Inequity in Protection: Why Agency Accommodation Does Not Always Work

*Ellen Howard**

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* J.D. Candidate, University of California-Davis 2010; B.A. in Environmental, Population, and Organismic Biology, University of Colorado at Boulder 2003. The author wishes to thank Professor Arturo Gandara for his guidance, advice, and support.

INTRODUCTION

The right to worship has been an ongoing struggle from beginning of time. In the 20th Century, recognition of the right to worship and the prevention of government establishment of religion have both been hotly contested topics in Constitutional Law.[1] Today the battle has taken on new ground. As Native American religions are recognized by federal and state governments, Native American Spiritual Sites are recognized for their historic significance and importance as places of tribal worship . In turn, this recognition has lead to increased protection for Spiritual Sites on federal lands. The 1990s saw a shift in management strategy, where federal land management agencies incorporated Spiritual Site protection in their land use planning decisions. This method of protection, known as Agency Accommodation,[2] can be a useful management tool but has proved to have its weaknesses. This note summarizes some the problems that have resulted under Agency Accommodation, and makes recommendations for improvements to the current system.

I. HOW CONFLICTS ARISE: LAND BASED SPIRITUALITY AND NATIVE AMERICAN RELIGIOUS BELIEFS

Understanding Native American religious practices is essential to understanding conflicts over sacred sites. Tribal religions are as diverse as the tribes themselves, but tribal religious beliefs can be loosely categorized as land-based faiths.[3] Places of worship, or Spiritual Sites, are often unique geological formations central to the tribal definitions of the universe, creation story, or other event in tribal history. As the United States expanded and Native American landholdings reduced, many tribes lost control of the lands where their spiritual sites were located. Some have been permanently lost to private development. Others exist among the vast swaths of federally held forests, parks, and open space. Legal recognition and protection of Spiritual Sites is a recent development in federal land management. Until recently, Indian people were discouraged, banned, and punished for practicing their religious beliefs.[4] Loss of tribal lands, ill-conceived government assimilation programs, and restrictions to access lead to the loss of tribal culture and religious cohesion.[5] Shifts in federal Indian Law in the 1960s ushered in a much needed recognition and acceptance of Native American culture. Government agencies began to

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[1] *See Lovell v. City of Griffin, GA*, 303 U.S. 444 (1938). *See also Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994).

[2] Marcia Yablon, *Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land*, 113 YALE L.J. 1623 at 1632.

[3] SAM D. GILL, NATIVE AMERICAN TRADITIONS: SOURCES AND INTERPRETATIONS (1983).

[4] ROBERT E. ANDERSON, BETHANY BERGER, PHILLIP P. FRICKEY, AND SARAH KRAKHOFF, AMERICAN INDIAN LAW: CASES AND COMMENTARY (Thomson West 2007) (hereinafter AMERICAN INDIAN LAW)

[5] *Id.*

recognize the need to incorporate Native American perspectives and beliefs into policy implementation. [6]

II. THE ERA OF AGENCY ACCOMMODATION

The environmental laws passed during the 1970s offered some limited protection for Spiritual Sites on federal land, but it did not guarantee protection. In the 1980's tribes used the court system to seek protection, arguing that the First Amendment created a government duty to protect Spiritual Sites and ensure access for Native American peoples to places of worship.[7] These Free Exercise cases were largely unsuccessful, culminating with the Supreme Court's decision in *Lyng v. Northwest Indian Cemetery Protective Association. Lyng* found the government's duty to provide access Spiritual Sites on federal lands under the First Amendment did not outweigh the government's right to make land use planning decisions on its own land.[8]

Following *Lyng*, Congress recognized this inequity in protection for Native American religious resources and enacted greater legislative protections through the Religious Freedom Restoration Act (RFRA) of 1993.[9] President Clinton's executive office followed suit in 1996 with Executive Order 13007.[10] The federal agencies making management decisions also recognized they were failing to properly address sacred sites in their planning and permitting processes.[11] Under this strategy, known as Agency Accommodation, agency employees strategized new ways of promoting conservation of sacred sites using existing federal law.[12]

III. RECENT CHALLENGES TO SPIRITUAL SITE PROTECTION: ACCESS FUND AND NAVAJO NATION

Prior to the shift in protection strategy, most litigation over Spiritual Site protection focused on the failure of an agency to protect a spiritual site. In the era of Agency Accommodation, government decision forced Sacred Site

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[6] *Id.*

[7] This First Amendment argument is based in an accommodationist interpretation of the Free Exercise Clause. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." If a government regulation substantially burdens a religion the action must withstand a strict scrutiny test by the courts, which requires a compelling government interest to overcome the discrimination; if the regulation only burdens religion.

[8] *Lyng v. Northwest Indian Cemetary Protective Association*, 485 U.S.439 (1988).

[9] The Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (2000). [requiring federal agencies to (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites]

[10] Exec. Order No. 13,007, 61 Fed. Reg. 26,771-26,772 (May 24, 1996).

[11] THOMAS F. KING, PLACES_THAT COUNT: TRADITIONAL CULTURAL PROPERTIES IN CULTURAL RESOURCE MANAGEMENT 12 (2003).

[12] Yablon, *supra* note 1.

protection against a challenge under the Entanglement Clause of the First Amendment.[13] Opponents of Sacred Site protection argued legal recognition and protection of these places by a federal government agency constitutes government endorsement of Native American religious beliefs.[14]

Two recent cases addressed Agency Accommodation head on. In *Access Fund v. USDA* the courts analyzed Forest Service protection of Cave Rock, a unique geologic feature on the shores of Lake Tahoe and a Spiritual Site for the Washoe Indian tribe. Cave Rock is a world renowned rock climbing area, but Washoe tribal members found use of the feature by climbers was inconsistent with their religious beliefs. Forest Service Staff took the Washoe concerns to heart and enacted an outright ban on rock climbing under the Forest Service Management Plan for the Lake Tahoe region[15].

The Access Fund, a climbing advocacy group, sued the Forest Service in attempt to rescind the ban on rock climbing at Cave Rock. The district court found no merit in the Entanglement argument and granted summary judgment on behalf of the government.[16] On appeal, the Ninth Circuit analyzed the substance of the Access Fund's Establishment Clause argument using the oft-criticized *Lemon* test.[17] While the Forest Service enacted a policy to protect a religious resource, the court found the action protecting Cave Rock did not constitute "excessive entanglement with religion" because it was undertaken with a secular purpose. Cave Rock was eligible for listing on the National Register for its historical qualities, not just religious purpose, and the Forest Service could therefore take action to protect Cave Rock based solely on its historic significance.

Navajo Nation offers another example of a sacred site conflict on federal land through a checkered history in the courts.[18] The District Court found the Forest Service's decision to allow snowmaking on the San Francisco Peaks was not a violation of RFRA, because allowing snowmaking failed to bar 'access, use, or ritual practice on any part of the peaks.'[19] A three-judge panel of the Ninth Circuit reversed, finding the use of reclaimed water on the peaks would burden religious practitioners using the peaks. A rehearing en banc of the Ninth Circuit

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[13] The Entanglement Clause is also based on the first sentence of the First Amendment. "Congress shall make no law respecting an establishment of religion..." *See Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994).

[14] *Access Fund v. USDA*, 479 F.3d 1024 (9th Cir. 2007).

[15] *Record of Decision for Cave Rock Management Direction, Final Environmental Impact Statement.* Lake Tahoe Basin Management Unit, August 5, 2003. (hereinafter Record of Decision)

[16] *Access Fund*, supra note 14, at 1042.

[17] *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

[18] Brucker, Sara. *Navajo Nation v. United States Forest Service: Defining the Scope of Native American Freedom of Religious Exercise on Public Lands.* 31 ENVIRONS ENVTL. L. & POL'Y J. 273 (2008).

[19] *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1046 (9th Cir. 2007) (later overturned by *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008).

was granted and the initial decision was then overturned. The full circuit hearing found snowmaking was not a violation of RFRA because it would not in any way be a "substantial burden" to religious practice on the peaks, and would offend only the subjective religious sensibilities of those who wanted to worship on the mountains.[20]

IV. MOVING FORWARD: WHAT IS THE FUTURE OF SPIRITUAL SITE PROTECTION ON FEDERAL LANDS?

The Supreme Court's refusal to find Constitutional protection for Sacred Sites in *Lyng* ushered in the era of Agency Accommodation by shifting the burden of protection to the other branches of government. *Access Fund* and *Navajo Nation* offer solid examples of the different levels of protection granted to Spiritual Sites under this scheme. On the one hand, the Lake Tahoe Basin Forest Plan and the subsequent Ninth Circuit decision in *Access Fund* adopt a strong preservationist policy for Cave Rock with very site-specific regulations tailored to the challenges faced by an individual tribe and resource.[21] On the other hand, the Forest Service's refusal to protect the San Francisco Peaks in *Navajo Nation* highlights the danger in relying on a system of Agency Accommodation for Spiritual Site protection. Under this overall system the case to protect Spiritual Sites on federal lands will be made or lost in front of the agency. Furthermore, agencies will be continually forced to put the very subjective substance of Native American religious beliefs on trial when making management decisions. Agency Accommodation also requires agencies to expend huge amounts of time and resources deciding the fate of Spiritual Sites.

Accommodation can work as a management strategy in some cases, but the time for improvements has come. New strategies for protection that lift the burden of Spiritual Site protection from the agencies should be considered. Restoration of Spiritual Site land to tribal ownership or tougher legislative protections would offer a better definition of protection and give tribes more legal security for Spiritual Site protection. The next era of Spiritual Site protection should consider management solutions as long-term strategies to define the legal status of these areas and grant increased protection.

[20] *Navajo Nation* (2008), *supra* note 19, at 1070.

[21] Yablon, *supra* note 1, at 1658.

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