, waters of the Truckee River, and lands adjoining the Cheyenne Reservation, sacred sites located off the reservation are essential to community vitality and the wellbeing of Indian nations.[298] For this reason, the federal government's trust responsibility should encompass a duty to protect the physical integrity of sacred sites and American Indians' meaningful access to them. Fortunately, there is already a process in place for ensuring that federal agencies meet their trust duties at sacred sites. The Executive Branch requires agencies to "consult" regularly with tribes on issues that affect them.[299] While this consultation requirement is primarily procedural in nature, President Clinton's Executive Order 13,007 offers specific content with respect to agency duties at sacred sites, requiring agencies 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."[300] It is true that the Executive Order confers no enforceable right, nor cause of action.[301] But, as the cases described above suggest, the federal Indian trust doctrine itself requires federal agencies to protect Indian resources. As the cases demonstrate, it is not enough for an agency to weigh all of the options equally and make a reasoned decision.[302] Rather, the government has the highest duty of care toward Indian nations and their resources.[303] Where, for example, a government agency faces a decision about whether to grant a mining license

298. *Cf. Protection of Native American Sacred Places as They Are Affected by Department of Defense Undertakings: Hearing Before the Senate Comm. on Indian Affairs*, 107th Cong. 33 (2002) [hereinafter *Hearing*] (statement of Malcolm B. Bowekaty, Governor of the Zuni Tribe) ("[T]he US Department of Interior has failed us in its obligations under existing law and trust responsibility to continue to protect this sacred lake and associated cultural resources from destruction.").

299. *E.g.*, Exec. Order No. 12,875, 3 C.F.R. 669 (1994) (reaffirming the federal government's responsibility to consult with tribes on a government-to-government basis before taking action on matters that may affect them); Exec. Order No. 13,084, 3 C.F.R. 150 (1999) (acknowledging burden on the federal government to initiate consultation with tribes on a government-to-government basis, and to defer to tribal laws by waiver); Exec. Order No. 13,175, 3 C.F.R. 304 (2001) (requiring each agency to have a consultation process in place, to establish regular and meaningful consultation with tribes, to respect treaty rights, and to grant wide discretion to tribes in self-governance).

300. Exec. Order No. 13,007, 3 C.F.R. 196 (1996) (accommodating access to and ceremonial use of Indian sacred sites by tribes to avoid adverse impacts to sites and maintain confidentiality).

301. *Id.* § 4.

302. *See* cases described *supra* notes 289–297.

303. *See, e.g.*, Secretary of the Interior Order No. 3215 (Apr. 28, 2000) (describing activities that constitute the proper discharge of the federal government's trust responsibilities to Indian tribes, including the appropriate management of natural resources within Indian Country; the exercise of a "high degree of care, skill and loyalty" to "protect and preserve Indian trust assets from loss, damage, unlawful alienation, waste and depletion"; and the protection of "treaty-based fishing, hunting, gathering, and similar rights of access and resource use on traditional tribal lands"), *available at* http://elips.doi.gov/elips/sec_orders/html_ orders/3215.htm.

on a tribal sacred site, the agency administrator cannot ignore its trust duties to the tribe out of a desire to accommodate other competing users or interests. Raising the trust argument proactively at the negotiating stage may effectively urge the federal administrator to weigh appropriately the tribal interests at stake. If the agency fails to take into account the trust duty at the decisionmaking phase, the tribe may sue for injunctive relief under the Administrative Procedure Act (APA), arguing that the agency decision was unlawful in its failure to fulfill the trust responsibility.[304]

Few judicial decisions have ruled on the merits of sacred sites claims based on the trust responsibility.[305] While certain arguments based on the trust relationship were raised in *Lyng* itself, they did not focus on the lands in question as a sacred site and were dismissed on procedural grounds.[306] At least one federal court, however, heard and rejected a tribal claim that the federal government violated its trust responsibility to protect sacred lands. In *Miccosukee Tribe of Indians v. United States*,[307] the tribe argued that that federal officials' decision not to attempt to prevent flooding of tribal lands, including lands where the Tribe grew corn for the Green Corn ceremony, violated the trust responsibility and other laws.[308] "[D]espite the general trust obligation of the United States to Native Americans," the court wrote, "the government assumes no specific duties to Indian tribes beyond those found in applicable statutes, regulations, treaties or other agreements."[309]

The *Miccosukee* holding should not, however, deter tribes from making trust arguments in sacred sites cases. *Miccosukee* misunderstands the enforceability problem by conflating requirements for breach of trust claims under two separate lines of cases. It is true that when tribes seek monetary damages for breach of trust claims pursuant to the Tucker Act,[310] they must base their

304. *See* Wood, *supra* note 280, at 362 (outlining the structure of the claim, and pointing out that "the tribal lawyer must argue that the agency is bound by the trust responsibility to use its discretion within [a particular] statutory regime to protect tribal interests unless doing so conflicts with the actual statutory language").

305. Some courts have considered trust responsibility arguments in cases involving other cultural resources. *See* N. Slope Borough v. Andrus, 642 F.2d 589, 612 (D.C. Cir. 1980) (rejecting tribal trust responsibility claim that the Secretary of the Interior's failure to preserve the bowhead whale in light of the impact of the potential disappearance of the whales on the traditional Inupiat culture on grounds that any duty the federal government had to protect the subsistence culture of the Inupiat Eskimos was satisfied by its compliance with the Endangered Species Act).

306. *See* Nw. Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 605 (N.D. Cal. 1983).

307. 980 F. Supp. 448 (S.D. Fla. 1997).

308. *Id.* at 460–63.

309. *Id.* at 461 (citing *Mitchell II* and the Tucker Act).

310. 28 U.S.C. §§ 1491, 1505 (2000).

claim on a statute or treaty that clearly articulates a trust duty.[311] But as Wood has demonstrated, this standard does not apply outside of the Tucker Act context—as in cases where tribes sue administrative agencies for equitable relief under the APA on grounds that an agency action unlawfully violated common law trust duties to tribes.[312] This is an important distinction in sacred sites cases because tribes typically do not seek damages, but rather want the government to take action to protect sacred sites.

3. Tribal Law and Custom Regarding Sacred Sites

Tribes' own laws and customs provide another source of Indian interests in sacred sites on public lands. For several reasons it is appropriate to look to tribal law and custom as a source of property law on sacred sites. First, if the aim is to facilitate legal solutions that ensure religious freedoms for American Indians, such solutions will only be meaningful if they incorporate tribal values. Tribally enacted legislation serves as a clear expression of those values, Second, courts[313] and scholars have generally accepted the role of "custom" in supporting citizens' interests in public lands. Third, preexisting land and property rights of indigenous peoples often survive the colonial process.[314] Although federal courts have not always recognized indigenous

311. *See* United States v. Navajo Nation, 537 U.S. 488, 505 (2003); United States v. Mitchell, 463 U.S. 206, 216 (1983); United States v. Mitchell, 445 U.S. 535, 538 (1980).

312. *See generally* Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975) (arguing that courts should enforce federal trust obligations to American Indians through traditional common law equitable remedies).

313. *See, e.g.*, Buford v. Houtz, 133 U.S. 320, 326 (1890) (recognizing custom as a source of rights to pasture cattle on public lands); Pub. Access Shoreline Haw. v. Haw. Planning Comm'n, 903 P.2d 1246 (Haw. 1995) (recognizing traditional and customary rights of native Hawaiians and that those rights may be practiced on public and private land); Knowles v. Dow, 22 N.H. 387 (1851) (recognizing custom as the source of town inhabitants' right to deposit seaweed on a private owner's close); Stevens v. Cannon Beach, 854 P.2d 449 (Or. 1993) (finding the public had a customary right of access to beachfront lands precluding private owners' takings claim).

314. *See* Federico M. Cheever, Comment, *A New Approach to Spanish and Mexican Land Grants and the Public Trust Doctrine: Defining the Property Interest Protected by the Treaty of Guadelupe-Hidalgo*, 33 UCLA L. REV. 1364, 1376 (1986) (describing "a basic precept of international law that upon the succession of sovereigns the law of the former sovereign remains in effect," the author argues it is "reasonable to draw upon Spanish and Mexican law to define the rights associated with Spanish and Mexican land grants [even though] in the years . . . following . . . conquest . . . United States courts ignored the rights and limitations the Mexican law imposed on pre-1846 land grants"); *see also* Yvette Trahan, Comment, The Richtersveld Community & Others v. Alexkor Ltd.: *Declaration of a "Right in Land" Through a "Customary Law Interest" Sets Stage for Introduction of Aboriginal Title Into South African Legal System*, 12 TUL. J. INT'L & COMP. L. 565 (2004) (discussing the "doctrine of continuity" in the South African property context).

property systems,[315] tribal law and custom remain available as a source of law on the treatment of sacred sites.[316]

Tribal law and custom also help to expose the limits of the ownership model and suggest alternatives to notions of absolute rights.[317] Irrespective of who *owns* a particular sacred place, indigenous peoples may have undeniable, ongoing relationships with it. As Rebecca Tsosie has explained: "The mere fact that the land is not held in Native title does not mean that the people do not hold these obligations, nor . . . that they no longer maintain the rights to these lands."[318] Even if a place has been desecrated, "a people's custodial responsibilities remain. No matter how damaged, the land retains its power and significance."[319] Indigenous customs and laws may challenge Anglo American property law to be more cognizant of the responsibilities and relationships that transcend ownership.

Any discussion of tribal law on sacred sites must acknowledge several challenges.[320] First, there exist among hundreds of tribes "different notions about the appropriate relationship and obligations people hold with respect to the land," and scholars must resist overgeneralization.[321] A related problem concerns the expropriation of tribal religious traditions by non-Indians, leaving many Indian people reluctant to share information with outsiders. Moreover, tribal custom may dictate that religious and cultural traditions be kept confidential among members, clans, societies, or practitioners within the

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315. *E.g.*, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 589–90 (1823). Chief Justice Marshall stated:

> Most usually, [conquered peoples] are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected. . . . Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired. . . . But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness.

Id.

316. *See generally* Angela R. Riley, *"Straight Stealing": Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69 (forthcoming 2005). *See also* Leeds, *supra* note 21, at 499 n.3 (noting that the Indian Land Consolidation Act of 1983 called for the application of tribal law in the probate context).

317. *See* GLENDON, *supra* note 15, at 176 ("We have much to learn from [N]ative Americans who have long known that there is a way in which the land owns us, even as we pretend to own the land, and that we ignore that fact at our own peril.").

318. Tsosie, *supra* note 177, at 1306.

319. Whitt et al., *supra* note 31, at 722.

320. *See* DELORIA, *supra* note 24, at 66–67. *See generally* Inés Hernández-Ávila, *Mediations of the Spirit: Native American Religious Traditions and the Ethics of Representation*, *in* NATIVE AMERICAN SPIRITUALITY 11 (Lee Irwin ed., 2000).

321. Tsosie, *supra* note 177, at 1306.

tribal community.[322] In some instances, however, Indian nations and practitioners have decided to share certain information about their traditional religions when it has seemed necessary in a legal struggle.[323] Yet, even when such decisions are made, problems of context and translation can make it difficult for indigenous peoples to share, and for courts to understand, information on sacred sites.[324]

This subpart aims to contribute to the development of legal strategy regarding sacred sites cases, while respecting indigenous expectations of privacy and cultural self-determination.[325] It identifies tribal legislative codes, customary law, and official statements expressing tribal expectations on sacred sites.[326] It further suggests how tribal law and custom on sacred sites can be used in cases in which tribes assert rights to such sites on federally owned lands.[327]

As Angela Riley has demonstrated, tribal councils have enacted legislation in the area of cultural resources protection.[328] A number of tribal codes pertain specifically to the protection of sacred sites.[329] These typically set forth tribal standards on the treatment of sacred sites and levy civil and criminal penalties for desecration. The Yankton Sioux tribal code, for example, prohibits the "desecration of Religious or Sacred Sites" providing that "any person who shall vandalize, injure, desecrate or destroy any property used for religious purposes or having religious or traditional importance to the Yankton Sioux

322. *See* Christopher H. Peters, *Postscript: Toward a Sacred Lands Policy Initiative*, *in* SACRED LANDS OF INDIAN AMERICA, *supra* note 3, at 131, 133.

323. *See, e.g.*, Theodoratus, *supra* note 267, at 302–11 (describing tribal participation in report on sacred sites in *Lyng* case); Peters, *supra* note 322, at 133 (describing the decision of Northwest tribes to survey national forest lands, and identify sacred areas for a confidential report accessible only by permission of the tribes).

324. See SACRED LANDS OF INDIAN AMERICA, *supra* note 3, at 18. In one telling example, Cha-das-ska-dum, a traditional Lummi practitioner giving testimony before the Washington State legislature, was asked "just what constituted a so-called sacred site." He answered, "Do you have time to listen to 132 songs?" *Id.*

325. *See* WILLIAMS, *supra* note 248, at 3–13 (advocating the study of indigenous legal traditions).

326. *See* Christine Zuni Cruz, *Tribal Law as Indigenous Social Reality and Separate Consciousness [Re]Incorporating Customs and Traditions Into Tribal Law*, 1 TRIBAL L.J. 1 (2000/2001), *at* http://tlj.unm.edu/articles/volume_1/zuni_cruz/index.php.

327. *Cf.* Jennifer Gingrich, Note, Buenig v. Hoopa Valley Tribe: *The Power Source of a Tribe Seeking to Achieve World Renewal and the Protection of Its Natural and Cultural Resources*, 33 ENVTL. L. 215, 216–17 (2003) (discussing the Hoopa Valley Tribe's attempt to use tribal law to "prohibit logging activities [around] its most sacred dance site").

328. Riley, *supra* note 316.

329. For a searchable database of a number of tribal codes and constitutions, see http://www.tribalresourcecenter.org/tribalcourts/codes/default.asp.

Tribe or its members shall be guilty of a Class A misdemeanor."[330] Other examples are found in the Pawnee,[331] White Mountain Apache,[332] Eastern Band of Cherokees,[333] and Absentee Shawnee[334] tribal codes. Some go beyond a narrow definition of "sacred site" and also protect ceremonial materials, sacred plants, and their habitats.[335] Few tribal codes expressly distinguish between sacred sites located on or off the reservation,[336] but in some instances tribal people have expressed their expectation that traditional values should govern treatment of sacred sites, irrespective of location.[337] Federal courts have already shown a

330. YANKTON SIOUX TRIBE CRIM. CODE ch. XLII, § 3-42-1 (1995), *at* http://www.tribalresourcecenter.org/ccfolder/yankton_tribalcode_3.htm.

331. PAWNEE TRIBE OF OKLA. LAW & ORDER CODE tit. VI, § 516 (1993), *at* http://www.tribalresourcecenter.org/ccfolder/pawnee_lawandordercode6.htm. The code section states:

> Desecration. (a) It shall be unlawful to purposely desecrate any public monument or structure; or to purposely desecrate a place of worship or burial, or other sacred place. (b) Desecrate means to deface, damage, pollute, destroy, take or otherwise physically mistreat in a way that the actor knows, or believes will outrage, the sensibilities of persons likely to observe or discover his action. (c) Desecration shall be punishable by a fine not to exceed Two Hundred Fifty Dollars ($250.00), or by a term of imprisonment in the tribal jail not to exceed three months, or both.

Id.

332. WHITE MOUNTAIN APACHE GOV'T CODE ch. 8 (1991) (designating religious sites within the White Mountain Apache Reservation for the use of practitioners of the traditional religion and providing civil and criminal penalties for desecration, including traditional Apache punishment), *at* http://www.tribalresourcecenter.org/ccfolder/wht_mtn_apache_tribalcode_government.html.

333. CODE OF THE E. BAND OF CHEROKEE INDIANS ch. 70, art. I, §70-1(a)–(b) (2001) ("The graves of Cherokee people and their ancestors are sacred and shall not be disturbed or excavated. . . . In the event skeletal remains of a Cherokee are excavated, such remains shall be reburied, together with all associated grave artifacts as soon as shall be reasonable [sic] possible."), *at* http://www.tribalresourcecenter.org/ccfolder/eccodech70preservation.htm.

334. ABSENTEE SHAWNEE TRIBE OF OKLA. TRIBAL CRIM. CODE § 516 (1994) ("It shall be unlawful to purposely desecrate any public monument or structure; or to purposely desecrate a place of worship or burial, or other sacred place"), *at* http://www.tribalresourcecenter.org/ccfolder/absentee_shawnee_tribalcode_crimoff.html.

335. *See* Riley, *supra* note 316.

336. *But see* CODE OF THE E. BAND OF CHEROKEE INDIANS ch. 70, art. I, § 70-1(c) (requiring that Cherokee human remains discovered *outside* of Cherokee trust lands must be reburied consistent with the Native American Graves and Repatriation Act), *at* http://www.tribalresourcecenter.org/ccfolder/eccodech70preservation.htm.

337. For instance, the White Mountain Apache Code does not reference specifically sacred sites located *outside* of the reservation, but leaders have expressed their view that tribal values pertain to those sites as well. In a well-known dispute, several universities are trying to put a huge telescope facility on a sacred Apache site, located on Mount Graham, on national forest lands in Arizona. Tribal Chairman Dallas Massey explained:

> Mount Graham (the mountains we refer to as *Dzil Nchaa Si'An*), is one of our holiest and most sacred mountains. Apache elders and cultural specialists have clearly and consistently advised all who have listened that this mountain should not be disturbed for research or commercial purposes. . . . If you are willing to understand the lessons from our culture and history then the University . . . will avoid any and all association with the telescope project, thus avoiding additional damages to Apache people, and Apache culture, and our sacred mountain.

willingness to apply tribal codes in cultural patrimony cases[338] and in sacred sites cases arising on the reservation.[339]

In addition to these examples of legislation, tribal leaders have also articulated tribal *custom* on the appropriate treatment of sacred sites. In one example, the sacred Zuni Salt Lake was threatened by the federal government's approval of a major power-development project that would put an 18,000 acre coal strip mine ten miles from the lake.[340] Zuni Governor Malcolm Bowekaty described the Lake in testimony to the Senate Select Committee on Indian Affairs:

> The Zuni Salt Lake is a sacred place. Located southeast of our Reservation in west central New Mexico, this saline lake is a unique geological feature and home to our *Ma'lokyattsik'i*, Salt Mother. For centuries, indigenous tribes from the Southwest have made pilgrimages to the Zuni Salt Lake to request spiritual guidance and rain, make offerings, and collect salt for ceremonial, ritual and domestic use.[341]

Here tribal custom and values provide standards for human behavior at this sacred place. The Zunis have a responsibility to care for the Lake, partly on behalf of other tribal peoples who also gather there to collect salt and conduct ceremonies. Governor Bowekaty explained the historical and contemporary manifestations of these values:

> The surrounding land has always been respected as a sanctuary zone, where warring tribes put weapons down and shared in the sanctity of the Salt Mother. Just this past weekend, our brothers and sisters from the Hopi, Yaqui, Pueblo, Xicano, Navajo and others joined us in a 260 mile run from Hopi and Phoenix to Zuni to pay homage to her, as well as to spiritually prepare us for this testimony today.[342]

Despite the fact that "[g]overnment intervention and the inequities of history have prevented this great salt shrine from being included in the boundaries of

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Letter of Dallas Massey, Sr., White Mountain Apache Tribal Chairman to Mark Yudof, President, University of Minnesota (Jan. 9, 2002), *available at* http://www.mountgraham.org/MN/letters/masseytoyudof.htm.

338. *See* Chilkat Indian Vill. v. Johnson, 870 F.2d 1469, 1471 (9th Cir. 1989) (applying a Chilkat Village Ordinance that "[n]o traditional Indian artifacts, clan crests, or other Indian art works of any kind may be removed from the Chilkat Indian Village without the prior notification of and approval by the Chilkat Indian Village Council").

339. *See* Bugenig v. Hoopa Valley Tribe, 266 F.3d 1201 (9th Cir. 2001) (upholding tribal authority to enact regulation preventing logging near protected sacred sites as against challenge by a non-Indian property owner within reservation); *see also* Gingrich, *supra* note 327.

340. *See Hearing*, *supra* note 298, at 33.

341. *Id.*

342. *Id.*

[the Zuni] reservation,"[343] Zuni Salt Lake remains important to the Zuni people for contemporary religious and cultural activities. Therefore, the Governor recommended special federal legislation to protect the Lake and other sacred sites. Although this legislation has not been enacted, the mining company decided to move its project elsewhere, largely as a result of indigenous advocacy.[344]

It may seem that tribal law, whether codified or customary, is unlikely to prevail in disputes over federally owned sacred sites or in any Indian law cases.[345] Non-Indians may be unfamiliar, or even "uneasy," with tribal law.[346] Some courts, however, have recognized the role of tribal customary law in sacred sites cases. In a particularly notable example, Navajo custom prevailed as the standard for management of a federal sacred site in *Natural Arch and Bridge Society v. Alston*,[347] a recent federal case from Utah. The legal sequel to the *Badoni* case described earlier,[348] *Natural Arch* reviewed a National Park Service (NPS) Management Plan closing certain portions of the Monument for revegetation and requesting through signs and brochures that the public respect cultural differences by voluntarily not walking underneath Rainbow Bridge. The district court upheld the accommodation against various challenges, first noting the importance of Rainbow Bridge in Navajo culture:

> The Navajo have a tradition that long, long ago one of their hero gods, hunting in the canyon, was suddenly entrapped by a rush of flood waters. In this predicament, with escape cut off, death for the hunter seemed certain. But just then the great Sky Father cast a rainbow before the torrent, the hero god climbed to safety across the arch, and the latter turned to stone and has so remained until this very day.[349]

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343. *Id.*

344. *See* Hillary Rosner, *Saving a Sacred Lake: Zuni Activist Pablo Padilla*, HIGH COUNTRY NEWS, Feb. 2, 2004, http://www.hcn.org/servlets/hcn.Article?article_id=14527.

345. *See* Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1777 (1997) (discussing the difficulty of identifying and incorporating "the [Indian] side of the story"); *cf.* J.R. Mueller, *Restoring Harmony Through* Nalyeeh: *Can the Navajo Common Law of Torts be Applied in State and Federal Forums?*, 2 TRIBAL L.J. 3 (2001/2002), *at* http://tlj.unm.edu/articles/volume_2/mueller/index.php (exploring whether tribal customary law can be applied in state and federal courts).

346. *See* Chief Justice Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225, 230 (1989).

347. 209 F. Supp. 2d 1207 (D. Utah 2002); *id.* at 1210 (quoting Judd Neil, *The Discovery of Rainbow Bridge*, NAT'L PARKS BULLETIN, Nov. 1927).

348. The National Park Service provides a detailed history of its management of Rainbow Bridge National Monument, including the legal struggles described in this Article, at http://www.nps.gov/rabr/adhi/adhi.htm.

349. *Natural Arch*, 209 F. Supp. 2d at 1210 (quoting Neil, *supra* note 347).

In more recent historical times, the court noted, Rainbow Bridge was "important to [Navajo] spiritual beliefs and identity as a people."[350] Some Navajos expressed these beliefs by abiding by certain rules and observances at Rainbow Bridge. The court recounted:

> In 1909, for example, it was noted that the Navajo guide, Dogeye-begay, rode around the end of the bridge because he did not know the prayer to insure [sic] his safe return should he pass beneath it. Similar observations were noted by other parties [of non-Indian explorers] who utilized Navajo guides to reach the bridge. To many Navajos, Rainbow Bridge is a sacred place. As such they believe that it should be respected by all humans.[351]

According to the court, it was perfectly appropriate for NPS to adopt this standard of treatment, deriving from Navajo custom, in its management plan for the Monument. In fact, under previous NPS management standards, the physical well-being of the Monument had been suffering the severe ill-effects of "unlimited visitor access." Cultural sites were being damaged by tourists touching, climbing, and defacing petroglyphs, along with vandalism and litter. NPS was falling short of its Congressional mandate to "conserve" the National Monument, scenery, and historic objects, and "provide for the enjoyment of [them] in such manner . . . as will leave them unimpaired for . . . future generations."[352] Implementing Navajo custom by asking visitors to go around, rather than under, the Bridge—as part of a multifactor management program including education, environmental, and cultural awareness components—offered a new approach to fulfilling Congress's directive.

Moreover, the court agreed with NPS that implementing Navajo custom did not effect an establishment of religion. Rather:

> This concept simply invites visitors to assume a receptive state of awareness, much as one might in any meeting hall, cathedral, or temple of the mind. It encourages respect for cultural beliefs and strengthens the identity and heritage of the Navajo Indian. It suggests that an honest appraisal of the historic example set by Dogeye-begay and other Indian guides may offer a new awareness and appreciation for both natural and cultural values, irregardless of the life style from which they may originate.[353]

Similarly, the Plan did not violate the Equal Protection Clause, because it applied to *all* visitors to the Monument. It asked everyone, including Native

350. *Id.*
351. *Id.*
352. *Id.* at 1212.
353. *Id.* at 1213 n.6.

Americans, to consider the example of Dogeye-begay and voluntarily refrain from walking under the Bridge. The tribal custom, according to the court, offered to *everyone* a better way of relating to the property in question.

Natural Arch was admittedly not framed as the assertion of Navajo property rights, but rather as a test of a federal agency's power to implement a management plan. Nevertheless, the *Natural Arch* case provides an example of a federal decision that applies tribal customary law to legal questions on sacred sites.[354] The court relied on the story of Dogeye-begay and the other Navajo guides who all went around the Bridge as setting forth a substantive standard for management of a sacred site located on federally owned property.[355] Additionally, Indian nations may look to several examples, outside the sacred sites context, where tribal law and customs have been the basis for recognition of property rights by domestic[356] and international courts.[357]

C. The Public Lands Context

This Article has considered *Lyng* as a problem between owners and nonowners in the common law context and between the federal government and Indian nations in the federal Indian law context. Additionally, there is a third dimension of the *Lyng* paradigm to consider. To the extent that *Lyng* involves Forest Service lands, *Lyng* is also a case about rights and obligations of the federal government and citizens with respect to public lands.[358] This subpart argues that the public trust doctrine may support the right of citizens (including American Indian citizens) to

354. *See* Tso, *supra* note 346, at 230 ("Navajo custom and tradition is law.").

355. *Natural Arch*, 209 F. Supp. 2d at 1211 ("Traditional Navajo ceremonies and rites are private and passed on from generation to generation.").

356. *See* Worthen, *supra* note 14, at 249–50 (describing cases in Hawaii and Australia where indigenous peoples "have gained the right to use lands for which they did not have fee title, relying on their customary use of the lands for traditional purposes, and demonstrating that common law principles may, in some situations, be flexible enough to accommodate Native American beliefs and practices"); *see also* Ian H. Hlawati, Comment, *Loko I'a: A Legal Guide to the Restoration of Native Hawaiian Fishponds Within the Western Paradigm*, 24 U. HAW. L. REV. 657 (2002) (using state law recognition of the native property rights regime, predating the overthrow of Hawaii, as a basis for limited contemporary rights to fishponds).

357. *See, e.g.*, S. James Anaya & Claudio Grossman, *The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 ARIZ. J. INT'L & COMP. L. 1 (2002) (describing the Inter-American Court's recognition of contemporary indigenous rights based on both indigenous property law and international law).

358. *Cf.* Marla E. Mansfield, *On the Cusp of Property Rights: Lessons From Public Land Law*, 18 ECOLOGY L.Q. 43, 44 (1991) ("Lessons from public land law may alter more general perceptions of property rights.").

use public lands for religious and cultural purposes, and it explores the accompanying federal duty to facilitate such uses.[359]

1. Federal Authority Over Public Lands

The federal government's authority over public lands derives from the Constitution's Property Clause: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[360] The Property Clause has given rise to several interpretations of the relative rights of the federal government, states, and individual citizens.

In the early history of the nation, many viewed the federal government as a "proprietor" of public lands—a title holder, just like any other private individual or entity, of lands deemed to exist *within* a particular state. Under this view, which continues to have adherents today, the Property Clause gave Congress the right (and power) to protect public lands from harm[361] until it exercised its duty to transfer public lands to states and individuals.[362] Eventually, the Property Clause became a source of federal power and authority justifying the creation of federal agencies to manage public lands. The trend increasingly was for the federal government to retain its lands,[363] and

359. Focusing on the "public" nature of federally owned lands, some scholars have suggested a "public forum" analysis to sacred sites cases. Analogizing to the government's obligation to accommodate citizens who desire to use public parks and streets for speech purposes, the argument is that Indian religious practitioners could claim rights to access public lands for religious activities. *See* Gordon, *supra* note 2, at 1466 (arguing that the public forum argument may be particularly strong where Indian use of sacred sites has taken place "from time immemorial"); *see also* Samuel D. Brooks, *Native American Indians' Fruitless Search for First Amendment Protections of Their Sacred Religious Sites*, 24 VAL. U. L. REV. 521, 549 (1990) (advocating a sliding scale of protection for American Indian sacred sites, roughly corresponding with the categories of public forum analysis); *cf.* Lance J. Schuster, State v. Lilburn *and* State v. Casey*: Harassing Hunters With the First Amendment*, 32 IDAHO L. REV. 469, 489–90 (1996) (arguing that some uses of the public lands for expressive purposes may not qualify under the public forum analysis). While the public forum argument resounds with this Article's focus on the obligations of the government to its citizens, it also relies heavily on the First Amendment, which has been unhelpful for Indians in sacred sites cases.

360. U.S. CONST. art. IV, § 3, cl. 2.

361. *See, e.g.*, Camfield v. United States, 167 U.S. 518, 524 (1897) (stating that "no legislation . . . was necessary to vindicate the rights of the Government as a landed proprietor" in cases where the government sought to remove privately erected fences around public lands).

362. *See* James L. Huffman, *The Inevitability of Private Rights in Public Lands*, 65 U. COLO. L. REV. 241, 247–50 (writing on the disposal of federal public lands from 1785 to 1934).

363. *Cf.* Zachary Smith, *Interior Encourages BLM Land Sales*, HIGH COUNTRY NEWS, Aug. 30, 2004, http://www.hcn.org/servlets/hcn.Article?article_id=14956 (describing the Department of the Interior's 2004 request for amendments to the Federal Land Transaction Facilitation Act that would "encourage the BLM to sell off more land" by extending, indefinitely, the statutory period for the identification of saleable lands).

Congress's power under the Property Clause was construed broadly and deemed to preempt state law.[364]

Under the proprietorship model, the federal government's powers as an owner of public lands were clearly limited. Even as the government has assumed a greater and more permanent role in the management of public lands, its powers are not deemed absolute. Rather, these powers are qualified by the idea that the government owns the public lands on behalf of citizens to whom it owes duties—a concept embodied[365] in the "public trust doctrine."[366]

2. Citizens' Rights in Public Lands: The Public Trust

The Anglo American public trust doctrine is traceable to Roman law recognizing property rights in rivers, oceans, and coastlines,[367] and to later English law prohibiting the monarch from denying commoners' rights to natural resources. Growing out of the Magna Carta, the English public trust doctrine held that the monarch owned common lands for the benefit of the public, thus giving rise to the concept of "sovereign property" and the

364. *See* Kleppe v. New Mexico, 426 U.S. 529 (1976) (sustaining the Wild Free-Roaming Horses and Burros Act against challenge by the State of New Mexico on grounds that "power over the public land . . . entrusted [by the Property Clause] to Congress is without limitations").

365. This Article focuses on common law formulations of the public trust doctrine. Nevertheless, it acknowledges that the public trust doctrine may be expressed more forcefully in other places. *See generally* CHRISTINE KLEIN ET AL., NATURAL RESOURCES LAW 32–90 (2005) (discussing federal authority and ownership of lands, with various examples of the federal public trust doctrine). The notion of a public trust appears, for example, in state cessions of land to the federal government. *See, e.g.*, Pollard v. Hagen, 44 U.S. 212 (1845) (finding that the Virginia and Alabama cession deeds stated that "all lands within the territory ceded . . . should be considered as a common fund for the use and benefit of all the United States"); *cf.* United States v. Gardner, 107 F.3d 1314 (9th Cir. 1997) (holding that the federal government is not required to hold, in trust for establishment of future states, public lands which it acquired in Nevada, and the equal footing doctrine did not give Nevada title to the public fast dry lands within its boundaries). In addition, the public trust doctrine manifests in various statutes. *See, e.g.*, Federal Land Policy and Management Act, 43 U.S.C. §§ 1701–1785 (2000) (stating that the federal government is to retain public lands unless disposal will serve the "national interest"); National Park Service Organic Act, 16 U.S.C. § 1 (2000) (stating that the Park Service is obligated to manage lands in light of "public value"); *see also* Jan Laitos & Rachael B. Reiss, *Recreation Wars for Our Natural Resources*, 34 ENVTL. L. 1091, 1116 (2004) (explaining that some courts have limited federal duties to those specifically set forth in statutes).

366. *See* 63C AM. JUR. 2D *Public Lands* § 7 (2004). Explaining further:

> Congress enjoys the powers of a proprietor of public lands and may deal with such lands as a private individual would deal with his or her property. It has also been observed, however, that the public lands of the United States are held by the federal government not as an ordinary individual or proprietor, but in trust for the people of all the states. Under this "public trust" doctrine, the government has a duty to protect and preserve the land for the public.

Id. (citation omitted).

367. *See* Joseph L. Sax, *Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475 (1970).

"inescapable duty of state stewardship."[368] African, Muslim, Spanish, Mexican, French, and American Indian legal traditions also historically protected certain natural resources for public, instead of private, welfare.[369]

The American public trust doctrine has evolved over time, with both state and federal versions.[370] The underlying idea is that citizens have protectable interests—usually economic or environmental—in certain lands. For example, in *Illinois Central Railroad Co. v. Illinois*,[371] the U.S. Supreme Court invalidated a state legislature's decision to sell submerged lands on the Chicago waterfront to a railroad, on grounds that the sale would transgress citizens' interests in navigable waters.[372] As in *Illinois Central*, the public trust often manifests as a state law doctrine—securing citizens' interests in state parklands and forests, beachfronts, and water sources.[373] But some scholars, led by Joseph Sax, have argued that the public trust doctrine also applies to the federal government, requiring the government to act as a trustee and administer the public lands for the beneficial interest of American citizens.[374]

Even those who accept the theoretical notion that the public has an interest in public lands question whether the public trust doctrine provides an enforceable source of citizens' rights. At the outer limits of the doctrine, some argue that citizens actually own the public lands, but this is probably an overstatement of citizens' property interests.[375] In certain specific contexts,

368. *See generally* Mark Dowie, *In Law We Trust: Can Environmental Legislation Protect the Commons Now?*, ORION, July/Aug. 2003, at 19 (detailing the fifteen hundred year history of the public trust doctrine).

369. *See* Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 428–30 (1989).

370. *See, e.g.*, Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 633–41 (1986) (reviewing the origins of the public trust doctrine in American law). *See generally* CAROL M. ROSE, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, *in* PROPERTY AND PERSUASION, *supra* note 156, at 105.

371. 146 U.S. 387 (1992).

372. *But see* Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269, 278–93 (1980).

373. *See* GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 382–83 (2002); *see also* ROSE, *supra* note 370, at 106 (articulating theories of public rights in private lands, especially waterfront and lands under navigable waters, including (1) public trust, (2) prescription or dedication, and (3) custom).

374. Sax, *supra* note 367, at 477. Recently, and far beyond the public lands context, the doctrine has been used to articulate a public right of access to technology. *See, e.g.*, Horwitz, *supra* note 23, at 116 & n.42.

375. In one well-known debate, some citizens have challenged fees to use the U.S. Forests on grounds that "they, as American citizens, own the public lands." However, there is actually "no legally cognizable right to free access for recreation." Kira Dale Pfisterer, *Foes of Forest Fees: Criticism of the Recreation Fee Demonstration Project at the Forest Service*, 22 J. LAND RESOURCES & ENVTL. L. 309, 352 (2002). Both the Constitution and federal statutes support the requirement of a permit for

such as mining, ranching, and mineral extraction, citizens clearly hold enforceable property interests.[376] But, in the absence of something as discrete as a mining patent or statutory entitlement, the question is whether citizens can use the public trust doctrine to assert that the government must manage its property in a way that reflects citizens' interests.

Perhaps the high watermark of the public trust doctrine manifested in *Sierra Club v. Department of Interior*,[377] where the Sierra Club claimed that the Secretary of the Interior and Park Service were required to protect Redwoods National Park from damage caused by logging. Rejecting the government's motion to dismiss, the court relied on the government's trust duty:

> The [S]ecretary [of the Interior] is the guardian of the people of the United States over the public lands .... In view of the ... trust responsibility of the Secretary of the Interior with respect to public lands and the [special] legislative history ... of the Redwood National Park Act ... a case for judicial relief has been made out by plaintiff.[378]

Somewhat similar to the structure of a claim under the federal Indian trust doctrine, the theory in *Sierra Club* was that the agencies abused their discretion by failing to take account of the public trust doctrine in their administration of the national park.

The district court, in a later state of the case, held the Park Service abused its discretion by failing to acquire adequate buffer areas to protect the park from logging operations.[379] While the court spoke of a "general trust duty," the court traced this duty to a specific statute, the National Park

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citizens' access to the forests, and citizens have only an implied license to use public lands. As Pfisterer points out, "such an implied license does not convey a very strong property right. Rather, it simply allows the recreating public access unless expressly prohibited." *Id.*

376. *See generally* Huffman, *supra* note 362 (discussing grazing permits, mining patents, and mineral leases). *See also* Sally K. Fairfax et al., *The Federal Forests Are Not What They Seem*, 25 ECOLOGY L.Q. 630, 634–38 (1999). Fairfax states that citizens' property interests in federal lands are found in: (1) "intermixed ownership" such as the checkerboard land patterns associated with railroad grants; (2) "leases and access rights" for:

> private cabins in national forests and parks; oil, gas, and coal leases on national forest and wildlife refuge lands; timber sale contracts on BLM and national forest lands; concessions to run gas stations, hotels, bars, souvenir shops, grocery stores, marinas and similar facilities in national parks; timber sale contracts; rights to provide guide services on major rivers; and grazing leases;

and (3) "informal claims" such as contemporary recreation claims by off-road vehicle users and historical claims by dispossessed minority groups such as Hispanics and Native Americans. *Id.*

377. 376 F. Supp. 90 (N.D. Cal. 1974) (mem.); 398 F. Supp. 284 (N.D. Cal. 1975), *modified*, 424 F. Supp. 172 (N.D. Cal. 1976).

378. 376 F. Supp at 93–95.

379. 398 F. Supp. at 292–93.

System Act, and not a common law source.[380] Because even *Sierra Club* relied on both the Redwood National Park Act and the National Park System Act,[381] scholars debate about the practical utility of common law public trust arguments. Many assert that only a statutory expression of a public trust duty will be enforced by the courts.[382] Still, others insist that, "The case for public trust review of administrative decisions in public natural resources law is not negligible. In some cases, courts seem to have adopted the idea without the label."[383] If the public trust doctrine remains alive as a tool of administrative review, the question is how to use it, in theory and in practice, in sacred sites cases.

3. Applying the Public Trust to Sacred Sites Cases

The public trust doctrine has been used to protect citizens' commercial, subsistence, and environmental interests in public lands. Or, to put it another way, the public trust doctrine allows citizens to express their values—in favor of economic growth, living off the land, and natural resources protection. Because individual citizens may not be able to devote their own private land to these uses for economic or other reasons, the doctrine enables citizens to effectuate their values through use of the public lands.[384]

The public trust doctrine similarly could be used to express collective values in favor of religious freedoms on public lands. The freedom of religion is a clearly entrenched American value. It serves, along with freedom of speech

380. *Id.* at 287. Congress later amended the Act to codify Secretarial duties to the public. *See also* Amendments to the National Park Service Organic Act, 16 U.S.C. § 1 (2000). The Amendments state:

> Congress further reaffirms . . . that the protection, management and administration of [the National Park System] shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these areas have been established, except as may have been or shall be directly and specifically provided by Congress.

Id.

381. 424 F. Supp. at 172–73; *see also* Sierra Club v. Andrus, 487 F. Supp. 443, 449 (D.D.C. 1980), *aff'd on other grounds sub nom.* Sierra Club v. Watt, 659 F.2d 203 (D.D.C. 1981) ("To the extent that plaintiff's argument advances the proposition that defendants [National Park Service and Bureau of Land Management] are changed with 'trust' duties, distinguishable from their statutory duties, the Court disagrees. Rather, the Court views the statutory duties as comprising *all* the responsibilities which defendants must faithfully discharge.").

382. *Cf.* 487 F. Supp. at 449 (discussing statutory duties).

383. COGGINS ET AL., *supra* note 373, at 388.

384. Justifying the public trust doctrine on economic groups, for example, Joseph Sax imagined that while a church might retain a rose garden for senior citizen use, an individual would choose to sell it for profit, even if he valued and wanted to please the elderly. Marla E. Mansfield, *On the Cusp of Property Rights: Lessons From Public Land Law*, 18 ECOLOGY L.Q. 43, 83 n.231 (1991).

and other fundamental rights, as a marker of a free society.[385] In a pluralistic society, people generally agree that all citizens deserve the freedom of religion. Despite a history of suppressing Indian religions, most Americans would, if asked today, probably agree that Indians should enjoy the right to practice their religions.[386] But the average citizen may not be in a position to express his support for religious freedoms in a way that extends meaningfully to American Indians. Even if they are educated about the issues (and many are not), many citizens may lack the economic power or sense of personal duty to accommodate Indian religions. When a sacred site is found on private land, the individual owner may not be able or willing to donate it to the appropriate tribe or provide special access—even if that individual believes in the right of everyone, including Indians, to worship freely.

By contrast, when a sacred site is located on public lands, the burden of accommodating Indian religions falls, for the most part, on the federal government instead of on any individual citizen. With greater access to information and economic power, the government can effectuate citizens' values in favor of religious freedoms in ways that individuals cannot (or will not). Today, when American citizens and political leaders (including the President), avow their respect for religious minorities, with emphasis on tolerance for Muslims in the wake of September 11, it seems clearer than ever before that religious freedom for every individual and group is a collective American value.[387] The public trust doctrine allows the government to effectuate our common interest in religious freedom by accommodating spiritual practices, including Indian spiritual practices, on public lands.[388]

If we can agree that the public trust doctrine in theory should be used to effectuate the value of religious freedom, the next question is how. Under a

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385. *Cf.* Peter Manus, *To a Candidate in Search of an Environmental Theme: Promote the Public Trust*, 19 STAN. ENVTL. L.J. 315, 356–62 (2000) (exploring constitutional justifications for the public trust doctrine).

386. *See, e.g.*, Zellmer, *supra* note 278, at 437–38 ("Congress has explicitly recognized that religious practices are an integral part of tribal culture and identity and has agreed to protect tribal interests in their own distinctive culture and religion as a matter of national policy and international law."); *see also* Peters, *supra* note 322, at 135 ("Clearly, the desecration of sacred sites is intolerable not just for Native Americans, but for non-natives too.").

387. *See, e.g.*, Wendy S. Ross, Bush at Islamic Center Urges Tolerance Towards Arab-Americans (U.S. Dep't of State, International Information Programs, Sept. 17, 2001), *available at* http://www.usinfo.org/usia/usinfo.state.gov/usa/islam/a091701.htm; White House Press Release, President Commemorates Eid al-Adha (Feb. 11, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/02/20030211-12.html; White House Press Release, President's Greeting for Ramadan (Nov. 5, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/11/20021105-3.html.

388. *Cf.* Manus, *supra* note 385, at 320 ("The idea that the citizens and government of the United States are bound to one another by some form of trust appears to be one of the foundations of our faith in the benevolence of American society.").

robust view of the doctrine, advocates could seek federal judicial review of agency action, claiming that an administrative agency has an affirmative public trust *duty* to accommodate religious uses of public land. In sacred sites cases, this might include a duty to provide access to practitioners and to maintain the physical integrity of the land in question. This approach would mirror the strategy in the *Sierra Club* case described above seeking relief on grounds that the agency abuses its discretion by failing to accommodate Indian religious or public lands. Realistically, though, advocates must recognize that most federal courts will require a separate statutory basis for such governmental duties,[389] as the court ultimately did in *Sierra Club*.

Although the American Indian Religious Freedom Act is generally considered to be an unenforceable policy statement, it may be worth considering whether it might suffice to express a federal public trust duty. 42 U.S.C. § 1996 states:

> [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.[390]

Perhaps an even stronger public trust duty in favor of accommodating Indian sacred site usage could be found in the Archaeological Resources Protection Act, the National Historic Preservation Act, and Native American Graves Protection and Repatriation Act.

Alternatively, sacred sites litigants could take the "interpretive technique" approach.[391] When ambiguities or silences exist in federal legislation or regulation affecting public lands, such legislation or regulation should be construed in a way that effectuates societal values. Accordingly, litigants in sacred sites cases could argue that public lands law should be construed in a manner that

389. Similarly, the U.S. Supreme Court has recently held that, even under the APA, a plaintiff must assert that an agency failed to take a discrete agency action that it is *required* to take. This so-called "discrete-action limitation" precludes a broad programmatic attack for an agency's failure to act, including in federal public lands cases. *See* Norton v. S. Utah Wilderness Alliance, 124 S. Ct. 2373, 2379–80 (2004) (rejecting claim of environmental organization that brought action against the Department of Interior, Bureau of Land Management, State of Utah, and others, seeking to compel, under the Administrative Procedure Act (APA), agency action in light of the alleged failure to manage off-road vehicle use in federal lands classified as wilderness study areas).

390. 42 U.S.C. § 1996 (2000).

391. *See* Sax, *supra* note 367, at 556 (arguing that public trust doctrine provides a technique for judicial review); *cf.* Mansfield, *supra* note 358, at 87 (stating that the public trust doctrine "can supply content to the congressional command to 'take any action necessary to prevent unnecessary or undue degradation of [BLM] lands.'").

protects the physical integrity of, and Indian access to, sacred sites. Such an interpretation would fulfill the public interest in religious freedom for all citizens.

Finally, Indian religious practitioners and advocates could evoke the public trust doctrine at the earlier stage of land management by administrative agencies. When an agency manages public lands containing sacred sites, and the Indian trust doctrine and other sources of law have not yet provided a clear course of action, the public trust doctrine can be used to mitigate in favor of a decision that accommodates religious practices.[392] Instead of mere "'accommodation' between collective values and private projects," such an approach could lead to substantive preference for land management decisions that accommodate the widely shared collective value of religious freedom.[393] The agency can be explicit in its management plan that its action is guided by the public trust doctrine (and Indian trust doctrine) and the public interest in religious freedom. Such agency actions should be entitled to the deference that courts accord administrative decisions, and perhaps even to increased deference.[394]

Some might point out that this application of the public trust doctrine is rather novel. The doctrine has more often been used to protect non-Indian citizens' economic and environmental interests. But the doctrine is broad and flexible. As Carol Rose has argued, "Given the possibility of historical change in our attitudes about what are and what are not valuable socializing institutions, we might expect that our views of inherently public property should change over time."[395] Respect for freedom of religion is a form of "social glue" that holds our society together. Our common interest in freedom of religion applies to Indians, and it can be expressed through the public trust doctrine.[396]

Today, the public trust approach calls for the accommodation of all religions that require use or access to federal public lands. This is consistent with "the principle of nonestablishment as barring governmental preferences for *particular* religious faiths."[397] In addition to the historical instances cited above, there are dozens, if not hundreds, of contemporary examples of Mormon, Quaker, and Catholic services that take place at churches and other religious facilities on public

392. *See* Mansfield, *supra* note 358, at 87.
393. *Id.* at 88.
394. *See id.* at 91.
395. ROSE, *supra* note 370, at 148.
396. Carol Rose notes that "the Romans had a category of public property for religious structures and places." *Id.* (opining that the freedom of speech is "perhaps a more important social glue of our own society" than is the freedom of religion).
397. Rosenberger v. Rectors & Visitors of Univ. of Va., 515 U.S. 819, 856 (1995).

lands.[398] Whether it is because they personally practice such a religion on public lands, or because they want to live in a country where all citizens enjoy the freedom of religion, or because the survival of indigenous cultures is important to them, all citizens may be able to support this application of the public trust doctrine.[399]

The availability of public trust arguments to *all* Americans is precisely what concerns some scholars. Rebecca Tsosie argues that, when it comes to sacred sites, Indians should not be reduced to mere stakeholders in public lands, forced to compete with rock climbers, timber companies, and even other religious users,[400] for use rights.[401] Tsosie raises an important question about the public trust doctrine: how should the law accommodate and balance competing public interests? In one respect, this Article aims only to establish a baseline of Indian rights at sacred sites, ensuring that Indians will have some place at the litigating or negotiating table, but reserving specific questions about priorities of rights for a subsequent piece.[402]

There are, however, a number of readily apparent reasons why it makes sense to offer a heightened level of protection for Indian interests in sacred sites on public lands. Some scholars advocate carefully considering the costs and benefits associated with harming or destroying Indian sacred sites. As Professors

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398. *See, e.g.*, O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979) (holding that the decision of the National Park Service to allow the Pope to perform Catholic Mass on the Mall, including the erection of a fence around the Mass area, did not violate the Establishment Clause).

399. *Cf.* SINGER, *supra* note 15, at 210 ("[W]e cannot reasonably expect individuals to honor the claims of others unless they are claims to which all could or should assent.").

400. Indian peoples who find the religious practices of "New Agers," for example, to be offensive and disruptive would likely agree with this critique. *See* Denise Ross, *Religious Groups Clash Over Bear Butte*, RAPID CITY J., July 15, 2004, http://www.rapidcityjournal.com/articles/2004/07/16/news/local/top/news01.txt ("Some of these New Agers, they're really far out in doing their ceremonies. Sometimes, it's a direct insult to what I practice every day for our rituals." (quoting Sonny Richards, a traditional American Indian religious practitioner)). On the other hand, some indigenous peoples reject the idea that they should or could have absolute rights at sacred sites—speaking instead in terms of responsibility, relationship, and respect. *Cf.* IN THE LIGHT OF REVERENCE (Bullfrog Films 2002) (interview of Vine Deloria). Deloria explained:

> It's not that Indians should have exclusive rights [at sacred sites], it's that that location is sacred enough that it should have time of its own and that once it has time of its own then the people who know how to do ceremonies should come and minister to it . . . . [T]he idea is not to pretend to own [a sacred site] or exploit it but to respect it.

Id.

401. *See* Rebecca Tsosie, *The Conflict Between the "Public Trust" and the "Indian Trust" Doctrines: Federal Public Land Policy and Native Nations*, 39 TULSA L. REV. 271, 292, 300 (2003); *cf.* Erin Ryan, Comment, *Public Trust and Distrust: The Theoretical Implications of the Public Trust Doctrine for Natural Resource Management*, 31 ENVTL. L. 477, 493 (2001) (reviewing critiques of the public trust doctrine, including that "the understanding of natural resources in private property terms that is reified by the public trust may render more vulnerable to degradation the very resources impressed with the trust").

402. As I describe *supra* note 13, a future Article will look at the role of property law in developing federal policy in favor of sacred site accommodation, and this future piece will have as one of its primary concerns the ordering of competing claims on public lands.

McConnell and Posner have suggested, we could revisit *Lyng* by weighing the benefits to the lumber companies (who have an interest in logging) and other citizens (who can use the logging road for other purposes) against the harm to the Indians (complete destruction of their religion). Under this analysis, McConnell and Posner observe, "the injury to the Indians religious interest appears unusually severe . . . while the secular interests seem relatively slight."[403]

On the one hand, a cost-benefit analysis would seem to leave Indians, as a small minority, particularly vulnerable to other groups' and individuals' interests in the public lands. Thus, a cost-benefit approach must be undertaken cautiously. But if we take seriously, as McConnell and Posner seem to suggest, the harm to Indian religions caused by competing uses, like the logging in *Lyng*, the cost-benefit analysis should favor Indian claims.[404] The idea is not to measure the *monetary* costs for Indians against the *monetary* gains for the logging industry, federal government, or citizenry, but to give real consideration to the value of the Indians' religious claims from their own perspective.[405] The very nature of Indian religions, place specific and ritual oriented as they often are, means that the harm posed by competing users will often be extremely grave. There is nothing fungible about Indian sacred site practices. On the other hand, the government or timber company's interests in logging or citizen's interests in rock climbing may often be realized at other locations. Moreover, under the public trust theory, we should consider that destroying Indian religions may have costs for non-Indians. In a society founded on a collective value in favor of religious freedom, everyone suffers when certain individuals, groups, or classes are denied that freedom. This factor should be considered as a "cost" of public land use that harms Indian sacred sites. Finally, we could look at the costs and benefits over a broader historical period and set of substantive concerns. When Indians have lost most of the continent to non-Indian settlers and their descendants who have benefited directly and indirectly from the "availability" of former Indian lands, recognizing Indian priorities at federally owned sacred sites seems like a small step toward justice that many citizens may be willing to take.[406]

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403. Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 48 (1989). This author would disagree with McConnell and Posner's conclusion that "the proper result in *Lyng* is not obvious."

404. *Cf.* McConnell & Posner, *supra* note 403, at 33–54 (advancing a framework for weighing costs of government regulation against benefits of religious freedom).

405. *See* Singer, *supra* note 230, at 1830 (critiquing Justice O'Connor's opinion in *Lyng* for its failure "to recognize the nonneutrality of the perpetrator perspective she adopted because she relied on her commonsense intuitions to tell her what is and is not a governmental interference with religion").

406. *See* William Bradford, *"With a Very Great Blame on Our Hearts": Reparations, Reconciliation, and an American Indian Plea for Peace With Justice*, 27 AM. INDIAN L. REV. 1 (2002–2003).

In many cases, therefore, agencies and courts should determine that, on the balance, it is more appropriate to accommodate the Indian interest in a sacred site than the interests of the government or other citizens. Admittedly, some cases will be difficult: non-Indians may have religious needs on public lands or claim other uses that also express collective values. In some instances, it may be possible to reconcile competing uses, but this should only occur where the harm to Indian religions will not be significant.

Relying on a cost-benefit analysis is clearly an imperfect solution to the problem of competing uses under a public trust theory. Many agency officials, judges, and other decision makers may not understand how Indians "value" their sacred sites. Calling for the recognition of non-economic values of property implicates a major reconceptualization of property law. Indeed, even invoking a cost-benefit analysis seems to implicate the discipline of law and economics, which is often critiqued for its failure to protect disempowered peoples and its presumption that those who really value property will simply bargain for it on the open market.[407] Indians, as a vulnerable minority group, may not be in a position to bargain or present their claims effectively against well-financed opposition by governments, corporations, and citizens' groups. But the intriguing aspect of applying McConnell and Posner's analysis to the public trust context is that it suggests a starting point for considering that the government's regulation of public lands has great costs for Indian religious practitioners. This line of argument has potential application to sacred site cases, but only if we are careful to weigh costs and benefits in terms and contexts that are meaningful to Indian peoples, and not limit them to monetary considerations.

In addition, some scholars, including Tsosie, would argue that Indians should not have to make such arguments. Instead, in Tsosie's view, principles of cultural sovereignty should operate to ensure Indian access to sacred sites.[408] Here, this Article agrees with Tsosie that, in the final analysis, the fact that tribes are sovereigns engaged in nation-to-nation relationships with the United States should be sufficient to protect Indian interests in sacred sites. The trust duty of the government to tribes should *already* require that agencies and courts offer the highest duty of care toward Indian resources, including sacred sites. But because cases like *Lyng* suggest that courts are not living up to these foundational principles of Indian law, a public trust

407. For some of the classic critiques applicable to the discussion in this Article, see RONALD DWORKIN, *Is Wealth a Value?*, *in* A MATTER OF PRINCIPLE 237 (1985); Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 23 (1989), summarizing the rational choice model; and Duncan Kennedy, *Cost-benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981).

408. Tsosie, *supra* note 401, at 301.

argument (along with the other property claims), may be helpful in improving Indians' positions in sacred sites matters. These property arguments should only be used in combination with claims insisting on the federal government's obligation to Indian nations under the Indian trust responsibility, cultural sovereignty, and other foundational principles of federal Indian law.

D. The Human Rights Context

Finally, cases like *Lyng* concern the relationship between indigenous peoples and a conquering nation-state, a relationship that implicates international law. As individual sovereigns, Indian nations dealt with Europeans on a nation-to-nation basis at the time of contact, and these dealings were, in significant part, governed by principles of international law.[409] While the United States inherited the rights and obligations of its European successors, the U.S. Supreme Court decided to treat Indians not as "foreign" but rather as "domestic dependent" nations.[410] Nevertheless, international law treats American Indians and other indigenous peoples as "groups of human beings with fundamental human rights concerns that deserve attention."[411]

Today, a discrete and growing body of international human rights law pertains specifically to indigenous peoples.[412] Although the U.S. Supreme Court remains generally reluctant to apply international law,[413] American Indians nevertheless increasingly are turning to this body of law as a basis for their rights, in claims before both domestic courts and international tribunals.[414] International covenants and agreements, as well as emerging norms of customary international law, protect indigenous peoples' rights to use their traditional property and may serve as sources of rights to use sacred sites located on federal public lands.

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409. *See generally* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (1996). *See also* Philip Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 75–80 (1996) (arguing that because Chief Justice Marshall originally decided the status of Indian nations in the context of international law, norms of international human rights law should continue to "provide an interpretive backdrop" in contemporary Indian law matters).

410. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

411. ANAYA, *supra* note 409, at 43.

412. *See* S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights Over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33, 33 (2001); *see also* Note, *International Law as an Interpretive Force in Federal Indian Law*, 116 HARV. L. REV. 1751, 1756 (2003) (stating that although international law respects the rights of nation-states to govern themselves, "certain violations of international human rights law justify intervention by another state or by the international community [and i]n recent decades, international human rights law has evolved in several ways favorable to the claims of indigenous peoples.").

413. *See* Alex Tallchief Skibine, *The Dialogic of Federalism in Federal Indian Law and the Rehnquist Court: The Need for Coherence and Integration*, 8 TEX. F. ON C.L. & C.R. 1, 43 (2003).

414. *See* Anaya & Williams, *supra* note 412, at 34.

1. Indigenous "Use" Rights

International human rights law offers expansive recognition of indigenous property rights. As S. James Anaya has written: "Property has been affirmed as an international human right."[415] Today, "modern notions of cultural integrity and self-determination join property as precepts in the affirmation of sui generis indigenous land and resource rights."[416] Several instruments offer explicit recognition of indigenous property rights, including rights to *use* land outside of reservations.[417]

Conventions 107 and 169 of the International Labour Organization recognize indigenous property rights to lands they traditionally have occupied.[418] In a provision of particular relevance to off-reservation sacred sites, Convention 169 furthermore recognizes "the right of the [indigenous] peoples to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities."[419]

The Draft United Nations Declaration on the Rights of Indigenous Peoples sets forth:

> Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands . . . which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.[420]

415. ANAYA, *supra* note 409, at 105.

416. *Id.*

417. International human rights law also offers expansive protection for indigenous peoples' *ownership* rights. For example, the American Declaration on the Rights and Duties of Man, to which the United States is a signatory, provides for the "right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home." AMERICAN DECLARATION ON THE RIGHTS AND DUTIES OF MAN art. XXII. For the most part, this Article focuses on "use" rights under international law, except when ownership and use rights overlap in the same legal instrument.

418. Convention 107: Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, International Labour Organisation, 40th Sess., June 26, 1957, art. II, 328 U.N.T.S. 247, 256; Convention 169: Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, International Labour Organisation, 76th Sess., June 27, 1989, art. 14.1, 28 I.L.M. 1382, 1387 [hereinafter ILO 169].

419. ILO 169 art. 14.2.

420. DRAFT UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES art. 26 (1994), *available at* http://www.indianlaw.org/UN_DraftDeclaration1994.pdf [hereinafter DRAFT U.N. DECLARATION].

Moreover, "indigenous peoples shall not be forcibly removed from their lands" and shall be entitled to compensation and a right of return where possible.[421]

Similarly, Article 18 of the Proposed American Declaration on the Rights of Indigenous Peoples provides:

> 1. Indigenous peoples have the right to the legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property.
> 2. Indigenous peoples have the right to the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied, as well as to the use of those to which they have historically had access for their traditional activities and livelihood.[422]

Consistent with the earlier discussion on the relevance of tribal law and custom, the Proposed American Declaration also explains: "Nothing . . . shall be construed as limiting the right of indigenous peoples to attribute ownership within the community in accordance with their customs, traditions, uses and traditional practices, nor shall it affect any collective community rights over them."[423]

Several provisions of international law may have particular relevance to cases in which sacred sites are threatened. The Draft U.N. Declaration importantly recognizes the right of indigenous peoples to "maintain and strengthen their distinctive spiritual and material relationships with the lands . . . they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations."[424] It also provides for the "right to the conservation, restoration and protection" of indigenous lands, and prohibits use of those lands for military projects without indigenous consent.[425] Other provisions protecting indigenous rights also may be relevant in sacred sites cases, including: protections for the right to practice cultural traditions; to maintain their cultural property; to pursue cultural and spiritual development; and providing for "restitution of spiritual property taken without their free and informed consent or in violation of their laws, traditions, and customs."[426]

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421. *Id.* art. 10.

422. PROPOSED AMERICAN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES art. XVIII (1997), *available at* http://www.dialoguebetweennations.com/OASdeclaration/english/ProposedAmerDeclar.htm.

423. *Id.* art. XVIII, ¶ 3, § iii.

424. DRAFT U.N. DECLARATION, *supra* note 420, art. 25.

425. *Id.* art. 28.

426. *Id.* arts. 12, 29, 37.

2. Indigenous Property Cases

Two recent indigenous property law cases demonstrate these international human rights norms in action. In January 2004, the Inter-American Commission on Human Rights issued a report finding that Belize, by granting logging and oil concessions on lands used and occupied by the Maya people in the Toledo District, violated the property rights of the Maya people.[427]

The Maya based their claims on the American Declaration of the Rights and Duties of Man, Draft U.N. Declaration, and ILO 169, alleging violations of the rights to property, religious freedom, and family, as well as the right to take part in the cultural life of the community, the right to a healthy environment, and the right to participate in government.[428] The Maya further claimed that because Belize is as a former British colony and a common law jurisdiction, the common law "should be deemed to incorporate the common law doctrine that upholds the property rights of indigenous peoples on the basis of customary land tenure, referred to by common law courts as 'aboriginal rights' or 'title,'" unless there was decisional law to the contrary.[429]

The Commission ultimately found that the Maya have collective property rights to the lands they use and occupy, not only the lands within reserve or village boundaries.[430] Protection of Maya property rights is critical because of indigenous peoples' relationship with land and the role of land in indigenous communities' economic, social, and cultural survival.[431] Moreover, these rights are cognizable under international law, even if Belize does not formally acknowledge them, and they include the right to participate in governing decisions about Maya land. The government of Belize specifically failed to protect these property rights by failing to establish legal mechanisms to protect Maya property, by granting the oil and logging concession without Maya consent, and by damaging the Maya environment.

The Commission ordered Belize to demarcate Maya lands in accordance with Maya custom and in consultation with Maya people, to recognize officially the collective property rights of Maya communities and undertake measures to protect them, and to obtain informed Maya consent before undertaking any activity, including oil or timber extraction, that affects Maya lands.[432] The

427. Report No. 96/03, Case 12.053, Maya Indigenous Communities of the Toledo District, Belize, October 24, 2003 (the report was issued in 2003 but not announced formally until 2004) [hereinafter Maya Indigenous Communities], *available at* http://www.indianlaw.org/BZ_2003-10-24_IACHR_Prelim_Rpt.pdf.

428. *See id.* at 44–56.

429. *Id.* at 13.

430. *Id.* at 37–38.

431. *Id.* at 33.

432. *Id.*

Maya decision is particularly relevant because the Commission based its holding on the American Declaration on the Rights and Duties of Man, which is considered binding on all members of the Organization of American States, although the United States has not agreed necessarily to be bound.[433]

The Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua was an earlier groundbreaking international decision.[434] There, the Inter-American Court on Human Rights ruled that the State of Nicaragua had violated the right to property as expressed in Article 21 of the American Convention on Human Rights by granting logging concessions on the traditional lands of the Mayagna (Sumo) community of Awas Tingni.[435] As one scholar has remarked, the Court importantly "engaged the perspective of the indigenous communities in its analysis of what the right to property means emphasizing . . . their spiritual connection with the land over the 'mere question' of possession and production."[436] The Inter-American Court thus required Nicaragua to adopt measures to create an effective mechanism for official recognition, demarcation, and titling of the indigenous community's properties. Although the United States has not ratified the American Convention on Human Rights, *Awas Tingni* nevertheless contributes to a body of international law recognizing the property rights of indigenous peoples.

3. Indian Sacred Sites Cases

Like the Maya in Belize and the Awas Tingni in Nicaragua, American Indians may have claims based on international human rights law when the United States interferes with their traditional uses of property, including sacred sites. These cases resound with sacred site disputes in that they, too, involve property outside of reservations (or their equivalent) and nation-states' decisions to use such property for natural resource extraction. American Indians might apply the principles of these cases to assert rights to use sacred sites and federal obligations to accommodate such uses. The question is how and where to bring such claims.

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433. *See* Anaya & Williams, *supra* note 412, at 42 & n.34.

434. The Case of the Mayagna (Sumo) Indigenous Community of Awas Tingni v. Nicaragua, Judgment of Aug. 31, 2001, Inter-Am. C.H.R., No. 79, *available at* http://www.indianlaw.org/AT_2001-08-31_InterAmerican_Court_Judgment_Official_English.pdf.

435. *See* Angela R. Riley, *Indian Remains, Human Rights: Reconsidering Entitlement Under the Native American Graves Protection and Repatriation Act*, 34 COLUM. HUM. RTS. L. REV. 49, 81–83 (2002).

436. Kirsten M. Hetzel, Comment, *Reaching Regional Consensus: Examining United States Native American Property Rights in Light of Recent International Developments*, 10 TUL. J. INT'L & COMP. L. 307, 321 (2002).

Indian nations should first consider raising such arguments in domestic settings. Some federal courts, albeit a minority, have recognized international legal arguments in Indian religious freedoms cases.[437] Scholars increasingly are urging the federal courts to recognize international human rights norms, at least as an interpretive technique mitigating in favor of Indian self-determination and reflecting Indian conceptions of culture and identity.[438] After having exhausted domestic remedies, tribes can consider bringing property claims in international tribunals.

In one recent property case, American Indians have availed themselves of the Inter-American Commission's investigation and reporting process. The United States has rejected the jurisdiction of the Inter-American Commission even though it is compulsory for members of the Organization of American States, of which the United States is a member. Nevertheless, in *The Case of Mary and Carrie Dann v. The United States*,[439] two Western Shoshone women have asserted aboriginal title to ancestral lands in response to United States' efforts to interfere with their ongoing use of those lands for subsistence and other purposes. After exhausting domestic remedies (in a complicated litigation process spanning decades), the Danns brought the case to the Inter-American system, where the Commission accepted jurisdiction.[440] The Commission ultimately held the United States must: (1) provide a fair legal process to determine the Western Shoshones' land rights, including legislation or other mechanisms to ensure the Danns' right to property; and (2) review domestic laws, procedures, and practices to ensure that the United States is governing the property rights of indigenous people consistent with the American Declaration on the Rights and Duties of Man.[441] The United States has thus far refused to comply with the recommendations of the report.[442] The Commission indicates that it will continue to monitor the situation until the United States takes remedial measures.

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437. *See, e.g.*, United States v. Abeyta, 632 F. Supp. 1301, 1304 (D. N.M. 1986) (relying on the 1848 Treaty of Guadalupe-Hidalgo between the United States and Mexico, along with the First Amendment, as a basis for dismissing a criminal proceeding against a Pueblo Indian who had killed an eagle for religious purposes without a federal permit). *But see* Manybeads v. United States, 70 F. Supp. 1515, 1520–21 (D. Ariz. 1989) (stating that international legal claims are "frivolous," and the Navajo-Hopi Settlement Act did not violate plaintiffs' rights under customary international law or the U.N. Charter). *See also* Hetzel, *supra* note 436, at 327.

438. *See, e.g.*, *International Law as an Interpretive Force in Federal Indian Law*, *supra* note 412.

439. Case 11.140, Inter-Am. C.H.R 860, Report No. 75/02, doc. 5 rev. 1, *available at* http://www.indianlaw.org/ws_Dann_case_IACHR_final.pdf.

440. *Id.* ¶ 76, at 18.

441. *Id.* ¶ 173, at 48.

442. *Id.* ¶¶ 175–79, at 49.

Despite the United States' response to the *Dann* case and its general refusal to submit to international jurisdiction, scholars argue that such decisions contribute to a body of customary international law important in indigenous struggles. As one scholar has argued:

> [T]he United States . . . stand[s] alone in its decision to consciously reject the principles promulgated by the various recent international instruments and the customary international law concerning indigenous peoples' rights. Two Native American women have brought the United States' Native American land policy into the spotlight, illuminating its direct conflict with the generally accepted international norms. In light of that heightened attention, and as a world power, the United States needs to set an example by fully incorporating its human rights obligations into its domestic policies, especially with regard to Native American property rights.[443]

This description of the effect of international human rights law contains an aspirational element, but American Indians and their advocates can use these decisions to try to bring the United States into compliance with the expectations of the world community.

The United States' refusal "to respect the relationship between . . . indigenous peoples' land and culture" in sacred sites cases highlights the contrast between the United States and many other international actors.[444] Thus, sacred sites cases may offer a good platform from which to encourage the United States to comply with international norms and expectations. Recall the Afghan-Taliban government's March 2001 decision to destroy ancient Buddha statues; the Taliban's destruction of the sacred outraged the international community—including the United States—and served as a precursor for other violent acts to come.[445] Recognizing the rights of

443. Hetzel, *supra* note 436, at 327–28.

444. *See International Law as an Interpretive Force in Federal Indian Law*, *supra* note 412, at 1763–64 (contrasting the United States approach in *Lyng* with Canadian and Nicaraguan cases recognizing indigenous interests in land and culture).

445. *See* Vasuki Nesiah, *From Berlin to Bonn to Baghdad: A Space for Infinite Justice*, 17 HARV. HUM. RTS. J. 75, 91 (2004). Nesiah states:

> Even before September 11, 2001 there was considerable pressure for a strong response against religious intolerance in Afghanistan. A year earlier, the U.S. government listed the Taliban as a particularly severe violator of religious freedom, as it undoubtedly was. In March 2001, the Taliban implemented its edict against worshipping idols by destroying the famous Buddha statues in Bamian. The Washington Post noted that despite widespread condemnation of this act, the international community "found no leverage" to dissuade the Taliban.

Id.

minorities to protect their sacred places and structures would seem, in hindsight, to be a mark of a civilized nation.[446]

V. RESPONDING TO CRITIQUES OF A PROPERTY RIGHTS APPROACH

There are a number of possible critiques to a property rights approach in sacred sites cases. This Article has already discussed such critiques in specific contexts, but it may be helpful to bring them together here. First, some might question the appropriateness of using property law to describe indigenous experiences with the sacred. In the Anglo American sense, "property" often connotes individuals' dominion over things and evokes a sense of absolute ownership rights. *Black's Law Dictionary*, for example, defines "property" as:

> That which is peculiar or property to any person, that which belongs exclusively to one.... The term is said to extend to every species of valuable right and interest. More specifically, ownership; the unrestricted and exclusive right to a thing; the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude everyone else from interfering with it.[447]

Although, as this Article suggests, this definition has been eroded substantially in practice, it continues to influence conceptions of property. And in some cases, the idea of land as property—in its most conventional Anglo American sense—may reflect indigenous experiences.[448] However, American Indians quite often depart from notions of absolute individual dominion and of land as a commodity, speaking instead of the relational and sacred nature of land in tribal communities. As Jimmie Durham, a Cherokee litigant in *Sequoyah*, explained:

> In the language of my people ... there is a word for land: Eloheh. This same word also means history, culture and religion. We cannot separate our place on earth from our lives on the earth nor from our vision nor our meaning as people. We are taught from childhood that the animals and even the trees and plants that we share a place with are [sic] our

446. I use the term "civilized" somewhat ironically and in light of centuries of United States policy designed to "civilize" the "savage" American Indians "through such methods as dividing their land in severalty and forcing them to become farmers, denying them rations if their children failed to attend school, and punishing them for practicing their traditional religions." Bethany R. Berger, *"Power Over This Unfortunate Race": Race, Politics and Indian Law in* United States v. Rogers, 45 WM. & MARY L. REV. 1957, 2017 (2004).

447. BLACK'S LAW DICTIONARY 1216 (6th ed. 1990). *Black's Law Dictionary* further defines "land" as "ground, soil, or earth whatsoever ... [and] in its more limited sense, ... the quantity and character of the interest or estate which a person may own in land." *Id.* at 877.

448. *See* Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559 (2001).

> brothers and sisters. 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 our crops are grown. We are speaking of something truly sacred.[449]

Particularly when the subject is a sacred site, indigenous peoples may not use the vocabulary of property or ownership. For example, Jicarilla Apache scholar Carey Vicenti describes "that beautiful and radiant sense of belonging to the country from which we come."[450]

Given the apparent semantic and cultural disconnect, it is not surprising that Indian nations and practitioners of tribal religions have not typically made detailed property law claims in sacred sites cases to date. Anglo American property law, with its focus on individual owners' rights and the use of land for exploitive purposes, sometimes may seem antithetical to indigenous relationships and values regarding land. Moreover, property law has been used to "legitimate" the conquest of Indian lands.[451] Even when Indians have retained property rights, U.S. courts have failed to accord them the legal protection routinely accorded to non-Indian property.[452]

Indian litigants and their attorneys thus justifiably are wary and critical of property law. But there may be reasons to reconsider property law as a source of Indian rights in the sacred sites context and beyond. Some of these reasons are pragmatic. If federal ownership trumps Indian religious claims, Indian attempts to bring any Free Exercise Clause claims regarding federally owned land are doomed from the start.[453] Advocates must try to develop creative and effective legal arguments that restore the availability of First Amendment review for their tribal clients. Establishing that an Indian nation, even as a nonowner, has a legally protected property right is one way to get courts to pay serious attention to Indians' claims at sacred sites. Asserting that the federal government, as an owner, has a legally enforceable property obligation at sacred sites is another.

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449. PETER MATTHIESSEN, INDIAN COUNTRY 119 (1984) (quoting Jimmie Durham, Eastern Band of Cherokees).

450. Rebecca Tsosie, *The American Indian Religious Freedom Act's 25th Anniversary: Past Accomplishments and Future Challenges*, INDIAN LEGAL PROGRAM (College of Law, Arizona State University), Dec. 2003, at 5, *available at* http://www.law.asu.edu/files/News/December ILP.pdf.

451. *See, e.g.*, WILLIAMS, *supra* note 19, at 313–17 (discussing Chief Justice Marshall's use of the European "Doctrine of Discovery" to deny Indians recognizable legal title to their homelands in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823)).

452. *See generally* Singer, *supra* note 19.

453. *See* Dussias, *supra* note 10, at 832–33 (citing cases).

To state it most powerfully (and optimistically), property law may accomplish what the First Amendment seemed unable to do in *Lyng*[454]—that is, create affirmative Indian rights and enforceable federal duties at sacred sites owned by the government.[455] At the very least, property law can challenge the notion that the government's ownership always gives it absolute rights to destroy Indian sacred places and religions.

More generally, thinking about property law may contribute to nationwide discussions about strategy in Indian law cases.[456] This effort stems from the fact that Indian nations are losing cases at a very high rate in the Rehnquist-era Supreme Court.[457] As advocates consider various strategies, some have suggested formulating arguments grounded more broadly in "the law" than in the narrower doctrines of "federal Indian law." The jury still is out on this strategy,[458] but it may be worth noting that in non-Indian cases, today's Court appears very responsive to property rights arguments.[459] Although history suggests that the Court has not offered Indian property the same level of protection as non-Indian property,[460] perhaps the time is right to attempt property law arguments in some Indian cases.[461]

A related reason to reconsider property law has to do with claiming a meaningful place for indigenous peoples in the U.S. legal regime. The government guarantees and protects interests in land that are classified as

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454. *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988) ("[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.").

455. *See* Horwitz, *supra* note 23, at 106 ("[T]he prevailing view of the U.S. Constitution is that its pronouncements are largely negative and meant only to prevent government from overstepping its bounds, not positive, thereby creating constitutional duties in the government to maximize the welfare of the citizenry." (citations omitted)).

456. *See, e.g.*, Tracy Labin, *We Stand United Before the Court: The Tribal Supreme Court Project*, 37 NEW ENG. L. REV. 695, 696 (2003) (describing a national project "to coordinate and strengthen the advocacy of Indian issues before the Supreme Court").

457. *See* David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 280–81 (2001).

458. *See* Skibine, *supra* note 413, at 7 (citing leading Indian law scholars who believe federal "Indian law should remain *sui generis*, just like Indian tribes").

459. *See* Singer, *supra* note 163, at 660–61 ("In recent years, the Supreme Court has been increasing constitutional protection for property rights."); *cf.* Echeverria, *supra* note 161, at 354 (writing on the limitations of litigation as a tool in pursuing a property rights agenda).

460. *See, e.g.*, Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) (holding that Alaska Native takings claims based on "aboriginal title" are not entitled to compensation under the Fifth Amendment); *see also* Skibine, *supra* note 413, at 25 n.153 (citing U.S. Supreme Court cases finding against tribal property rights).

461. *See* Skibine, *supra* note 413, at 24–25 (discussing U.S. Supreme Court cases that reflect "concern not only for property rights, in this case tribal property rights, but also a judicial willingness to analyze historical contexts surrounding Acts of Congress interfering with such rights").

"property."[462] As the peoples with the longest and deepest relationships to the lands that now comprise the United States, American Indians should enjoy this legitimating and protective function of the government. The present marginalization of indigenous peoples in legal discussions about property is not acceptable. Indeed, some scholars' acceptance of the "limited ability of western property law to protect American Indian land rights" convinces them that "*Lyng* was right."[463] Based on faulty premises about the nature and extent of Indian property rights, such statements let courts off the hook[464] and deny Indian peoples the kind of legal protection that should be available to them.[465]

A very significant risk associated with a property rights approach has to do with the commodification of Indian sacred sites. If Indian interests in sacred sites become "property," they can be quantified and reduced to monetary damages.[466] In practical terms, the government will continue to engage in development projects on sacred lands, but will pay off the Indians first, leaving many with the impression that justice—in the Anglo American sense—has been served. In the indigenous sense, monetary compensation for the loss of sacred sites rarely, if ever, represents a just result.[467] But even this worst case scenario offers an improvement over the status quo under which the government has the absolute right to destroy Indian sacred sites. Damages awards may serve to deter the government from destroying sacred sites in the future. And, in some cases, Indians will be able to secure injunctive relief for "irreparable harm" to their religious or other interests.[468]

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462. BLACK'S LAW DICTIONARY, *supra* note 447, at 1216 (defining "property" as "in the strict legal sense, an aggregate of rights which are guaranteed and protected by the government"); *see also* GLENDON, *supra* note 15, at 21 (paraphrasing John Locke, "the essential reason human beings submit to government is to safeguard their 'property,' . . . [and] the preservation of property . . . 'is the great and *chief end*' for which men come together into commonwealths").

463. Yablon, *supra* note 12, at 1630, 1634.

464. *See id.* at 1636 ("[I]t is unlikely that even the most sympathetic court would consider it appropriate to discard precedent and incorporate Indian conceptions of property into its sacred sites decisions.").

465. *See* Leeds, *supra* note 21, at 493.

466. *See supra* note 244 (discussing the compensation of traditional Native Hawaiian land interests under the Fifth Amendment); *see also* Western Australia v. Ward (2002) 191 A.L.R. 1, 173 (decision of the High Court of Australia that native title rights and interests are not underlying property rights, but instead consist of a "bundle of rights" that must be individually proven and can be extinguished individually).

467. The classic example is *United States v. Sioux Nation*, 448 U.S. 371 (1980), where the Sioux Nation sued for the unlawful taking of the Black Hills, was awarded a huge monetary judgment and has subsequently refused to accept the money.

468. *See also supra* note 238 and accompanying text (irreparable harm).

On a broader scale, Indian nations will insist that the law recognize the way they *value* land.[469] A property term like "easement" is never going to express the complex and spiritual nature of Indians' relationships with sacred places and litigating such claims can be painful in many ways to tribal communities. As Hank Meshorer has written about the *Platt* case, "To the Zunis, an interruption of their sacred trek was simply incomprehensible, a thought so foreign to their psyches that the possibility of it even occurring was beyond verbalization. Nor were the Zunis particularly comfortable with asking the federal government for its assistance [in litigation]."[470] But extreme circumstances sometimes require extreme responses, and the Zunis sued for a property right and won. When the Zuni people use their judicially recognized prescriptive easement to reach Zuni Heaven, they start to enlarge American concepts about what it means to use land. Other Indian nations may do the same.[471] The larger project of "indigenizing" property law is a daunting one and beyond the scope of the present Article, but Indian people can push property law to make more room for indigenous rights, interests, and values.[472]

The second major critique might concern this argument's focus on rights. Many have argued that rights-based arguments are overly rigid, stark, and litigious ways of dealing with complex problems among people.[473] As Mary Ann Glendon has put it, "Our rights talk, in its absoluteness, promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground."[474] These criticisms may seem particularly apt when talking about interests in the federal public lands that, by nature, require some degree of accommodation and compromise.

While acknowledging the validity of these criticisms, this Article contends that a rights-based approach is nonetheless crucial in sacred sites cases.

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469. In the Black Hills example, Lakota peoples continue to resist the Anglo American commodification of the sacred. A quarter century after the decision in *Sioux Nation*, they still refuse to accept the money judgment, and tribal people are suggesting alternative remedies. *See, e.g.*, LaVelle, *supra* note 236 (calling for the restoration of the Black Hills to the Sioux people, with management of adjacent plans according to conservation and indigenous values, with opportunities for tribal control).

470. Meshorer, *supra* note 214, at 318.

471. *See, e.g.*, ROYSTER & BLUMM, *supra* note 249, at 8–14 (recognizing "traditional indigenous environmental ethics").

472. *See* IN THE LIGHT OF REVERENCE, *supra* note 400 (interview of Vine Deloria) ("Indians don't believe [the earth] is an object and they base that on thousands of years of experience.").

473. A full consideration of "rights" critiques is beyond the scope of this Article. For some examples, see GLENDON, *supra* note 15; Morton J. Horwitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393 (1988); and Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984).

474. GLENDON, *supra* note 15, at 14.

A stronger articulation of Indian rights may help to ensure that the parties even engage in dialogue and work toward accommodation.[475] Presently, the government has little need to come to the bargaining table. This is because, under *Lyng*'s absolute ownership model, the government has an awesome power to destroy and Indians have only the hope that the government will be merciful with its power. O'Connor said as much in her conclusion to *Lyng*, writing that although the government had the power to destroy sacred sites, "[n]othing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen. The Government's rights to the use of its own land, for example, need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents."[476] The government may choose to negotiate sacred sites protection and usage, but this decision is discretionary in many cases.

From a tribal perspective, the mere hope that the government will act mercifully is not enough when this same government has a long history of suppressing Indian religions,[477] and in contemporary times, is engaged in development projects that continue to threaten sacred sites.[478] The First Amendment offers no real protection in these cases,[479] and the American Indian Religious Freedom Act "has no teeth in it."[480] While cultural resources protection statutes have begun to offer some relief, they typically offer protection only for a narrow subset of sacred places, such as burial grounds or archaeological sites.[481] Tribes need something more to secure their religious freedoms.

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475. *Cf.* HUSSEIN ABU HUSSEIN & FIONA MCKAY, ACCESS DENIED: PALESTINIAN LAND RIGHTS IN ISRAEL 34 (2003). Hussein and McKay write:

> [T]he language of rights can be used as part of popular pressure to bring about change. Sometimes, it can help secure gains through the courts; more often, it can be used as part of a wider campaign for the introduction of new legislation or changes in government policy. Ultimately the essence of a "rights approach" is that it empowers people to participate in the struggle to achieve their rights.

Id.

476. *Id.* at 453–54.

477. *See* Dussias, *supra* note 10, at 776–805 (describing the U.S. Government's historical attempts to "Christianize" Native Americans and suppress their ceremonial dances).

478. *See infra* notes 486–489.

479. *See* Zellmer, *supra* note 278, at 415.

480. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 455 (1988) (recounting that AIRFA sponsor Representative Udall "emphasized that the bill would not 'confer special religious rights on Indians,' would 'not change any existing State or Federal law,' and in fact 'has no teeth in it'"); *see also* Tsosie, *supra* note 401, at 289 (discussing whether the Religious Freedom Restoration Act will apply in sacred sites disputes on federal public lands).

481. *See* Zellmer, *supra* note 278, at 439–54 (discussing the Archaeological Resources Protection Act, the National Historic Preservation Act, and the Native American Graves Protection and Repatriation Act).

Many would respond that, in the years following *Lyng*, the federal administrative process has become a forum for substantial and meaningful accommodations of Indian religions. Under President Clinton's administration, federal agencies made notable changes in policy and practice in favor of accommodating tribal religions.[482] Of particular note was President Clinton's Executive Order requiring federal agencies to "accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and avoid adversely affecting the physical integrity of such sacred sites . . . [w]here appropriate, maintain[ing] the confidentiality of [the] sacred sites."[483] The policy changes led to the adoption of federal land management plans with varying degrees of protection for sacred sites and religious practices. These were upheld in the federal courts,[484] convincing many scholars and advocates that they could entrust Indian religious freedom to the agencies.[485]

The reality, however, is that administrative policy depends on who occupies the White House. President Clinton's policy on Indian sacred sites often coincided with his administration's concern for environmental protection. President Bush's energy plan takes an opposite approach. For example, President Bush's Executive Order No. 13,212 directs agencies to "expedite their review of permits or take other actions as necessary to accelerate the completion of [energy-related] projects."[486] Similarly, the Bush Administration has proposed lifting Clinton-era bans on logging in roadless areas of the

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482. Of particular note is President Clinton's Exec. Order No. 13,007, 3 C.F.R. 196 (1996), requiring federal agencies to "accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and avoid adversely affecting the physical integrity of such sacred sites," where possible, "maintaining the confidentiality" of them. But even this Order, which remains in place under the Bush Administration, stops short of providing any enforceable right, explaining:

> 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.

483. *Id.*

484. Several of these accommodations are discussed in *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.2d 814 (10th Cir. 1999), rejecting challenges to accommodation of Indian religions at Devils Tower National Monument. *See also* Natural Arch & Bridge Soc'y v. Alston, 209 F. Supp. 2d 1207 (D. Utah 2002) (upholding accommodations of Indian religions at Rainbow Bridge National Monument).

485. *See, e.g.*, Yablon, *supra* note 12, at 1653–58 (arguing that agency accommodation represents "permanent change" in sacred sites cases); *see also* BROWN, *supra* note 20, at 151–72 (discussing the National Park Service accommodation at Devils Tower National Monument). *See generally* 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 (2001) (advocating a narrative approach that would stimulate new ways of resolving sacred sites disputes).

486. Exec. Order No. 13,212, 3 C.F.R. 769 (2002); *see also* Ted Williams, *For a Week's Worth of Gas*, MOTHER JONES, Oct. 2004, at 66.

national forests.[487] While Clinton's Executive Order in favor of sacred site protection remains in place, it creates no affirmative or enforceable right supporting a cause of action in cases in which new energy extraction projects threaten sacred sites.[488] In some instances, the Bush Administration has reversed Clinton-era decisions and has opened up sacred sites for mining, gas drilling, and other extractive projects.[489]

Thus, a stronger source of legal rights may be necessary to protect sacred sites from contemporary threats.[490] Rights arguments can apply in a variety of different legal settings. Despite the limitations described above, tribes should absolutely continue to work through the administrative process on sacred sites problems. In many instances, the law *requires* them to exhaust administrative remedies before filing litigation.[491] Within the administrative process, tribes that are able to establish property rights to sacred sites may be better able to negotiate a satisfactory accommodation of their religious practices in the administrative process. In future Free Exercise Clause litigation, the existence of a property right may help tribal religious practitioners survive a summary judgment motion based on the

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487. *See* Special Areas, State Petitions for Inventoried Roadless Area Management, 69 Fed. Reg. 42, 636 (proposed July 16, 2004) (to be codified at 36 C.F.R. pt. 294) (proposing to replace logging bans in roadless areas of national forests with the opportunity for state governors to petition for management protocols); *see also* Paula Dobbyn, *Forest Service OKs Logging 1,800 Formerly Roadless Acres on Gravina Island*, ANCHORAGE DAILY NEWS, Aug. 18, 2004, at F1.

488. *See* Exec. Order No. 13,007, 3 C.F.R. 196 (1996). The Order states:

> 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.

489. For instance, President Clinton's Secretary of the Interior, Bruce Babbitt, denied the Glamis Corporation a mining permit on lands sacred to Quechan Indians in California because of concerns over potential cultural impacts. Ten months later, President Bush's Secretary of the Interior, Gale Norton, reversed the decision and reinstated the permitting process. *See* Tom Kenworthy, *New Mining Rules Reverse Provisions*, USA TODAY, Oct. 26, 2001, at 8A. In another example, the Clinton Administration denied the Anschutz Exploration Corporation a permit to drill an exploratory well in Weatherman Draw, Montana, a sacred area for a number of tribes. Twelve days after President Bush took office, the Bureau of Land Management reversed the decision and granted the permit. *See Exploratory Well in Weatherman Draw*, BLM NEWS, Feb. 6, 2001, *at* http://www.mt.blm.gov/ea/news2001/anschutz.2-6-01.htm. In this instance, the Anschutz Corporation itself ultimately decided to refrain from drilling and donate the property to the National Trust for Historic Preservation. *See* National Trust for Historic Preservation, Agreement to Protect Weatherman Draw, *at* http://www.nationaltrust.org/law/weatherman.html.

490. Even critics of rights-based advocacy note that "legally enforceable rights . . . have given minorities a way to articulate claims that majorities often respect, and have assisted the weakest members of society in making their voices heard." GLENDON, *supra* note 15, at 15.

491. *See* Administrative Procedure Act, 5 U.S.C. § 704 (2000).

ownership prong of *Lyng*. Alternatively, a rights argument could support federal legislative programs in favor of religious and cultural freedoms.[492]

In none of these settings—administrative process, legislation, or litigation—should lawmakers merely replace an absolutist vision of government rights with an absolutist vision of Indian rights (a vision which would conflict with indigenous values).[493] Rather, the Article calls for the recognition of Indian *rights* in the context of Indian *relationships* with the government, other citizens, and the land itself, as well as in the context of widely shared values like religious freedom and cultural diversity.[494] The recognition of rights in a vulnerable minority does not require reverting to the winner-take-all property law approach of *Lyng*. Rights have a place in negotiated approaches to legal problems.

Some might argue that a property rights approach sets Indians up for a big loss—if Indians fail to establish a property interest in a sacred site (as they often will), courts will affirm the federal government's right to destroy sacred sites. In this case, *Lyng* will have been right after all. But property law does not operate in isolation, and Indians should also make arguments rooted in the Constitution, statutes, and federal Indian law. Most importantly, even if Indian nations fail to establish an enforceable right at sacred sites, they should not face the destruction of such sites. In the most difficult cases, in which fundamental values like the freedom of religion and cultural survival are at issue, the parties should not fixate on who has the highest rights to property but should work together to effectuate mutually agreeable legal solutions. We can use property law to create the society we want to inhabit, rather than using it to justify destructive legal decisions like *Lyng*.[495]

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492. Glendon points out that the recognition of "rights" can occur in ways other than via direct enforcement. In European countries, for example, the constitutional "proclamations of social and economic rights . . . are . . . what European lawyers call 'programmatic rights'" that are fulfilled by implementing economic and social programs through legislation. GLENDON, *supra* note 15, at 99–100; *see also* Tsosie, *supra* note 401, at 303–04 (discussing legislative proposals for addressing the sacred sites issue).

493. *See, e.g.*, VINE DELORIA, JR., FOR THIS LAND: WRITINGS ON RELIGION IN AMERICA 131 (1999) ("The essence of the Indian attitude toward peoples, lands, and other life forms is one of kinship relations in which no element of life can go unattached from human society.").

494. *See* GLENDON, *supra* note 15, at 15 (suggesting that a "refined rhetoric of rights would promote public conversation about the ends towards which our political life is directed. . . . Let us freely grant that legally enforceable rights can assist citizens in a large heterogeneous country to live together in a reasonably peaceful way.").

495. *See* SINGER, *supra* note 15, at 210 (suggesting "we focus our attention on choosing property institutions and rules . . . that *accord* with our considered judgments about the appropriate and defensible forms of social life" (emphasis added)).

Finally, any recognition of Indian rights and federal duties at sacred sites might trigger Establishment Clause challenges.[496] As a general proposition, religious accommodations survive the Establishment Clause when they are made available to all similarly situated religious and secular people in need of similar treatment, and they advance secular goals.[497] Accommodations of Indian practices on federal public lands have survived the Establishment Clause because they avoid advancing religion and do not entangle the government in religion.[498] As scholars have pointed out, accommodating the religious practices of Indian nations almost always advances numerous secular goals, such as the protection of the environment, the protection of cultural resources, and the fulfillment of the government's political obligations to tribes.[499]

Moreover, history reveals many instances in which the federal government's use of public lands for religious purposes survived Establishment Clause challenges.[500] Ironically, of course, many of the historical examples involve the government's attempts to force Christianity on Indian nations[501] (corresponding with an aggressive, sometimes violent practice of eradicating

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496. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (finding that 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).

497. *See* Roberto L. Corrada, *Religious Accommodation and the National Labor Relations Act*, 17 BERKELEY J. EMP. & LAB. L. 185, 275 (1996) (discussing the Establishment Clause as applied to "broad and neutral exemption[s]").

498. *See* Bear Lodge Multiple Use Ass'n v. Babbitt, 2 F. Supp. 2d 1448, 1454 (D. Wyo. 1998), *aff'd on other grounds*, 175 F.3d 814 (10th Cir. 1999) (rejecting a Establishment Clause claim against the National Park Service accommodation of Native American religions at Devils Tower National Monument grounds).

499. *See* Zellmer, *supra* note 278, at 416. Zellmer states:

> Decisions that support American Indian cultural interests do not establish or endorse religion. Many governmental decisions that protect cultural resources or provide access to them have cultural, historical, or political, rather than religious, objectives and effects. These decisions satisfy traditional Establishment Clause analysis, even if they result in incidental benefits to religious interests. . . . Protecting cultural resources and allowing tribal access to them advance numerous secular objectives, including the political and legal obligations inherent in the federal trust responsibility toward tribes, as expressed in treaties and statutes.

Id. This point is borne out by the fact that many indigenous peoples would probably even not use the word "religion" to describe their practices and experiences at sacred sites.

500. *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 862–63 (1995) (Thomas, J., concurring) (citing historical examples of public support of religion, including the First Congress' ratification of the Northwest Ordinance setting aside federal lands for the use of church-affiliated schools).

501. *See* Dussias, *supra* note 10, at 776–805 (discussing federal Indian Christianization efforts including the assignment of missionaries to Indian reservations, outlawing of Indian ceremonial dances, the removal of Indian children to boarding schools where they were instructed in Christianity, and other measures).

Indian religions).[502] Thus, some contemporary accommodations of Indian traditional religions on public lands may be necessary to alleviate burdens on religious freedom and *dis*entangle the government from its previous suppression of Indian religions.[503]

CONCLUSION

Federal courts have used the fact of federal ownership to deny Indian religious freedoms at sacred sites located on public lands. This Article has argued that these cases reflect an "ownership model" of property law that is neither descriptively accurate nor normatively desirable. To the extent that property law often protects the rights of nonowners, Indian nations and their advocates should examine carefully the facts of future sacred sites cases to ascertain whether they may be able to claim an enforceable right or duty supporting the need to use, or to maintain the physical integrity of, the sacred place. Whether in litigation or in negotiated settings like the federal administrative process, property rights ultimately may enhance legal recognition of Indian interest at sacred sites.

Of course, property arguments alone will not suffice to guarantee Indians' religious freedoms at sacred sites—nor should they have to do so. Indian nations are more than mere property claimants; they are political and cultural sovereigns engaged in a government-to-government relationship with the United States, and they are entitled to the full body of legal protections growing out of that relationship. Individual Indians, in turn, should be eligible for the protections of the First Amendment, like any other citizen. The present argument is only that, in light of *Lyng*, tribes should consider property rights arguments as part of a multipronged legal strategy in sacred sites cases. Recognizing the rights of Indians as nonowners of sacred sites located on federal public lands may help to effectuate the values of religious and cultural freedom that we all cherish.

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502. *See Bear Lodge Multiple Use Ass'n*, 175 F.3d at 817 ("By the late 19th Century federal attempts to replace traditional Indian religions with Christianity grew violent. In 1890 for example, the United States Calvary shot and killed 300 unarmed Sioux men, women and children en route to an Indian religious ceremony called the Ghost Dance.").

503. *See* Corrada, *supra* note 497, at 276 (discussing the Establishment Clause as applied to accommodations that "lift a grave, serious or significant burden on religion"); *see also* Zellmer, *supra* note 278, at 416 ("[D]ecisions that provide preferences or exemptions for tribal spiritual needs by alleviating burdens to ceremonial practices or otherwise dispelling the lingering effects of religious suppression are an appropriate form of accommodation.").