Trends & Insights

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Tribal Sacred Places and American Values

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> For hundreds and hundreds of years, the land and water of Black Mesa have been central to the culture, economy and worship of the Indian people of Black Mesa. My people, the Hopi, view all things as living - the land, the water, the crops and vegetation that spring from the earth (especially corn), as well as animals and human beings. All exist in a delicate, natural and spiritual balance.

Testimony of Vernon Masayesva, Executive Director, Black Mesa Trust, before the United States Senate Committee on Indian Affairs (July 17, 2002).

Mr. Masayesva was testifying about the threat to Black Mesa, a place that is sacred to the Hopi Tribe, from a mining operation using large quantities of precious desert water. But looking beyond this specific place, his statement more generally illustrates the difference between the world view of many indigenous people of America (and the world) and that of the dominant Western society. It is a conflict between those who view the land from a spiritual perspective and those that view it as a commodity. And, because a large number of these places are located on lands outside of reservation boundaries (many on federally owned land), it is a conflict that is spawning legal conflict in courts and attracting legislative attention from Washington, D.C. to Sacramento.

These issues are of profound importance to Native Americans whose very ability to practice their cultures and religions can be severely affected by development at places that they hold sacred. Examples abound. One that has received a substantial amount of attention in the print media is set in Southern California, where the Glamis Gold Corporation has proposed a massive, open-pit, cyanide heap-leach gold mine located in the heart of a place sacred to the Quechan Indian Tribe. The permit was originally denied by the Bureau of Land Management, after completion of an environmental impact statement (EIS), in large part because of the severity of the damage that would be inflicted on places sacred to the tribe. Based upon a different interpretation of the mining laws, the Bush administration rescinded the Record of Decision and is revisiting whether a permit should be issued. In yet another example, permits have recently been issued for a coal strip mine in New Mexico that has the potential to

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drain water from an aquifer that is essential for the continued existence of Zuni Salt Lake, an irreplaceable site that is sacred for Zuni Pueblo.

While sacred site protection, for many tribes, is a matter of transcendent importance, issues relating to tribal sacred sites also have implications that go far beyond the Native American community. Because many tribal sacred sites are located in relatively undisturbed places in the natural world, protecting these places can yield benefits from an ecological standpoint, preserving wilderness and wildlife habitat. *See* Dean B. Suagee, *The Cultural Heritage of American Indian Tribes and the Preservation of Biological Diversity*, 31 ARIZ. ST. L. J. 483 (1999). Preserving tribal sacred places through historic preservation conveys the message that tribal oral traditions are important in American history, and that we value these aspects of our national heritage. Moreover, protecting tribal sacred places shows the world that religious tolerance is a core American value—a value that is worth living up to in an era when religious intolerance has contributed to much suffering and warfare throughout the world.

Despite such public interest reasons for protecting tribal sacred places, existing law recognizes the value of accommodating the religious needs of Native Americans to only a limited extent. With respect to constitutional law, the United States Supreme Court has ruled that the Free Exercise Clause of the First Amendment is not available to place restrictions upon federal agency land management decisions for the purpose of protecting Indian sacred places on federal lands lands. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). Some statutes do provide a measure of protection through procedural requirements. Most notably, the National Historic Preservation Act (NHPA) provides that "a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance" to a historic property when a federal or federally assisted undertaking may affect that property. 16 U.S.C. §§ 470a(d)(6), 470f. In addition, the Native American Graves Protection and Repatriation Act (NAGPRA) provides for notice and consultation when grave sites are involved, as well as repatriation of human remains and funerary objects in some circumstances. 25 U.S.C. §§ 3001-3013. NHPA is implemented through regulations issued by the Advisory Council on Historic Preservation, 26 C.F.R. pt. 800, and NAGPRA by regulations issued by the Secretary of the Interior, 43 C.F.R. pt. 10. The American Indian Religious Freedom Act, 42 U.S.C. § 1996, and Executive Order 13,007 (published following 42 U.S.C. § 1996), announce that it is federal policy to protect the integrity of and access to sacred sites, although neither is judicially enforceable.

While not providing much in the way of substantive protection, NHPA and NAGPRA and their regulations do create some legally enforceable procedural rights, rights that tribes can use to get to the table and tell their own stories from their own perspectives. If, that is, they know how these procedural mechanisms work and are willing to disclose enough information to influence decisions. (It is often the case that tribes are reluctant to reveal certain information for cultural or religious reasons, or because of fears that, once identified, sites will be desecrated.) A growing number of tribes are becoming adept at using these procedural mechanisms. Significantly, amendments to the NHPA enacted in 1992 have contributed to the growth of tribal programs because this Act now recognizes and authorizes funding for Tribal Historic Preservation programs. Some thirty tribes have now taken over historic preservation roles that would otherwise be performed by state historic preservation officers (SHPOs). While these programs are mainly focused on protecting historic places within reservation boundaries, having such a program also empowers a tribe to advocate for the protection of lands outside reservation boundaries. Because, as noted earlier, protecting tribal sacred places outside reservation boundaries can converge with other public interests, a broad public interest is served by the existence of tribal historic preservation programs. *See* Sandra B. Zellmer, *Sustaining Geographies of Hope: Cultural Resources on Public Land*, 73 U. COLO. L. REV. 413 (2002).

These federal laws have allowed for strengthened protection of sacred sites on tribal lands and the negotiation of some agreements to protect sacred places located on non-Indian lands—for example, the Bighorn Medicine Wheel in Wyoming. Protection of Native sacred places, however, is still largely a case-by-case struggle to convince land managers that these sites need to be protected and that it is possible to do so. 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 agreements may be reached to protect a site. Where powerful economic interests are involved, however, and where protection of the site can be obtained only through prevention of the proposed activity, as opposed to modification, existing laws will generally not protect sacred sites. In our opinion, the goals and wants of those who seek to extract resources from (or otherwise "develop") lands are more readily incorporated into government land management policies and decision-making than are the religious beliefs of Native Americans affected by that development.

Even when agreements to protect sites are reached, legal challenges to such agreements often arise. For example, agreements to protect the Bighorn Medicine Wheel, Devils Tower, and Rainbow Bridge have been challenged. *See, e.g., Wyoming Sawmills v. United States Forest Service*, 179 F. Supp. 2d 1279 (D. Wyo. 2001); *Bear Lodge Multiple Use Ass'n v. Babbitt*, 2

F. Supp. 2d 1448 (D. Wyo. 1998), *aff'd*, 175 F.3d 814 (10th Cir. 1999), *cert. denied*, 529 U.S. 1037 (2000); *see* Zellmer, at 459-61.

The obstacles faced by Native people seeking to protect the places they hold sacred has led to the creation of a Sacred Lands Protection Coalition which includes tribes, Indian and other organizations, such as the National Trust for Historic Preservation. This coalition is seeking legislation to provide stronger protection for sites. Tribal efforts to protect sacred places also have attracted the attention of legislators. In Washington, D.C., the Senate Committee on Indian Affairs, chaired by Senator Daniel Inouye (D-Hawaii), has held the first two of a scheduled five oversight hearings designed to explore what federal agencies have done and are doing in connection with the management of lands where tribal sacred sites are located. In addition, both Senator Ben Nighthorse Campbell (R-Colo.) and Representative Nick Rahall (D-W.V.) have introduced legislation addressing aspects of this issue, S. 2921 and H.R. 5155, respectively.

In California, the state legislature passed legislation introduced by Senator John Burton, S.B. 1828, that would require mining operations to reclaim lands within one mile of a tribal sacred site as a condition of permit approval. This bill also would require public agencies that are considering development applications that would significantly affect sacred sites to notify and consult with tribes, seek to reach agreement on mitigation and, in the absence of agreement, to issue a permit only if there is an overriding public interest and all feasible mitigation measures have been incorporated into the project.

As one might expect, the legislation is supported by tribes and environmental organizations and opposed by building and mining industries and the Chamber of Commerce. The battle over this legislation is typical of the kinds of battles that arise over this issue. Development interests call the legislation a "job killer" bill. Indian tribes view the bill as balanced and reasonable—a bill that will provide tribes with a voice in the process and instructs agencies that they must explore whether there are feasible alternatives and a sufficient public interest in the proposed development before approving a plan that would harm a sacred site.

Ultimately, the debate about this California bill is about a conflict between two kinds of values that are considered of fundamental importance in American society—the value we place on religious freedom and the value we place on people being able to use land for economically productive purposes. Are such conflicts irreconcilable? In some cases maybe so. In most cases, we tend to believe that, when a tribal sacred place is threatened, there are likely to be a host of other public interests that should operate to constrain the activities that create the threat. We know that development interests fear that tribal sacred places are everywhere. We also know that the places that are held sacred by tribes are, in fact, of a finite number. Each such place is unique and irreplaceable. We believe that the balance struck by existing laws places too many obstacles in the path of those who practice traditional Native religions and who are seeking to protect the irreplaceable. And we believe that the value of religious tolerance, and the related value of treating the heritage of minority cultures with respect, are too often the subject of superficial rhetoric rather than conscious choices about priorities. Tribal cultures are essential parts of our heritage as Americans. If we are to continue to have Indian tribes among us as living cultures, we as a nation must find ways to protect the places that tribes believe are sacred.

On September 30, 2002, Governor Davis vetoed the Indian sacred lands bill, although on the same day he did issue a statement expressing opposition to the proposed Glamis mine. It is not clear why he vetoed the bill, which had passed the legislature with bipartisan support and that polls showed had broad public support. This action highlights the tension between the relative political power of "development" interest groups compared to those who express support for Indian religious freedom. We know that the members of the Quechan Tribe found the Governor's veto to be disheartening, but we have no doubt that the Quechan Tribe will continue to fight the proposed Glamis mine. As seen by the Quechan Tribe, this proposed mine on federal public lands would rip apart the places that they hold sacred and saturate the rubble with cyanide in order to leach out relatively small quantities of gold for private profit. From a Quechan perspective, the fact that this proposed mine has not been rejected once and for all must raise questions about the extent to which religious freedom really is a basic American value. Tribes such as the Quechan need the American people to become involved in the politics and morality of these conflicts if religious freedom for all Americans is to continue as a core principle of American life.

Incredible Evidence

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The United States Environmental Protection Agency decided in 1997 that any "credible" evidence may be used to prove a violation of the Clean Air Act. 62 Fed. Reg. 8314 (Feb. 24, 1997). EPA stated as part of its credible evidence rulemaking that allowing violations to be determined through means other than the

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