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# Devils Tower, Rainbow Bridge, and the Uphill Battle Facing Native American Religion on Public Lands

Charlton H. Bonham\*

It's a place where the Shoshones go up and obtain songs from this mountain. When they go fasting over there, they obtain songs, the songs given to them at this place for Sun Dance, Peyote, or whatever they are seeking. So, to us it is holy ground. We respect it. We walk in with respect and walk away from it with respect. It's a holy place to us, very sacred.<sup>1</sup>

## I. Introduction

Devils Tower National Monument, located in northeastern Wyoming, is an unparalleled natural phenomenon with great historical and religious significance. Named the first national monument in 1906,<sup>2</sup> the Tower attracts scores of recreational visitors and Native American religious worshippers. Native American Indian tribes,<sup>3</sup> including the Cheyenne River Sioux,

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1. Jeffery R. Hanson & David Moore, *Applied Anthropology at Devils Tower National Monument*, 44 PLAINS ANTHROPOLOGIST: MEMOIR 31, at 57 (1999) (quoting from June 1992 interview with Eastern Shoshone tribe spiritual representative to the Medicine Wheel Coalition).

2. In 1906, President Theodore Roosevelt employed the newly-enacted Antiquities Act and designated Devils Tower the country's first national monument. See *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814, 819 (10th Cir. 1999) (citing Proclamation No. 658, 34 Stat. 3236 (1906)), cert. denied, 529 U.S. 1037 (2000). The Proclamation noted that the Tower is "a natural wonder and an object of historic and great scientific interest . . . [and] warning is hereby given to all unauthorized persons not to appropriate, injure or destroy any feature of the natural tower." Proclamation No. 658, 34 Stat. 3236, 3237 (1906). See also Joel Brady, *Land Is Itself a Sacred, Living Being: Native American Sacred Site Protection on Federal Public Lands Amidst the Shadows of Bear Lodge*, 24 AM. INDIAN L. REV. 153, 165 (2000) (describing in brief the history and cultural significance of Devils Tower).

3. This Article considers the terms "Native American" and "Indian" to be interchangeable, but predominantly employs the term "Native American" for consistency.

Arapahoe, Crow, Kiowa, Lakota Sioux, and Eastern Shoshone,<sup>4</sup> know Devils Tower as Mato Tipila or He Hota Paha.<sup>5</sup> For the tribes, the Tower is a sacred site where, according to religious legend, seven sisters took refuge from a pursuing bear.<sup>6</sup> Stranded, the sisters died and ascended into the sky, forming the Big Dipper's stars.<sup>7</sup> For non-Native Americans, however, Devils Tower is primarily considered a world-class rock climbing location.<sup>8</sup>

Devils Tower is—literally and figuratively—stuck between a rock and a hard place. Native American tribes, the National Park Service (NPS),<sup>9</sup> and rock climbers each have differing views on acceptable management plans, schedules, and actions for the Tower.<sup>10</sup> More importantly, the tribes and the rock climbers

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4. See *Bear Lodge*, 175 F.3d at 816 n.3.

5. See *id.* at 816 n.2. The various religious and culturally significant Native American names mean Bear Lodge, Bear's Tipi, Bear's House, or Grey Horn Butte. See *id.* The Devils Tower name derives from a scientific expedition to the area, which took place in violation of Indian treaty rights. See Brady, *supra* note 2, at 165. The scientific community believes Devils Tower to be the neck of an extinct volcano. See 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, 201-02 (1999) (citing Greg Burton, *A Day at Devils Tower*, in NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, DEVILS TOWER (1984) (Handbook 111 of the NPS Handbook series introducing various national parks and monuments)).

6. See Brady, *supra* note 2, at 165; see also Burton & Ruppert, *supra* note 5, at 201 (recounting the tribes' explanation for the origin of Devils Tower).

7. See Brady, *supra* note 2, at 165; see also Burton & Ruppert, *supra* note 5, at 201 (recounting the tribes' explanation for the origin of Devils Tower).

8. See Hanson & Moore, *supra* note 1, at 53. For example, after interviewing fifty-eight climbers and reviewing the climber registry cards during the 1991 climbing season, the authors determined that seventy-four percent of Devils Tower climbers drove over six hours to climb at the Monument. See *id.* at 58. The number of climbers visiting Devils Tower has increased substantially over the last century. See *id.* at 54. In 1991, the Tower was climbed more than 5000 times. See *id.* Compare that figure to the period between 1938 and 1950, during which an estimated ten parties reached the summit of the rock. See *id.*; see also *Bear Lodge Multiple Use Ass'n v. Babbitt*, 2 F. Supp. 2d 1448, 1449 n.1 (D. Wyo. 1998) (stating that approximately 6000 climbers visit the site annually). As recreation in general—and rock climbing in particular—increases in popularity, more climbers can be expected to visit Devils Tower.

9. The U.S. National Park Service is the federal public lands management agency with administrative control over Devils Tower National Monument. See *Bear Lodge*, 175 F.3d at 819. The NPS's administrative control over the Monument began in 1916. See *id.*

10. For example, "the most sacred religious artifact of the Sioux people is the White Buffalo Calf Pipe, given to them by White Buffalo Calf Woman at the beginning of creation when she emerged from Devils Tower." *Bear Lodge*, 175 F.3d at 816. Tribal religious leaders have consistently advocated that the National Park Service should restrict, if not prohibit, climbing. See Hanson & Moore, *supra* note 1, at 59. On the other hand, sixty-seven percent of climbers interviewed during the

advocate uses of the Tower that are in direct conflict. One group wants to climb the Tower; another wants the climbing to stop.<sup>11</sup>

The Devils Tower conflict implicates constitutional provisions, federal statutes, case law, and executive orders.<sup>12</sup> To understand the Devils Tower conflict, one must understand the First Amendment's Establishment<sup>13</sup> and Free Exercise Clauses,<sup>14</sup> the American Indian Religious Freedom Act of 1978,<sup>15</sup> the Religious Freedom Restoration Act of 1993,<sup>16</sup> certain U.S. Supreme Court decisions,<sup>17</sup> and the Clinton Administration's 1996 Executive Order 13,007.<sup>18</sup> This order requires federal agencies to "accommodate access to and ceremonial use of" sacred sites and to "avoid adversely affecting the physical integrity" of those sites.<sup>19</sup>

Recently, the Wyoming federal district court and the Tenth Circuit addressed the Devils Tower conflict.<sup>20</sup> In 1996, the Federal District Court for the District of Wyoming determined that portions of the NPS's 1995 Final Climbing Management Plan

1992 climbing season indicated that "knowledge of Native American concerns about climbing would not change their own views about climbing Devils Tower in the future." *Id.* Beyond its program of climbing closures, whether voluntary or mandatory, the NPS also implemented a program whereby climbers cannot place any new climbing bolts into the Tower. *Bear Lodge*, 175 F.3d at 819 (citing ROCKY MOUNTAIN REGION, NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, FINAL CLIMBING MANAGEMENT PLAN 24-25 (1995) (FCMP)). Climbers characterize themselves as either sport or free climbers. *See* Hanson & Moore, *supra* note 1, at 59. Sport climbers rely on bolted protection placed permanently into the rock during their ascent. *See id.* Free climbers, or traditional climbers, place removable, generally passive, protection pieces into the rock while climbing. *See id.*

11. There is only one resource: the Tower. Climbers want to climb there and tribal members want to worship and conduct ceremonies at the site. Climbing affects both the physical characteristics of the rock and the "spiritual life and practices of American Indians." *Bear Lodge*, 175 F.3d at 815.

12. *See infra* notes 44-124 and accompanying text.

13. The First Amendment's Establishment Clause reads, "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I.

14. The Free Exercise Clause of the First Amendment bars Congress from making any laws "prohibiting the free exercise" of religion. U.S. CONST. amend. I. Thus, the First Amendment guarantees the free practice of religion and prohibits government-supported religion. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1155-57 (2nd ed. 1988).

15. 42 U.S.C. § 1996 (1994).

16. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

17. *See, e.g.,* *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (holding that the Free Exercise Clause does not prohibit the Forest Service from allowing logging and construction on lands traditionally deemed sacred by three Native American tribes).

18. Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996).

19. *Id.*

20. *See* *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).

(FCMP) for Devils Tower National Monument violated the Establishment Clause.<sup>21</sup> The court found a violation because the FCMP's mandatory ban on climbing during the month of June for the benefit of tribal religious practices was—as the commercial and private climber plaintiffs argued—a “subsidy of the Indian religion.”<sup>22</sup> Subsequently, the NPS revised the FCMP.<sup>23</sup> After the NPS changed the plan's prohibition on climbing to a voluntary climbing closure, the district court ruled the commercial climbing ban issue moot,<sup>24</sup> and concluded that a voluntary ban in the FCMP does not violate the Establishment Clause.<sup>25</sup> Failing to reach the merits of the plaintiffs' claim, the Tenth Circuit affirmed in 1999 the district court decision on standing grounds.<sup>26</sup> In March 2000, the U.S. Supreme Court denied certiorari.<sup>27</sup>

The district court decision, however, will most likely not be the last time a federal court will evaluate a conflict between resource user groups on public lands and balance the interests of Native American religious activities against recreation interests and federal land management agency decisions.<sup>28</sup> In fact, the plaintiff attorneys in *Bear Lodge*<sup>29</sup> recently pursued litigation

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21. See Raymond Cross & Elizabeth Brennen, *Devils Tower at the Crossroads: The National Park Service and the Preservation of Native American Cultural Resources in the 21st Century*, 18 PUB. LAND & RESOURCES L. REV. 5, 27 (1997) (citing Complaint in *Bear Lodge Multiple Use Ass'n v. Babbitt*, Civ. No. 96-CV-063-D (D. Wyo. June 8, 1996)).

22. *Id.*

23. See Brady, *supra* note 2, at 170-71.

24. See *Bear Lodge*, 2 F. Supp. 2d at 1452.

25. See *id.* at 1456-57.

26. See *Bear Lodge*, 175 F.3d at 822. Although plaintiffs failed on standing grounds, the legal question is still live. Artful pleading, better facts showing injury from agency management decision, or any combination of the two should result in judicial review on the merits.

27. *Bear Lodge Multiple Use Ass'n v. Babbitt*, 529 U.S. 1037 (2000).

28. The Tenth Circuit has unquestionably drawn a “line demarcating impermissible accommodation in the area of public lands ruling that the '[e]xercise of First Amendment freedoms may not be asserted to deprive the public of its normal use of an area.” *Bear Lodge*, 2 F. Supp. 2d at 1455 (quoting *Badoni v. Higginson*, 638 F.2d 172, 179 (10th Cir. 1980)). As the *Bear Lodge* district court noted, the “record clearly reveals that climbing at the Devils Tower National Monument is a ‘legitimate recreational and historic’ use of Park Service lands.” *Id.* (quoting FCMP at 2). Because the Supreme Court has yet to conclusively address the issue of public lands management, the Establishment Clause, and Native American religious practices, many commentators hope that the Court will accept certiorari of an appropriate case. See Brady, *supra* note 2, at 172-73.

29. Plaintiffs in *Bear Lodge* included a commercial climbing operator and several recreational climbers. See *Bear Lodge*, 175 F.3d at 816 n.1. The Mountain States Legal Foundation (MSLF) represented the *Bear Lodge* plaintiffs. See *id.* at 815.

concerning Rainbow Bridge National Monument in Utah.<sup>30</sup> In the Rainbow Bridge case, plaintiffs similarly alleged that the Park Service's attempt at a voluntary ban to promote respect for Navajo religious activities violates the Establishment Clause.<sup>31</sup>

Beyond these legislative and judicial considerations, the principle of competitive exclusion and the doctrine of discovery present more challenging obstacles to the advancement of Native American religion on public lands. When ideological conflicts and differences separate two resource user groups, the ecological principle of competitive exclusion states that one group will exclude the other from access to that resource.<sup>32</sup> A key triggering characteristic of the principle's exclusionary effect is competition over a scarce resource.<sup>33</sup> Due to the increase of recreation on public lands, use of those lands often involves a struggle over access.<sup>34</sup>

The history of exclusion of Native American tribes, however, is not limited to examples involving the competitive exclusion principle. Instead, this history began with America's acquisition of territory through discovery.<sup>35</sup> The doctrine of discovery aided the

30. On March 3, 2000, the MSLF filed the Rainbow Bridge complaint. See MOUNTAIN STATES LEGAL FOUND., CONSTITUTIONAL LIBERTIES, at [http://www.mountainsstateslegal.org/legal\\_cases\\_home.cfm](http://www.mountainsstateslegal.org/legal_cases_home.cfm) (last visited Apr. 17, 2002). Judgment by the Utah federal district court was entered on April 9, 2002. See UTAH DISTRICT COURT, CIVIL CASES WITH RECENT JUDGMENTS, <http://www.utd.uscourts.gov/reports/judgment.html> (last visited Apr. 17, 2002). The court dismissed the First Amendment claim for failure to properly join defendants. See *Natural Arch and Bridge Soc'y v. Alston*, No. 2:00 cv 191J (D. Utah Apr. 9, 2002), [http://www.utd.uscourts.gov/reports/tifs/2\\_00cv00191\\_00000044.tif](http://www.utd.uscourts.gov/reports/tifs/2_00cv00191_00000044.tif). MSLF intends to appeal this decision to the Tenth Circuit. See MOUNTAIN STATES LEGAL FOUND., *supra*.

31. See *infra* notes 270-273 and accompanying text.

32. See Hanson & Moore, *supra* note 1, at 59 (suggesting that the data collected during field studies of climbers and Native Americans at the Tower could "be approached from the ecological principle of competitive exclusion").

33. See *infra* notes 290-312 and accompanying text.

34. See *infra* notes 290-312 and accompanying text.

35. The doctrine of discovery provides "that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other . . . governments, which title might be consummated by possession." *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 573 (1823). Indian law scholars note that "*Johnson* has spawned a cottage industry among legal scholars on the 'meanings' of the decision." DAVID H. GETCHES ET AL., *FEDERAL INDIAN LAW* 70 (4th ed. 1998). Some commentators have suggested that the doctrine of discovery did not greatly affect tribes. See Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1, 25-26 (1987). Others argue that the doctrine's acceptance in North America dramatically altered the tribes' status with the land, and that the doctrine allowed colonization to "legitimate, energize, and constrain as needed

settlement of the original thirteen colonies, and contributed greatly to the nation's eventual expansion westward.<sup>36</sup> Today, the doctrine is relevant to conflicts between recreationalists and Native Americans over sacred sites on public lands. At Devils Tower National Monument, many climbers believe that their recreational use of the Tower does not infringe or impede the tribes' religious practices.<sup>37</sup> Like their forefathers in discovery, Devils Tower climbers often express the belief that "they" discovered the resource.<sup>38</sup>

Much scholarly analysis exists on the Devils Tower conflict, centering largely on the *Bear Lodge* decisions and the constitutional issues implicated. This Article, however, argues that regardless of the resolution of these important legal issues, the realistic ramifications of the principle of competitive exclusion and the doctrine of discovery may lead to the limitation and diminishment of tribal access to sacred sites and decreased protection of their religious practices. Competitive exclusion and the discovery doctrine are applicable to these conflicts on public lands because the conflicts consistently involve ideological differences, scarce resources, and traditional Western-centric rules of law.<sup>39</sup>

This Article begins with a brief overview in Section II of the constitutional provisions, statutory directives, and other legislative and executive means applicable to ensure Native

white society's will to empire over the North American continent." ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 316-17, 325-26 (1990). More emphatically, Professor Williams concluded that "*Johnson's* acceptance of the Doctrine of Discovery into United States law preserved the legacy of 1,000 years of European racism and colonialism directed against non-Western peoples." *Id.* at 317.

36. Chief Justice Marshall's opinion in *Johnson v. McIntosh* legitimized "the right of the United States government to 'extinguish' Indian title." Ali Friedberg, *Reconsidering the Doctrine of Discovery: Spanish Land Acquisition in Mexico (1521-1821)*, 17 WIS. INT'L L.J. 87, 104 (1999). If the U.S. government had not been able to self-legalize its physical taking of Native American lands, the expansion west would have been more difficult. "By denying the Indians' ownership rights in their lands and reducing their status from 'true owners' to 'occupants'," Marshall facilitated "practical, utilitarian concerns for the acquisition of land." *Id.* at 107-08.

37. See Hanson & Moore, *supra* note 1, at 59.

38. See *id.* (noting that climbers "perceived Devils Tower as public property"); *infra* notes 176-177 and accompanying text. Federal courts have determined that "[a]ny aboriginal proprietary interest that the [Indians] may have held in this land would have been extinguished by the entry of the white man in earlier years." *Badoni v. Higginson*, 455 F. Supp. 641, 644 (D. Utah 1977) (Navajo challenge to inundation of the Glen Canyon area in Colorado).

39. These factors are present in the Devils Tower conflict and are clearly seen in the pending Rainbow Bridge litigation.

American religious freedom on public lands and protection of Native American sacred sites found on public lands.<sup>40</sup> This Section also discusses the tension inherent in the Constitution's religion clauses. Section III describes the Devils Tower conflict from the tribes', climbers', and NPS's perspectives.<sup>41</sup> Section IV discusses the district court and Tenth Circuit's *Bear Lodge* decisions, analyzes the current Rainbow Bridge controversy, and then applies the *Bear Lodge* decisions to the Rainbow Bridge controversy.<sup>42</sup> This Section argues that the legal outcome of both cases will be similar. Section V details the principle of competitive exclusion and provides an overview of the doctrine of discovery.<sup>43</sup> Section V argues that because of these two concepts, recreationalism on public lands may prevail over preservation of Native American religious practices and sacred sites. This Article concludes that, realistically, the principle of competitive exclusion and the doctrine of discovery predetermine the outcome of the conflict between Native American religious practices, federal land management decisions, and recreation on public lands; unless both the law and society change, Native American religious freedom may ultimately lose.

## II. The American Legal System's Conflicted Structure for Balancing Native American Religion and Interests on Public Lands

Within the lifetime of many Native Americans alive today, the U.S. government pursued a policy designed to suppress traditional Native American religious and cultural practices and ceremonies.<sup>44</sup> The American legal system struggles to balance the need for accommodating Native American religions, where religion

40. See *infra* notes 44-124 and accompanying text.

41. See *infra* notes 125-197 and accompanying text.

42. See *infra* notes 198-288 and accompanying text.

43. See *infra* notes 289-344 and accompanying text.

44. See FELIX COHEN, OFFICE OF THE SOLICITOR, U.S. DEPT OF THE INTERIOR, HANDBOOK OF FEDERAL INDIAN LAW 175 n.347 (1942). In 1921, the U.S. Commissioner of Indian Affairs announced:

The sun-dance, and all other similar dances and so-called religious ceremonies are considered "Indian Offences" under existing regulations, and corrective penalties are provided. I regard such restrictions as applicable to any [religious] dance which involves . . . the reckless giving away of property . . . frequent or prolonged periods of celebration . . . in fact any disorderly or plainly excessive performance that promotes superstitious cruelty, licentiousness, idleness, danger to health, and shiftless indifference to family welfare.

*Id.* (quoting the Commissioner).



and culture are often indistinguishable, with the primary objective of keeping "church and state" separate.<sup>45</sup> Federal statutes, such as the American Indian Religious Freedom Act (AIRFA)<sup>46</sup> and the Religious Freedom Restoration Act (RFRA),<sup>47</sup> as well as executive orders<sup>48</sup> attempt to strike that appropriate legal balance. The First Amendment, however, inhibits this balancing because of the inherent conflict between allowing the free exercise of religion and prohibiting the establishment of religion.<sup>49</sup>

### A. *The First Amendment*

#### 1. The Free Exercise Clause

The Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise" of religion.<sup>50</sup> Generally, the Free Exercise Clause forbids governmental interference with religious practices.<sup>51</sup> Yet, barring a finding that the government affirmatively "coerced or penalized" one particular religious group because of that group's beliefs, government interference with the free exercise of religion is permissible.<sup>52</sup>

The leading Supreme Court case on Native American religion on public lands and the Free Exercise Clause is *Lyng v. Northwest Indian Cemetery Protective Ass'n*.<sup>53</sup> In *Lyng*, the U.S. Forest Service attempted to complete a logging road through the Six Rivers National Forest in northwestern California despite three Native American tribes' religious use of the area.<sup>54</sup> According to

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45. See GETCHES ET AL., *supra* note 35, at 754-55.

46. 42 U.S.C. § 1996 (1994).

47. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

48. *E.g.*, Exec. Order No. 13,007, 61 Fed. Reg. 26,771, § 1(a) (May 24, 1996).

49. The First Amendment contains both the Establishment and Free Exercise Clauses. U.S. CONST. amend. I. Government can accommodate religious practices to "prevent a free exercise violation, but it must be something less than the establishment of religion." Lydia T. Grimm, *Sacred Lands and the Establishment Clause: Indian Religious Practices on Federal Lands*, 12 NAT. RESOURCES & ENV'T 19, 21 (1997).

50. U.S. CONST. amend. I.

51. See Grimm, *supra* note 49, at 19.

52. Ann M. Hooker, *American Indian Sacred Sites on Federal Public Lands: Resolving Conflicts Between Religious Use and Multiple Use at El Malpais National Monument*, 19 AM. INDIAN L. REV. 133, 137-38 n.42 (1994) (concluding that "[t]he penalty or coercion theory was developed in *Bowen v. Roy*, 476 U.S. 693 (1986), and applied to sacred site cases in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988)").

53. 485 U.S. 439 (1988).

54. See *id.* at 441-42.

the Court, the question presented was whether the First Amendment's Free Exercise Clause prohibited construction of the road.<sup>55</sup> The Court concluded that it did not because the road would not coerce the tribes into violating their religious beliefs.<sup>56</sup> The Court reversed the Ninth Circuit's earlier determination that the Forest Service road would violate the Free Exercise Clause.<sup>57</sup>

The decision in *Lyng* effectively marked the end of Native American attempts to employ the Free Exercise Clause to protect Native American religious sites on public lands because it established the demanding "coerced or penalized" standard.<sup>58</sup> Thus, despite the language of the Free Exercise Clause prohibiting governmental interference with religious practices, tribes have been unsuccessful in challenging government actions that harmed tribal sacred sites, which thereby interfered with tribal religious practices.<sup>59</sup>

Government cannot, of course, intentionally discriminate against religious practices.<sup>60</sup> However, governmental actions that incidentally prohibit free exercise as the result of a neutral, "generally applicable law" will not violate the First Amendment's Free Exercise Clause.<sup>61</sup> It is some assurance that if a law is not generally applicable and an agency explicitly excludes Native American religion, then some relief may be available. But the more likely dynamic is diminishment of Native American religious freedom via neutral and generally applicable laws without express agency targeting—a situation where little or no Free Exercise relief exists.

55. *See id.* at 441.

56. *See id.* at 468. In *Lyng*, the Court referred to its earlier *Bowen* decision, where parents of a child argued that using a Social Security number to identify the child would interfere with their religious beliefs, and applied the *Bowen* reasoning to determine that "[i]n neither [*Bowen* or *Lyng*], however, would the affected individuals be coerced by the Government's action into violating their religious beliefs; nor would either governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Lyng*, 485 U.S. at 449 (citing *Bowen*, 476 U.S. 693).

57. *See* Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688 (9th Cir. 1985); Robert J. Miller, *Correcting Supreme Court "Errors": American Indian Response to Lyng v. Northwest Indian Cemetery Protective Association*, 20 ENVTL. L. 1037, 1051-52 (1990).

58. *See* Grimm, *supra* note 49, at 20 (noting that the "Supreme Court dealt the final blow to Free Exercise claims" in *Lyng*); Brady, *supra* note 2, at 161.

59. *See* Brady, *supra* note 2, at 159-60.

60. *See* Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 532-33 (1993).

61. Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 878 (1990); *infra* notes 98-105 and accompanying text.

## 2. The Establishment Clause

In the 1980s, Native American efforts to stop federal land management agency actions that affected sacred tribal lands centered on the Free Exercise Clause.<sup>62</sup> Now, as federal land management agencies attempt to accommodate Native American religious practices and protect sacred sites located on public lands, courts are faced with the question of whether those agency accommodations violate the First Amendment's Establishment Clause.<sup>63</sup>

The Establishment Clause prohibits Congress from making laws "respecting an establishment of religion."<sup>64</sup> The Establishment Clause, therefore, manifests the principle of separation of church and state.<sup>65</sup> The prohibition on laws "respecting an establishment of religion" expressly prohibits governmental endorsement or disapproval of religion.<sup>66</sup> But the Establishment Clause does not require "callous indifference" to religion.<sup>67</sup>

Establishment Clause analysis generally involves three steps,<sup>68</sup> which the Supreme Court described in *Lemon v. Kurtzman*.<sup>69</sup> In short, a secular purpose must be at the core of the government's action; the effect of the action must primarily be secular, or it must remain neutral as to religion, neither advancing nor inhibiting it; and the action must not rise to the level of an excessive entanglement in religion.<sup>70</sup> More recently, however, the Court has addressed Establishment cases without applying the *Lemon* test.<sup>71</sup> Consequently, the proponents of Native American sacred sites and religious freedom on public lands can never entirely predict with accuracy the type of test a particular court

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62. See Grimm, *supra* note 49, at 20-21.

63. See *id.*

64. U.S. CONST. amend. I.

65. See *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

66. See *Lynch v. Donnelly*, 465 U.S. 668, 690-91 (1984) (O'Connor, J., concurring).

67. *Id.* at 673.

68. See Robert Charles Ward, *The Spirits Will Leave: Preventing the Desecration and Destruction of Native American Sacred Sites on Federal Land*, 19 ECOLOGY L.Q. 795, 813 n.120 (1992).

69. 403 U.S. 602 (1971); see also Ward, *supra* note 68, at 814 (describing the three-part Establishment Clause test); Grimm, *supra* note 49, at 21 (setting forth the elements of the three-part Establishment Clause test).

70. See Ward, *supra* note 68, at 813 n.120; see also Grimm, *supra* note 49, at 21 (setting forth the elements of the three-part Establishment Clause test).

71. See Grimm, *supra* note 49, at 21.

will employ.<sup>72</sup>

### 3. The Inherent Tension Between the Religion Clauses, and Its Effect on Native American Religious Freedom and Sacred Sites on Public Lands

The First Amendment necessarily discusses religion in the context of law. Yet the constitutional framers considered law and religion as mutually non-threatening.<sup>73</sup> In fact, the First Amendment's purpose "was to state an objective, not to write a statute."<sup>74</sup> This historical belief in co-existence of the clauses is grounded in the overarching objective of religious liberty.<sup>75</sup> Under the Free Exercise Clause, individuals have the right to choose without state interference.<sup>76</sup> The Establishment Clause further ensures liberty by preventing a heavy government hand in religion.<sup>77</sup>

Constitutional scholars suggest that three schools of thought influenced the framers while drafting the First Amendment.<sup>78</sup> Some argued that religion needed protection from government;<sup>79</sup> others argued the reverse;<sup>80</sup> while still others believed that neither government nor religion was the aggressor, and if left alone they would develop their respective spheres.<sup>81</sup> Professor Laurence Tribe concludes that when conflicts arise, history and case law indicate that one should err on the side of free exercise over anti-establishment.<sup>82</sup> This approach favors diversity over fear.

72. See Brady, *supra* note 2, at 162-64 (describing the *Lemon* test, the "coercion" test, and the "endorsement" test). The endorsement test, developed by Justice O'Connor in *Lynch*, is particularly relevant to Native American religion and sacred sites on public lands. See Cross & Brenneman, *supra* note 22, at 32-33. This test builds on the *Lemon* test's effect prong by "[f]ocusing on the evil of government endorsement or disapproval of religion." *Lynch*, 465 U.S. at 691. Here, even the intention to "convey a message of endorsement or disapproval" would be violative. *Id.* But, as to Native American religious protection on public lands, this test may provide the most assurances of not violating the Establishment Clause because accommodating religion is not necessarily an endorsement. See Cross & Brenneman, *supra* note 22, at 32-33; Brady, *supra* note 2, at 164.

73. See TRIBE, *supra* note 14, at 1154 (noting that in the religion clauses, "the framers represented relatively clear statements of highly compatible goals").

74. *Id.* at 1155 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)).

75. See *id.* at 1156-57.

76. See *id.* at 1157.

77. See *id.*

78. See *id.* at 1158.

79. See *id.* (describing the Roger Williams school).

80. See *id.* at 1158-59 (describing the Jefferson school).

81. See *id.* at 1159 (describing the Madison school).

82. See *id.* at 1201.

Unfortunately, such a context is seemingly overlooked as modern courts struggle to balance the two clauses, believing that "the single word 'religion' governs two prohibitions and governs them alike."<sup>83</sup> Thus, in order to avoid a situation of irresolvable conflict, the First Amendment is understood to require a balancing act where the absolute terms of both clauses struggle for neutral ground.<sup>84</sup> However, the judges that employ this balancing, and the history they use to guide them, never conceived that the "unitary pristine nature of the high country" was the equivalent of a church for Native American religions.<sup>85</sup>

A First Amendment dilemma arises when Native American tribes ask federal land management agencies to implement programs or undertake actions to allow tribal religious practices and protect sacred sites located on public lands; or conversely, when parties challenge agency actions as an endorsement of religion. Neither Congress nor federal land management agencies may manage federal lands in a manner that violates the Constitution.<sup>86</sup> However, it is equally clear that agencies must accommodate Native American religion, because the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions."<sup>87</sup> Consequently, federal land management agency accommodation of Native American religious practices and protection of sacred sites on public lands is a line-drawing exercise. The agency must protect and accommodate Native American free exercise without establishing a religion. The current strategy for drawing these lines involves a balancing approach whereby federal land management agencies weigh competing interests in a collaborative process to develop a management plan that respects all user groups. The rub, of course, is that no First Amendment line-drawing exercise can do away with the blurred nuances of the religion clauses.<sup>88</sup>

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83. *Id.* at 1186 (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 32 (1947) (Rutledge, J., joined by Frankfurter, Jackson, and Burton, JJ., dissenting)).

84. *See id.* at 1157.

85. *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 692 (9th Cir. 1985).

86. *See Hooker, supra* note 52, at 137.

87. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984); Brady, *supra* note 2, at 162.

88. The NPS, at Devils Tower National Monument, implemented a collaborative process incorporating the conflicting user groups. *See infra* notes 183-186 and accompanying text. That collaborative process produced the Final Climbing Management Plan. *See infra* note 183-184 and accompanying text. The *Bear Lodge* district court ruled the plan constitutionally permissible largely because it struck an appropriate balance between competing user groups. *See Bear*

B. *Native American Religious and Cultural Site Protection: Statutes, Executive Orders, and Other Legal Methods*

1. The American Indian Religious Freedom Act of 1978

Congress has the authority to establish a statutory structure that promotes federal government efforts to accommodate Native American religious practices.<sup>89</sup> Unfortunately, it employs this authority only in limited circumstances.<sup>90</sup> For example, in 1978 Congress passed the American Indian Religious Freedom Act (AIRFA).<sup>91</sup> AIRFA established the policy to preserve Native American tribes' "inherent right of freedom to believe, express, and exercise the traditional religions . . . including but not limited to access to sites . . . and the freedom to worship through ceremonials and traditional rights."<sup>92</sup> The Supreme Court decided that AIRFA is little more than a Congressional policy statement that provides no substantive relief for Native American tribes.<sup>93</sup> Regrettably,

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Lodge Multiple Use Ass'n v. Babbitt, 2 F. Supp. 2d 1448, 1456-57 (D. Wyo. 1998). At Rainbow Bridge National Monument, the NPS has followed the Devils Tower balancing model. See *infra* notes 274-286 and accompanying text. If the balancing aspect of plan is brought into question by one of the parties involved, a court will determine if the balance struck by the agency is constitutionally permissible.

89. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 567-68 (1903) (holding that Congress has broad legislative latitude to act in tribes' best interest). Congress' power to legislate on Native American affairs stems from its plenary authority under the Indian Commerce Clause. See U.S. CONST. art. I, § 8, cl. 3.; *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832). Congress' power to legislate on management of federal lands derives from its plenary power under the Property Clause. See U.S. CONST. art. IV, § 3, cl. 2; *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976).

90. See *Grimm*, *supra* note 49, at 22.

91. Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified at 42 U.S.C. § 1996 (1994)).

92. *Id.*

93. See *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 455 (1988). AIRFA does not even hint at "any intent to create a cause of action or any judicially enforceable individual rights." *Id.* But, "the absence of any private right of action in no way undermines the statute's significance as an express congressional determination that federal land management decisions are not 'internal' Government 'procedures,' but are instead governmental actions that can and indeed are likely to burden Native American religious practices." *Id.* at 471 (Brennan, J., dissenting). Dismissing the Act as ineffectual "seems to miss Justice Brennan's point that even though there is no statutory cause of action created by AIRFA, it is nonetheless mandatory that federal land managers view its commands with the utmost seriousness." *Brady*, *supra* note 2, at 174. A stronger AIRFA "could have required a detailed study such as that mandated by the National Environmental Policy Act." *Ward*, *supra* note 68, at 816. Under that regime, courts would review federal land management agency decisions to ensure that the decisions were based on adequate information and fully considered all aspects of the religious issues. See *id.*

AIRFA is best known as a bill that "has no teeth."<sup>94</sup>

Even though AIRFA may have no teeth, it is a clear congressional directive to federal land management agencies to give due consideration to agency actions that may affect Native American sacred sites and religious freedom.<sup>95</sup> This due consideration could take the form of agency policy, procedure, consultation, or even greater access.<sup>96</sup> These practices or procedures, however, would amount to little substantial aid because AIRFA is effectively a policy directive that falls well short of being a statutory vehicle for protection of Native Americans from laws favorable to the general public.<sup>97</sup>

## 2. The Religious Freedom Restoration Act of 1993

In 1993, Congress enacted the Religious Freedom Restoration Act<sup>98</sup> (RFRA) in specific response to the Supreme Court's decision in *Employment Division v. Smith*.<sup>99</sup> In *Smith*, the Court determined that when "a valid and neutral law of general applicability" merely incidentally prohibits the exercise of religion, the First Amendment is not offended.<sup>100</sup> Under RFRA, the

94. *Lyng*, 485 U.S. at 455 (citing 124 CONG. REC. 21,444, 21,445 (1978) (comment of Rep. Udall, sponsor of bill)).

95. See *Wilson v. Block*, 708 F.2d 735, 745-46 (D.C. Cir. 1983).

96. See *id.* (describing federal agency duties under AIRFA).

97. See *id.* at 746.

98. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

99. *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). Writing for the majority in *Smith*, Justice Scalia determined that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* at 879 (internal quotations omitted). Congress responded to the *Smith* decision by enacting RFRA, which reinstated the requirement of governmental justification for laws burdening the practice of religion even in cases where the law enacted is religiously neutral. See 42 U.S.C. § 2000bb (setting forth the specific finding that *Smith* virtually eliminated the necessity of governmental justification of burdens placed on religion by laws that are religiously neutral, and delineating the purpose of restoring the compelling interest balancing test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963)); see also Grimm, *supra* note 49, at 22-23 (describing *Smith* and the congressional response); Hooker, *supra* note 52, at 154 (discussing *Smith* and the congressional investigation and response, particularly the testimony of Professor Philip Frickey, then of the University of Minnesota Law School, before the Senate Indian Affairs Committee). President Clinton explained that RFRA reversed "the Supreme Court's decision in *Employment Division v. Smith* and reestablish[ed] a standard that better protects all Americans of all faiths in the exercise of their religion." GETCHES ET AL., *supra* note 35, at 778 n.2 (citing *Religious Freedom Restoration Act Signing Ceremony*, FED. NEWS SERVICE, Nov. 16, 1993).

100. *Smith*, 494 U.S. at 878.

government can only "substantially burden" a person's exercise of their religion when it has relied on the least restrictive means possible to further a compelling interest.<sup>101</sup> In 1997, the Supreme Court ruled RFRA unconstitutional.<sup>102</sup> Thus, the pre-*Smith* balancing test that provided more protection for religious practices by placing the burden on government to show a compelling interest and use of the least restrictive means is no longer applicable.<sup>103</sup>

Congress' effort to ensure that government agencies, including federal land management agencies, did not substantially burden Native Americans' ability to practice their religions briefly provided an avenue for tribes to challenge all neutral and generally applicable regulatory laws that incidentally restricted their exercise of religion. In ruling the Act unconstitutional, the Court solidified *Lyng* as the controlling law for federal land management and Native American religious practices on public lands.<sup>104</sup> Consequently, *Lyng's* redefinition of a burden on religion as something coercive or prohibitive in nature continues to effectively undermine most Native American Free Exercise claims because few agency actions rise to that level of coercion.<sup>105</sup>

### 3. Executive Order 13,007

In May 1996, President Clinton issued Executive Order 13,007.<sup>106</sup> It provides that federal agencies shall "(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."<sup>107</sup> The Order is novel in that it expressly requires federal land management agencies to

101. 42 U.S.C. § 2000bb-1(a)(3).

102. See *City of Boerne v. Flores*, 521 U.S. 507 (1997). The Court ruled RFRA unconstitutional because the Act was in scope and content broader than Congress' enforcement powers under the Fourteenth Amendment. See *id.* at 527-36.

103. See Grimm, *supra* note 49, at 22.

104. See Grimm, *supra* note 49, at 23 ("The courthouse door closed by . . . *Lyng* and re-opened by Congress when it passed RFRA appears now to have been closed again.").

105. Hooker, *supra* note 52, at 155 ("*Lyng* thus arguably redefined a 'burden' on the free exercise of religion to include only coercion or penalties surrounding the practice of religion, and to exclude the destruction of religious beliefs."); see also Miller, *supra* note 57, at 1062 (arguing that "[i]f the Court did not see a violation of the Indian religious practices in . . . [*Lyng*] in the foreseeable future, this Court will not find for Indian people on a free exercise issue").

106. Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996).

107. *Id.* § 1(a).



"avoid adversely affecting the physical integrity of such sacred sites."<sup>108</sup> This mandate is directly applicable to conflicts between recreational activities and the physical integrity of sacred sites on public lands.

For example, in the *Bear Lodge* litigation, the NPS's climbing management plan—both the draft and final versions—incorporated a ban on rock climbers' abilities to drill climbing anchors into Devils Tower.<sup>109</sup> This physical integrity component of the Order is a logical and reasonable federal land management directive because without protection and preservation of the physical sites, the requirement to consider and accommodate tribal religious practices is meaningless.<sup>110</sup> Executive Order 13,007's attempt to protect sacred sites is important because the loss of sacred sites is potentially devastating to Native American religions and cultures.<sup>111</sup> Broadly, this Executive Order simply restates the AIRFA principles already applicable to federal land management agencies.<sup>112</sup> The Order, however, incorporates qualifying language that limits federal land management agency implementation of the objectives to situations where it is "not clearly inconsistent with essential agency functions" and only "to the extent practicable."<sup>113</sup> Executive Order 13,007, therefore, is largely a hortatory and aspirational expression of government policy.<sup>114</sup>

#### 4. Other Methods of Legal Protection

Commentators and legal scholars suggest other possibilities for providing protection to Native American religious practices at sacred sites on public lands.<sup>115</sup> Those possibilities include Section

108. *Id.*; see also Grimm, *supra* note 49, at 78 (commenting that "section 1(a)(2) [of the Executive Order] adds something new by focusing agencies on the physical integrity of sites").

109. See *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814, 819-20 (10th Cir. 1999).

110. See Grimm, *supra* note 49, at 78.

111. See *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 462 (1988) (Brennan, J., dissenting).

112. See Grimm, *supra* note 49, at 78. Compare the Executive Order's objective "to accommodate" Native American religious practices at sacred sites to AIRFA's directive "to consider" Native American religious practices at sacred sites. See *id.*

113. Exec. Order No. 13,007, 61 Fed. Reg. 26,771, § 1(a) (May 24, 1996).

114. The Executive Order is substantively similar to AIRFA, and AIRFA is purely an aspirational statute. See *Ward*, *supra* note 68, at 816. "Exceedingly cautious language," such as "to the extent practicable, permitted by law, and not clearly inconsistent with agency functions," serves to diminish the Order's agency-binding power. Grimm, *supra* note 49, at 24, 78 (internal citation omitted).

115. See *Ward*, *supra* note 68, at 815-23.

106 of the National Historic Preservation Act,<sup>116</sup> the National Forest Management Act,<sup>117</sup> and the Antiquities Act of 1906.<sup>118</sup> Environmental statutes such as the National Environmental Policy Act<sup>119</sup> could also provide protection. Finally, Indian law scholars advocate an extension of the federal government's trust responsibility to Native Americans so that the "fiduciary duty" of the government extends to the protection of sacred sites and Native American religious freedom on public lands.<sup>120</sup> Under this trust responsibility, the government's actions as a protector are held to the highest moral standard.<sup>121</sup>

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116. 16 U.S.C. § 470f (2000). The National Historic Preservation Act requires agencies to "take into account the effect of [their actions] on" eligible or already listed properties where so-called "traditional" cultural property values play a significant role in listing. *Id.*

117. 16 U.S.C. § 1604 (2000). The National Forest Management Act requires agencies to seek tribal input during the land management decision planning process. See Brady, *supra* note 2, at 173.

118. 16 U.S.C. §§ 431-433 (2000). Pursuant to the Antiquities Act, tribes could advocate for the designation of sacred sites as national monuments. See Ward, *supra* note 68, at 818.

119. 42 U.S.C. §§ 4321-4370c (1994). The National Environmental Policy Act requires that agencies consider all possible environmental ramifications before undertaking major actions. See Exec. Order No. 11,574, 35 Fed. Reg. 19,627 (Dec. 23, 1970), reprinted in 42 U.S.C. § 4321 (1994). Tribes can use that process to "draw attention to the desecration of sacred lands and . . . mobilize political opposition." Ward, *supra* note 68, at 821.

120. See Ward, *supra* note 68, at 821-22. Chief Justice Marshall created the trust concept when he stated that the relationship between the United States and tribes "resembles that of a ward to his guardian." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). This trust concept is prevalent in Indian law affairs including tribal treaty rights and claims to land and water. See Ward, *supra* note 68, at 821-22. All branches of the government have this fiduciary obligation. See Matthew Perkins, *The Federal Indian Trust Doctrine and the Bald and Golden Eagle Protection Act: Could Application of the Doctrine Alter the Outcome in U.S. v. Hugs?*, 30 ENVTL. L. 701, 714 (2000).

121. See Cross & Brenneman, *supra* note 22, at 44 n.195; *Seminole Nation v. United States*, 316 U.S. 286, 297 n.12 (1941). Describing government's fiduciary duty to Native Americans, the *Seminole Nation* Court quoted then-Chief Judge Cardozo, who remarked:

A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior . . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.

*Id.* (quoting *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928)). Commentators suggest this fiduciary trust duty is "extra-constitutional" and therefore not subject to First Amendment balancing exercises. See Cross & Brenneman, *supra* note 22, at 44. At the district court during the *Bear Lodge* litigation, Justice Department attorneys "emphasized the federal government's trust responsibility to the tribes." Burton & Ruppert, *supra* note 5, at 228-29. Specifically, the government argued that it "enjoys very substantial latitude in fulfilling that responsibility in the accommodation of Native American religion." *Id.* The district court cursorily

In addition, Congress has the legislative power to create site-specific acts to protect Native American interests in public lands.<sup>122</sup> Congress could also establish a general statute regarding sacred site and public lands protection and/or management that incorporates the crucial Native American concept that the "land is itself a sacred, living being."<sup>123</sup> However, even if Congress took site-specific or broader legislative action, the dichotomy of the First Amendment's Free Exercise and Establishment Clauses remains an issue as public lands resource user groups advocate for their exclusive use of the land.<sup>124</sup> Therefore, the legislative branch, like the judiciary, must ultimately satisfy the careful balancing requirement between protecting free exercise and preventing an establishment of religion.

### III. Devils Tower: The Beginning of Life and the Center of Controversy

Devils Tower National Monument, or Bear Lodge, is located in northeastern Wyoming. Geological evidence shows that the Tower is hardened magma from the neck of an extinct volcano.<sup>125</sup> Earth stresses sixty million years ago uplifted the continental crust, thereby allowing magma to form in the shape of the Tower.<sup>126</sup> The Tower stands 1267 feet high<sup>127</sup> and presides over the area as the dominant landscape feature.<sup>128</sup> The Tower is not a

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dismissed this argument. *See id.*

122. Examples of congressional acts based on sacred site-specific reasons include: provision of 48,000 acres in the Carson National Forest for Taos Indians; placement of 185,000 acres in the Grand Canyon National Park in trust for the Havasupai Indians; designation of portions of the Six Rivers National Forest as wilderness in response to the *Lyng* controversy; and creation of El Malpais National Monument to protect sacred lava flows. *See* Hooker, *supra* note 52, at 139-40 (providing a detailed description of the "four instances [in which] Congress addressed American Indian free exercise claims on a site-specific basis").

123. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 461 (1988) (Brennan, J., dissenting).

124. *See* Michael C. Blumm, *Public Choice Theory and the Public Lands: Why "Multiple Use" Failed*, 18 HARV. ENVTL. L. REV. 405, 407-08 (1994). Professor Blumm described the process where "Public Choice theory predicts that small, well-organized special interest groups will exert a disproportionate influence on policymaking." *Id.* (internal quotations omitted).

125. *See* Burton & Ruppert, *supra* note 5, at 201-02.

126. *See id.* at 201.

127. GREAT OUTDOOR RECREATION PAGES, DEVILS TOWER NATIONAL MONUMENT, at [http://www.gorp.com/gorp/resource/us\\_NM/wy\\_devil.htm](http://www.gorp.com/gorp/resource/us_NM/wy_devil.htm) (last visited Mar. 14, 2002). Not including the base, the Tower is 867 feet tall, which is 310 feet taller than the Washington Monument.

128. *See* FROMMER'S, OVERVIEW OF DEVILS TOWER NATIONAL MONUMENT, at

smooth rock formation; rather, it is a series of uneven columns that are constantly evolving.<sup>129</sup> This texture provides a different and awe-inspiring view of the Tower from every angle.<sup>130</sup> The Monument is so striking that it served as a centerpiece for director Steven Spielberg's movie *Close Encounters of the Third Kind*.<sup>131</sup>

#### A. *The Native American Religious Perspective*

For many Native American tribes, Bear Lodge is the physical representation of their culture's creation story.<sup>132</sup> The Native American name for the Tower in Lakota is Mateo Teepee, or Mato Tipi, which roughly translated means Bear's Lodge or Bear's Teepee.<sup>133</sup> The name derives from tribal creation stories where seven young girls fled bears by jumping onto a small rock outcrop.<sup>134</sup> As the bears closed in, the girls prayed for the rock's aid, and the rock grew to the stars where the young girls became the seven stars of the Big Dipper.<sup>135</sup> The distinctive columnar characteristics of the Tower are attributed to the furious scratching of the pursuing bears.<sup>136</sup>

Some tribes, like the Lakota Sioux, have performed their

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<http://www.frommers.com/destinations/devilstowernationalmonument/> (last visited Mar. 14, 2002).

129. For pictures of the Tower and other sites at the Monument, see NORTHEAST WYOMING, DEVILS TOWER, WYOMING PHOTO ALBUM, at <http://www.newyoming.com/DevilsTower/PhotoAlbum/> (last visited Mar. 14, 2002).

130. See *id.*

131. See George Linge, *Ensuring the Full Freedom of Religion on Public Lands: Devils Tower and the Protection of Indian Sacred Sites*, 27 B.C. ENVTL. AFF. L. REV. 307, 307 n.1 (2000).

132. See Burton & Ruppert, *supra* note 5, at 201-02 (comparing Western and Native American versions of the Tower's place in creation); *id.* at 202 n.4 (detailing different tribes' creation stories for Bear Lodge). Ethno-histories of the Devils Tower area indicate that "at least six tribes have varying degrees of cultural affiliation with the Tower." *Id.* at 206. For Native Americans, culture and religion are essentially simply mirrors of each other. See Ward, *supra* note 68, at 799 (remarking that "religion" is an English word without equivalent in many Indian languages, where 'religion' is not distinct from 'culture'). The district court in *Bear Lodge* even concluded that it was not "persuaded that a legitimate distinction can be drawn in this case between the 'religious' and 'cultural' practices of those American Indians who consider Devils Tower a sacred site." *Bear Lodge Multiple Use Ass'n v. Babbitt*, 2 F. Supp. 2d 1448, 1450 n.2. (D. Wyo. 1998). Each tribe that joined the Medicine Wheel Coalition presumably became involved to protect their specific tribal interest in Bear Lodge.

133. See Burton & Ruppert, *supra* note 5, at 201 n.1.

134. See *id.* at 201.

135. See *id.*; see also Brady, *supra* note 2, at 165 (recounting in brief the tribal myth of the creation of Devils Tower).

136. See Burton & Ruppert, *supra* note 5, at 201.

most important ceremonies at Bear Lodge for over 10,000 years.<sup>137</sup> Archaeological evidence places other tribes in the Devils Tower area as early 1500 A.D.<sup>138</sup> Today, the Lakota still perform yearly Sun Dances in June to celebrate the summer solstice;<sup>139</sup> ritual prayer offerings continue to occur at the Tower;<sup>140</sup> and Bear Lodge remains a crucial component of oral tribal histories.<sup>141</sup>

Perhaps the most private and personal present-day religious practice is the placing of prayer offerings at the Tower's base.<sup>142</sup> A prayer bundle is typically a colorfully bound collection of sage or tobacco.<sup>143</sup> The bundle is usually used as part of a private ceremony between an individual tribal member and a spirit.<sup>144</sup>

Without Bear Lodge, the tribes' ability to pass their religious and cultural practices to the next generation is severely limited.<sup>145</sup> Practical benefit also derives from such religious practices because revitalization of traditional religious and cultural practices often counters tribal social problems.<sup>146</sup> In the *Bear Lodge* litigation, tribal representatives remarked that they appeared in federal court "to protect our traditions because we believe that our traditions are in fact the root of the solution to all of our societal ills."<sup>147</sup> The protection and preservation of Native American

137. See Brady, *supra* note 2, at 165 (citing interview with Greg Bourland, president of the Cheyenne River Sioux tribe, stating that "for about 10,000 to 12,000 years, [the Lakotas] performed an annual Sun Dance at Devils Tower"). Religious ceremonies such as the Sun Dance have taken place at Devils Tower for thousands of years, and the Lakota have historically been victims of incredible injustice in part due to their religious practices. See, e.g., *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814, 816-17 (10th Cir. 1999) (describing one instance of such injustice, though unrelated to the Sun Dance ceremony: "In 1890 . . . the United States Calvary shot and killed 300 unarmed Sioux men, women, and children en route to [a] . . . Ghost Dance; these included individuals from the Intervenors' tribes").

138. See Burton & Ruppert, *supra* note 5, at 206 (noting establishment of Eastern Shoshone tribe's existence).

139. See *id.* at 208; Brady, *supra* note 2, at 165.

140. See Burton & Ruppert, *supra* note 5, at 208.

141. See *id.* at 207-08.

142. See *id.* at 208.

143. See *id.* at 210.

144. See Jurgita Saltanaviciute, *Native American Sacred Sites: Battle for Protection* (2000) (unpublished M.A. thesis, University of Wyoming), <http://uwacadweb.uwo.edu/Rgodby/ENR2000/Saltanaviciutethesis.htm> (last visited Mar. 14, 2002).

145. Brady, *supra* note 2, at 166 ("In light of the growing number of contemporary Native Americans turning away from their traditional cultures, such teachings are imperative to the survival of those proud traditions.").

146. See *id.* at 167.

147. Burton & Ruppert, *supra* note 5, at 229.

religious freedom and sacred sites on public lands, therefore, may correctly be characterized as a matter of survival.

Disturbing Native American sacred sites causes the spirits occupying those sites to flee.<sup>148</sup> This connection between sacred sites, religious practices, and spiritual beliefs represents the fundamental doctrinal difference between Native American and traditional Western religions.<sup>149</sup> That the "land is itself a sacred, living being" is the essence of Native American religions.<sup>150</sup>

Beyond doctrinal differences, Western and Native American cultures also differ with regard to ideas of property ownership.<sup>151</sup> For example, a familiar Western legal tool is the description of property rights as a "bundle of sticks."<sup>152</sup> The bundle represents that property rights are all-encompassing as to fee title to land.<sup>153</sup> In contrast, Native Americans never conceived of fee title ownership outright, but instead developed structures of property around limited use of communal lands.<sup>154</sup>

Federal land management policies, structures, and decisions presently allow activities on public lands that imperil sacred sites. These include mining, large-scale federal water projects, forestry operations, and a continual influx of recreation.<sup>155</sup> These activities, according to Native American tribes, drive away and kill

148. See Ward, *supra* note 68, at 797.

149. See *id.* at 798-99 ("Native American religions are difficult to understand within the doctrinal confines of the major religions of the Western World."); see also Brady, *supra* note 2, at 157-59 (comparing and contrasting Native American and Christian faiths).

150. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 461 (1988) (Brennan, J., dissenting).

151. See *id.* at 473 (explaining that "the dominant Western culture, which views land in terms of ownership and use" conflicts with "that of Native Americans, in which concepts of private property are not only alien, but contrary to a belief system that holds land sacred"). Certain Native Americans developed ownership concepts for discrete sites like fishing spots. See Michael C. Blumm & Brett M. Swift, *The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. COLO. L. REV. 405, 422 (1998). However, the tribes did not generally subscribe to the objective of taming the wilderness and owning the land. See Cross & Brenneman, *supra* note 22, at 12 (commenting on "America's seeming obsession with the destruction of those irreplaceable cultural and social resources embodied in what most Americans regarded as an impenetrable and foreboding Indian-dominated wilderness").

152. See Michael R. Newhouse, *Recognizing and Preserving Native American Treaty Usufructs in the Supreme Court: The Mille Lacs Case*, 21 PUB. LAND & RESOURCES L. REV. 169, 170 (2000).

153. See *id.* at 170 n.8.

154. See *id.* at 170.

155. See Ward, *supra* note 68, at 805-07 (discussing federal land management authorized activities that destroy sacred lands).

the Native American spirits that are woven into the land.<sup>156</sup> For example, the construction of Glen Canyon Dam on the Colorado River created Lake Powell, which the Navajo Nation believes drowned Navajo Gods.<sup>157</sup>

At Devils Tower, tribal members also express concern that Tower climbing prevents them from teaching their children respect for their religion because the children “see people ‘playing’ on such an important shrine.”<sup>158</sup> Tribal members complain that the presence of climbers in general disrupts the peacefulness necessary for religious practices.<sup>159</sup> In addition, placing climbing bolts and anchors into the rock adversely affects the physical integrity of the Tower and “seriously impair[s] the spiritual quality of the site.”<sup>160</sup> Perhaps most intrusively, researchers have even documented cases of climbers removing sacred prayer bundles.<sup>161</sup>

To be fair, not all climbers disrespect Native American practices at the Monument.<sup>162</sup> Moreover, not all Native Americans consider Bear Lodge in a sacred or religious context.<sup>163</sup> Nevertheless, the concerns that are expressed by Native

156. See Ward, *supra* note 68, at 802-03, 803 n.44 (noting that the spirits are inseparable from the land, and that destroying the land drives away or kills the spirits). For example, in *Badoni v. Higginson*, the Tenth Circuit recognized that from the Navajo perspective, impounding water in Lake Powell would inundate Rainbow Bridge and drown Navajo Gods. See *Badoni v. Higginson*, 638 F.2d 172, 177 (10th Cir. 1980). In *Badoni*, the Navajo plaintiffs argued, in the court’s words, that “if humans alter the earth in the area of the Bridge . . . [their] prayers will not be heard by the gods and their ceremonies will be ineffective to prevent evil and disease.” *Id.* at 177.

157. See *Badoni*, 638 F.2d at 177.

158. Brady, *supra* note 2, at 166.

159. See *Bear Lodge Multiple Use Ass’n v. Babbitt*, 175 F.3d 814, 818 (10th Cir. 1999) (noting that climbers can intrude on “solitude”).

160. *Id.* at 818 (citing FCMP at iii).

161. See *id.* at 818; see also Hanson & Moore, *supra* note 1, at 60 (noting that researchers’ student witnessed taking of prayer offering).

162. Brady, *supra* note 2, at 185 n.138 (“[T]he vast majority of climbers at Devils Tower are respecting the voluntary ban on June climbing, and staying away from the site during that month.”); see also Chris Smith & Elizabeth Manning, *The Sacred and the Profane Collide in the West*, HIGH COUNTRY NEWS, May 26, 1997 (stating that after the voluntary ban was initiated, “85 percent of the climbers complied”), [http://www.hcn.org/servlets/hcn.URLRemapper/1997/may26/dir/Feature\\_the\\_sacred.htm](http://www.hcn.org/servlets/hcn.URLRemapper/1997/may26/dir/Feature_the_sacred.htm).

163. See Smith & Manning, *supra* note 162. For example, “[t]here are also plenty of Indians who—whether it’s because they practice Christianity, live in a city, or even work for a federal agency—ignore the fights over sacred lands.” *Id.* Often, for those Native Americans, a national monument is “just a tourist attraction.” *Id.*

Americans at Bear Lodge and other sacred sites are compelling reasons to create a federal land management structure capable of protecting these sites and Native American religious practices conducted on them. As the tribes remarked during the *Bear Lodge* litigation, and as a majority of commentators have noted, U.S. society would not allow similar activities to occur at Western religious sites.<sup>164</sup>

### B. *The Climbers' Recreational Perspective*

America's climbing history is a rich one, full of epic conquests, noble intentions, and colorful personas.<sup>165</sup> Many climbers retreat to the outdoors to escape urban environments.<sup>166</sup> Climbing represents an opportunity to experience adventure, natural beauty, and solitude.<sup>167</sup> When considered in this context, climbers often describe their passion to climb as "religion."<sup>168</sup>

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164. See Brady, *supra* note 2, at 170. An attorney for the Indian Law Resources Center, Steve Gunn, argued in response to the *Bear Lodge* litigation that "[t]his situation is no different than what other government agencies do on other federal property. For example, recreational activities are not allow[ed] at Arlington National Cemetery during religious ceremonies." *Id.* Gunn also remarked that "there are countless churches and chapels on government lands that, when services are taking place, disruptive activities are simply not allowed." *Id.* Commentators have noted that no time soon will the Wailing Wall in Jerusalem be torn down to "build a shopping mall." Miller, *supra* note 57, at 1037. Miller further noted, "Usually, the only Indian religious values that are upheld are ones that judges can analogize to Judeo-Christian precepts." *Id.* at 1041. Building a road through a Native American sacred site is easily analogized to building a road through a church; climbing at Devils Tower is easily analogized to climbing the dome of St. Peter's Cathedral in Rome. Just as climbing would intrude upon worship in a cathedral, temple, or mosque, climbing intrudes on Native American worship at Devils Tower. See Burton & Ruppert, *supra* note 5, at 214. Yet courts fail to recognize this similarity. Interestingly, if collaborative balancing efforts at Devils Tower and Rainbow Bridge National Monuments are constitutionally invalid, similar agency accommodation at other parks for Christian religion should be constitutionally invalid as well. See Smith & Manning, *supra* note 162.

165. See Timothy Dolan, *Fixed Anchors and the Wilderness Act: Is the Adventure Over?*, 34 U.S.F. L. REV. 355, 355 n.2 (providing a brief list of early influential climbs). One of the Nation's great environmentalists, John Muir, proffered the suggestion to "[c]limb the mountains and get their good tidings." *Id.* at 367.

166. See *id.* at 366 (noting that climbers seek a "primitive and unconfined type of recreation").

167. See *id.*

168. See Burton & Ruppert, *supra* note 5, at 215 (describing the process of climbers and tribal representatives learning about each other). During work group meetings for the FCMP process, climbers "explained that for some the act of climbing was a kind of religious experience, and therefore climbing should be afforded any accommodations provided to American Indian religious practitioners." *Id.*; see also Cross & Brenneeman, *supra* note 22, at 22 n.69 (commenting that the FCMP recognized that some climbers expressed feelings that they "enjoy a sense of



Climbing at Devils Tower National Monument has a roughly one-hundred-year history.<sup>169</sup> Today, climbers are “part of monument culture,”<sup>170</sup> and the NPS recognizes climbing as an historical activity at the Monument.<sup>171</sup> The climbing at Devils Tower is world-class because of the large selection of high quality crack climbing routes located on it.<sup>172</sup> Consequently, the climbing community considers it worthwhile to travel even great distances to the Tower. For example, almost seventy-five percent of climbers interviewed during NPS surveys indicated that they had traveled more than six hours to climb at the Tower.<sup>173</sup> The Tower is steadily gaining an international reputation for its premier climbing.<sup>174</sup>

Certainly not all climbers agree with the select group of recreational climbers and commercial climbing guides who chose to file suit challenging the FCMP’s mandatory and voluntary closure iterations.<sup>175</sup> Yet even well-intentioned climbers capable of

psychological and spiritual satisfaction in reaching the summit of Devils Tower”).

169. Evidence suggests that the first climbing on the Tower occurred in 1893. See *Bear Lodge Multiple Use Ass’n v. Babbitt*, 175 F.3d 814, 818 (10th Cir. 1999); see also Hanson & Moore, *supra* note 1, at 54 (noting that the first public climb was made on July 4, 1893). Hanson and Moore further relate that “[b]etween 1938 and 1950 approximately ten parties of climbers ascended Devils Tower.” *Id.* at 54. In slightly over twenty years, that number had increased to “more than 500 parties climbing annually.” *Id.*

170. Hanson & Moore, *supra* note 1, at 54.

171. See *Bear Lodge*, 175 F.3d at 818.

172. See *id.* (citing FCMP); see also Brady, *supra* note 2, at 166 (noting that the climbing community considers the Tower “a big draw for those interested in the best ‘crack climbing’ in the world”). Crack climbers are “free” climbers in that they ascend a route by climbing in naturally formed cracks in the rock, placing and then removing impermanent protection devices. See Hanson & Moore, *supra* note 1, at 59. In contrast, sport climbers typically climb the face of the rock by relying on bolted, permanently fixed anchors. See *id.* It is estimated that “[t]oday the tower has about 220 named routes,” and that “[a]pproximately 600 metal bolts are currently embedded in the rock along with several hundred metal pitons.” *Bear Lodge*, 175 F.3d at 818 (citing FCMP).

173. See Hanson & Moore, *supra* note 1, at 58.

174. See Burton & Ruppert, *supra* note 5, at 211.

175. The Access Fund served as the climbing representative for formulation of the FCMP. See Burton & Ruppert, *supra* note 5, at 212 n.63. The Access Fund, the climbing community’s principle advocacy organization, “voted to oppose the lawsuit.” Open Letter, *Why the Access Fund Did Not Support the Devils Tower Lawsuit*, 15 ACCESS NOTES (The Access Fund, Boulder, Colo.), Fall 1996, at 2 (on file with author). Specifically, the Fund chose not to participate in the litigation because it “had negotiated in good faith with the other participants on the Planning Team, and believed that asking climbers to voluntarily refrain from climbing on the Tower during traditional Indian ceremonial periods was consistent with the Access Fund’s policy of developing cooperative, non-regulatory solutions to competing uses of public lands.” *Id.* Moreover, the Fund noted that the commercial outfitters had

recognizing the cultural and religious significance of traditional Native American ceremonies often climb at Devils Tower National Monument.<sup>176</sup> Some climbers believe they have a "right to climb" because it is their public land.<sup>177</sup>

### C. *The National Park Service Land Management Perspective*

Congress has plenary power under the Property Clause to manage federal lands.<sup>178</sup> It delegates that power to federal land management agencies, including the NPS.<sup>179</sup> At Devils Tower National Monument, the NPS's management objective is to protect the values President Roosevelt established in 1906, when he designated the Tower and 1300 surrounding acres as the country's first national monument.<sup>180</sup> The NPS has determined that a primary value of the Tower is its Native American cultural significance.<sup>181</sup> The NPS also determined that it would manage the Tower as a rock climbing site.<sup>182</sup>

In 1995, Deborah Liggett, then-Superintendent of Devils Tower National Monument, employed her wide discretion as a federal land manager and responded to the intensifying conflict between Native Americans and climbers by issuing the FCMP.<sup>183</sup> The NPS did not craft and issue the first FCMP hastily. In stark contrast, the NPS, led by Liggett, initiated and completed a collaborative process that involved the antagonistic user groups.<sup>184</sup> This collaborative process was intended to avoid just the type of

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their own advocacy organization, while the Fund spoke for recreational and private climbers. *See id.*

176. *See* Hanson & Moore, *supra* note 1, at 58-59 (noting that interviews showed that ninety-five percent planned to return to climb again and that sixty-seven percent said knowledge of Native American issues would not stop them from climbing).

177. *See id.* at 59; FRIENDS OF DEVILS TOWER, THE ISSUE, at <http://www.devils-tower.com/freedom> (last visited Mar. 14, 2002).

178. *See* U.S. CONST. art. IV, § 3, cl. 2.

179. *See* George C. Coggins, *Regulating Federal Natural Resources: A Summary Against Devolved Collaboration*, 25 *ECOLOGY L.Q.* 602, 602 (1999).

180. *See* Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814, 819 n.7 (10th Cir. 1999) ("President Roosevelt declared the Tower is 'a natural wonder and an object of historic and great scientific interest . . . [and] warning is hereby given to all unauthorized persons not to appropriate, injure, or destroy any feature of the natural tower.'" (quoting Proclamation No. 658, 34 Stat. 3236, 3237 (1906))).

181. *See id.* at 819.

182. *See* Cross & Brenneman, *supra* note 22, at 21.

183. *See id.* at 8-9, 23-24.

184. *See id.* at 24.

conflict that later resulted in the revised, second FCMP. Consensus-building both defined the NPS's perspective and was its objective for FCMP process.<sup>185</sup> According to the NPS, consensus-building would lead to broad-based acceptance of future management plans for the Monument.<sup>186</sup>

The stated purpose of the FCMP is "to protect the natural and cultural resources of Devils Tower and to provide for visitor enjoyment and appreciation of this unique feature."<sup>187</sup> In addition, the FCMP "sets a new direction for managing climbing activity at the Tower for the next three to five years."<sup>188</sup> Because the NPS is relying on climber self-regulation to satisfy the revised plan's requirements, it is crucial for the NPS that the consensus-building atmosphere developed during formulation of the FCMP translates into effective implementation.<sup>189</sup> This self-regulation is the crux of the FCMP's voluntary ban on climbing on the Tower during June, when ceremonies honoring the summer solstice mark the peak month of Native American religious practices.<sup>190</sup>

In addition to the voluntary June closure, the FCMP prohibits new bolts, fixed pitons, or new routes requiring either.<sup>191</sup> The FCMP also highlights the need for access trail maintenance and requires camouflaged climbing equipment.<sup>192</sup> The NPS announced that if the voluntary plan is not successful, it would revise the climbing plan, restart the collaborative planning process, and implement mandatory closure during June.<sup>193</sup>

The NPS set a high standard of success for the voluntary closure, stating that full success is achieved "when every climber personally chooses not to climb at Devils Tower during June out of respect for American Indian cultural values."<sup>194</sup> The climbing community accepted the FCMP through its representative, the

185. See *id.*; Burton & Ruppert, *supra* note 5, at 212-17.

186. See Burton & Ruppert, *supra* note 5, at 211-14.

187. *Bear Lodge*, 175 F.3d at 819 (quoting FCMP at i).

188. *Id.*

189. See *Bear Lodge Multiple Use Ass'n v. Babbitt*, 2 F. Supp. 2d 1448, 1450 (D. Wyo. 1998).

190. *Bear Lodge*, 175 F.3d at 820; see also Brady, *supra* note 2, at 165 (discussing the importance of June as the month the Lakota and other tribes gather to perform the Sun Dance, one of the most important expressions of the tribes' faith).

191. See *Bear Lodge*, 175 F.3d at 819.

192. See *id.*

193. See Brady, *supra* note 2, at 168; see also *Bear Lodge*, 175 F.3d at 820 (citing FCMP at 23).

194. *Bear Lodge*, 2 F. Supp. 2d at 1449-50.

Access Fund.<sup>195</sup> The Access Fund reasoned that benefits deriving from cooperative efforts, voluntary self-regulation, and the favorable public and agency opinion that climbers would gain by refraining from climbing in June as a “gesture of respect” far outweighed the other option: mandatory June climbing closure, combative relations with the NPS and tribes, and typecasting as an interest group pariah.<sup>196</sup> A small group of mostly commercial climbing outfitters, however, chose to challenge both the draft climbing plan, which advocated a mandatory June closure, and the altered FCMP’s voluntary June closure.<sup>197</sup>

#### IV. The Striking Similarities Between the Bear Lodge Litigation and the Rainbow Bridge Controversy

##### A. *The District Court Opinion in Bear Lodge Multiple Use Ass’n v. Babbitt*

In June 1996, the federal district court of Wyoming first addressed the NPS’s attempts to accommodate Native American religious practices at Devils Tower National Monument.<sup>198</sup> Specifically, the court ruled on a preliminary injunction motion filed by plaintiffs—a coalition formed to advocate for development of natural resources to maintain economic stability.<sup>199</sup> The court agreed with the plaintiffs that the NPS’s first version of the FCMP violated the Establishment Clause because it contained a mandatory closure provision and denied commercial climbing permits for the month of June.<sup>200</sup>

Commentary by legal scholars and other observers on the court’s analysis has been primarily negative. These criticisms focus on the court’s preliminary injunction ruling, opining that the court confused Free Exercise and Establishment Clause case law.<sup>201</sup> Critics argue that the court first detailed the prevailing Establishment Clause test but then applied the *Lyng* Free

195. See *supra* note 175.

196. See *supra* note 175.

197. *Bear Lodge*, 2 F. Supp. 2d at 1449-50.

198. See generally *Bear Lodge*, 2 F. Supp. 2d 1448.

199. See Brady, *supra* note 2, at 170-71.

200. See *Bear Lodge*, 2 F. Supp. 2d at 1450; Brady, *supra* note 2, at 170.

201. See Cross & Brenneman, *supra* note 22, at 27 (arguing that by relying on the Supreme Court’s *Lyng* decision and the Tenth Circuit’s *Badoni* decision, the court “effectively abolished any governmental opportunity to accommodate Native American or other minority religious beliefs or practices”).

Exercise test.<sup>202</sup> Consequently, the court forced a strict interpretation of *Lyng* onto the FCMP instead of applying the Establishment Clause's traditional test, apparently believing the Establishment and Free Exercise Clauses to be interchangeable.<sup>203</sup> According to these critics, the original FCMP—which included the mandatory ban—did not violate the Establishment Clause and thus passed constitutional scrutiny.<sup>204</sup> The Wyoming federal district court determined, however, that the plan's purpose in denying commercial climbing permits amounted to government coercion in favor of Native American religion.<sup>205</sup> Therefore, the FCMP was an "impermissible government entanglement with religion."<sup>206</sup> As such, the court ruled the plan unconstitutional.<sup>207</sup>

The NPS reacted quickly to the court's preliminary injunction ruling and eliminated the ban on commercial permits.<sup>208</sup> The NPS recast the commercial climbing ban as a voluntary closure.<sup>209</sup> On April 2, 1998, the district court concluded that because the voluntary ban on both commercial and recreational climbing balanced competing user group needs without violating the Establishment Clause, "the plan constitute[d] a legitimate exercise of the Secretary of the Interior's discretion in managing the Monument."<sup>210</sup> The defendant NPS argued that because it had not implemented the mandatory commercial climbing ban, plaintiffs' claims were moot.<sup>211</sup> In response, plaintiffs argued that the mere threat that the NPS could re-institute the ban kept the

202. See Grimm, *supra* note 49, at 22 (noting that the court "appeared to be relying primarily on *Lyng* and *Badoni*, but the language of its opinion cites the third prong of the *Lemon* test").

203. See Brady, *supra* note 2, at 170 (describing Professor Raymond Cross' analysis that argued "how the case would have come out under the Establishment Clause, had Judge Downes properly utilized it"); see also Miller, *supra* note 57, at 1044-47 (describing the traditional Supreme Court test).

204. See Miller, *supra* note 57, at 1044-47; Brady, *supra* note 2, at 170-71. As applied to the first FCMP, the *Lemon* test and the coercion and endorsement tests for Establishment Clause questions indicate that either the government's interest in protecting Native American religious freedom outweighed the burden on climbers' ability to climb the Tower during June, or alternatively, the government implemented the least restrictive means to further its compelling trust obligation to Native Americans. See Cross & Brenneman, *supra* note 22, at 29-39.

205. See Brady, *supra* note 2, at 170.

206. Grimm, *supra* note 49, at 22.

207. See Brady, *supra* note 2, at 170.

208. See *Bear Lodge*, 2 F. Supp. 2d at 1450.

209. See Grimm, *supra* note 49, at 22.

210. *Bear Lodge*, 2 F. Supp. 2d at 1456-57.

211. See *id.* at 1451-52.

controversy live.<sup>212</sup> The court agreed with the NPS.<sup>213</sup>

According to the court, plaintiffs could not transmute the agency's voluntary ban into a coerced ban.<sup>214</sup> The court determined that plaintiffs' challenges to the mandatory ban provision of the plan no longer constituted a live controversy.<sup>215</sup> The court also concluded that plaintiffs had no standing to challenge interpretative programs or signs placed in the Monument grounds by the NPS to raise awareness of religious practices within Monument grounds because they could not prove these NPS efforts caused injury in fact.<sup>216</sup> The court did not rule that plaintiffs lacked standing to challenge the voluntary climbing ban portions of the plan; instead, the court ruled that the plan was constitutionally permissible.<sup>217</sup>

### B. *The Tenth Circuit Opinion in Bear Lodge*

Immediately after the district court's final decision upholding the NPS's climbing management plan, the Mountain States Legal Foundation (MSLF), which represented the plaintiffs, expressed its intent to appeal to the Tenth Circuit.<sup>218</sup> The MSLF stated that the Tenth Circuit's 1980 decision in *Badoni v. Higginson*<sup>219</sup> meant that their appeal was "[f]rankly . . . a slam dunk."<sup>220</sup>

In *Badoni*, the Navajo Nation challenged the inundation of Rainbow Bridge and subsequent increased tourist activity at the Rainbow Bridge National Monument.<sup>221</sup> The Navajo alleged that these actions violated their right to free exercise of religion.<sup>222</sup> The Tenth Circuit determined that the Navajo did not raise a legitimate claim because the government did not prohibit any religious practices,<sup>223</sup> and "drew a line demarcating impermissible accommodation in the area of public lands."<sup>224</sup> This *Badoni*-line

212. *See id.* at 1452.

213. *See id.*

214. *See id.* at 1455.

215. *See id.* at 1452.

216. *See id.* at 1453.

217. *See id.* at 1456-57.

218. *See Brady, supra note 2*, at 172.

219. 638 F.2d 172, 176 (10th Cir. 1980).

220. *Brady, supra note 2*, at 172.

221. *See Badoni*, 638 F.2d at 176.

222. *See id.*

223. *See id.* at 178.

224. *Bear Lodge Multiple Use Ass'n v. Babbitt*, 2 F. Supp. 2d 1448, 1455 (D. Wyo. 1998).

provides that the “[e]xercise of First Amendment freedoms may not be asserted to deprive the public of its normal use of an area.”<sup>225</sup> Emboldened by the Tenth Circuit decision in *Badoni*, MSLF appealed the district court decision in *Bear Lodge*.<sup>226</sup>

On April 26, 1999, the Tenth Circuit ruled that the plaintiff climbers lacked standing.<sup>227</sup> According to the Tenth Circuit, plaintiffs alleged no injury deriving from their allegation that the FCMP violated the Establishment Clause.<sup>228</sup> Consequently, even though the FCMP voluntary ban clearly incensed the plaintiff climbers, who believed in their right to recreational freedom,<sup>229</sup> the court concluded that the climbers’ lack of standing was dispositive.<sup>230</sup> The court reasoned that because the FCMP ban was merely voluntary, the climbers could always choose to climb during the month of June.<sup>231</sup> Thus, the court concluded that the FCMP caused no injury to plaintiffs.<sup>232</sup>

The Tenth Circuit did not reach the merits of either the plaintiffs’ constitutional Establishment Clause challenge to the FCMP or the government’s defense that the FCMP amounted to an appropriate accommodation to further the application of the Free Exercise Clause.<sup>233</sup> The Supreme Court denied certiorari.<sup>234</sup> Therefore, the *Bear Lodge* district court decision is the final judicial ruling on what types of federal land management accommodations of Native American religious practices at Devils Tower National Monument are constitutionally permissible.

### C. *Interpreting the Bear Lodge Decisions*

The district court’s ruling at the preliminary injunction stage in *Bear Lodge* amounted to an unfavorable view of federal land management accommodation of Native American religious practices on public lands because the court found the NPS’s reasonable efforts at accommodation unconstitutional.<sup>235</sup> At that

225. *Badoni*, 638 F.2d at 179.

226. *See supra* text accompanying notes 218-220.

227. *See Bear Lodge Multiple Use Ass’n v. Babbitt*, 175 F.3d 814, 822 (10th Cir. 1999).

228. *See id.*

229. *See id.*

230. *See id.*

231. *See id.* at 820-821.

232. *See id.* at 822.

233. *See id.*

234. *Bear Lodge Multiple Use Ass’n v. Babbitt*, 529 U.S. 1037 (2000).

235. *See supra* notes 205-207 and accompanying text.

stage, the court directly tied its analysis to restrictive language in *Lyng* and *Badoni*, which fails to adequately acknowledge that the land is sacred to Native Americans.<sup>236</sup> Further, the district court incorrectly applied one body of constitutional law to another separate and distinct constitutional question.<sup>237</sup> The plan survived constitutional scrutiny only after the NPS altered it to include a voluntary, rather than mandatory, climbing ban.<sup>238</sup>

This agency alteration and subsequent finding of constitutionality underscores the highly unstable posture of reasonable agency management actions. In this instance, constitutionality clearly hinged on whether the climbing "ban" was styled as voluntary or mandatory.<sup>239</sup> Further, the voluntary or mandatory tightrope greatly influences the standing issue.<sup>240</sup> Based on the district court and court of appeals *Bear Lodge* decisions, when a defendant agency can successfully show the voluntary nature of a ban, plaintiffs alleging a violation of the Establishment Clause will face significant standing hurdles.<sup>241</sup> This dynamic obviously sets the stage for litigating a ban voluntary in name and form but mandatory in substance and effect. Artful pleading, more favorable facts, or any combination of the two may allow future plaintiffs to move past procedural barriers to the constitutional merits. Finally, it may be the case at either Devils Tower, Rainbow Bridge, or at some future sacred site on public lands that a voluntary ban proves insufficient for protection purposes because parties elect to disregard any such ban. Assuming the agency remains receptive to Native American concerns in such a case, the question again becomes how far can an agency go to protect sacred sites and religious freedom without establishing a religion.

Despite its final ruling, the district court persistently failed to recognize the importance of the land to Native American religious practices and the government's trust duty to the tribes.<sup>242</sup> This failure mimics the Supreme Court's oversights in *Lyng*.<sup>243</sup>

236. See *supra* notes 6, 56, 203 and accompanying text.

237. See *supra* notes and 201-204 and accompanying text.

238. See *Bear Lodge*, 2 F. Supp. 2d at 1456-57.

239. See *id.* at 1456 ("[T]he remote and speculative possibility of a mandatory ban . . . is insufficient to transform the Government's action into a coercive measure.").

240. See *Bear Lodge*, 175 F.3d at 822.

241. See *id.*

242. See *Burton & Ruppert*, *supra* note 5, at 229.

243. See *supra* Part II.A.



The district court, in fact, questioned whether the tribes' effort and time might not be better spent remedying Native American social ills like alcoholism.<sup>244</sup> The tribes' response that protection of religious practices would preserve and strengthen Native American culture—thereby helping to remedy the very ills the court highlighted—apparently fell on deaf ears.<sup>245</sup>

Plaintiffs appealed to the Tenth Circuit believing success was assured by the *Badoni* decision.<sup>246</sup> However, the appellate court did not reach the merits of the issues involved.<sup>247</sup> Thus, the freedom of Native Americans to practice religious activities on public lands remains tenuous in the Tenth Circuit because the court has yet to apply *Badoni* to modern land management agency accommodation efforts. Assuming future plaintiffs can establish standing, it is likely that additional litigation will further restrict Native American religious practices on public lands because *Badoni* and *Lyng* tilt the balancing test against Native Americans.<sup>248</sup> This weighting of factors against Native American religious practices conversely lowers the standard that plaintiffs challenging such uses must meet to prove a violation of the Establishment Clause.<sup>249</sup> Consequently, tribes are left without Free Exercise Clause protection when defending against Establishment Clause challenges.<sup>250</sup>

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244. See Burton & Ruppert, *supra* note 5, at 229. The judge wondered aloud from the bench why the government had misapplied "such skilled legal talent to the defense of the government's actions to accommodate tribal cultural preservation." *Id.*

245. See *id.* The tribes began their closing remarks by stressing that they "appear here in federal court to protect our traditions because we believe that our traditions are in fact the root of the solution to all of our societal ills." *Id.*

246. See *supra* notes 218-220 and accompanying text.

247. See *Bear Lodge*, 175 F.3d at 814.

248. See notes 38, 93-94, 103-105 and accompanying text.

249. Pursuant to *Badoni*, future plaintiffs challenging NPS accommodation need only prove that the agency's efforts deprived them "of their normal use of an area." See *Badoni v. Higginson*, 638 F.2d 172, 179 (10th Cir. 1980).

250. The Rainbow Bridge controversy could be such a case where reasonable government actions designed to accommodate free exercise of religion violate the Establishment Clause.

*D. Voluntary Bans and Rainbow Bridge: Recreating the Bear Lodge Conflict*

1. Rainbow Bridge: The *Bear Lodge* Conflict Repackaged to Resolve Whether a Voluntary Ban Is Unconstitutional

Tourism, recreation, resource extraction, and development currently threaten more than forty-four Native American sacred sites.<sup>251</sup> The controversy at one such site, Rainbow Bridge, continues twenty-two years after the ruling in *Badoni* that the NPS policy of allowing tourist access to the site did not violate Native Americans' Free Exercise rights. The site continues to be the subject of debate concerning federal land management agency accommodation of Native American religious practices, the Free Exercise Clause, and the Establishment Clause.<sup>252</sup>

In litigation commenced March 3, 2000, the MSLF filed a complaint with the District Court for the District of Utah on behalf of the Natural Arch and Bridge Society and individual visitors.<sup>253</sup> The complaint challenged NPS actions allegedly denying tourist access to portions of the Rainbow Bridge National Monument.<sup>254</sup> Thus, while the NPS faced a challenge in 1980 from Native Americans attempting to limit tourist access to the site,<sup>255</sup> the NPS now faces a challenge from groups attempting to ensure expansive tourist access to the site. The district court entered judgment on April 9, 2002.<sup>256</sup> The court dismissed the First Amendment claim for failure to properly join defendants.<sup>257</sup> MSLF intends to appeal this decision to the Tenth Circuit, thus keeping the First Amendment issue alive.<sup>258</sup>

Rainbow Bridge is a sandstone arch that rises 309 feet high and spans 278 feet.<sup>259</sup> It is the largest freestanding natural stone arch in the world.<sup>260</sup> The Bridge is located within the Rainbow Bridge National Monument, a 160-acre area surrounded by a

251. See Brady, *supra* note 2, at 175.

252. See MOUNTAIN STATES LEGAL FOUND., *supra* note 30.

253. See *id.*

254. See *id.*

255. See *Badoni v. Higginson*, 638 F.2d 172, 179 (10th Cir. 1980).

256. See UTAH DISTRICT COURT, CIVIL CASES WITH RECENT JUDGMENTS, <http://www.utd.uscourts.gov/reports/judgment.html> (last visited Apr. 17, 2002).

257. See *Natural Arch and Bridge Soc'y v. Alston*, No. 2:00 cv 191J (D. Utah Apr. 9, 2002), [http://www.utd.uscourts.gov/reports/tifs/2\\_00cv00191\\_00000044.tif](http://www.utd.uscourts.gov/reports/tifs/2_00cv00191_00000044.tif).

258. See MOUNTAIN STATES LEGAL FOUND., *supra* note 30.

259. *Badoni*, 638 F.2d at 175.

260. See Smith & Manning, *supra* note 162.

Navajo reservation.<sup>261</sup> The NPS administers the Monument.<sup>262</sup> Navajo Indians consider the Bridge one of the “incarnate forms of Navajo gods”;<sup>263</sup> other Native Americans consider the Bridge to be the doorway between life and death.<sup>264</sup> Navajo ceremonies performed within the Monument’s grounds predate the inundation of Glen Canyon and the area near the Bridge caused by the damming of the Colorado River.<sup>265</sup>

Glen Canyon Dam on the Colorado River is fifty-eight miles downstream from the Rainbow Bridge National Monument.<sup>266</sup> Prior to the construction of Glen Canyon Dam, which created Lake Powell, very few tourists visited the Monument because of its isolated location.<sup>267</sup> Lake Powell, however, now provides for easy access to the Monument and the Bridge because tourists need only reserve a place on federally-licensed tour boats that ferry visitors to a docking area near the Bridge.<sup>268</sup> Private boat owners and operators are also free to visit the Monument via Lake Powell. The attractions at Rainbow Bridge include sunbathing, diving off the rocks into the lake, and walking under the Bridge.<sup>269</sup>

Plaintiffs, the Natural Bridge and Arch Society, alleged that the NPS prevents access to the Bridge, thereby denying tourists the opportunity to walk under it.<sup>270</sup> Plaintiffs alleged that the NPS restricted their access to the Monument for the sake of one particular religion.<sup>271</sup> NPS actions at Rainbow Bridge include erecting barriers, posting signs requesting visitors not to walk under the Bridge, and staffing roaming Park Service rangers to explain the need to not walk under the Bridge.<sup>272</sup> Plaintiffs stressed that little agreement exists between the five tribes negotiating with the NPS on Rainbow Bridge management about Rainbow Bridge’s exact cultural and religious significance to the

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261. *See Badoni*, 638 F.2d at 175.

262. *See id.*

263. *Badoni v. Higginson*, 455 F. Supp. 641, 643 (D. Utah 1977).

264. *See Brady*, *supra* note 2, at 181 n.130.

265. *See id.*

266. *See Badoni*, 638 F.2d at 175.

267. *See id.*

268. *See Badoni*, 455 F. Supp at 642.

269. *See Smith & Manning*, *supra* note 162.

270. *See* Editorial, *Keep Religious Neutrality*, SALT LAKE TRIB., Mar. 12, 2000, at AA1, <http://www.tribaccess.com>.

271. *See id.*

272. *See Smith & Manning*, *supra* note 162 (“[T]he agency built a shin-high rock wall in 1995 to discourage visitors from leaving the viewing area.”).

tribes.<sup>273</sup>

## 2. Applying the *Bear Lodge* Decisions to the Rainbow Bridge Litigation

As with the *Bear Lodge* conflict, Native Americans at Rainbow Bridge similarly argue that tourist practices desecrate the sacred site and interfere with Native American religious and cultural practices.<sup>274</sup> Similar to its actions at Devils Tower, the NPS responded to the tribes' concerns in a collaborative fashion, whereby the five involved tribes and the agency drafted a memorandum of understanding and began consultation on the agency's proposed activities within the Monument.<sup>275</sup> Negotiating under a collaborative structure, the agency and the tribes achieved positive results. For example, the agency considered paving the access trail to the Bridge, but when the tribal coalition indicated that paving the trail would block spirit passage between worlds, the agency stabilized the path with a pine-based substance.<sup>276</sup> Further, at the tribes' urging, the NPS deleted from the Rainbow Bridge informational pamphlet descriptions of the trails underneath the Bridge so as not to encourage tourists to walk under the Bridge.<sup>277</sup>

These productive efforts, present both here and at Devils Tower, ensure NPS compliance with President Clinton's 1994 Executive Order 13,007 to accommodate Native American religious practices at sacred sites.<sup>278</sup> The Executive Order's mandate to "avoid adversely affecting the physical integrity of such sacred sites" supports federal land management actions to protect and preserve Native American religion and sacred sites on public lands.<sup>279</sup> To effectuate such protection, the NPS elected to undertake a collaborative approach and voluntary measures. Although such actions were permissible at *Bear Lodge* and *Rainbow Bridge*, an agency could unknowingly act to protect the physical integrity of sacred sites in such a way that it crosses the line between permissible and impermissible religious

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273. *See id.* The five tribes are the Navajos, San Juan Southern Paiutes, Kaibab Paiutes, Hopis, and White Mesa Utes. *See id.*

274. *See id.*

275. *See id.*

276. *See id.*

277. *See id.*

278. *See supra* Part II.B.3 (discussing the Executive Order).

279. Exec. Order No. 13,007, 61 Fed. Reg. 26,771, § 1(a) (May 24, 1996).

accommodation. Exactly where this line is will likely be addressed in future litigation.

The NPS's touchstone for its Rainbow Bridge National Monument management structure is summarized in one word: voluntary.<sup>280</sup> In 1998, after the district court in *Bear Lodge* found voluntary efforts to accommodate Native American religious practices constitutionally permissible, the NPS adopted a similar management structure at Rainbow Bridge. NPS added the word "voluntary" to signs located near the Bridge requesting that tourists respect the Bridge as a Native American sacred site and refrain from approaching or walking underneath it.<sup>281</sup> In addition, the NPS prudently stresses that its management actions and efforts designed to accommodate Native American religious practices at the Bridge are purely voluntary in nature.<sup>282</sup> The Monument's supervisor, Joe Alston, likewise notes, "[i]t is absolutely not illegal for you to walk under Rainbow Bridge . . . . A ranger might ask you if you noticed the sign, but you will not be stopped."<sup>283</sup>

The similarities in management structure between Devils Tower and Rainbow Bridge significantly increase the likelihood that the Tenth Circuit will address the unanswered question of the *Bear Lodge* litigation. The court must look at whether the NPS's management plans and actions at Rainbow Bridge are "a policy that has been carefully crafted to balance the competing needs of individuals using [the Monument] while, at the same time, obeying the edicts of the Constitution."<sup>284</sup> That substantive question exists against a backdrop of legal uncertainty because the Tenth Circuit in *Bear Lodge* refused, on standing grounds, to decide if the NPS climbing management plan established a religion in violation of the Establishment Clause or if the NPS climbing management plan was an appropriate exercise of agency discretion necessary to satisfy the Free Exercise Clause.<sup>285</sup> Moreover, it is unclear whether the relatively recent agency trend in management plans toward voluntary compliance provisions, like those at issue at Devils Tower and Rainbow Bridge, will

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280. This approach is similar to the FCMP implemented at Devils Tower. See *supra* note 190 and accompanying text.

281. See Brady, *supra* note 2, at 182.

282. See *id.*

283. See Smith & Manning, *supra* note 162.

284. *Bear Lodge Multiple Use Ass'n v. Babbitt*, 2 F. Supp. 2d 1448, 1456-57 (D. Wyo. 1998).

285. See *supra* text accompanying notes 227-233.

survive the scrutiny of a *Badoni* analysis, where even a voluntary plan otherwise permissible may alter normal non-Native American use of public lands.<sup>286</sup>

### 3. *Badoni* Versus *Bear Lodge*: Determining the Potential Disposition of Rainbow Bridge and Future Controversies

The substantive legal question of federal land management agency accommodation of Native American religious practices at sacred sites on public lands is certain to arise in additional circuits, given that federal land management agencies administer more than 700 million acres.<sup>287</sup> When that question arises, judicial recognition and application of the Tenth Circuit's *Badoni* test may result in a determination that even voluntary federal land management agency accommodation efforts violate the First Amendment because they "deprive the public of its normal use of an area."<sup>288</sup> Other voluntary measures, however, could fall on the constitutionally permissible side of the judicially-created line because they strike an appropriate balance between the First Amendment's counter-poised directives.

In such a controversy, the issue will evolve into arguments over where that First Amendment line lies. Rainbow Bridge and future controversies in the Tenth Circuit pit the *Badoni* decision against the more recent *Bear Lodge* district court decision upholding voluntary and carefully crafted land management plans. To the extent other circuits may look to the Tenth Circuit for guidance, courts can clearly uphold the NPS's efforts to accommodate Native American religious practices as long as those efforts are constitutionally permissible exercises of agency discretion. *Bear Lodge* proves this possibility. Ultimately, however, it is impossible to determine what religious and recreational values a judicial balancing will reflect. When such a determination is made, the Supreme Court should grant review in order to bring finality to this controversial issue.

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286. See *supra* text accompanying notes 221-225.

287. See Hooker, *supra* note 52, at 136 (stating that Congress has plenary power to oversee federal lands, which amount to 732 million acres).

288. *Badoni v. Higginson*, 638 F.2d 172, 179 (10th Cir. 1980).

## V. Competitive Exclusion and Discovery: The Battle to Protect Sacred Lands and Religious Freedom

Despite the possibility of successful litigation, Native Americans at Devils Tower, Rainbow Bridge, and other sacred sites will still likely lose their battle to protect sacred sites and religious practices on those public lands. The principle of competitive exclusion and the doctrine of discovery predict that, realistically, Native Americans will ultimately lose this battle.

### A. *The Competitive Exclusion Principle*

Federal land management agencies administer over 700 million acres of public lands.<sup>289</sup> On those public lands, conflicts often develop between older, more established user groups and new, emerging user groups.<sup>290</sup> Managing recreation on public lands is now a primary goal for federal land management agencies like the National Park Service.<sup>291</sup> As recreation on public lands increases, specialized recreational sub-groups are also likely to grow in number and user intensity.<sup>292</sup> For example, the documented increase of rock climbing at Devils Tower National Monument indicates that climbing will greatly influence all future public lands management decisions, plans, and actions at the Monument. Moreover, newly influential user groups will actively advocate for their "fair share" of public lands.<sup>293</sup>

The ecological principle of competitive exclusion states that when two user groups compete for one scarce resource, ideological conflict will arise, and each group will attempt to exclude the other's access to that resource.<sup>294</sup> The Devils Tower National Monument serves as a case study for this principle. At Devils Tower, two groups perceive one resource drastically differently.<sup>295</sup> The fundamental and ideological difference between Native Americans and climbers concerns the appropriate uses of the

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289. See Hooker, *supra* note 52, at 136.

290. See Cross & Brenneman, *supra* note 22, at 22 n.67 (explaining growth of rock climbing).

291. See Burton & Ruppert, *supra* note 5, at 209.

292. See *id.* at 209-10 (referring specifically to climbing as a recreational sport).

293. See Blumm, *supra* note 124, at 407-08.

294. See Hanson & Moore, *supra* note 1, at 59.

295. See Burton & Ruppert, *supra* note 5, at 211-12. The NPS clearly understood this potential for conflict between climbers, who appreciate the Tower as a premier climbing site, and Native Americans, who appreciate the area as a sacred site. See *id.* The starkly differing cultural views resulted in a NPS management approach geared toward conflict resolution. See *id.*

Tower: the climbers want to climb it and the Native Americans object. Representatives of the Bear Lodge Native American community argue that climbers should not climb the Tower.<sup>296</sup> Meanwhile, representatives of the Tower's climbing community stress that, despite their knowledge of Native American's beliefs, the Tower is public property, and therefore they have a "right" to climb it.<sup>297</sup>

The competitive exclusion principle fails to acknowledge the possibility that collaboration or compromise efforts can provide for multiple uses of scarce resources.<sup>298</sup> When ideological differences exist within a conflict, collaborative efforts are less likely to succeed.<sup>299</sup> Thus, competing user groups will not compromise, thereby causing the conflict resolution process to dissolve and fulfill the principle's prediction that the competing groups must struggle to exclude each other's access or be excluded themselves.<sup>300</sup> Despite the NPS program designed to promote a collaborative result at Devils Tower, ideological conflicts remain between Native Americans and climbers regarding use of the Tower.<sup>301</sup>

According to the Wyoming district court, the Devils Tower FCMP struck an appropriate balance between the two user groups.<sup>302</sup> Yet, from either side's perspective, one user group still pushed to exclude the other's access before, during, and after the

296. See Hanson & Moore, *supra* note 1, at 57-58.

297. See Burton & Ruppert, *supra* note 5, at 213.

298. See *id.* at 215 ("All compromise can be viewed as an assessment of mutual loss and gain. One party is often willing to alter an original position if they perceive that their adversary is also willing to adjust their original demands.").

299. See *id.* at 216. Collaboration becomes more difficult "when the parties are separated not only by negotiating positions, but also by different cultural heritage." *Id.*

300. See *id.* at 215-16. Progress via collaboration is based on what gains a group sees as attainable through compromise. See *id.* Ideological beliefs often restrict a group's interest in comprise. The competitive exclusion principle is particularly applicable to situations where a group desires to protect an ideological belief or the physical manifestation of that belief (e.g., a sacred site).

301. See *id.* at 202 (concluding that "the two cultures perceptually construct the landmark in two very different ways: as a natural cathedral through one cultural lens, and as a geologic curiosity and rock climber's playground through the other"). Some climbers choose to climb with full knowledge of the tribal position. See *supra* note 176 and accompanying text.

302. Bear Lodge Multiple Use Ass'n v. Babbitt, 2 F. Supp. 2d 1448, 1456-57 (D. Wyo. 1998) (concluding that because the voluntary ban on both commercial and recreational climbing balanced competing user group needs without violating the Establishment Clause "the plan constitut[ed] a legitimate exercise of the Secretary of the Interior's discretion in managing the monument").



*Bear Lodge* litigation. The ecological principle of competitive exclusion, therefore, predicts that, despite federal land management agency efforts and judicial decisions upholding carefully-designed agency management plans, conflict will continue to emerge.

Devil's Tower and Rainbow Bridge are not the first examples of competitive exclusion at work. In the late 1970s and early 1980s, members of the Cherokee Nation challenged the Tennessee Valley Authority's (TVA) construction of Tellico Dam.<sup>303</sup> Tribal members argued the dam would inundate sacred ground.<sup>304</sup> There, the two groups' desired uses of the land were mutually incompatible. In its decision, the Sixth Circuit determined that "[n]o law [was] to stand in the way of the completion and operation of the dam."<sup>305</sup> Therefore, in a clear instance of the competitive exclusion principle, the dominant culture—expressed through the TVA—successfully excluded the Cherokee Nation from the scarce resource of the Little Tennessee Valley.<sup>306</sup> Similarly, looking at other cases through the lens of this principle, the dominant culture has excluded Native American interests in public lands or waters for oil,<sup>307</sup> expansion of ski areas,<sup>308</sup> and mining.<sup>309</sup>

The competitive exclusion principle, of course, is not a judicially-created principle. Nevertheless, as the principle reflects one group's dominance over another, the courts may be considered an extension of cultural conquest applied to Native American religious freedom on public lands.<sup>310</sup> Courts reviewing conflicts

303. See *Sequoyah v. Tenn. Valley Auth.*, 620 F.2d 1159 (6th Cir. 1980); Linge, *supra* note 131, at 321.

304. See *Sequoyah*, 620 F.2d at 1160.

305. *Id.* at 1161. The Tellico Dam case is better known as the *Snail Darter Case*, which resulted in the Supreme Court's landmark Endangered Species Act decision. See Linge, *supra* note 131, at 321.

306. See *Sequoyah*, 620 F.2d at 1160-65.

307. See, e.g., *Inupiat Cmty. of the Arctic Slope v. United States*, 548 F. Supp. 182 (D. Ala. 1982), *aff'd*, 746 F.2d 570 (9th Cir. 1984); see Linge, *supra* note 131, at 327.

308. See, e.g., *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983); see Linge, *supra* note 131, at 328.

309. See, e.g., *Havasupai Tribe v. United States*, 752 F. Supp. 1471, 1476 (D. Ariz. 1990), *aff'd sub nom. Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir. 1991); see Linge, *supra* note 131, at 335.

310. See Larry Sager, *Rediscovering America: Recognizing the Sovereignty of Native American Indian Nations*, 76 U. DET. MERCY L. REV. 745, 752 (1999) (concluding that "[t]he courts of the United States have justified the forcible taking of land and exploitation of resources from American Indians using culturally-biased rhetoric, culturally relativistic slogans, and biased theoretical models based on Natural Law; the Doctrine of Discovery, Social Darwinism, or Manifest Destiny").

where the competitive exclusion principle is at play are not the courts of Native Americans, but instead the "courts of the conqueror."<sup>311</sup> Devils Tower and Rainbow Bridge are clear examples of the competitive exclusion principle because they evidence the characteristics of ideological conflict, competing user groups, and scarce resources.<sup>312</sup>

### B. *The Doctrine of Discovery*

The doctrine of discovery is well summarized by the judicial pronouncement that "might makes right."<sup>313</sup> Essentially a validation of conquest, this justification has been U.S. law for 179 years, beginning with the 1823 decision in *Johnson v. McIntosh*.<sup>314</sup>

The doctrine of discovery was introduced into U.S. law in a trilogy of Supreme Court opinions authored by Chief Justice John Marshall, which effectively excluded Native Americans from their land and forbade their participation in the political process.<sup>315</sup> In *Johnson v. McIntosh*, Chief Justice Marshall determined that the U.S. government gained title to Native American lands through its "discovery" of North America.<sup>316</sup> Marshall noted that this discovery and "title by conquest" process relied on force.<sup>317</sup> In other words, the "entry of the white man" extinguished all Native American proprietary land interests and claims.<sup>318</sup> Marshall's decision simultaneously facilitated and justified the colonization of America.<sup>319</sup>

311. *Id.* at 750.

312. When such conflict exists and collaborative efforts cannot remedy ideological conflict, the doctrine of discovery predicts that Native Americans will be the group excluded from access to scarce resources found on public lands.

313. See Burton & Ruppert, *supra* note 5, at 219 (tracing the origin of the doctrine of discovery to *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823), and noting that in *Johnson*, "the otherwise eminent jurist [Chief Justice Marshall] came closer than perhaps at any other time in his thirty years of administering justice to simply declaring that might makes right").

314. 21 U.S. (8 Wheat.) 543, 543 (1823).

315. See *id.*; *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) (holding that the Cherokee Nation was not considered a foreign state and thus did not have standing to sue in U.S. courts); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (holding that treaties between the Cherokee Nation and the U.S. government can be overridden by subsequent unilateral government action).

316. *Johnson*, 21 U.S. at 589.

317. *Id.*

318. *Badoni v. Higginson*, 455 F. Supp. 641, 644 (D. Utah 1977) ("Any aboriginal proprietary interest that the Navajos may have had in this land would have been extinguished by the entry of the white man in earlier years." (citing *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 339 (1945))).

319. See WILLIAMS, *supra* note 35, at 8.

Marshall further diminished the status of Native Americans in *Cherokee Nation v. Georgia* by announcing that Native American tribes were “domestic dependent nations,” essentially “ward[s]” of the United States.<sup>320</sup> One year later, he cemented this structure of dominance in *Worcester v. Georgia*, writing that “power, war, conquest give rights, which after possession, are conceded by the world; and which can never be controverted by those on whom they descend.”<sup>321</sup> With the doctrine of discovery thus manifested in a rule of law, the U.S. government acquired and settled the land from sea to sea “in perfect good faith” that all of its historically varying and sometimes inconsistent Native American policies satisfied the law.<sup>322</sup>

The doctrine of discovery is not limited solely to land conquest. The U.S. government relied on the doctrine’s theoretical basis for other programs and policies that suppressed Native American culture, including discouragement of religious practices, forced assimilation, and consistent disregard of Indian treaty rights.<sup>323</sup> In this sense, the doctrine of discovery in U.S. history indicates that law provides the power to empire.<sup>324</sup>

### C. *Combining the Doctrines: Excluding Native Americans Once and for All*

The ecological principle of competitive exclusion suggests that the dominant culture will prevail in resource struggles.<sup>325</sup> History, interpreted through the doctrine of discovery, reveals that Native Americans are the excluded group. The dominant culture is non-Native American, and Native Americans in turn are subject to that culture’s courts—the “courts of the conqueror.” Issues concerning both the competitive exclusion principle and the doctrine of discovery exist today. For example, the Devils Tower and Rainbow Bridge conflicts are clear cases in which two groups fight to exclude each other from use of a single scarce resource. In addition, in 1998 the U.S. Court of Federal Claims determined that Native Americans have no original interest in certain land

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320. *Cherokee Nation*, 30 U.S. at 17; see also Burton & Ruppert, *supra* note 5, at 219-20.

321. *Worcester*, 31 U.S. at 543.

322. WILLIAMS, *supra* note 35, at 325.

323. See *id.* at 325-26.

324. See *id.* Williams further notes that “[t]he history of the American Indian in Western legal thought reveals that a will to empire proceeds most effectively under a rule of law.” *Id.* at 325.

325. See Hanson & Moore, *supra* note 1, at 59.

because they lost title when conquered.<sup>326</sup>

American development and expansion pushed aside Native Americans and their tribes.<sup>327</sup> George Washington, as the nation's Commander-in-Chief, remarked that settlement would "as certainly cause the Savage as the Wolf to retire."<sup>328</sup> This same theme of victory through settlement underscores the debate over public lands management and Native American religious practices at sacred sites located on public lands. Conflict over public lands management for Native American sacred sites and religious practices will increase because recreational use of public lands is increasing.<sup>329</sup> The sheer number of recreationalists could silence the Native American voices advocating for protection.<sup>330</sup>

Competitive exclusion and the doctrine of discovery do not impede judicial or legislative progress toward protection of Native American religious freedom on public lands. Rather, the principle and the doctrine prevent progress from occurring at all. Status as the conqueror, coupled with an approach to conflict resolution for which the frame-of-reference is cultural superiority, produces a subjective body of law and policy. President Theodore Roosevelt once remarked that "[p]eace has come through the last century to large sections of the earth because the civilized races have spread over the earth's dark places."<sup>331</sup> When the conqueror determines who is civilized and what places are dark, the non-dominant

326. See *Karuk Tribe of Cal. v. United States*, 41 Fed. Cl. 468, 476 (Ct. Fed. Cl. 1998). Ruling on whether the Yurok Tribe of California established a compensable expectancy in land to establish a Fifth Amendment takings claim, the court noted that "aboriginal title may be terminated by the sovereign without any legally enforceable obligation to compensate the Indians. . . . [It] constitutes no more than permissive title, which is vulnerable to affirmative action by the sovereign, which possess[es] exclusive power to extinguish the right of occupancy at will." *Id.* at 476 (internal quotations and citations omitted). The dominant culture's right to extinguish Native American land interest is supreme, "whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise." *Havasupai Tribe v. United States*, 752 F. Supp. 1471, 1478 (D. Ariz. 1990).

327. See WILLIAMS, *supra* note 35, at 325.

328. Letter from George Washington, U.S. Commander-in-Chief, to James Duane, head of the Continental Congress' Committee of Indian Affairs (Sept. 7, 1783), reprinted in GETCHES ET AL., *supra* note 35, at 84-85.

329. For example, 300,000 tourists a year visit Rainbow Bridge National Monument. See Editorial, *Keep Religious Neutrality*, *supra* note 270.

330. At Rainbow Bridge, for example, five tribes stand against a potential pool of 300,000 tourists. See *supra* note 329 and accompanying text; see also Smith & Manning, *supra* note 162 (discussing the five tribes' attempt to restrict tourist traffic at Rainbow Bridge).

331. Sager, *supra* note 310, at 750 (citing HOWARD K. BEALE, THEODORE ROOSEVELT AND THE RISE OF AMERICA TO WORLD POWER 72 (1956)).

culture faces an uphill battle. In the end, Native American success in achieving change will likely continue to depend on the law and the dominant culture's capacity to abandon the doctrine of discovery and minimize the impact of competitive exclusion.

*D. Possible Solutions to Overcome the Negative Impact of Competitive Exclusion and Discovery*

Despite competitive exclusion and the doctrine of discovery, legislative, judicial, and executive means exist to further the resolution of the current and future conflicts between Native Americans and other resource user groups over sacred sites on public lands. Congress could establish legislation designed to clarify the appropriate balance between competing applications of the Establishment Clause and the Free Exercise Clause to land management. After all, it has plenary authority over public lands.<sup>332</sup> In the alternative, Congress could enact legislation to protect Native American free exercise of religion on public lands under its enforcement powers and the Fourteenth Amendment's fundamental liberty concept, so long as it is appropriately tailored.<sup>333</sup> Congress also has the authority to establish legislation specific to a sacred site.<sup>334</sup> For example, when it established the El Malpais National Monument in New Mexico in 1987, Congress granted the Secretary of Interior the authority to respond to tribal requests with temporary closure of sacred sites to public access.<sup>335</sup> Moreover, Congress could create a general statute for sacred sites based on the El Malpais model.<sup>336</sup> To date, however, Congress' legislative action in this field is glaringly lacking.<sup>337</sup>

As for the judiciary, great care should be given whenever the issues of Native American religious freedom and sacred site protection on public lands are presented for review. The *Bear Lodge* district court decision indicates that the nuances of balancing between the religion clauses may produce flawed analysis.<sup>338</sup> Further, courts could become more receptive to

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332. See *supra* note 89.

333. See *City of Boerne v. Flores*, 521 U.S. 507, 517-19, 529-36 (1997).

334. See *Hooker*, *supra* note 52, at 134.

335. *Id.*

336. See *Grimm*, *supra* note 49, at 24.

337. See *id.* at 23 ("Congress has never enacted a general sacred lands protection statute.").

338. See *supra* Part IV.A.

treating land as a sacred being for Free Exercise purposes<sup>339</sup> or more receptive in general to expansion of existing Indian law doctrines like the trust doctrine.<sup>340</sup> In Establishment cases, courts should act to narrow the field of potentially applicable tests.<sup>341</sup> Finally, when conflicts between the religion clauses arise in an apparently irreconcilable way, courts should rule on the side of free exercise over anti-establishment.<sup>342</sup>

The most hope for change, however, rests with the federal land management agencies. Federal land management agencies should implement responsible, proactive, and collaborative efforts to facilitate competing user groups, as was done at Devils Tower. Certainly the law, as well as legislative and judicial impact on the law, holds great potential for the future of Native American religious freedom and sacred site protection on public lands. Nevertheless, it is land management agencies that are best placed to promote objective discourse on cultural and social beliefs as to public lands. Ideological differences, which are at the core of the exclusion principle, may be diffused through open, reasoned, and collaborative processes. When the land management agency is faced with competing user groups with strong value differences, a collaborative process allows each side to see the other's point of view.<sup>343</sup> Through this process, lasting change may occur. Finally, as *Bear Lodge* shows, collaborative processes that produce a voluntary-based land management effort are more likely to pass constitutional scrutiny.<sup>344</sup>

## Conclusion

Undoubtedly, Native American tribes across the United States are exerting more authority and receiving more recognition from federal and state governments in return. This recognition means that the visibility of Native American affairs and Indian law issues will increase in the public arena. However, faith that such power and recognition will be able to effect change overlooks the realistic lessons that American Indian history teaches.

The idea of "government by the people, for the people"<sup>345</sup>

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339. See Ward, *supra* note 68, at 797.

340. See *supra* note 120 and accompanying text.

341. See *supra* notes 68-72 and accompanying text.

342. See TRIBE, *supra* note 14, at 1201.

343. See Burton and Ruppert, *supra* note 5, at 211-12.

344. See *supra* Part IV.A.

345. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), in HENRY J.

presupposes adequate representation of 'a people' as a member of the collective whole. In the context of Native American religious freedom on public lands, the table is seemingly tilted in favor of the dominant culture. The competitive exclusion principle and the doctrine of discovery are crucial to understanding this imbalance, because the matter is largely about conflict on public lands pitting the interests of dominant culture of new and expanding user groups, such as recreationalists, against Native American religious practice and sacred site protection.

Sadly, the competitive exclusion principle and the doctrine of discovery could operate to diminish much of the gains Native Americans achieve in the courts and the legislature. The status quo, although perhaps changing, continues to reflect the fact that American culture and America's legal policy of "might makes right" in Native American affairs works to curtail, if not defeat, reasonably tailored federal land management agency efforts designed to protect Native American religious practices at sacred sites on public lands. This real world cause-and-effect dynamic is particularly shameful when compared to Chief Seattle's words: "Every part of this soil is sacred in the estimation of my people. Every hillside, every valley, every plain and grove, has been hallowed by some sad or happy event in days long vanished."<sup>346</sup> Changing this dynamic certainly involves the law. But, perhaps more importantly, change also requires persuasive and objective discourse aimed at cultural and societal beliefs and value systems. This focus is all the more important if voluntary bans by federal land management agencies to preserve sacred sites and protect Native American religious freedom are the standard for constitutionally permissible agency action.

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RAYMOND, THE LIFE, PUBLIC SERVICES AND STATE PAPERS OF ABRAHAM LINCOLN, 211-12 (1865).

346. Dean B. Suagee, *American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth's Caretakers*, 10 AM. INDIAN L. REV. 1, 1 (1983) (citing Chief Seattle, Statement Upon Signing the Treaty at Medicine Creek (1854)).

There is an ongoing discussion as to whether Chief Seattle actually made this speech. For further insight, see Jerry L. Clark, *Thus Spoke Chief Seattle: The Story of an Undocumented Speech*, 81 Q. OF THE NAT'L ARCHIVES AND RECORDS ADMIN. 2 (1985) and Chief Seattle, Treaty Oration (1854), <http://www.halcyon.com/arborhts/chiefsea.html> (last visited Mar. 24, 2002).