Protecting American Indian Sacred Sites on Federal Lands

Elizabeth G. Pianca
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I. INTRODUCTION

We saw the Great Spirit's work in almost everything: sun, moon, trees, wind, and mountains. Sometimes we approached him through these things. Was that so bad? ... Indians living close to nature and nature's ruler are not living in darkness.1

Walking Buffalo, Stoney Tribe2

A striking feature of American Indian3 culture is a relationship to the natural world and to spiritually significant places where important events are believed to have occurred.4 For this reason and because American Indian worship and religion is characterized by such a relationship to these sacred places, destruction of such places is a catastrophic event.5

But the American Indian belief system is not understood

* Managing Editor, Santa Clara Law Review, Volume 45; J.D. Candidate, Santa Clara University School of Law; B.A. Urban Studies, Stanford University.
2. The Stoney/Assiniboine (One Who Cooks by the Use of Stones) is a Great Plains tribe, traditionally living in present-day North Dakota, Montana, and southern Canada. Contact with non-Indians in the 1830s brought a smallpox epidemic that killed more than 4,000 of the tribe’s estimated population of 10,000. See id. at 132. Today a small number of Assiniboine live on reservations at Fort Belnap and Fort Peck, Montana. See id.
3. The terms Indian and American Indian are used interchangeably throughout this comment.
within the dominant Judeo-Christian belief system. This absence of understanding is reflected in the judicial system, which consistently holds that American Indians cannot assert a free exercise of religion claim against the federal government for destruction of sacred sites on federal lands. Thus, American Indian tribes struggle to protect sacred sites on federal lands.

This comment will first explore the differences between the Judeo-Christian and the American Indian belief systems and the ways in which these differences are reflected in judicial decisions, resulting in an absence of a viable legal theory for protecting sacred sites on federal lands. Next, the comment will consider the application of the National Historic Preservation Act ("NHPA") as a means of protecting sacred sites on federal lands. The comment will then discuss why judicial doctrine and the NHPA trivialize the value of sacred sites to Indians. Finally, the comment will propose federal legislation specifically targeted at protecting sacred sites on federal lands.

II. BACKGROUND

A. Federal Policy and American Indians

Beginning in the 1950s, the federal government promoted a policy to end American Indian tribal identity as a means of forcing Indians to assimilate into mainstream society. In

6. See, e.g., Lyng v. N.W. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988). The Court held that the Free Exercise Clause does not prohibit government action on sacred sites located on federal lands. Id. at 441-42.

7. See generally 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 (1999) (discussing the obstacles Indian tribes encounter when protecting sacred sites on federal lands).

8. See infra Part II.


10. See infra Part II.

11. See infra Part IV.

12. See infra Part V.

13. See H.R. Con. Res. 108, 83rd Cong. (1953). This resolution served as a policy statement, and individual acts were needed to implement the policy in regard to specific tribes. See id. Under this policy statement, Indian tribes would eventually lose any special standing they had under federal law such as the tax exempt status of their lands and repudiation of federal responsibility for their economic and social well-being. See id. For a detailed review of Indian
the early 1970s, the federal government abandoned its official termination policy. Yet, the elimination of the basis of American Indian religious beliefs by government action continues today. The resurgence of site-specific Indian religions, coinciding with increased development at or near federal public lands, highlights the dilemma of native worshipers attempting to practice their religion on sacred lands in a social and legal system that does not recognize site-specific beliefs on federal lands.

Indian tribes have challenged development plans affecting sacred sites on federal lands, claiming that the Free Exercise Clause of the First Amendment protects Indian religious interests in governmental property. However, judicial

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1. For a detailed account of termination policy, see David H. Getches et al., Cases and Materials on Federal Indian Law (3d ed. 1993).

2. In a letter to Congress dated July 8, 1970, President Richard M. Nixon declared that the federal policy—enunciated in House Concurrent Resolution 108—of formal termination of Indian tribes as a method of encouraging assimilation was "morally and legally unacceptable, because it produces bad practical results, and because the mere threat of termination tends to discourage greater self-sufficiency among Indian groups . . . ." H.R. Doc. No. 91-363, at 3 (1970).

3. See Gardner, supra note 5, at 76-79.

4. See Joseph Epes Brown, Spiritual Legacy of the American Indian 1 (1982). Brown discusses how American Indian religions have survived colonization and cultural isolation and how they are reaffirmed by today's American Indians. See id.

5. See Bureau of Land Management, U.S. Department of the Interior, 2003 Annual Report 1 (2003), available at http://www.blm.gov/nhp/info/stratplan/AR03.pdf (last visited Jan. 20, 2005). The Bureau of Land Management is responsible for more than 260 million acres of public land, primarily in the West. See id. Over the past century, the population of the West has grown from about 4.3 million to 63 million people. Id. Today, 22 million people live within 25 miles of public lands. Id. This phenomenal population growth has broad impacts on the resources located on federal lands, such as American Indian sacred sites. See id.


7. The First Amendment of the U.S. Constitution provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

8. Indian suits seeking to block development on public lands because development will disrupt Indian religious beliefs or practices and thus violate the First Amendment's guarantee of the free exercise of religion include: Lyng v. N.W. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (Yurok, Karok, and Tolowa challenge to proposed road construction and timber harvesting plans on federal land in California); Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983), cert. denied, 464 U.S. 1056 (1984) (Hopi suit against proposed expansion of a ski resort in Arizona's Coconino National Forest north of Flagstaff); New Mexico Na-
analysis of the religious interests at stake in American Indian challenges to site development has, in large part, misconstrued the nature of Indian beliefs and practices.21

Indians have long worshiped at sacred sites situated on what are now public lands.22 Adherents to traditional Indian religions claim that development of certain areas threatens their religion with extinction.23 They fear that development will undermine the religious power of sacred sites, inhibit communication with spirits, prevent the collection of healing herbs, and even kill tribal deities.24


21. See Lyng, 485 U.S. at 439; Wilson, 708 F.2d at 735; Badoni, 638 F.2d at 172; Sequoyah, 620 F.2d at 1159; Crow, 541 F. Supp. at 785.

22. Sites sacred to native religions but not in actual possession of the Indian worshipers are often located on public lands. As the legislative history of the American Indian Religious Freedom Act, 42 U.S.C. § 1996 (2003), states: “Often, these locations include certain sites—a hill, a lake, or a forest glade—which are sacred to Indian religions . . . [m]any of these sites not in Indian possession are owned by the federal government and a few are on State lands.” H.S. REP. No. 95-1308, at 2 (1978), reprinted in 1978 U.S.C.C.A.N. 1262.

23. See JOSEPH CAMPBELL, THE MASKS OF GOD: CREATIVE MYTHOLOGY 5-6 (1968). Campbell discusses how a religion may be destroyed when the foundations for it are undermined. See id. For American Indians the destruction of a sacred site directly undermines the foundations on which the religion is established. See Joseph Epes Brown, The Roots of Renewal, in SEEING WITH A NATIVE EYE: ESSAYS ON NATIVE AMERICAN RELIGION 25, 29-31 (Walter Holden Capps ed., 1976).

24. See generally Lyng, 485 U.S. at 448, 451 (logging and road construction would impair the collection of medicinal plants and erode religious significance of sacred area); Wilson, 708 F.2d 740, 740 n.2 (testimony of tribal leader that development would destroy basis of Hopi belief); Badoni, 638 F.2d at 177 (“[T]he stated infringement is the drowning of the Navajo gods . . . .”).
B. The Judeo-Christian and American Indian Concepts of Religion

The Judeo-Christian concept of a supreme and immortal deity is not applicable to many Indian religions because it is universally true that among Indian religions the divinity manifests its being through nature. American Indian religions view gods, humans, and nature as an integral whole. Therefore, in many Indian religions the relationship between spiritual reality and physical reality is symbiotic. The alignment of spiritual and physical reality in nature makes the spiritual uniquely tied to the physical. This alignment partially explains why Indian beliefs are site-specific, thus making the development of a sacred site a threat to religious practice. Indeed, an Indian deity may be particularly vulnerable to changes in the physical habitat to which it is intimately and inseparably connected. In short, location is essential to many aspects of Indian beliefs, and the place where an event occurred, rather than the event itself, assumes special significance. Because of the importance of place to American Indian worship, the destruction of an Indian sacred site is a catastrophic event.

Similarly, in the Judeo-Christian world, the prospect of the desecration of the Christian sites in the Holy Land by an enemy of Christianity was enough to send countless Chris-
tians on religious crusades. In Judeo-Christian beliefs, sacred sites continue to emanate a magical religious presence. In Israel, where many of these sacred sites are located, such places and access to them are protected by law.

The American legal system, however, has generally failed to recognize that physical locations within its own jurisdiction may be of vital significance to the American Indian site-specific religions. A solution to the preservation of American Indian sacred sites on federal lands appears to lie in the Free Exercise Clause of the First Amendment, which protects the exercise of religious beliefs against all but the most compelling state interests. Yet, to date, the courts have not ac-

33. See ROBERT PAYNE, THE DREAM AND THE TOMB: A HISTORY OF THE CRUSADES 17 (1984). From the late eleventh century through the thirteenth century, Europeans flocked to the Middle East to free the Holy Land, and especially Jerusalem, from Saracen control. See id. The role of the earthly city of Jerusalem as the spiritual center of Christian worship for the Crusaders made freeing the Holy Land a religious mission of the highest importance. See id. at 18.

34. See generally NANCY C. RING ET AL., INTRODUCTION TO THE STUDY OF RELIGION 43-47 (1998). A recent example of the significance of Judeo-Christian sacred sites was the 2002 Palestinian siege of the Church of the Nativity in Bethlehem. The Church is one of Christianity's most sacred places and is built over the site where Jesus was believed to have been born. The event was one of international importance, not only because of the long-standing Israeli and Palestinian conflict, but because of the profound religious symbolism attached to the Church. See PBS, Frontline: The Siege of Bethlehem, available at http://www.pbs.org/wgbh/pages/frontline/shows/siege (last visited Feb. 20, 2005).


36. See Lyng, 485 U.S. 439; Wilson, 708 F.2d 735; Badoni, 638 F.2d 172.

37. The First Amendment of the U.S. Constitution provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

38. The Court has held that the Free Exercise Clause "embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940). Thus, whenever the purpose of a governmental action is to negatively affect a particular type of conduct because it is dictated by religion, that act will almost automatically be found to violate the Free Exercise Clause and will be subject to strict judicial scrutiny. See id. However, situations where such an illicit motivation can be proved rarely arise. See Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993). Plaintiffs were members of the Santeria religion, which involves performing ritual sacrifices on animals. See id. at 524-26. Defendant, city of Hialeah, enacted an ordinance outlawing such religious sacrifices on animals. See id. at 528. The Court unanimously
knowledged American Indian free exercise claims on federal lands.  

C. Contemporary Judicial Approach to American Indian Sacred Sites Claims

Indian suits challenging development of public land are based on the First Amendment's guarantee of the free exercise of religion, and on the federal policy of accommodation of Indian religious beliefs and practices embodied in the American Indian Religious Freedom Act ("AIRFA"). American Indians have increasingly sought to vindicate these rights in court.

Faced with Indian challenges to development projects, some courts have denied that development of public lands gives rise to any free exercise claim, emphasizing that the Indian plaintiffs have no "property" interest at stake. Other
courts, however, have recognized that the lack of a specific property interest does not preclude a First Amendment claim. But these courts have held that the challenged governmental action does not constitute a burden on religious beliefs or practices, reasoning that actual access to sacred sites has not usually been denied; rather, the site itself has been substantially altered by development. Where free exercise rights conflict with the government's property rights, courts have generally resolved the conflict in favor of the government's property rights.

The Supreme Court case most clearly associated with the elevation of government property rights over American Indian free exercise rights is Lyng v. Northwest Indian Cemetery Protective Ass'n. Prior to Lyng, however, several lower federal court cases focused on property rights as the basis for denying First Amendment claims, creating a judicial doctrine denying American Indians' free exercise of religion claims for sacred sites on federal lands.

I. Badoni v. Higginson

In Badoni v. Higginson, the Navajo plaintiffs sought to
enjoin government actions that were causing waters of Lake Powell to encroach upon Rainbow Bridge National Monument in Utah. The plaintiffs explained that certain geological formations in the Rainbow Bridge area were incarnate forms of Navajo gods, having central importance in the Navajo religion. These shrines had "performed protective and rain-giving functions for generations of Navajo singers." The plaintiffs alleged that the flooding of Bridge Canyon, in which they performed ceremonies, and the increased tourist boats on Lake Powell created a number of infringements on their free exercise rights, causing the Navajos "severe emotional and spiritual distress."

The district court began its analysis by focusing on property rights, stating that the "plaintiffs do not allege nor do they have any property interest in the Rainbow Bridge National Monument." Although the monument area lies within the boundaries of the Navajo Reservation, it had, the court explained, "never actually been a part of the Navajo Reservation." The court further noted that "any 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." The district court held that the Navajos lacked a property interest and thus did not come within any cognizable legal theory upon which relief could be granted.

The Court of Appeals for the Tenth Circuit rejected the district court's reasoning but upheld the ruling on the grounds

50. See id. at 643. The plaintiffs included a number of Navajo individuals, three of whom were medicine men, defined by the court as "religious leaders of considerable stature among the Navajo, learned in Navajo history, mythology and culture, and practitioners of traditional rites and ceremonies of ancient origin." Id. at 642.

51. See id. at 643.

52. Id. Springs in the area also supplied water for other ceremonies. See id.

53. See id. at 644. The plaintiffs alleged the following infringements: "the destruction of holy sites; the drowning of entities recognized as gods by the plaintiffs; prevention of plaintiffs from performing religious ceremonies; desecration of holy sites by tourists; and, by virtue of all of this, injury to the efficacy of plaintiffs' religious prayers, and entreaties to their remaining gods." See id.

54. Id.


56. Id. Since 1910, the site had been held in federal ownership as a National Monument. See id.

57. Id. (citing N.W. Bands of Shoshone Indians v. United States, 324 U.S. 335, 339 (1945)).

58. See id.
that the government's property interest outweighed the plaintiffs' religious interest.\footnote{Badoni, 638 F.2d at 177. The appellate court ultimately rejected the district court's argument that the Navajos lacked a property interest and did not come within any cognizable legal theory, noting that "the government must manage its property in a manner that does not offend the Constitution." \textit{Id.} at 176.}

Subsequently, the National Park Service ("NPS"), which administers the Glen Canyon National Recreation Area adjacent to Rainbow Bridge National Monument, entered into an agreement with the Indian tribes having cultural affiliations with the monument.\footnote{National Trust for Historic Preservation, \textit{Federal Appeals Court Upholds Park Service Policy Encouraging Respect for Native American Religious Beliefs at Rainbow Bridge National Monument, Utah}, \textsc{Legal Defense Fund Review} 4, at http://www.nationaltrust.org/law/NTHP_LDF_May2004.pdf (May 2004) (last visited Feb. 20, 2005).} The agreement calls for consultation with the tribes regarding the management of the monument.\footnote{\textit{See id.}} The NPS, in an effort to respect the religious significance of Rainbow Bridge to the Indian tribes, asks that visitors to the park voluntarily refrain from approaching and walking under the monument.\footnote{\textit{See Natural Arch \& Bridge Soc'y v. Alston, 98 Fed. Appx. 711, 713 (10th Cir. 2004).}}

This policy was recently challenged by the Natural Arch and Bridge Society and several individuals.\footnote{\textit{Id. at 712.}} These challengers argued that the NPS policy violates the Establishment Clause and the Equal Protection Clause.\footnote{\textit{Id.}} The Court of Appeals for the Tenth Circuit held that the plaintiffs lacked standing to challenge the NPS policy under the Establishment Clause because they had not shown or demonstrated a specific injury as a result of the policy.\footnote{\textit{Id. at 716.}}

2. Sequoyah v. Tennessee Valley Authority

The government raised similar property rights arguments to defeat a First Amendment free exercise of religion claim in \textit{Sequoyah v. Tennessee Valley Authority}.\footnote{Sequoyah, 480 F. Supp. 608.} The Cherokee plaintiffs explained that land which would be flooded by the completion of a planned dam project was "sacred to the Cherokee religion and a vital part of the Cherokee
The court noted that the land was considered "sacred and necessary" to the Cherokee religion and that active Cherokee practitioners would desire to come to the area as a precept of their religion. It concluded, nonetheless, that the plaintiffs had not stated a First Amendment free exercise claim.

The court emphasized that the land was owned by the government, which "uses the land it owns for a wide variety of purposes, many of which require limiting or denying public access to the property." The plaintiffs' claim failed because the court held that "the Free Exercise Clause is not a license in itself to enter property, government owned or otherwise, to which religious practitioners have no other legal right to access." The Court of Appeals for the Sixth Circuit did not find the lack of property rights determinative, but did hold that religious practices would not be burdened by the development.

3. Other District and Circuit Court Opinions

Other district courts have also focused on American Indian plaintiffs' lack of property rights as grounds for rejecting free exercise challenges. For example, in Crow v. Gullet, the plaintiffs included traditional chiefs and spiritual leaders of the Lakota Nation and Tsistsistas Nation who contended that state construction projects at, and restriction on access to, South Dakota's Bear Butte State Park violated their free exercise rights. Bear Butte is the most significant site of Lakota religious ceremonies, and the Lakota also conducted the Vision Quest at the site. Bear Butte was also the site of

67. Id. at 610.
68. Id. at 612.
69. See id. at 611.
70. See id. at 612.
71. Id.
73. See Sequoyah, 620 F.2d at 1164.
75. See id. at 787-88. The defendants had constructed roads, bridges, parking lots, and other facilities. See id.
76. See id. Bear Butte was the site where the Lakota first met with the Great Spirit. See id.
77. See id. The Vision Quest involves purification through the sweat lodge ceremony, fasting, and praying aloud and singing at a solitary place on the Butte. See id.
pilgrimages for the Tsistsistas, who went there “to receive the powers and benefits of the Great Spirit.” The defendants acknowledged the significance of Bear Butte as a religious site for the Lakota and Tsistsistas people. The court held that the plaintiffs had failed to show that construction in the park had “burdened any rights protected by the Free Exercise Clause,” and rejected the claim that restrictions on access to ceremonial areas violated free exercise rights.

In Wilson v. Block, the United States Court of Appeals for the District of Columbia Circuit also relied on property rights in rejecting American Indian free exercise rights. The Hopi Indian Tribe and the Navajo Medicinemen’s Association challenged decisions allowing private interests to expand and develop the government-owned Snow Bowl ski area on the San Francisco Peaks in Arizona’s Coconino National Forest near Flagstaff. The Hopis and Navajos believed that development of the peaks would impair the Peaks’ religious and healing power.

The Snow Bowl area of the peaks had been used for skiing since 1937, but in 1979 the Forest Service decided to permit additional development. The plaintiffs argued that the expansion would burden them in the practice of their religion, destroying the conditions necessary for religious ceremonies and collection of religious objects. The court held that in order for the plaintiffs to be able to “restrict government land

78. Id. at 788.
79. See id. at 789.
80. Crow, 541 F. Supp. at 791. The court referred specifically to the defendants’ power to “manage and develop the state park in the public interest.” Id.
81. See id. at 792. The court also rejected both plaintiffs’ claims with respect to allowing the disruptions by tourists and restrictions on religious practices at Bear Butte Lake. See id. at 791-93.
82. Wilson, 708 F.2d 735.
83. See id. at 738. The San Francisco Peaks had played a central role in the Hopi religion for centuries. See id. The Navajos regarded the peaks as part of the four sacred mountains and believed them to be the home of specific deities. See id. The Hopis believed that the peaks were “the body of a spiritual being or god, with various peaks forming the head, shoulders, and knees of a body reclining and facing east, while the trees, plants, rocks, and earth form the skin.” Id.
84. See id.
85. See id. at 738-39. The development was to include the clearing of fifty acres of forest for new runs, the construction of new lodging facilities and lifts, and the paving and widening of the road. See id.
86. See id. at 742. The plaintiffs also argued that the expansion burdened their religious beliefs, but the court held that the government’s action had not directly burdened plaintiffs in their beliefs. See id. at 740-41.
use in the name of religious freedom, [they] must, at a minimum, demonstrate that the government’s proposed land use would impair a religious practice that could not be performed at any other site. Because the plaintiffs failed to demonstrate that the land at issue was indispensable to a religious practice, they could not justify a First Amendment claim.

4. The Supreme Court and Lyng v. Northwest Indian Cemetery Protective Ass’n

The Supreme Court itself addressed the conflict between government property rights and American Indian free exercise rights in Lyng v. Northwest Indian Cemetery Protective Ass’n. The plaintiffs challenged the U.S. Forest Service’s decisions to complete construction of a logging road and to permit timber harvesting in an area of the Six Rivers National Forest in northwestern California. A portion of the area, referred to as the “high country,” was considered sacred by the Yurok, Karok, and Tolowa Indian tribes.

Plaintiffs, the American Indian tribes and the State of California, maintained that either completion of the road or implementation of the timber harvesting plan would desecrate the high country, thereby violating plaintiffs’ free exercise rights. The plaintiffs regularly used the high country for a number of religious purposes, which would be impaired by the completion of the road and the logging activities.

87. See id. at 744.
88. See Wilson, 708 F.2d at 743. Although the plaintiffs had presented evidence that all of the San Francisco Peaks, including the Snow Bowl, are sacred, this was not enough to establish the indispensability of the permit area to the Hopis or Navajos. See id. at 745 n.7.
89. 485 U.S. 439.
90. See N.W. Indian Cemetery Protective Ass’n v. Peterson, 565 F. Supp. 586, 589-90 (N.D. Cal. 1983). The area in contention was referred to as the Blue Creek Unit. See id. at 590. The Blue Creek Unit was composed of 67,500 acres, approximately 31,000 of which were untouched Douglas firs. Id. The plan adopted by the Forest Service provided for the harvesting of over 733 million board feet of timber over eighty years. See id.
91. Id. at 591.
92. See id.
93. Individuals used “prayer seats” in the area to seek religious guidance and personal power through exchanges with “the creator,” which were made possible by the solitude and pristine nature of the high country. Id. at 591-92. The area was also used for purification rites and medicine gathering. See id.
94. See id. at 592. The plaintiffs contended that completion of the road would violate the high country’s sacred character and impair its use for religious purposes. See id. The Forest Service estimated that an average of 168
The district court concluded that the proposed actions imposed an unlawful burden on the plaintiffs' free exercise rights. The court specifically noted that the plaintiffs' lack of property interests in the high country did "not release defendants from the constitutional responsibilities the First Amendment imposes on them." The Court of Appeals for the Ninth Circuit agreed with the district court's finding that the proposed actions violated the Free Exercise Clause.

The U.S. Supreme Court reversed, concluding that even if it were to assume that the government's proposed actions would, as the court of appeals had predicted, "virtually destroy the Indians' ability to practice their religion," the Free Exercise Clause did not prohibit the government from permitting timber harvesting or road construction in the area. The Court recognized the sincerity of the plaintiffs' beliefs and the fact that the proposed actions would have severe impacts on the practice of their religions. Nevertheless, the Court did not accept the plaintiffs' argument that the government action was intrusive enough to impose a burden on religion, and thus the government was not required to demonstrate a compelling need to complete the road or harvest timber in the area. Rather, the Court found it determinative that Indian tribes would not be coerced into violating their religious beliefs, nor would governmental action deny any person the rights, benefits, and privileges enjoyed by other citizens. Under this approach, in the absence of coercion or a penalty

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vehicles would cross the disputed section of the road every day. See id. at 592 n.5. Timber harvesting would have "adverse visual, aural, and environmental impacts" on the high country's "salient religious characteristics." Id. at 592.

95. See id. at 595-96. The court concluded that the proposed action "would seriously impair the Indian Plaintiff's use of the high country for religious purposes." See id. at 594. Moreover, the defendants' asserted interests did not override the plaintiffs' free exercise rights. See id. at 595-97.

96. N.W. Indian Cemetery Protective Ass'n, 565 F. Supp. at 594.

97. See N.W. Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 695 (9th Cir. 1986). In particular, the court noted: "In our view, the government has fallen short of demonstrating the compelling interest required to justify its proposed interference with the Indian plaintiffs' free exercise rights." Id.

98. Lyng, 485 U.S. at 451 (quoting N.W. Indian Cemetery Protective Ass'n, 795 F.2d at 693).

99. Id. at 441-42.

100. See id. at 451.

101. See id. at 447.

102. See id. at 449.
on religion,\textsuperscript{103} the Court did not require a compelling justification for government action.\textsuperscript{104}

Property rights figured in the Court's analysis in two ways. First, the Court referred to the government's "rights to the use of its own land."\textsuperscript{105} The Court stated that a law which prohibited the plaintiffs from visiting the high country would raise a different set of constitutional questions.\textsuperscript{106} Second, the Court asserted that the plaintiffs were trying to establish property rights with respect to the high country by exacting standards on the government-owned land.\textsuperscript{107}

\textbf{D. The National Historic Preservation Act}

The purpose of the National Historic Preservation Act ("NHPA")\textsuperscript{108} is to encourage the preservation and protection of America's historic and cultural resources.\textsuperscript{109} Amendments to the NHPA in 1992 introduced provisions related to Indian tribes and Indian reservations.\textsuperscript{110}

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\item \textsuperscript{103} The Court noted that the crucial word in the constitutional text for free exercise of religion is "prohibit." \textit{Id.} at 451. Thus, the Court found that the 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 on the government. \textit{See id.} (citing \textit{Sherbert v. Verner}, 374 U.S. 398 (1963)).
\item \textsuperscript{104} \textit{See Lyng}, 485 U.S. at 450-51.
\item \textsuperscript{105} \textit{Id.} at 454 (citing \textit{Sherbert}, 374 U.S. at 422-23 (Harlan, J. dissenting)).
\item \textsuperscript{106} \textit{See id.} at 453.
\item \textsuperscript{107} \textit{See id.} at 452-53. The Court characterized the Indians' claim as seeking to impose a "religious servitude." \textit{Id.} at 452. Furthermore, the Court speculated that the plaintiffs' need for privacy for religious practices in the high country could "easily require de facto beneficial ownership of some rather spacious tracts of public property." \textit{Id.} at 453.
\item \textsuperscript{108} National Historic Preservation Act, 16 U.S.C. §§ 470-470x-6 (2000).
\item \textsuperscript{109} \textit{Id.} § 470. To achieve the basic goal of historic and cultural resource preservation, Congress identified three principal purposes for the NHPA: (1) strengthen and broaden the process of inventorying historic and cultural sites, and establish a National Register of Historic Places, including "districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering and culture;" (2) enhance and encourage state, local, national, and tribal interest in historic preservation; and, (3) "establish the Advisory Council on Historic Preservation (ACHP) to oversee matters related to preservation of historic properties, to coordinate preservation efforts, and to promulgate regulations to outline federal, state, and now tribal obligations regarding consideration of sites that may be affected by federal, or federally controlled, activities." \textit{See id.} §§ 470-470x-6.
\item \textsuperscript{110} National Historic Preservation Act, Amendments of 1992, Pub. L. No. 102-575, 106 Stat. 4753 (codified as amended at 16 U.S.C. §§ 470-470x-6 (2000)). Congress amended the NHPA to make more explicit the need for consultation with affected Indian tribes whenever management plans for historic sites covered by the Act were being constructed in a way that might implicate
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For activities on public lands, sections 106 and 110 are the two most significant portions of the NHPA.\(^\text{111}\) Section 106 and its implementing regulations describe the obligations imposed on federal agencies prior to taking any action that may affect cultural or historic properties.\(^\text{112}\) Section 110 imposes specific obligations on federal agencies with respect to existing historic resources.\(^\text{113}\) The NHPA also includes a provision requiring federal agency preservation-related activity to be carried out in consultation with Indian tribes.\(^\text{114}\)

1. National Register of Historic Places

Section 101(a) of the NHPA authorizes the Secretary of the Interior to expand and maintain a National Register of Historic Places ("National Register").\(^\text{115}\) If a property is listed

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\(^{111}\) 16 U.S.C. §§ 470f, 470h-2. Section 106 provides:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure or object that is included or eligible for inclusion in the National Register. *Id.* § 470f. Throughout the remainder of this comment, sections 470f and 470h-2 will be referred to in textual discussion as "section 106" and "section 110," respectively. "Section 106" and "section 110" are the terms used by practitioners in the field of historic preservation law. *See* A HANDBOOK ON HISTORIC PRESERVATION LAW 246-309 (Christopher J. Duerksen ed., 1983).

\(^{112}\) 16 U.S.C. § 470f. *See also* Protection of Historic Properties, 36 C.F.R. §§ 800-800.16 (2003) (providing that the purpose of section 106 is to implement a regulatory scheme to be followed by federal agencies when addressing historic resources).

\(^{113}\) 16 U.S.C. § 470h-2. "The heads of all federal agencies shall assume responsibility for the preservation of historic properties that are owned or controlled by such agency." *Id.* § 470h-2(a)(1). "Each agency will undertake, consistent with the preservation of such properties and the mission of the agency . . . any preservation as may be necessary to carry out [section 110]." *Id.* Each federal agency will establish a program to locate, inventory, and nominate to the Secretary of the Interior all properties under the agency's ownership or control that appear to qualify for inclusion in the National Register. *Id.* § 470h-2(a)(2). "Consistent with the agency's missions and mandates, all federal agencies will carry out agency programs and projects (including those under which any federal assistance is provided or any federal license, permit, or other approval is required) in accordance with the purposes of [the NHPA]." *Id.* § 470h-2(d). This comment focuses on the application of section 106. Section 110 is applicable to the management of identified historic resources on federal lands.

\(^{114}\) *See id.* § 470a(d).

\(^{115}\) *Id.* § 470a(1)(A). The National Register is composed of districts, sites,
on the National Register, or determined eligible for listing, the procedural protection of section 106 applies to proposed federal or federally assisted undertakings that would affect the property.\textsuperscript{116} Any property that is included or eligible for inclusion in the National Register is by definition a "historic property" or "historic resource."\textsuperscript{117} Regulations issued by the Secretary of the Interior specify criteria for evaluating the eligibility of properties for the National Register.\textsuperscript{118}

2. Nominations and Determinations of Eligibility

Nominations to the National Register are made by the State Historic Preservation officer\textsuperscript{119} and federal agencies.\textsuperscript{120} In addition, other entities and individuals may request that a property be nominated.\textsuperscript{121} Any person may appeal the nomination of a property or the refusal of a nominating agency to

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\textsuperscript{116} Id. § 470f.

\textsuperscript{117} See id. § 470w(5). A "historic property" or "historic resource" is defined as "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register, including artifacts, records, and material remains related to such a property or resource." Id.

\textsuperscript{118} See National Register of Historic Places Criteria for Evaluation, 36 C.F.R. § 60.4 (2003). These regulations provide:

The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and (a) that are associated with events that have made a significant contribution to the broad patterns of our history; or (b) that are associated with the lives of persons significant in our past; or (c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or (d) that have yielded, or may be likely to yield, information important in prehistory or history.

\textsuperscript{119} 16 U.S.C. § 470a(b)(3)(B). The NHPA establishes a system whereby in each state the governor designates and appoints a State Historic Preservation officer to administer the approved State Historic Preservation Program. Id. § 470a(b)(1)(A).

\textsuperscript{120} See Nominations by the Historic Preservation Officer Under Approved State Historic Preservation Programs, 36 C.F.R § 60.6 (2003); Nominations by Federal Agencies, 36 C.F.R. § 60.9 (2003).

\textsuperscript{121} See Requests for Nominations, 36 C.F.R. § 60.11 (2003). Any organization or person may submit a completed National Register nomination form. See id.
nominate a property. A property deemed eligible for the National Register is entitled to the procedural protections of section 106 regardless of whether it has been formally listed on the National Register.

3. The Section 106 Review Process

If a property is eligible for or listed on the National Register, then the section 106 process of the NHPR requires that federal agencies take into account the impact of their actions on the property and provide the ACHP an opportunity to comment on the federal project before implementation. The federal agency undertaking the proposed action, is responsible for initiating the review, gathering information to decide which historic properties might be affected, exploring alternatives to the potential adverse effects on a property, and reaching an agreement with the State Historic Preservation officer and tribal officer on measures to deal with the adverse effects. Section 106 will not necessarily stop a project; it merely ensures that federal agencies fully consider historic preservation issues in the planning of the project. Section 106 is applicable not just when a federally owned or controlled property is involved, but also when the project receives federal funds or requires a federal permit, license, or other approval. Throughout the section 106 review, federal agencies are required to take into account effects of their undertakings on historic properties included in or eligible for inclusion in the National Register.

124. Id. Prior to any federally assisted undertaking, the federal agency must take into account the effect of the undertaking on historic properties “included in or eligible for inclusion in the National Register.” Id.
128. See Assessment of Adverse Affects, 36 C.F.R. § 800.5(a)-(d) (2003).
129. See Resolution of Adverse Affects, 36 C.F.R. § 800.6(a)-(c) (2003).
131. See Purposes and Participants, 36 C.F.R. § 800.1 (a)-(c) (2003). The NHPR requires that the federal agencies “take into account effects of their undertakings on historic properties.” Id. at § 800.1(a). An “undertaking” is defined as “a project, activity, or program funded in whole or part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.” See Definitions, 36 C.F.R. § 800.16(y) (2003).
agencies must consider the views of the public. This often occurs at public hearings, where the public is encouraged to convey its concerns directly to the federal agency. In addition, federal agencies must actively consult with certain organizations, including Indian tribes, during the section 106 review.

4. Traditional Cultural Properties

The term “traditional cultural properties” ("TCPs") describes a subset of the term “historic properties" as places with religious or cultural importance to a community. Although TCPs are not explicitly defined in the NHPA, the National Park Service has published a guidance document on TCPs. This document is commonly referred to as Bulletin 38. Bulletin 38 defines TCPs in general terms as National Register eligible properties that are associated with cultural practices, beliefs, and identities of a community. Significance in American culture is a quality that may render a property eligible for the National Register. Bulletin 38 explains several ways in which TCPs may qualify under one or more of the criteria for National Register eligibility.

133. See generally ADVISORY COUNCIL ON HISTORIC PRESERVATION, supra note 130, at 12-13.
134. See Participants in the Section 106 Process, 36 C.F.R. § 800.2(c) (2003).
136. See id. § 470a(d)(6).
137. The National Park Service, housed in the Department of the Interior, is responsible for administering the National Register. See id. § 470a.
139. See id. at 1. In pertinent part, BULLETIN 38 defines TCPs as property “that is eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community." Id.
141. See BULLETIN 38, supra note 138, at 11, 18. Properties that have an integral relationship to traditional cultural practices or beliefs where the preservation of such property is relevant to the survival of such relationship may be found eligible for the National Register. Id. at 11-12.
5. American Indian Tribes' Participation in Federal Undertakings

The NHPA gives Indian tribes a statutory right to participate in the section 106 consultation process when a proposed federal undertaking would affect a TCP. Since section 106 is triggered by a proposed federal undertaking, regardless of the ownership status of the land on which the historic property is located, this statutory consultation requirement applies regardless of the land ownership status of any TCP affected by a federal undertaking.

The level of federal involvement necessary to trigger NHPA compliance obligations is a minimal threshold: "[W]here the federal agency's role is so insignificant as to allow no more than a recommendéation," the NHPA "is plainly inapplicable." However, the NHPA usually applies, even when federal involvement is indirect.

As provided by the NHPA, the Advisory Council on Historic Preservation promulgates regulations to implement section 106 provisions. Prior to the initiation of any ground-disturbing activities, the section 106 process must be completed.

143. See id. § 470a(d)(6)(B). In pertinent part, the section states: "In carrying out its responsibilities under section 106 (16 U.S.C. § 470f), a Federal agency shall consult with any Indian tribe... that attaches religious and cultural significance to" a property that is listed on or eligible for the National Register. Id.
144. Id. The section 106 consultation process applies to any "federal and federally assisted undertaking" that would affect any property listed on or eligible for the National Register. Id. § 470f.
146. See 16 U.S.C. § 470f. In pertinent part, section 106 states: "the head of any Federal agency having direct or indirect jurisdiction over a proposed Federally or Federally assisted undertaking..." Id.
147. See id. § 470s.
148. See Initiation of the section 106 Process, 36 C.F.R. § 800.3 (2003); Morris County Trust for Historic Pres. v. Pierce, 714 F.2d 271, 278-79 (3rd Cir. 1983) (courts have consistently reinforced the procedural nature of the NHPA: "NHPA, like NEPA [National Environmental Policy Act], is primarily a procedural statute, designed to ensure that Federal agencies take into account the effect of Federal and Federally-assisted programs on historic places as part of the planning process for those properties." Morris County Trust for Historic Pres., 714 F.2d at 278-79.)
6. Confidential Information

Because information about sacred sites tends to be confidential to the Indian tribes,\(^{149}\) the NHPA provides a mandate for withholding such information from disclosure.\(^{150}\) Section 470w-3 (commonly referred to as "section 304") provides that a federal agency receiving grant assistance under the provisions of the NHPA should withhold from disclosure to the public any information about the character of the sacred sites.\(^{151}\) Disclosure will not occur if it may cause a significant invasion of privacy, risk harm to the historic resources, or impede the use of traditional religious sites by practitioners.\(^{152}\)

7. Judicial Review of Section 106 Compliance

Failure to comply with the procedural strictures of section 106 subjects the offending federal agency to the threat of a preliminary injunction.\(^{153}\) In *Attakai v. United States*,\(^{154}\) the court enjoined a range management project in the area used jointly by Hopi and Navajo tribes for failure to follow portions of the section 106 procedures.\(^{155}\)

In *Attakai*, the Bureau of Indian Affairs ("BIA") followed its standard practice to identify historic properties potentially affected by a fence construction project.\(^{156}\) Because the BIA failed to consult with the Arizona State Historic Preservation officer (a party pertinent to consultation), the court concluded the BIA violated the NHPA and issued an injunction mandating compliance with section 106.\(^{157}\)

The court rejected the BIA's arguments that its action met the spirit of section 106 and its regulations as outlined in the Code of Federal Regulations, and that the regulations themselves expressly permit flexible implementation.\(^{158}\) The court stated that the NHPA regulations rely on consultation as the principal means of protecting historic resources.\(^{159}\)

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149. *See BULLETIN 38, supra* note 138, at 17.
151. *Id.* § 470w-3(a).
152. *Id.*
155. *See id.* at 1406, 1413.
156. *See id.* at 1406.
157. *See id.* at 1409, 1413.
158. *See id.* at 1408-09.
159. *See id.* at 1408 (citing 36 C.F.R. § 800.1(b)).
court also stated that the BIA is required to consult with Indian tribes and the failure to do so constituted another basis for relief.

E. Executive Order 13007

In an effort for federal agencies to evaluate their policies towards American Indian sacred sites, former President William J. Clinton issued Executive Order 13007. Under the order, federal land managers are to accommodate access to Indian sacred sites and to avoid adversely affecting the physical integrity of such sites. A sacred site is defined in the order as

any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site.

Executive Order 13007 provides a directive to federal agencies in the absence of codified legislation to address sacred sites on federal lands. The order requires federal land managing agencies to accommodate access to and ceremonial use of Indian sacred sites by religious practitioners and to avoid any adverse activity that would affect the physical integrity of the site. Additionally, the order requires federal agencies to develop procedures for reasonable notification of the actions.

III. IDENTIFICATION OF THE PROBLEM

Current American jurisprudence does not favor suits by American Indian tribes who assert their First Amendment re-

160. See Attakai, 746 F. Supp. at 1408.
161. See id. at 1409.
163. See id.
164. Id. § (1)(b)(iii).
165. See id.
166. See id. § 1(a)(1)-(2).
167. See id. § 2(a).
religious rights to protect sacred sites on federal lands. In the absence of a legal theory to protect such sacred sites, American Indian tribes have turned to a variety of federal statutes that provide differing degrees of protection for sacred sites.

The NHPA is the primary mandate for federal agencies to provide leadership in preserving significant historic and prehistoric resources. In relevant part, the NHPA provides opportunities for Indians to influence administrative decision making in order to protect sacred sites on federal lands.

Application of the NHPA is a viable alternative in the absence of a judicial doctrine for the protection of American Indian sacred sites on federal lands. However, it falls short of explicitly protecting sacred sites from governmental activity because it focuses primarily on properties of "historic," not "sacred," value to American Indians. Thus, a site with significant sacred value to American Indians may be disregarded as lacking "historic" value based on NHPA criteria.

Given the absence of a judicial doctrine and federal legislation, it appears that federal legislation specifically addressing the protection of sacred sites on federal lands is appropriate. Following the analysis, this comment will propose federal legislation for the protection of sacred sites on federal lands.

168. See Lyng v. N.W. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988). The Court held that the Free Exercise Clause of the First Amendment does not prohibit government action on sacred sites located on federal lands. Id. at 440.


171. See id. § 470f. Section 470f (also referred to as "section 106") imposes obligations on federal agencies prior to taking action that may affect historic properties. See id. These obligations include consultation with Indian tribes. See id. § 470a(d)(1)(A).

172. See Burton & Ruppert, supra note 7, at 239.

173. See 16 U.S.C. § 470w. "Sacred" is not defined in the NHPA. See id.

174. See id. § 470a(a); National Register of Historic Places Criteria for Evaluation, 36 C.F.R. § 60.4 (2003).


176. See infra Part V.
IV. ANALYSIS

A. Case Law

Each of the cases discussed previously demonstrates the difficulty American Indians face when asserting First Amendment free exercise of religion rights against the federal government. In addition, the cases illustrate judicial misunderstanding, or lack thereof, of the role of religion in Indian culture. Because Indian religion does not emanate in the usual Judeo-Christian religion form, it is generally classified by courts as a cultural practice rather than a religious practice. This classification makes the heightened scrutiny test, developed for the First Amendment free exercise of religion claims, inapplicable to government action interfering with the free exercise of American Indian religion.

Courts appear to justify their holdings in favor of the government both on their interpretation that the Indian religious practices are cultural rather than religious and on the fact that American Indians have no property interest in the disputed land where federal development is proposed. For example, the district court in Badoni v. Higginson was particularly concerned about the results to which holding that a person may assert First Amendment rights to the disruption of the property rights of others could lead.

177. See discussion supra Part II.
178. See Lyng v. N.W. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (road construction through Indian sacred land would not violate Indians religious beliefs); Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983) (expansion of ski resort into Hopi sacred land was not indispensable to Hopi religious practice); Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980) (government's interest in developing land outweighed Navajos' religious interest); Sequoyah v. Tenn. Valley Auth., 620 F.2d 1159 (6th Cir. 1980) (Cherokee challenge to construction of dam dismissed because of prevailing government interest in dam project); Crow v. Gullet, 541 F. Supp. 785 (D.S.D. 1982) (government restrictions on access to Lakota religious site did not burden any rights protected under the First Amendment).
179. See infra note 180 and accompanying text.
180. See, e.g., Sequoyah, 620 F.2d 1159. The court found that plaintiffs' claims were based on culture and tradition rather than religion and not protected under the First Amendment. See id. at 1165.
181. See supra note 38 (discussing the judicial test used to determine whether a religious right has been violated or burdened because of governmental action).
182. See cases cited supra note 20.
The appellate court ultimately rejected the district court’s argument that the Indians’ lack of a property interest resulted in their lack of any cognizable legal theory. The court appeared to recognize the Indians’ interest as a cultural, rather than a religious, interest, and government resource extraction outweighed the Indian cultural practices. The plaintiffs failed to establish their religious interests to the appellate court’s satisfaction, while the defendants’ interests in the continued operation of the dam and reservoir were deemed significant.

In *Sequoyah v. Tennessee Valley Authority*, the Court of Appeals for the Sixth Circuit rejected the district court’s conclusion that the plaintiffs’ lack of property rights was determinative “in view of the history of the Cherokee expulsion from Southern Appalachia followed by the ‘Trail of Tears’ to Oklahoma and unique nature of the plaintiffs’ religion.” However, the court concluded that plaintiffs’ claims were based on culture and tradition rather than on religion, and thus they had “not alleged infringement of a constitutionally cognizable First Amendment right.” Again, the court recognized the American Indian religion as a cultural practice rather than a religious one.

In *Wilson v. Block*, the court held that in order for the plaintiffs to be able to restrict government land use in the name of religious freedom, they must, at a minimum, demonstrate that the government’s proposed land use would impair religious practice that could not be performed at any other site. Because the plaintiffs failed to demonstrate that the land at issue was indispensable to a religious practice, they could not justify a First Amendment claim. Here, the reli-

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184. See Badoni v. Higginson, 638 F.2d 172, 177 (10th Cir. 1983).
185. See id.
186. See id.
187. Id. at 177. The court characterized defendants’ interests as concerning a crucial part of a multi-state water and power generation project. See id.
188. Sequoyah, 620 F.2d 1159.
189. Id. at 1164.
190. Id. at 1165.
191. See id.
192. 708 F.2d 735.
193. See id. at 744.
194. See id. at 743. Although the plaintiffs had presented evidence that all of the San Francisco Peaks, including the Snow Bowl, were sacred, this was not enough to establish the indispensability of the permit area in particular. See id.
gious practices were not necessarily restricted to a particular site but encompassed the area as a whole. The Snow Bowl development would not burden the Hopi religion because the Hopis still had access to the site. The court did not fully consider that the development would destroy the natural conditions necessary for prayer and ceremony to be effective.

Until the Supreme Court's holding in Lyng v. Northwest Cemetery Protection Ass'n, it appeared that courts did not even consider American Indians to hold religious value to the sacred sites. The Court in Lyng recognized the significant value that these sites have to American Indian tribes, but held that government intervention would not necessarily burden the American Indians' practice of religion. The Court neglected to recognize the nature of American Indian religious practices and the fact that although government action may not, in the perspective of the Court, burden the practice of religion, it created an atmosphere that would cumulatively harm the religion.

Regardless of whether the plaintiffs' claims were characterized as implicating constitutional rights or potentially establishing property rights, the Court made it clear that the government's property rights took priority. Moreover, the Court rejected the argument that a basis for relief was provided by AIRFA. In Justice Brennan's dissenting opinion, this rejection of AIRFA as a basis for relief made a mockery of the policy set out in the statute.

Thus, the Court protected the government's property rights against any potential limitations stemming from American Indian free exercise rights and firmly established
the judicial doctrine in this area. The Court sided with the government in what Justice Brennan recognized as a "long-standing conflict between two disparate cultures—the dominant Western culture, which views land in terms of ownership and use, and that of American Indians, in which concepts of private property are not only alien, but contrary to a belief system that holds land sacred."206

B. The NHPA

The NHPA has been identified as the most appropriate federal statute to provide protection of American Indian sacred sites.207 But this protection is offered under the assumption that these sacred sites qualify as historic sites, rather than as sacred sites of religious significance to American Indians.208 Thus, the protection extended by the NHPA may appear to some Indian tribes to trivialize the religious value that these sacred sites possess.209

Although the term traditional cultural properties ("TCPs") has gained acceptance in federal, state, and tribal programs, many still find it less than ideal because it does not explicitly define "sacred sites" for purposes of Indian tribes.210 The NHPA does not offer protection to places on the basis of their sacredness, but rather because they have enough historic significance to be eligible for the National Register.211 By focusing on the historic significance of TCPs, such as sacred sites, Bulletin 38 helps those who seek to protect sacred sites show how such places fit within the existing structure of the National Register, and thus gain some measure of protection.212

Another problem with the NHPA is that the consultation process with Indian tribes simply provides consultation with no additional protection for sacred sites.213 The consultation

205. See id. at 454.
206. Id. at 473 (Brennan, J., dissenting).
208. See id. § 470a. See also Criteria for Evaluation for the National Register of Historic Places, 36 C.F.R. § 60.4 (2003).
209. See supra notes 25-32 and accompanying text.
211. See id. § 470a. See also Criteria for Evaluation for the National Register of Historic Places, 36 C.F.R. § 60.4 (2003).
212. See BULLETIN 38, supra note 138, at 11-12.
process may appear to circumvent the problems Indian tribes have faced in the judicial arena, where the courts have held that the lack of Indian ownership of federal lands prevents tribes from asserting free exercise claims for the protection of sacred sites. But because the NHPA is a procedural statute, section 106 merely provides for consultation and falls short of protecting sacred sites on federal lands.

In addition to its failure to recognize sacred sites, the NHPA lacks any judicial mandate for a cause of action against the government when destruction of historic sites occurs. The NHPA is viewed as a procedural statute and does not guarantee protection of sacred sites. The NHPA is not an action-forcing statute, but rather a statutory mandate imposing only procedural requirements on federal agencies to promote the preservation of "the historical and cultural foundations of the Nation." Federal agencies cannot approve projects that would affect cultural properties without complying with certain procedures; however, the NHPA does not contain an enforceable substantive mandate.

Although the NHPA provides some level of protection for sacred sites on federal lands, it only does so in the context of protecting sacred sites as historic resources and not necessarily for their value as places of religious and spiritual significance to American Indians. But sacred sites are more than just historic resources because they have a spiritual meaning to American Indians, and defining them as historic resources trivializes their value to American Indians. Because judicial decisions have clearly indicated that Indian tribes cannot

214. See, e.g., Lyng, 485 U.S. 439. The Court protected the government’s property rights against any potential limitations stemming from American Indian free exercise rights. See id. at 454.

215. Courts have consistently reinforced the procedural nature of NHPA: "NHPA, like NEPA, is primarily a procedural statute, designed to ensure that Federal agencies take into account the effect of Federal and Federally-assisted programs on historic places as part of the planning process for those properties." Morris County Trust for Historic Pres. v. Pierce, 714 F.2d 271, 278-79 (3rd Cir. 1983).


217. See Morris County Trust for Historic Pres., 714 F.2d at 278-79.


219. Failure to follow NHPA strictures will render a project vulnerable to judicial challenges and the imposition of mandatory injunctive relief. See, e.g., Attkai, 746 F. Supp. at 1405-09.


221. See supra notes 25-32 and accompanying text.
assert a freedom of exercise of religion claim for federal agency action on federal lands, tribes have turned to the NHPA for protection. Ultimately, the NHPA is a procedural statute, which at most can provide injunctive relief for a party claiming that the prescribed procedures have not been followed.

C. Executive Order 13007

In the instance where a sacred site may not meet the National Register criteria for a historic property and, conversely, a historic property may not meet the criteria for a sacred site, a federal agency should, in the course of the section 106 review process, consider accommodation of access to and ceremonial use of the property in accordance with Executive Order 13007. Executive Order 13007 serves as a federal agency directive and not a judicially enforceable mandate for the protection of sacred sites. A federal agency, moreover, is not required to integrate the requirements of the executive order in the section 106 review process, and compliance with the executive order is merely an option, but not a requirement.

V. PROPOSAL

Given the existing law and policy for sacred site protection, Indian tribes have few avenues to compel government protection of a sacred site. Although Indian tribes should continue to use the NHPA and seek early involvement in federally sponsored projects, additional enforcement mecha-

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223. See Morris County Trust for Historic Pres., 714 F.2d at 278-79.
224. See Exec. Order No. 13007, 61 Fed. Reg. 26,771 (May 24, 1996). Section 2(a) of the Executive Order calls for federal agencies to establish procedures for the purposes of accommodating the use of sacred sites on federal lands when proposed "land management policies . . . may restrict future access to or ceremonial use of, or adversely affect the physical integrity of, sacred sites." See id. § 2(a). The "proposed actions," enunciated in the Executive Order, on the federal land will trigger the section 106 review. See Purposes and Participants, 36 C.F.R. § 800.1(a) (2003).
226. See id. § 2(a). The operative language making this order an option rather than a requirement is evidenced in section 2(a) where it states that federal agencies "shall, as appropriate." Id.
isms for the protection of sacred sites are necessary.\textsuperscript{227} One such mechanism would be the passage of legislation explicitly providing protection for American Indian sacred sites on federal lands and a cause of action for Indian tribes when such protection does not occur. This would go beyond AIRFA,\textsuperscript{228} which was found by the Court to be unenforceable.\textsuperscript{229} What follows is a proposal for such legislation.

**Preservation of American Indian Sacred Sites on Federal Lands Act**

An Act to protect Indian sacred sites on Federal lands from destruction, desecration, and significant damage. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.\textsuperscript{230}

Section 1. Protection of Sacred Sites. (a) In managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands will:\textsuperscript{231} (1) provide 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.\textsuperscript{232} Where appropriate, agencies shall maintain the confidentiality of sacred sites.\textsuperscript{233} (b) For purposes of this Act: (1) “Federal lands” means any land or interests in land owned by

\textsuperscript{227} See Press Release, supra note 175.


\textsuperscript{231} This language builds from the section 106 review process, requiring that federal agencies are responsible for the management of federal lands and for evaluating the potential impact of a federal undertaking on such land. See, e.g., Protection of Historic Properties, 36 C.F.R. Pt. 800 (2003). See also supra notes 125-61 and accompanying text.

\textsuperscript{232} See supra notes 49-107 and accompanying text. This section discusses the goals of the Indian tribes when filing claims against the federal government. It can be deduced from the background of these cases that the Indian tribes sought two goals: to accommodate access to the sacred sites for religious purposes and to avoid adverse consequences as a result of federal action.

\textsuperscript{233} See National Historic Preservation Act, 16 U.S.C. § 470w-3(a) (2000). This section of the NHPA enables the confidentiality of sites where it may create significant invasion of privacy, risk of harm, or impede the use of sites.
the United States; (2) “Indian tribe” means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that is eligible for special programs and services provided by the United States because of its Indian status; and (3) “Sacred site” is any specific, discrete, narrowly delineated location on Federal land that is identified by Indian tribal leaders, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established and documented religious significance to, or ceremonial use by, an Indian tribal religion.

Section 2. Procedures for Protecting Sacred Sites. (a) Each executive agency with statutory or administrative responsibility for the management of Federal lands will implement procedures for purposes of carrying out the provision of section 1 of this Act, including procedures to ensure reasonable notice provided of proposed actions or land management policies that may restrict future access to or ceremonial use of, or adversely affect the physical integrity of, sacred sites. (b) The head of each executive branch agency with statutory or administrative responsibility for the management of Federal lands will report to Congress on the implementation of this Act each year. The report will include information about changes to accommodate the ceremonial use of Indian sacred sites, changes necessary to avoid adversely affecting such sites, and procedures implemented to protect such sites from adverse undertakings that would limit access for ceremonial purposes.

Section 3. This Act is intended to provide for the preservation of sacred sites on Federal lands and creates a substantive right enforceable at law or equity by Indian tribes when such procedures and requirements imposed by this act are not complied with by the federal agency.

234. See generally id. § 472w(4) (providing a definition for what constitutes an “Indian tribe”).
236. This follows from Purposes and Participants, 36 C.F.R. § 800.1(a)-(c) (2003). The section 106 process calls for such procedures to be implemented.
237. Given the importance of these sacred sites to Indians, it only seems appropriate that Congress be provided a yearly update as to any changes with the sites. This would also serve as a documentation mechanism.
238. The substantive right created by this Act differs from what is currently available under the NHPA. The NHPA is a procedural statute but provides no cause of action if a historic property is destroyed. See supra notes 207-29 and
VI. CONCLUSION

Places of religious importance to American Indians are the natural places and landscapes of America. Unfortunately, the national understanding of American Indian sacred sites is in conflict with the Judeo-Christian concept of sacred sites.

Judicial doctrine has demonstrated that the Indian religion is interpreted by courts as a cultural practice rather than a religious one. This classification makes government action interfering with the free exercise of American Indian religion inapplicable to the heightened scrutiny test developed by the court for First Amendment free exercise of religion claims.

In the absence of a judicial doctrine, Indian tribes have turned to the NHPA. The protection offered under the NHPA is based on the assumption that American Indian sacred sites qualify as historic sites; thus, the protection offered appears to trivialize the religious value that these sacred sites possess. Furthermore, the NHPA is a procedural statute and lacks any judicial mandate for a cause of action against the government when destruction of a sacred site occurs.

Given the lack of judicial doctrine and substantive federal legislation, it is time for Congress and the president to recognize and protect American Indian sacred sites on federal lands.

accompanying text.

239. See HIGHWATER, supra note 26, at 124.
240. See supra notes 25-32 and accompanying text.
241. See, e.g., Sequoyah v. Tenn. Valley Auth., 620 F.2d 1159 (6th Cir. 1980). The court found that plaintiffs' claims were based on culture and tradition rather than on religion and thus were not protected under the First Amendment. See id. at 1165.
242. See supra note 38, discussing the judicial test used to determine whether a religious right has been violated or burdened because of government action. See also Lyng v. N.W. Protective Cemetery Ass'n, 485 U.S. 439 (1988).
244. See id. § 470a; see also Criteria for Evaluation for the National Register of Historic Places, 36 C.F.R. § 60.4 (2003).
246. The author acknowledges that this comment does not address the turbulent history of American Indians in the context of our nation's development. A book that has influenced the author's interest in American Indian history and policy is Dee Brown's BURY MY HEART AT WOUNDED KNEE. DEE BROWN, BURY MY HEART AT WOUNDED KNEE (Henry Holt and Co. 2001) (1971).