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In the Absence of Title: Responding to Federal Ownership in Sacred Sites Cases

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This paper examines the challenge of protecting American Indian sacred sites located on federal public lands. Many have addressed this issue in the religious freedoms context,[1] but I believe the problem is just as much about property law. The Supreme Court's decision in *Lyng v. Northwest Indian Cemetery Protective Association,* for example, would appear to suggest that federal ownership of certain sacred sites trumps tribal free exercise clause claims regarding those sites.[2] This holding corresponds with a classic model in which "[p]roperty is about rights over things and the people who have those rights are called owners."[3] However, a closer look at property law reveals that "ownership" is only one factor in any analysis, and property also encompasses interests, obligations, and values beyond the narrow question of owners' rights.[4] Here I argue that recognizing the expansiveness of property law can be a useful tool in developing legal arguments that respond to the ownership bar presented by *Lyng*.[5]

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1. *See, e.g.*, VINE DELORIA, JR., *Sacred Lands and Religious Freedom, in* FOR THIS LAND: WRITINGS ON RELIGION IN AMERICA 203–13 (1998). *See generally* Scott Hardt, *The Sacred Public Lands: Improper Line Drawing in the Supreme Court's Free Exercise Analysis*, 60 U. COLO. L. REV. 601 (1989).

2. *See* 485 U.S. 439, 453 (1988).

3. JOSEPH WILLIAM SINGER, ENTITLEMENT 2 (2000) [hereinafter, "ENTITLEMENT"].

4. *See id.* at 6–18.

5. This paper is meant only to provide an initial introduction to the use of certain property law arguments in sacred sites cases. The ideas discussed here will be developed and substantiated in a subsequent piece. This paper does not address the several federal statutes that may also be helpful to tribes in sacred sites cases; these statutes have been discussed in a number of articles. *See, e.g.*, Richard B. Collins, *Sacred Sites and Religious*

SACRED PLACES AND FEDERAL OWNERSHIP

Most American Indian cultures and religions are deeply connected to certain places in the natural world. These "sacred sites" include Sweet Grass Hills in Northern Montana, Devils Tower in Wyoming, the Black Hills of South Dakota, and hundreds or thousands of other places that have religious and cultural significance for Indian peoples.[6] Many sacred sites figure prominently in tribal oral traditions; some mark the place of creation, while others have more recent historical significance.[7] These sites maintain their significance today, and Indians visit them to hold ceremonies and engage in other activities that are crucial to community vitality. For example, in litigation involving Devils Tower, known to Lakota peoples as *Mato Tipila* or Bear's Lodge, Cheyenne River Sioux practitioners explained:

> [The sun dances, vision quests, and other spiritual practices that occur at Devils Tower] are: "vital to the health of our nation and to our self-determination as a Tribe. Those who use the butte to pray become stronger. They gain sacred knowledge from the spirits that helps us to preserve our Lakota culture and way of life. They become leaders. Without their knowledge and leadership, we cannot continue to determine our destiny."[8]

Today, however, Indian nations' ability to maintain their relationship with these sacred sites is threatened. As a result of European conquest and American colonization, Indian nations lost most of their traditional territories,[9] and today, former Indian lands are owned by private

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Freedom on Government Land, 5 U. PA. J. CONST. L. 241, 255–56 (2003) (analyzing the American Indian Religious Freedom Act and other laws); Sandra B. Zellmer, *Sustaining Geographies of Hope: Cultural Resources on Public Lands*, 73 U. COLO. L. REV. 413, 438–58 (2002) (discussing the Archeological Resources Protection Act, Native American Graves Protection and Repatriation Act, and other federal statutes).

6. *Compare* ANDREW GUILFORD, SACRED OBJECTS AND SACRED PLACES: PRESERVING TRIBAL TRADITIONS 67–176 (2000), *with* Thomas F. King, *"Sacred Sites" Protection: Be Careful What You Ask For*, May 28, 2002 (arguing that the term "sacred sites" fails to encompass all of the land and resources that are spiritually signficant to Indian peoples), *at* http://www.sacredland.org/thomas_king.html (last visited Jan. 3, 2003).

7. *See* VINE DELORIA, JR., GOD IS RED 272–82 (1992).

8. Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814, 817 (10th Cir. 1999) (quoting Intervenors, Cheyenne River Sioux Tribe).

9. Chief Justice John Marshall held in 1823 that Indian nations possessed original Indian title to their lands, and that the federal government held the sole and exclusive right to acquire their title "by purchase or by conquest." Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 587 (1823). *See generally* ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990) (discussing the origins of the doctrine of discovery and other legal doctrines that Europeans and Americans used to

individuals, companies, governments, and others.[10] This paper focuses on lands owned by the federal government and the conflicts that arise when the government wants to use the land in a way that would desecrate a sacred site or prevent Indian access to it.

THE OWNERSHIP BAR

The federal government holds over six hundred million acres of land in fee simple title, including national parks and forests, monuments, historic sites, and grazing lands.[11] Even though these lands are now owned and managed by the federal government, American Indians continue to visit sacred sites located on public lands and practice their religions to the extent possible.[12] But their ability to do so is hampered by some federal land management practices, including the development of timber, oil and gas resources, the construction of dams and roads, and the facilitation of commercial recreation and tourism. These, and other federal land use

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justify the dispossession of Indian lands). *See also* Nell Jessup Newton, *Compensation, Reparations, & Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453, 458 (1994) (stating that "although land transfers did result from armed conflicts with Indian tribes, much more land was acquired through treaties negotiated with Indian tribes"). *See also* Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481, 486–503 (1994) (discussing the legal extinguishment of original Indian title).

10. American Indians tribes and individuals, who originally owned 100% of the present-day United States, now own only 4.2% of the land in the United States. *See* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 21 (4th ed. 1998) (citing figures from 1996).

11. *See* ROBERT L. GLICKSMAN & GEORGE CAMERON COGGINS, MODERN PUBLIC LAND LAW 1 (2d ed. 2001). In this paper I focus on the government as the "owner" of federal public lands, but I recognize it also acts as a "sovereign" over these lands. *See* Light v. United States, 220 U.S. 523, 536–37 (1911). *See also* James L. Huffman, *The Inevitability Of Private Rights In Public Lands*, 65 U. COLO. L. REV. 241, 255–56 (1994) (on whether the government's dominion over public lands is best described through an ownership or sovereignty model, and whether it is the government or the citizens who are the proprietors of the land). Indian tribes, too, are both sovereigns and owners, although in some cases courts have failed to recognize the duality. *See* Joseph William Singer, *Sovereignty and Property,* 86 NW. U. L. REV. 1, 5–6 (1991). The ramifications of the property/sovereignty tension will be considered in a subsequent article.

12. The story of how the federal government came to "own" vast tracts of "public lands" is closely linked to American Indian history, as described in several books focusing on the National Parks System. *See, e.g.*, PHILIP BURNHAM, INDIAN COUNTRY, GOD'S COUNTRY: NATIVE AMERICANS AND THE NATIONAL PARKS (2000); ROBERT H. KELLER & MICHAEL F. TUREK, AMERICAN INDIANS AND NATIONAL PARKS (1998); MARK DAVID SPENCE, DISPOSSESSING THE WILDERNESS: INDIAN REMOVAL AND THE MAKING OF THE NATIONAL PARKS (1999). Of course the government's ownership and management of public lands involves issues beyond Indian sacred sites that are not treated in this paper.

projects and programs, can threaten the physical integrity of sacred sites, as well as the quiet and privacy that American Indians require for religious and cultural practices.

In recent decades, tribal people brought several lawsuits challenging federal development projects on grounds that they would infringe on the Indians' freedom of religion in violation of the First Amendment.[13] In *Sequoyah v. Tennessee Valley Authority*, for example, the Eastern Band of Cherokees tried to stop the construction of the Tellico Dam on property owned by the Tennessee Valley Authority, an agency of the federal government.[14] The Cherokees claimed the project would flood historic Cherokee towns, destroying sacred sites, medicine gathering places, graves, and deadening the Tennessee River itself.[15] The Cherokees further argued that the proposed project would impose a substantial infringement on their religion and that, as a result, the government was required to demonstrate a compelling interest in the project and that no alternative could satisfy the government objective.[16]

Similar suits followed. In *Badoni v. Higginson*,[17] Navajo medicine people and others argued that federal management of Rainbow Bridge National Monument was drowning Navajo gods in the rising waters of Lake Powell.[18] Next, in *Wilson v. Block*,[19] the Hopi Tribe and Navajo Medicinemen's Association attempted to protect the sacred San Francisco

13. *See, e.g.*, Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 591–97 (N.D. Cal. 1983), *aff'd in relevant part*, 764 F.2d 581 (9th Cir. 1985), *rev'd sub nom* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); Hopi Indian Tribe v. Block, Nos. 81-0481, 81-0493, and 81-0558 (D.D.C. May 14, 1982), *aff'd sub nom*, Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 956 (1983); Sequoyah v. Tennessee Valley Auth., 480 F. Supp. 608, 611–12 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980); Badoni v. Higginson, 455 F. Supp. 641, 644–45 (D. Utah 1977), *aff'd* 638 F.2d 172 (10th Cir. 1980). *See also* United States v. Means, 858 F.2d 404, 406–08 (8th Cir. 1988) (affirming Forest Service denial of special use permit to group of Sioux Indians for use of Black Hills National Forest for religious purposes); Inupiat Cmty. of the Arctic Slope v. United States, 548 F. Supp. 182, 188–89 (D. Ark. 1982) (rejecting claim that offshore mineral exploration and development affected religious interests); Crow v. Gullet, 541 F. Supp. 785, 793 (D. S.D. 1982) (rejecting challenge by Lakota and Tsistsistas Nations to state action interfering with religious practices at Bear Butte State Park).

14. *See* Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159, 1160–61 (6th Cir. 1980).

15. *See id.*

16. *See id.* at 1163 (citing Sherbert v. Verner, 374 U.S. 398, 402–03 (1963); Wisconsin v. Yoder, 406 U.S. 205, 214–15 (1972)).

17. 638 F.2d 172 (10th Cir. 1980).

18. *See id.* at 175–76.

19. 708 F.2d 735 (D.C. Cir. 1983).

Peaks, located on national forest lands, from development as a ski area.[20] These cases culminated in *Lyng v. Northwest Indian Cemetery Protective Ass'n*,[21] where Yurok, Karok, and Tolowa Indians sought to stop the building of a forest service road through their sacred "High Country," located on national forest lands.[22]

These cases have been well-treated in legal scholarship, and I will not discuss them in detail here.[23] The relevant point is that the Indians lost in every one.[24] In *Lyng*, for example, the Court recognized that government action would "virtually destroy" the Indian religion, but held that the development plan did not violate the Free Exercise Clause because it would not coerce belief and because the government's interest in developing its land trumped any Indian religious claim.[25]

As scholars have pointed out, the tribes often lose because the federal courts do not understand Native religions.[26] Much of the jurisprudence appears to be grounded in a worldview that separates land from religion, history from spirituality, and belief from practice. These distinctions, such as the land/religion distinction, may be meaningful in Judeo-Christian religions:

> Those traditions ... emphasize the idea of an individual relationship with God developed as part of a religious community.... In the absence of coerced conformity, adherents to such traditions are free to practice their religions wherever they wish. For example, although specific places have deep religious significance to both Jews and Christians, it is generally assumed to be possible to practice these religions anywhere.[27]

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20. *See id.* at 737–38.

21. 485 U.S. 439 (1988).

22. *See id.* at 442–43.

23. *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). *See generally* BRIAN EDWARD BROWN, RELIGION, LAW, AND THE LAND: NATIVE AMERICANS AND THE JUDICIAL INTERPRETATION OF SACRED LAND (1999).

24. See BROWN, *supra* note 23, at 1–7.

25. *See Lyng*, 485 U.S. at 451–53.

26. *See, e.g.*, Lloyd Burton & David Ruppert, *Bear's Lodge or Devils Tower: Intercultural Relations, Legal Pluralism, and the Management of Sacred Sites on Public Lands*, 8 CORNELL J.L. & PUB. POL'Y 201, 204–05 (1999).

27. Joseph William Singer, *Property and Coercion In Federal Indian Law: The Conflict Between Critical and Complacent Pragmatism*, 63 S. CAL. L. REV. 1821, 1832 (1990):

> What would you have to believe to think that there is no coercion involved in forcibly desecrating sacred lands? You would have to believe (1) that physical places are not central to religious practice; (2) that forcible removal of a person

But unlike Judeo-Christian religions, tribal religions often are inextricably tied to particular places in the natural world and cannot be relocated.[28] Cherokee plaintiffs made this point in the *Sequoyah* litigation, stating:

> 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 ....[29]

When the Sixth Circuit held that the First Amendment did not offer the Cherokees any protection in this case,[30] one can only assume that cultural barriers prevented the judges from understanding what "freedom of religion" would mean in a Cherokee context.

The cultural and religious issues are both important and complex but, for my present argument, I am most interested in how property law loses the case for the tribes. In *Lyng*, for example, the Supreme Court was particularly concerned about the Indians' claim that they needed "undisturbed naturalness" to practice their religion in the sacred High Country, located within the national forest.[31] In the Court's view, this claim challenged the federal government's right to use the land according to its

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> protesting desecration of a sacred place is not *religious* coercion; (3) that alteration by human beings of natural spaces is not an intrusion on religion; (4) that religion is not connected to a place and can be practiced anywhere; (5) that religion is a set of beliefs and rituals and that coercion arises only when the state requires forced avowals of belief or prohibits the practice of ritual. The concept of coercion, as Justice O'Connor defined it here, embodies the perspective underlying a particular set of monotheistic religious traditions ... particularly Jewish and Christian traditions.... This conception of religion differs from those that involve a spiritual world understood as both multiple and indissolubly linked with particular aspects of nature. These religions are place specific. Most members of American Indian nations who adhere to traditional beliefs understand all aspects of nature as spiritual.

Id. at 1832–33.

28. *See Lyng*, 485 U.S. at 460–61 (Brennan, J, dissenting). *See generally* DELORIA, *supra* note 7.

29. *See* BROWN, *supra* note 23, at 15 (quoting the testimonies of Lloyd Sequoyah, Emmalie Driver, Willie Walkingstick, and Lloyd C. Owle in the plaintiff's complaint, *Sequoyah v. Tenn. Valley Auth.*, 620 F.2d 1159 (6th Cir. 1980)) (alterations in original).

30. *See Sequoyah*, 620 F.2d at 1165.

31. *See Lyng*, 485 U.S. at 453.

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."[32] In reality, the Indians were not actually claiming ownership rights, such as the right to exclude others. Instead, they requested that the federal government manage *its* property in a way that would protect the "privacy and solitude" necessary for Indian religious practices.[33] But the majority held that the Indian position would require a "diminution of the Government's property rights, and the concomitant subsidy of the Indian religion."[34] While the Court speculated that Indians *might* have some rights, "[w]hatever rights the Indians may have to use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land."[35]

After *Lyng*, the outlook is bleak for tribal religious practitioners: they seek access to, and protection of sacred sites on federal public lands because their relationship to the land is strong and essential to their religion and culture. Yet they lose every case in part because their relationship to the land does not constitute "ownership" in the sense of having fee simple title to the land. Thus, *Lyng* appears to serve as a potential bar to many tribal free exercise claims involving sacred sites located on federally-owned land.

A THEORETICAL RESPONSE TO THE OWNERSHIP BAR

Going forward, tribes need to confront the property law aspect of these cases.[36] In particular, tribes must develop legal arguments that respond to the notion that federal ownership trumps Indian religious freedoms in

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32. *Id.*

33. *See id.* at 476 (Brennan, J., dissenting).

34. *Compare id. at* 453, *with* JUDITH V. ROYSTER & MICHAEL C. BLUMM, NATIVE AMERICAN NATURAL RESOURCES LAW: CASES AND MATERIALS 23 (2002) ("Suppose a government action would not merely destroy a Catholic church, but also the place where an alleged religious miracle occurred? Would such an action penalize religion?... Would the Court describe enjoining the project to protect the free exercise rights of Catholics as a subsidy to the religion?").

35. *Lyng*, 485 U.S. at 453. *Compare with Sequoyah*, 620 F.2d at 1164 ("The district court ... based its holding [dismissing the Cherokee's Free Exercise Clause Claim] on the plaintiffs' lack of any property interest in the Tellico area.... While this is a factor to be considered, we feel it 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.").

36. Other scholars also have acknowledged the property law challenge presented by *Lyng*. *See* Dussias, *supra* note 23, at 823–33; 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 (2000). *See generally* BROWN, *supra* note 23.

sacred sites cases. In his recent works, Professor Joseph Singer has articulated theories of property law that may be helpful to tribes as they confront this challenge.[37]

Singer argues that contemporary law and society are heavily influenced by an "ownership model" of property.[38] In this model, owners enjoy virtually unlimited rights to exclude, to transfer, to use, and to possess property.[39] Accordingly, in *Lyng*, the question was framed as: which party had rights to use the Forest Service land? As the owner, the government was the entity with the rights; as the non-owners, the Indians had few, if any, rights. The government wanted to develop its land, and its rights to do so were superior to the Indians' claims for religious freedoms. Thus, *Lyng* reflects the pervasive notion that owners "are free to use the[ir] property as they wish," that owners have virtually unlimited rights to exclude, to transfer, to use, and to possess property.[40]

Despite popular perceptions, however, a deeper examination reveals that the rights of owners are neither exclusive nor absolute.[41] In fact, owners' rights are limited by owners' obligations to other people and to society.[42] As a result, non-owners may have protectable interests in property—even while the owner maintains her rights to the property. Professor Singer outlines several examples.[43] A landlord's right to use his property can be limited by common law, statutes, and the terms of a lease with a tenant. 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

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37. *See generally* JOSEPH WILLIAM SINGER, THE EDGES OF THE FIELD: LESSONS ON THE OBLIGATIONS OF OWNERSHIP (2000) [hereinafter, "THE EDGES"]; ENTITLEMENT, *supra* note 3. Professors Angela Riley and Rebecca Tsosie have already considered Singer's social relations and entitlement theories in the context of Indian law issues. *See generally* 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 (2001).

38. *See* ENTITLEMENT, *supra* note 3, at 3.

39. *See id.* at 2–3.

40. *Id.* at 2.

41. *See id.* at 30 (images popularly associated with property include a "single owner with consolidated rights;" a "title" that provides clear criteria and designation of the owner and her rights; "historical entitlement" as depending only on the moment of creation and transfer; "boundaries" delineating the space where an owner enjoys his "absolute powers" to use and possess, transfer, and exclude; ownership as involving "control of things;" property as comprised of "many owners" whose uses are "self-regarding;" and "harm" to others as the only legitimate reasoning for limiting one's ownership rights).

42. *See id.* at 3.

43. The examples provided in this section are drawn from ENTITLEMENT, *supra* note 3, at 19–94 and THE EDGES, *supra* note 37, at 7–17.

her right to take possession of the property at the end of the lease. A shopping mall owner's right to exclude patrons perceived as undesirable may be limited by laws that prohibit discrimination on the basis of race. In some instances, the limitations on ownership may not be strictly legal. Even in the absence of a union contract, for example, a factory owner's right to close the factory may be limited by moral obligations to support workers and the larger community.[44] Underlying these legal and moral limits on the rights of ownership include important societal values, such as racial equality, providing people with security in their homes, and human decency.

These examples, and others,[45] suggest that property is not just about protecting the owner's rights. Instead, property is better conceptualized through an "entitlement model" that recognizes "the conflicting interests of everyone with legitimate claims to rights in the property in question."[46] Once we accept that the law should acknowledge the interests of owners *and* certain non-owners, we can then turn to normative questions about the recognition and distribution of entitlements[47]—or deciding what the law should be. Here, Singer urges decision-makers to pay attention to the way property structures "social relations."[48] In many contexts, from condominium governance to informal agreements between neighbors to city ordinances regarding the homeless, property rules structure relationships between people by setting expectations, imposing obligations, and affecting power distribution. In all of these settings, the justification of any property right depends on the way in which it shapes relationships among people and expresses human values.[49]

Thus, in property law generally, ownership is just one aspect of the analysis; and the same should be true in Indian sacred sites cases. Both the federal government, as owner, and the Indians, as non-owners, have rights

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44. *See* ENTITLEMENT, *supra* note 3, at 38–39.

45. Another example might come from the intellectual property field. Federal law grants copyright owners the exclusive right to copy, distribute, perform, or display their works, but it limits these protections to a time period (life of the author plus seventy years), after which the work enters the public domain. The copyright statute thus balances competing public policy values. On the one hand, it fosters invention and authors' creativity, while on the other hand, it promotes the free exchange of ideas and marketability of intellectual property. It accomplishes these goals by simultaneously protecting and limiting owners' rights and recognizing the public's interests. *See* U.S. CONST. art. I, § 8, cl. 8; 17 U.S.C. §§ 101–1332 (2000).

46. ENTITLEMENT, *supra* note 3, at 91.

47. *See id.* at 92.

48. *See generally id.* at 95–139.

49. THE EDGES, *supra* note 37, at 21.

and obligations to sacred sites.[50] Moreover, the important questions may not be answered by arguing about either party's rights,[51] but rather by looking deeply at societal values regarding religious and cultural freedoms, and asking how the federal government and Indian nations wish to relate to one another on the sacred lands that they now share.[52]

POTENTIAL APPLICATIONS OF SOCIAL RELATIONS AND ENTITLEMENT THEORY

Following the classic property law model, the Supreme Court in *Lyng* held that the non-owner Indians had no interest that could limit the government's rights as owner.[53] This focus may have obscured several arguments in favor of Indian interests and federal obligations in sacred sites, including claims based on common law property doctrine, treaty rights, and the federal-Indian trust relationship.[54] Looking forward to future cases, I briefly outline these arguments in a general context, recognizing that their utility in any particular sacred site dispute will depend significantly on the facts.

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50. *See supra* notes 11–12 and accompanying text (recognizing that the government and Indian nations are both owners and sovereigns).

51. *See* Howard J. Vogel, *The Clash of Stories at Chimney Rock: A Narrative Approach to Cultural Conflict Over Native American Sacred Sites on Public Land*, 41 SANTA CLARA L. REV. 757, 759 (2001) ("[W]e need to recognize [sacred sites] disputes as *cultural conflicts* between communities, arising from a *clash between master stories*, which inform the identity and understanding of the peoples who are the parties to these disputes, rather than simply as disputes involving conflict between individual rights and government power.").

52. *See* Burton & Ruppert, *supra* note 26, at 204, 238–40.

53. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 452–53 (1988).

54. Certain arguments based on the trust relationship were raised in *Lyng*. The Hoopa parties claimed that the Forest Service's decision to build a road on certain National Forest Lands and its proposed timber management plan would violate water and fishing rights reserved to the Tribe when its reservation was created—as well as violate the government's trust duties to protect those rights. *See* Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 605 (N.D. Cal. 1983). The district court accepted these arguments, holding that the proposed projects would adversely affect water quality and the fish habitat on the Hoopa Reservation, and would thereby violate the government's trust duties. *See id.* The Ninth Circuit held that the Hoopa Tribe was not a party to the litigation and vacated this portion of the district court holding. *See* Northwest Indian Cemetery Protective Ass'n v. Peterson, 764 F.2d 581, 697 n.10 (9th Cir. 1985). The Supreme Court did not further comment on the merits of this claim. *See Lyng*, 485 U.S. at 444. The trust argument was thus framed narrowly and quickly dismissed by the courts. None of the *Lyng* opinions considered whether the trust responsibility, treaties, common law property, or any other source of law, could establish tribal property rights or limit the near-absolute right of the government over its land.

First, tribes could examine whether there is any common law property doctrine that might help them overcome the hurdle of *Lyng*.[55] The common law has long recognized that non-owners may have certain rights as against title holders; these include, but are not limited to, rights established by adverse possession, easements, and covenants. At least one tribe has successfully used common law property arguments to establish a limited entitlement to lands owned by a third party that were necessary for a tribal religious practice. In *U.S. v. Platt*, the Zuni Tribe sought access to a path located on private lands and necessary for its pilgrimage from the reservation in New Mexico to Zuni Heaven in Arizona—a 110-mile trek which sixty religious leaders had been making on horseback and foot every four years since at least 1540.[56] The Tribe, cognizant of the limitations imposed by *Lyng*, sued for a prescriptive easement instead of seeking relief under the First Amendment.[57] Finding that the Tribe's use of the path demonstrated actual, open and notorious, continuous and uninterrupted use for the statutory period, the court granted a prescriptive easement to use the path for the pilgrimage to Zuni Heaven once every four years.[58] Following the Zunis' example in *Platt*, tribes should evaluate closely the various common law property claims available to them. In *Platt*, for example, the Zunis could frame their case under Arizona's law of prescription because they were suing a private defendant, but generally such claims are not actionable against the federal government.[59] Other common law claims may be appropriate depending on the facts of a particular case.[60]

Second, tribes could re-examine treaties to determine whether they contain residual rights to sacred sites.[61] Under the reserved rights doctrine, tribes retain any rights that have not been ceded in treaty language or divested by statute.[62] Moreover, the Indian canons of construction provide

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55. *See* Worthen, *supra* note 36, at 248.

56. *See* United States *ex rel.* Zuni Tribe of N.M. v. Platt, 730 F. Supp. 318 (1990).

57. *See* Hank Meshorer, *The Sacred Trail to Zuni Heaven: A Study in the Law of Prescriptive Easements*, *in* READINGS IN AMERICAN INDIAN LAW 319–20 (Jo Carillo ed., 1998).

58. *See id.* at 323–24.

59. *But see* JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES AND PRACTICES 221 (3d ed. 2002) (in some jurisdictions, property law is becoming more amenable to adverse possession claims against governments).

60. *See, e.g.*, Nome 2000 v. Fagerstrom, 799 P.2d 304, 308–09 (Alaska 1990) (holding Alaska Native claimants satisfied the elements of adverse possession through their use of certain lands for subsistence and recreational purposes).

61. *See* 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); Worthen, *supra* note 36, at 251.

62. *See* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 401–

that treaties must be read liberally in favor of the Indians, as they would have understood them, with ambiguous provisions resolved in favor of the Indians.[63] In the recent case of *Minnesota v. Mille Lacs Band of Chippewa Indians,* the Supreme Court applied the reserved rights doctrine and the Indian canons to uphold tribal hunting rights in traditional territories, even where the tribe had relinquished title to those lands by treaty.[64] An analogous argument may have potential in the sacred site context: where a treaty conveyed to the government fee simple title to lands encompassing Indian sacred sites but did not explicitly divest tribal practitioners of the rights to use those sites, the treaty should be interpreted as preserving the tribal religious use. Potential limitations to this approach include that the Supreme Court has applied the Indian canons with decreasing frequency in recent cases[65] and many of the treaties were signed during the period when the government was actively suppressing tribal religions.[66] Depending on the particular treaty language, however, Indians may be able to establish reserved treaty rights to access and use of sacred sites.

Third, tribes could argue the federal government has a duty to protect sacred sites under the federal-Indian trust doctrine. The trust doctrine provides that, as a result of dealings between the United States and Indian nations, the government assumed a fiduciary duty toward Indian peoples,

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02 (1993) (citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 552–53 (1832); Winters v. United States, 207 U.S. 564, 576–77 (1908); United States v. Winans, 198 U.S. 371, 381–82 (1905)).

63. *See* Kristen A. Carpenter, *Interpreting Indian Country in* State of Alaska v. Native Village of Venetie, 35 TULSA L.J. 73, 74 (1999) (citing Choctaw Nation v. United States, 318 U.S. 423, 431–32 (1943); Choctaw Nation v. Oklahoma, 397 U.S. 620, 631–32 (1970); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973)). *See generally* Frickey, *supra* note 62; 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 (1975).

64. *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 195–202 (1999). *See also* Menominee Tribe v. United States, 391 U.S. 404, 412–13 (1968) (treaty-guaranteed hunting and fishing rights survived the Termination Act's extension of state law to former reservation lands); Ed Goodman, *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Comanagement as a Reserved Right*, 30 ENVTL. L. 279, 284 (2000) (arguing that tribes not only have reserved rights to hunt and fish off-reservation but also to participate in land management decisions affecting off-reservation habitats).

65. *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, 267–68 (2001).

66. *See* Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814, 817 (stating that "past federal policy was to assimilate American Indians into United States culture, in part by deliberately suppressing, and even destroying, traditional tribal religions and culture in the 19th and early 20th centuries").

their lands, and other assets.[67] This duty has been interpreted to require federal protection of Indians' natural resources against other threats.[68] In the context of sacred sites located on federally-owned lands, however, this argument may be somewhat difficult to make[69] because these lands are, by definition, not held by the government "in trust" for tribes.[70] But a broader view of the trust relationship suggests that it applies in most dealings between the government and Indian nations,[71] including the protection of

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67. *See* United States v. Mitchell, 463 U.S. 206, 225 (1983) (Mitchell II); Seminole Nation v. United States, 316 U.S. 286, 295–96 (1942); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

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

69. Federal courts have rejected trust responsibility claims even where sacred sites are located on tribal lands. *See, e.g.*, Miccosukee Tribe of Indians of Fla. v. United States, 980 F.Supp. 448, 460–63 (S.D. Fla. 1997) (holding that federal officials' decision not to take action to prevent flooding of tribal lands, including lands where the Tribe grew corn for the religious Green Corn ceremony, did not violate the trust responsibility and other laws). In denying the Tribes' claims for a writ of mandamus and damages on a breach of trust theory, *Miccosukee* held that "despite the general trust obligation of the United States to Native Americans, the government assumes no specific duties to Indian tribes beyond those found in applicable statutes, regulations, treaties or other agreements." *Id.* at 461 (citing *Mitchell II* and the Tucker Act). This holding may conflate requirements for breach of trust claims under two separate lines of cases. The Supreme Court has held that the Tucker Act, 28 U.S.C. §§ 1491, 1505, requires an affirmative legal basis, separate from the Tucker Act itself, to support an award of damages for breach of federal trust duties to Indians in suits brought in the Court of Federal Claims. *See* United States v. Navajo Nation, 123 S. Ct. 1079, 1091 (2003); United States v. Mitchell, 445 U.S. 535, 538 (1980) (Mitchell I); United States v. Mitchell, 463 U.S. 206, 216 (1983) (Mitchell II). However, scholars have argued that this standard does not apply outside of the Tucker Act context, such as in cases where tribes sue administrative agencies for equitable relief under the Administrative Procedure Act on grounds that an agency action unlawfully violated common law trust duties to tribes. *See* Mary Christina Wood, *Origins & Development of the Trust Responsibility: Paternalism or Protection?*, Remarks at the Federal Bar Association Indian Law Conference (April 10, 2003) (on file with the author) (citing *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 256–57 (D.D.C. 1972) and numerous other federal cases holding that agencies' breach of trust duties supports equitable remedies); Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1521–22. *See generally* Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975) (courts should enforce federal trust obligations to American Indians through traditional common law equitable remedies).

70. *Compare* United States v. White Mountain Apache Tribe, 123 S. Ct. 1126, 1133 (2003) (the "fact that the property occupied by the United States is expressly subject to a trust supports a fair inference that an obligation to preserve the property improvements was incumbent on the [Government] as trustee," in a case for damages under the Tucker Act).

71. *See, e.g.*, Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual*

sacred sites on public lands.[72]

In sacred sites claims, then, Indian nations may be able to rely on common law property, treaty rights, and the federal-Indian trust doctrine to challenge the notion that federal ownership trumps Indian interests in sacred sites. This is only a partial list. Indian nations might also consider developing arguments based on international law's increasing protection for indigenous property rights[73] and tribes' own laws and customs on sacred sites.[74]

Finally, in some cases Indians may be unsuccessful in establishing tribal rights or federal obligations at federally-owned sacred sites; however they should still not face the destruction of their religion. Even where the federal government arguably has the legal "right" to destroy a tribal religion, it is not *required* to exercise that right. Consistent with the values underlying the First Amendment and citizens' expectations of religious freedom and tolerance, the federal government accommodates many mainstream religious practices.[75] It should do the same for Indian religions, within the parameters of the Establishment Clause.[76] Indeed, current federal policy

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Property in Indigenous Communities, 18 CARDOZO ARTS & ENT. L.J. 175, 210–11 (2000) (The trust relationship is "grounded . . . in a number of sources, including treaties, laws of Congress, and judicial rulings" giving rise to a "duty 'to protect and enhance the people, the property, and the self-government of Indian tribes.'") (quoting the AMERICAN INDIAN POLICY REVIEW COMM'N, 95TH CONG., FINAL REPORT TASK FORCE NO. 9, at 39 (Comm. Print 1977)). This broad view is consistent with both indigenous understandings of the trust relationship, see ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW & PEACE, 1600–1800 (1997), and international law on states' duties to indigenous peoples, see S. James Anaya, *International Law and the United States' Trust Responsibility Toward Native Americans*, *in* NATIVE VOICES: AMERICAN INDIAN IDENTITY AND RESISTANCE, (forthcoming June 2003).

72. *See generally*, Jeri Beth K. Ezra, *The Trust Doctrine: A Source of Protection for Native American Sacred Sites*, 38 CATH. U. L. REV. 705 (1989); Ward, *supra* note 61, at 821.

73. *See* Riley, *supra* note 37, at 78–83 (discussing The Mayagna (Sumo) Indigenous Cmty. of Awas Tingni v. Nicaragua, Case No. 79 Inter-Am. C.H.R. (2001)). *See generally* 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 (2001).

74. *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).

75. *See* Lynch v. Donnelly, 465 U.S. 668 (1984) (citing numerous examples of federal accommodation of religion, the Supreme Court ruled that a nativity scene on city property did not violate the Establishment Clause, even though it had religious significance to Christians).

76. *See* Bear Lodge Multiple Use Ass'n v. Babbitt, 2 F.Supp.2d 1448, 1454 (D. Wyo. 1998) (applying Lemon v. Kurtzman, 403 U.S. 602 (1971) where the Supreme Court ruled that a governmental action does not offend the Establishment Clause if it (1) has a secular purpose, (2) does not have the principal or primary effect of advancing or inhibiting

directs executive agencies to accommodate tribal religious practices on federal public lands.[77] Agencies have successfully implemented this policy, as in the National Park Service's development of a management plan for Devils Tower National Monument that accommodated Indian ceremonial practices, while also recognizing the interests of rock climbers and visitors to Devils Tower. The management plan survived Establishment Clause challenges and was upheld by the Tenth Circuit in *Bear Lodge Multiple Use Ass'n. v. Babbitt*.[78] The legislative branch, too, has an important role in recognizing tribal rights to federally-owned sacred sites, as evidenced in recent federal legislation settling a dispute over Sandia Mountain in New Mexico. This settlement simultaneously confirms ongoing federal ownership, the public's interest in access, and tribal rights to use the land for religious purposes and participate in decision making regarding the land.[79]

CONCLUSION

Lyng suggests that Indians are likely to lose Free Exercise Clause claims involving sacred sites located on lands owned by the federal government. Yet Indian religious practitioners and their advocates can develop legal arguments that respond to *Lyng*'s "ownership bar." Property law can be used to support Indian rights and federal obligations in sacred sites, even in cases of federal ownership. In a subsequent article, I will develop and substantiate these property-based arguments, and evaluate their potential efficacy in contexts such as litigation, legislation, and the administrative process. But this preliminary analysis suggests that a more expansive approach to property law can help both Indian nations and the federal government to approach sacred sites cases in a way that reflects common values in favor of religious freedoms.

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religion, and (3) does not foster an excessive entanglement with religion). *See also* Zellmer, *supra* note 5, at 416 (discussing the appropriateness of accommodating American Indian uses of sacred sites).

77. *See* Executive Order No. 13007, 61 Fed. Reg. 26,771 (May 24, 1996). *See* Charlton H. Bonham, *Devils Tower, Rainbow Bridge, and the Uphill Battle Facing Native American Religion on Public Lands*, 20 LAW & INEQ. 157, 164–74 (2002) (discussing federal statutes and other laws that offer protection to American Indian sacred sites).

78. 175 F.2d 814 (10th Cir. 1999) (holding that the plaintiffs lacked standing). *See also* Burton & Ruppert, *supra* note 26 (offering a detailed discussion of *Bear Lodge*). In my next article on this topic, I will focus on the administrative process as a potential forum for tribes to use more expansive notions of property law in sacred sites cases.

79. *See* T'uf Shur Bien Preservation Trust Area Act of 2003, H.R. 222, 108th Cong. (2003) (establishing the T'uf Shur Bien Preservation Trust Area within the Cibola National Forest in the State of New Mexico in order to resolve a land claim involving the Sandia Mountain Wilderness). *See also* Michael Coleman, *Sandia Dispute Comes to an End*, ALBUQUERQUE J., Feb. 21, 2003, *available at* 2003 WL 12460652.

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