

Existing Federal Law and the Protection of Sacred Sites

Possibilities and Limitations

by Jack F. Trope

Many of the initial European settlers in North America migrated to what became the United States of America to worship the Creator in the manner they freely chose. Their descendants, however, have failed to equally respect the religious traditions of the people who preceded them to the North American continent. As a result, even today, sites which are sacred to those Native American Indians who continue to practice their traditional religions lack complete protection under United States law.

In his article, Professor Ortiz has described the nature of Native American sacred sites and their importance to the practice of traditional Indian religions. This article is designed to discuss the legal safeguards which protect sacred sites threatened by proposed development and the limitations of existing laws. As an illustration, it will describe the effort to protect a sacred Medicine Wheel in the Big Horn Mountains in Wyoming.

Historical Legal Background

For most of American history, the United States government has actively discouraged, and even outlawed, the exercise of traditional Indian religions. Throughout the 19th and for much of the 20th Century, the government provided direct and indirect support to Christian missionaries who sought to "convert and civilize" the Indians. From the 1890s through the 1930s, the government moved beyond promoting voluntary abandonment of tribal religions to affirmatively prohibiting the exercise of traditional religion. On those reservations where it had the authority, the Bureau of Indian Affairs outlawed the "sun dance" and all other similar dances and



Big Horn Medicine Wheel, Wyoming.

so-called religious ceremonies," as well as the "usual practices of so-called 'medicine men.'" It was not until 1934 that the federal government fully recognized the right of free worship on Indian reservations.

However, many obstacles to free religious practice remained. For example, Indian religious practitioners were frequently denied access to sacred sites located outside of reservations, often on federal lands, and those sites were not protected against development incompatible with their continued usage.

The Contemporary Problem

A large number of those sites which are known to be sacred to traditional Indian religions are located on what is currently federal land. Frequently, the needs and philosophy of Western society have conflicted with the use of lands by traditional Indian people. For example, Western concepts of resource development, e.g., logging,

mining, tourism, are often inconsistent with the preservation of the integrity and sanctity of sacred sites. The goals and needs of those who want to "develop" such lands are generally more readily incorporated into land management policies and decision-making, than are the religious beliefs of Native Americans affected by that development.

Further, government land managers often feel that simply relocating a development project a short distance away from a Native American site will suffice to mitigate the impact of developmental activity. For Native American spiritual sites where the surrounding landscape may contribute substantially to the sacred qualities of the site, project relocation in proximity to the site may not be a viable solution.

For these reasons, traditional Indian people continue to engage (as they have for decades) in a struggle with the federal government—and occasionally state governments—to protect threatened sacred sites.

1970s and 1980s: Successes and (mostly) Failures

In a few cases, the efforts to protect sacred sites during the 1970s and 1980s were successful. In 1970, President Nixon signed legislation returning part of the sacred Blue Lake in New Mexico, which had been annexed by the United States in 1906 to the Taos Pueblo. Another example of a successful defense of a sacred site involved Kootenai Falls in Montana which was threatened by proposed hydroelectric development in the 1980s. An administrative law judge ruled that the project was against the public interest.

However, throughout those years, most of the disputes between traditional Indian religious practitioners and federal and state governments were resolved in favor of the government—with a resulting impact upon the ability of practitioners to utilize these sacred sites. For example, cases were decided which permitted the following activities to take place:

- Development of a ski area on the San Francisco Peaks in Arizona, sacred to the Hopi and Navajos
- Construction of viewing platforms, parking lots, trails and roads at Bear Butte in South Dakota, sacred to many Plains Indians
- Flooding of sacred Cherokee sites by the Tennessee Valley Authority

In 1988, the United States Supreme Court directly considered the issue of the First Amendment protection of sacred sites in the case of *Lyng v. Northwest Indian Cemetery Prot. Assn.* The case involved the construction of a road by the Forest Service in Northern California which the government asserted would improve access to timber and recreational resources. The federal trial and appellate courts had ruled in favor of the Indian religious practitioners, applying a balancing test known as the “compelling interest” test; the courts had held that the negative impact upon the traditional Native American religious practices outweighed the government’s interest in building the road.

The United States Supreme Court reversed the lower courts, rejecting the application of the compelling interest test to land management decisions by the government. The court ruled that unless (1) there was specific governmental intent to infringe upon a religion or (2) the government’s action coerced individuals to act contrary to their religious beliefs, the First Amendment provided no protection against governmental action which impacted upon, or even destroyed, a Native American sacred site. In 1990, in the *Smith v. Emp. Sec. Div. of Oregon* case involving the ceremonial use of peyote, the Supreme Court extended its rejection of the previously applied compelling interest test to most governmental activity which indirectly impacts upon religious activity, thereby insulating those activities from strict scrutiny by the courts as a matter of constitutional law.

The *Lyng* decision also established that the American Indian Religious Freedom Act of 1978 (AIRFA) is not available as an alternative mechanism for judicial protection of sacred sites (see discussion of AIRFA below). The court held that “it has no teeth.”

Current Legal Protection: In General

As a result of the *Lyng* decision, where a governmental action threatens a sacred site, a traditional Indian religious practitioner has no enforceable First Amendment protection based upon a religious freedom claim. Thus, lawyers representing such practitioners or Indian tribes must resort to a patchwork of statutory laws which provide some mechanisms for challenging land management decisions which impact upon sacred sites.

American Indian Religious Freedom Act

AIRFA established a federal policy “to protect and preserve” American Indian religious freedom rights, including “access to sites” and “the freedom to worship through ceremonies and traditional rites.” Pursuant to AIRFA, a limited number of admin-

istrative regulations and policy statements have been issued which provide some opportunity for Indian input into land management decisions. For example, regulations have been promulgated for land management acts such as the National Forest Management Act which governs Forest Service land and the Federal Land Policy and Management Act applicable to lands managed by the Bureau of Land Management. As indicated, however, if land managers do not pay attention to Indian input, the Supreme Court has held that there is no legal redress under AIRFA available to Indian individuals or tribes.

The Native American Graves Protection and Repatriation Act

The Native American Graves Protection and Repatriation Act (NAGPRA) provides partial protection to one category of sites that are sometimes sacred—Native grave sites on tribal and federal lands. Specifically, NAGPRA provides that whenever a party intends to intentionally excavate a burial site for any purpose that party must obtain a permit from the agency managing the land where the burial site is located. If tribal lands are involved, the grave site may be excavated only after notice to, and consent of, the tribe. If federal lands are involved, the site may be excavated only after notice and consultation with the appropriate tribe.

Where buried cultural items are inadvertently discovered as part of another activity, such as construction, mining, logging or agriculture, the person who has discovered the items must temporarily cease activity and notify the responsible federal agency in the case of federal land or the appropriate tribe in the case of tribal land. When notice is provided to the federal agency, that agency has the responsibility to promptly notify the appropriate tribe. Activity may resume thirty days after notice has been received. The intent of this provision is to “provide for a process whereby Indian tribes...have an opportunity to intervene in development activity on Federal or tribal lands in order to safe-

guard Native American human remains, funerary objects, sacred objects or objects of cultural patrimony...[and to afford] Indian tribes...30 days in which to make a determination as to appropriate disposition for these human remains and objects." (In terms of Hawaii, certain defined Native Hawaiian organizations may exercise the rights accorded to tribes in this legislation.)

Under NAGPRA, Indian tribes or descendants of the deceased will have ownership and control over human remains and cultural items which are discovered or excavated on federal and tribal lands in the future whenever: lineal descendancy or cultural affiliation can be shown; tribal land is involved; or where an Indian tribe has successfully obtained a land claims judgment establishing that a given piece of federal land was within its aboriginal territory. Presumably, these ownership and control rules diminish the incentive to excavate such sites simply for the purpose of excavation. Except in the case of tribal lands, however, NAGPRA does not empower tribes to absolutely bar disturbance of Native grave sites, which is a significant limitation particularly where a site is considered to be an "obstacle" to completion of an unrelated development project.

The National Historic Preservation Act

Another mechanism which is available for the protection of sacred sites is the National Historic Preservation Act (NHPA). The National Historic Preservation Act protects "districts, sites, buildings, structures and objects significant in American history, architecture, archaeology, engineering, and culture."

In order to achieve its goals, the Act establishes a process (generally referred to as the Section 106 process) whereby federal agencies who are engaged in an undertaking must determine if the undertaking will have an adverse impact upon an historic property (a prehistoric or historic site that is eligible for listing in the National Register of Historic Places). The determination as to whether a project is an

undertaking, and thus subject to the regulatory provisions of the NHPA, is initially made by the federal agency. When the integrity of sites that may be historic properties are threatened by an undertaking, the federal agency is then required to consult with the State Historic Preservation Office (SHPO) concerning site eligibility for the National Register and project effects.

Where there is an adverse effect, the agency, SHPO and (if it so chooses) the Advisory Council on Historic Preservation, an independent agency of the federal government created by the NHPA, consult on methods for mitigating the effects. If the parties can agree upon mitigation measures, a Memorandum of Agreement is usually executed. If agreement cannot be reached, the Advisory Council is given the opportunity to comment on the undertaking to the head of the federal agency involved in the undertaking. Once these comments have been considered, the agency may proceed with the undertaking as it sees fit. The agency, SHPO and Advisory Council may agree to invite other parties to take part in an Agreement as consulting parties and the agency is also required, in certain circumstances, to consider input from certain interested parties before entering into such agreements.

NHPA regulations adopted in 1986 require that, where traditional cultural properties are involved, Indian tribes shall be provided with "the opportunity to participate as interested persons." Moreover, "[t]raditional cultural leaders are considered to be interested persons with respect to undertakings that may affect historic properties of significance to such persons."

A 1992 amendment to the NHPA has strengthened these requirements. It provides that "a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance" to a property which falls under the Act. The amendment also specifically recognizes that "properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National

Register." Regulations to implement these amendments have not yet been approved. The language suggests a role for Indian tribes in the process, when a property of cultural or religious significance is involved, which would be similar to that of the State Historic Preservation Offices.

In general, the National Historic Preservation Act is a procedural statute and does not impose substantive criteria upon federal agencies, although some courts have imputed a requirement of good faith to agencies in terms of their compliance with the required procedures. The one area where the NHPA imposes a substantive requirement is in the case of properties which have been designated as National Historic Landmarks. Federal agencies are required to affirmatively minimize the impact of their activities upon such sites.

National Environmental Policy Act

The National Environmental Policy Act (NEPA) requires agencies to assess the impact of their activities upon the human environment. This impact is normally assessed through the development of Environmental Assessments (EA) and Environmental Impact Statements (EIS). Consultation with and evaluation of the effects upon Indian tribes is provided for in the implementing regulations.

There is no requirement *per se* that the impact of a project upon a sacred site be considered within a cultural-religious framework; however, the regulations define the "human environment" to include "the relationship of people with that environment" and "effects" of a project include "cultural and social" effects. As a result, analyses known as Social Impact Assessments have been included in NEPA documents. This is in addition to requirements that the ramifications of related legislation, such as the National Historic Preservation Act, be included in the overall analysis.

Of course, ultimately, if an EIS and EA have fully and fairly considered the impacts of the project and all reasonable alternatives, a federal agency may

go forward with the project notwithstanding its impact. NEPA has been held to impose procedural requirements only upon federal agencies and does not establish substantive environmental criteria.

Archeological Resources Protection Act

The Archeological Resources Protection Act (ARPA) regulates the issuance of permits for archeological excavations of archeological sites on federal and tribal lands. Tribes must consent to excavations on their lands and receive notice of excavations on federal lands if the site is of religious or cultural importance.

Religious Freedom Restoration Act

In 1993, Congress enacted the Religious Freedom Restoration Act (RFRA) which restored the First Amendment compelling interest balancing test rejected by the United States Supreme Court in the *Smith* case in 1990. Specifically, the Act provides that governmental activity may substantially burden a person's free exercise of religion only if the activity is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. Under this Act, any person whose free exercise is burdened by a governmental activity may seek judicial redress.

On its face, the legislative language would appear to provide a judicial mechanism for traditional religious practitioners to challenge harmful federal land use decisions. However, the legislative history underlying RFRA is mixed. The House committee report indicates that the "definition of governmental activity covered by the bill is meant to be all inclusive. All governmental actions which have a substantial external impact on the practice of religion would be subject to the restrictions in this bill..." regardless of whether the government activity "coerce(s) individuals into violating their religious beliefs...[or] penalize(s) religious activity by denying any per-



Cloth prayer offerings tied to the wheel's fence.

son an equal share of the rights, benefits and privileges enjoyed by any citizen." This would seem to indicate an intent to disavow the *Lyng* case since these factors served as the very basis for that decision.

In the Senate committee report and on the floor of the Senate, however, statements were made to the effect that the legislation was meant to reverse the *Smith* case and that pre-*Smith* case law (i.e., *Lyng*) had made it clear that strict scrutiny did not apply to "the use of the Government's property or resources." This legislative history makes it uncertain whether RFRA will be available for protection of sacred sites—an uncertainty that will not be resolved for at least several years.

How These Laws Work in Practice: Medicine Wheel

The Big Horn Medicine Wheel is a stone circle approximately 80 feet in diameter with twenty-eight spokes extending from a central cairn to the perimeter. It was constructed hundreds of years ago by Plains Indians and is located at an altitude of 10,000 feet in the Big Horn National Forest of Wyoming. To Plains tribes, it is an important and powerful religious site actively utilized by traditional religious practitioners of those tribes. The federal government has designated the site as a National Historic Landmark.

In 1988, the Big Horn National Forest prepared a Draft Environmental Assessment pursuant to the require-

ments of NEPA which analyzed a proposal to build a viewing platform at the Wheel, upgrade the dirt road near the Medicine Wheel, and construct a visitor's center in the vicinity of the Wheel. The proposal continued to authorize vehicular access within 100 feet of the Medicine Wheel and made no provision for the religious use of the site or the overall protection of the integrity of the site. In response to this proposal, traditional communities within several tribes with an interest in the Wheel mobilized in opposition. The Wyoming State Historic Preservation Office, the Advisory Council on Historic Preservation and the Medicine Wheel Alliance, an activist group including both Native Americans and environmentalists, also vocally opposed the plan.

As a result of the opposition to the proposed development and the urging of the Wyoming SHPO, the United States Forest Service began to hold a series of large public meetings in late 1989 and early 1990. It was during that period that I first became involved in the effort to block these proposals when local traditional Indian practitioners opposing the project requested the assistance of a national advocacy organization for which I worked as Senior Staff Attorney, the Association on American Indian Affairs (AAIA). AAIA has provided both legal and organizational assistance to Indian people opposing the project since 1989.

In January 1990, the Native Americans concerned about the Wheel developed and presented to the Forest Service a unified proposal regarding the Medicine Wheel, calling for restrictions upon vehicular access to the site, limitation upon other development near the Wheel, and for the set aside of the Medicine Wheel for ceremonial use at certain times. In an effort to formalize this collective effort, the Medicine Wheel Coalition on Sacred Sites of North America was established in May 1990. The Coalition consists of tribally designated traditional religious practitioners representing several Plains tribes. Francis Brown, an Arapaho Elder,

The Wyoming Division of Tourism

serves as President. The Coalition, the Medicine Wheel Alliance, and the Wyoming State Historic Preservation Office continued to meet with and pressure the Forest Service to alter its plans for the site during 1990 and early 1991.

As a result of the level of public concern, the Forest Service decided that NEPA required the preparation of an Environmental Impact Statement (EIS). A draft EIS was prepared and issued in May 1991. The Forest Service's preferred alternative continued to provide for the paving of the road going past the Medicine Wheel, construction of a new parking lot in the vicinity of the Wheel and continued unlimited vehicular access to the site. Also, it contained no provisions for a set aside of ceremonial days. The visitor's center and viewing platform were no longer part of the proposal, however. The Medicine Wheel Coalition, Medicine Wheel Alliance, Wyoming SHPO and the Advisory Council all strenuously objected to the Forest Service's preferred alternative.

In October 1991, the Big Horn Forest commenced the NHPA section 106 process. In January 1992, the Forest Service, Advisory Council and Wyoming SHPO agreed that the Medicine Wheel Coalition should be given consulting party status. Later that year, the Medicine Wheel Alliance and Wyoming Big Horn County Commissioners were also granted consulting party status.

Finally, after a series of public meetings and private negotiating sessions and an abortive attempt by the Forest Service to issue a unilateral decision on this issue, a Memorandum of Agreement (MOA) was signed by the six consulting parties in May 1993. The MOA prohibited tourist vehicular traffic to the Medicine Wheel except for handicapped access and required that tourists park approximately 1 1/2 miles from the Wheel and hike to the Wheel from that location. Continued vehicular access to areas northwest of the Wheel by ranchers and hunters via the Medicine Wheel road was authorized by the MOA, however, so long as those individuals did not stop or park

at the Wheel. In addition, pursuant to the MOA, Native American interpreters were posted at the Wheel during tourist season and twelve days were set aside for traditional ceremonial use by Native Americans without disturbance. The Forest Service also agreed to provide funding for the continuation of an ethnographic study of the Medicine Wheel and vicinity, begun in 1992 under the auspices of the Medicine Wheel Coalition through a grant from the Wyoming SHPO. That study is expected to result in the approval of expanded boundaries for the National Historic Landmark.

In August 1994, the parties to the MOA, as well as the Federal Aviation Administration which operates a radar dome on nearby Medicine Mountain, entered into a Programmatic Agreement. The PA continued the interim MOA management procedures for 1995 and also provided for procedures governing the development of a long-term Historic Preservation Plan (HPP) by June 1, 1996; completion of the ethnographic study; and a moratorium on final approval of undertakings within a 2 1/2 mile radius of the Wheel, pending completion of the HPP.

Thus, enormous progress in protection of the Wheel as a traditional religious and cultural site has occurred, although there continue to be long-term management issues that will need to be resolved in the Historic Preservation Plan process. Existing law has served as a mechanism to protect the site.

Why have the laws worked thus far in terms of this site? There are several explanations:

1. Native Americans were organized and unified early in the process, before the agency's plans had progressed beyond the initial proposal stage.

2. State and federal agencies established to protect historical sites were fully supportive of the efforts of the Native Americans. Both the Wyoming SHPO and the Advisory Council aggressively defended the Native American agenda for the protection and ceremonial use of the Medicine

Wheel by insisting upon strict compliance with the regulatory provisions of the NHPA. The fact that the Medicine Wheel is a National Historic Landmark enhanced the ability of those agencies to influence the Forest Service decisions. Moreover, Washington-based officials of the Forest Service (and National Park Service) expressed their desire to local land managers that an agreement be reached concerning protection of the site. In fact, management changes occurred at the Big Horn National Forest in 1991 in part because of the inability of the local Big Horn Forest administrators to deal adequately with this issue during the preceding three years. The individuals appointed to positions of authority in the Big Horn National Forest in 1991 had a greater understanding, than did their predecessors, that the Forest needed to address Native American concerns in regard to this site.

3. The economic interests of the non-Indian community were such that solutions were possible which would protect those interests in a manner consistent with the overall goal of the protection of the integrity of the site in terms of its contemporary religious use. For example, the agreement protected local economic interests by providing for continued access by ranchers and hunters to areas northwest of the Wheel and access by tourists (albeit by foot) to the Wheel itself.

4. During the negotiations, the Native Americans expressed the reasons why it was so important to protect the Wheel in a manner which both the Forest Service and most of the non-Indian community were forced to respect. Once those two entities became persuaded that the sanctity of the Wheel needed to be protected and publically so stated, those parties had little choice but to seek and accept constructive solutions and not be obstructionist.

5. The Native Americans focused upon achievable goals. For the most part, they avoided polemically-based positions (e.g., insisting on total closure of the Wheel to tourists).

It is worth noting that the struggle concerning Mount Graham, described

in the article by Elizabeth Brandt, illustrates the limitations in the very laws which have been used to protect the Medicine Wheel. Unlike the Medicine Wheel situation, Native opposition to the Mount Graham telescope project did not coalesce immediately because the Indian people with a direct interest in the site were not adequately notified. In addition, state and federal historic preservation agencies were not aggressive in protecting the site. Moreover, economic interests behind the project were very influential and exercised their political clout. Only if the project went forward as planned could those economic interests be satisfied, yet, at the same time, there was no position short of relocating the project to another mountain that would protect the religious integrity of the site. Finally, although the Apache have gathered considerable support from the environmental and religious communities and convinced a number of other United States universities who had planned to take part in the project to withdraw, they have been unable to persuade the university and certain international entities interested in the site of the need to abandon the project.

Thus, most of the elements which have led (thus far) to a successful effort to protect the Medicine Wheel have been absent in terms of Mount Graham and the university has succeeded in constructing two of the planned telescopes. That the Apache have been able to prevent further development is a tribute to the strength of their beliefs and the tenacity of the Apache and their supporters in the face of great obstacles.

Conclusions

Analysis of and experience with existing laws reveals both their possibilities and limitations. In general, where enough political pressure can be brought to bear and mitigation is possible without a substantial cost to powerful economic actors, existing laws may provide the tools whereby Indian people and tribes, the federal government and (where applicable) developers can negotiate agreements which

will protect sacred sites. Of course, even in the best case, negotiating such agreements is not easy. Issues such as the need for confidentiality on the part of traditional religious practitioners and lingering underlying racism and ethnocentrism should not be discounted. Nonetheless, where the positive elements described above are present, the possibility of successful resolution is also present.

Where powerful economic interests are involved, however, and protection of the site can be obtained only through prevention of the proposed activity, as opposed to modification, existing laws (unless the Religious Freedom Restoration Act is ultimately interpreted to apply fully to sacred sites) generally will not successfully protect sacred sites. At best, those laws may achieve limited mitigation of impacts or provide some opportunity for delay where that is an appropriate strategy.

Obviously, many cases will fall between these two paradigms. From an advocate's perspective, successful use of existing laws is best achieved through Indian tribes and traditional practitioners actively seeking involvement with federal agencies in review processes and through Coalition building between Indians and sympathetic elements of the non-Indian community as well as any federal or state agencies which may be supportive. In addition, the possibility of protection of sites is enhanced through creative development of alternatives to a proposed activity (where this is possible) which avoid direct conflict with potential adversaries. It is also enhanced through development of relationships with those who are seeking the threatening development so that they understand the harm that would occur and decide to constructively seek solutions to avoid that harm.

Moreover, to the extent that Indian people and tribes can build relationships with local land managers during the earliest possible stages of long-term management plan development, this has the potential of reducing the number of threats to sacred sites. Under existing laws, as well as the existing

trust relationship between the federal government and sovereign Indian tribes based upon the Constitution, treaties and 200 years of federal common law, agencies are under at least some mandate to consult in regard to these matters. Indian tribes and traditional practitioners ought to aggressively remind them of this responsibility.

Ultimately, however, the protection of these sites should not be dependent upon the political pressure that tribes can muster, the political clout of a potential developer or the good will of the local land manager. Over the long term, it would be most appropriate to transfer sacred sites to tribal control where this is possible. Most religious sites in this country are controlled by the religious communities that value them. The ultimate goal should be to achieve the same end for practitioners of Native American traditional religions.

In the meantime, however, where agreements which would avoid harm to sacred sites cannot be realized, the federal government—at the very least—ought to be required to justify that the need for an activity is compelling and that there is no less intrusive manner to achieve that end before it can proceed with an activity that will be destructive of a sacred site. This was the central goal of the sacred sites provisions of Native American Free Exercise of Religion Act which were proposed, but not enacted, in the last Congress. In the current political climate, the immediate prospects for this legislation may not be favorable. However, the need for this minimal protection continues in order to ensure that Native people may continue to worship in the manner which they have chosen and practiced since long before European settlers, seeking to escape religious persecution, came to the Western Hemisphere. ■

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