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# AMERICAN INDIAN SACRED SITES ON FEDERAL PUBLIC LANDS: RESOLVING CONFLICTS BETWEEN RELIGIOUS USE AND MULTIPLE USE AT EL MALPAIS NATIONAL MONUMENT

Ann M. Hooker\*

## I. Background

### A. Introduction

American Indians are beginning to reassert their right to freely express their religious beliefs despite past European American attempts to suppress them.<sup>1</sup> However, misunderstandings and conflicts persist in part because of basic differences between American Indian and European American religious beliefs. These differences become apparent especially when sacred mountains, lakes, forest groves, caves and other natural sites located on federal land are threatened with development for mining, flood control, recreation, logging, and other intensive activities and Native Americans attempt to protect them for religious purposes. In 1978, Congress passed the American Indian Religious Freedom Act (AIRFA)<sup>2</sup> to require federal land managers to consult with Native Americans,<sup>3</sup> but Congress itself has said that AIRFA "has no teeth."<sup>4</sup>

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The opinions and conclusions expressed in this paper are those of the author.

1. Russel Lawrence Barsh, *The Illusion of Religious Freedom for Indigenous Americans*, 65 OR. L. REV. 363, 369-72 (1986).

2. American Indian Religious Freedom Act of 1978 (AIRFA), Pub. L. No. 95-341, 92 Stat. 469 (codified at 42 U.S.C. § 1996 (1988)).

3. *Id.* § 1966 note.

4. 124 CONG. REC. 21,444, 21,445 (1978) (statement of Rep. Udall). *See infra* note 38 and

Since passage of AIRFA, Native Americans have lost several recent lawsuits involving free exercise claims to use sacred sites on federal lands, including *Lyng v. Northwest Indian Cemetery Protective Ass'n*.<sup>5</sup> In four cases Congress granted wilderness or park status to sacred sites to preserve their natural character but did not fully resolve the conflict between public use and sacred use. The public was allowed to visit the sites either at all times or only with permission of a tribe.<sup>6</sup> In *Lyng*, the Court expressed the fear that anyone, not just American Indians, could place a religious servitude on large areas of public lands and refused to entangle itself in evaluating the content of each religious claim.<sup>7</sup>

Congress used a new approach in resolving the conflict between sacred use and public use of federal lands when it established the El Malpais National Monument in 1987.<sup>8</sup> As it had done in a few other situations, Congress preserved the sacred site. The site consists of volcanoes, extensive lava flows, ice caves, and other natural features known as El Malpais, or bad lands, near Grants, New Mexico.<sup>9</sup> Then, Congress, rather than placing the site in trust for the Indians, e.g., as part of an existing reservation, or opening it to general public use, e.g., as a wilderness area or national park, gave the Secretary of the Department of Interior authority to temporarily close particular sites to public access upon request of any one of four tribes that have historically used El Malpais for sacred purposes.<sup>10</sup>

### B. History of Conflict

American Indians hold religious beliefs that are organic-spiritual in character.<sup>11</sup> Traditionally, they believe that humans and nature are fundamentally interdependent. They also believe that a creative spirit, known as the Great Spirit, exists,<sup>12</sup> and that the Great Spirit created nature. The creative process is not finished, however, and the Great Spirit, rather than

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accompanying text.

5. *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 552 F. Supp. 951 (N.D. Cal. 1982), *aff'd*, 764 F.2d 581 (9th Cir. 1985), 565 F. Supp. 586 (N.D. Cal. 1983), *aff'd*, 795 F.2d 688 (9th Cir. 1986), *rev'd sub nom. Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (evaluating the effect of logging road and logging in National Forest on use of Chimney Rock area for sacred ceremonies).

6. See *infra* notes 40-45 and accompanying text.

7. *Lyng*, 485 U.S. at 452-53.

8. El Malpais Act, Pub. L. No. 100-225, 101 Stat. 1539 (codified at 16 U.S.C. §§ 460uu to 460uu-50 (1988 & Supp. III 1991)).

9. *Id.* § 101, 101 Stat. at 1539.

10. *Id.* § 507, 101 Stat. at 1548.

11. AKE HULTKRANTZ, BELIEF AND WORSHIP IN NATIVE NORTH AMERICA 124-26, 157-84 (Christopher Vecsey ed. 1981).

12. Gerard Reed, *A Native American Environmental Ethic: A Homily on Black Elk*, in RELIGION AND ENVIRONMENTAL CRISIS 25, 26-30 (Eugene C. Hargrove ed., 1986).

being transcendent, is actively participating in this process.<sup>13</sup> Therefore, Native Americans believe that they must be able to receive guidance from the Great Spirit to understand nature, the Great Spirit's intentions, and consequently, what actions they should take in their daily lives.<sup>14</sup>

Native Americans believe that the Great Spirit is immanent in nature. They believe all of nature is sacred for it is a living manifestation of the Great Spirit and reveals a higher order:<sup>15</sup> "If he is in everything, he can be excluded from nothing. If everything is in him, nothing is apart from him. The immanent Spirit, by his real presence in all things, makes all he dwells in (or all that dwells in him) precious with rarely expressed in theological language, the Native American's belief in the absolute immanence of the Creator in creation undergirds and structures all his ethics."<sup>16</sup> They believe that they cannot disturb the Earth too much or the Great Spirit will leave, the cosmic order will be disrupted and they will be lost.<sup>17</sup>

Of particular concern to Native Americans is the need to protect certain spiritual landmarks, such as particular mountain peaks, lakes, volcanic features, rivers, valleys, and forest groves. At these places American Indians conduct religious ceremonies and receive communications from the Great Spirit.<sup>18</sup> "Religious ceremonies were 'considered as the means for keeping the cosmic order in its course and the continuance of the earth and its life processes.'"<sup>19</sup>

Native American religious use of sacred sites has come into conflict with federal lands policy because many of the more significant sacred sites are located on federal lands outside of reservation boundaries.<sup>20</sup> To continue receiving communications from the Great Spirit, Native Americans require that these sites remain in their natural state. They also require that they have

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13. *Id.* at 30; Barsh, *supra* note 1, at 364.

14. Barsh, *supra* note 1, at 364-67.

15. HULTRANTZ, *supra* note 11, at 126.

16. Reed, *supra* note 12, at 28; *see also* HULTRANTZ, *supra* note 11, at 128; Reed, *supra* note 12, at 34-35. "Traditional Native American thinkers such as Black Elk articulated an ethic of reverence for nature as the handiwork and manifestation of God." *Id.*

17. Reed, *supra* note 12, at 29-30. Reed states that Native Americans studied natural beings, not so much to make them idols, but to use them as lenses through which to peer into the depths of the Great Mystery. Just as Christians revere the written Word of God, preserving and studying the Bible, Native Americans revere the created world, preserving and studying it as a manifestation of and message from God.

*Id.*

18. *Id.* at 367; HULTRANTZ, *supra* note 11, at 157-84; Reed, *supra* note 12, at 28; Charles Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth" — How Long a Time is That?*, 63 CAL. L. REV. 601, 605 n.17 (1975).

19. Wilkinson & Volkman, *supra* note 18, at 605 n.17 (quoting GENE WELTFISH, *THE LOST UNIVERSE—THE WAY OF LIFE OF THE PAWNEE* 10 (1971)).

20. Barsh, *supra* note 1, at 397, 411.

access to these sites and privacy during religious ceremonies.<sup>21</sup> When the European nations discovered North America, not all of the land was unoccupied. Indian nations occupied some of the land. The sovereign powers of Europe claimed title to Indian lands as between themselves subject to "the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man."<sup>22</sup> However, the indigenous people could be divested of their rights by voluntary cession or actual conquest.<sup>23</sup> Eventually through a variety of means, including treaties and executive orders, the tribes ceded most of their land to what is now the United States government, and these lands were added to the public domain. The public domain is a pool of federally acquired lands otherwise available to the states and private parties for acquisition until 1976 when the federal government "withdrew" these lands and adopted a policy of retention. In the meantime, the federal government had already made a variety of reservations, including military reservations, Indian reservations, national parks, wilderness areas, national forests (formerly forest reserves), and fish and wildlife refuges.<sup>24</sup> When the lines were drawn, the spiritual significance of certain sites to Native Americans was not necessarily taken into consideration and some of these sites were not included in Indian reservations.

Congress has plenary power under the Property Clause<sup>25</sup> of the U.S. Constitution to manage the federal lands,<sup>26</sup> which today comprise 732 million acres, or one-third of the land area of the United States.<sup>27</sup> Congress manages those federal lands that have not been designated as Indian reservations for public purposes under the public trust doctrine.<sup>28</sup> Federal land policy has been based largely on the European-American "mechanistic-rational" theory

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21. *Id.* at 398.

22. S. James Anaya, *The Rights of Indigenous Peoples and International Law in Historical and Contemporary Perspective* (1989) (symposium paper), in *HARVARD INDIAN LAW SYMPOSIUM* 191, 202 n.53 (Harvard Law School Publications Center 1990) (quoting Justice Marshall in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832)).

23. *Id.* at 202; *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 573 (1823).

24. SAMUEL T. DANA & SALLY K. FAIRFAX, *FOREST AND RANGE POLICY: ITS DEVELOPMENT IN THE UNITED STATES* 10-11 (2d ed. 1980).

25. U.S. CONST. art. IV, § 3, cl. 2. Note that Congress also has plenary power under the Indian Commerce Clause, *id.* art. I, § 8, cl. 3, and the treaty power, *id.* art. II, § 2, cl. 2. The Supreme Court recognized exclusive congressional authority over Indian affairs in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832).

26. *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976). In fact, in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), Justice O'Connor noted the constitutional conflict between the Property Clause and the First Amendment and stated, "Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land." *Id.* at 453.

27. GEORGE CAMERON COGGINS & CHARLES F. WILKINSON, *FEDERAL PUBLIC LAND AND RESOURCES LAW* 167 (2d ed. 1987) (citing U.S. DEP'T OF INTERIOR, *BLM PUBLIC LAND STATISTICS* (1983)).

28. *Light v. United States*, 220 U.S. 523, 537 (1910); *Kleppe*, 426 U.S. at 539.

of the relationship of society to nature. This theory favors the rational management of nature for economic and aesthetic purposes.<sup>29</sup> Federal land policy has been strongly influenced in the last 100 years by utilitarian theory of the late 1800s.<sup>30</sup> Gifford Pinchot, first Chief of the Forest Service, for example, stated that the national forests should be managed "for the greatest good of the greatest number for the longest time."<sup>31</sup>

Congress cannot, however, manage federal lands in violation of other parts of the Constitution, including the Free Exercise of Religion<sup>32</sup> and Establishment<sup>33</sup> Clauses of the First Amendment.<sup>34</sup> Consequently, when American Indians and others ask federal land management agencies to preserve sacred sites located on federal land and grant American Indians exclusive use for religious purposes<sup>35</sup> these agencies face a dilemma.

In 1978, Congress enacted the AIRFA,<sup>36</sup> recognizing American Indian religious freedom and requiring "federal agencies to learn about, and avoid unnecessary interference with, traditional Indian religious practices."<sup>37</sup> However, Rep. Morris K. Udall (D-Ariz.), who cosponsored the bill, stated that AIRFA did not create any legal rights.<sup>38</sup> AIRFA instead "depends on Federal administrative good will for its implementation."<sup>39</sup> Proposed legislation is pending in Congress to strengthen American Indian rights under AIRFA.

Meanwhile, American Indians have had to rely on the Free Exercise Clause of the First Amendment to support their claims. In a series of sacred site cases brought during the 1980s,<sup>40</sup> the federal courts moved from a balancing

29. CAROLYN MERCHANT, *THE DEATH OF NATURE* at xvi, 192-252 (1980); HULTKRANTZ, *supra* note 11, at 125; Wilkinson & Volkman, *supra* note 18, at 605 n.17; *see also* Sarah B. Gordon, *Indian Religious Freedom and Governmental Development of Public Lands*, 94 *YALE L.J.* 1447, 1449-51 & nn.15-18 (1985) (discussing the separation of spiritual life from physical reality in the European-American worldview).

30. *See generally* SAMUEL P. HAYS, *CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT 1890-1920* (Atheneum Press 1980) (1959); DANA & FAIRFAX, *supra* note 24.

31. GIFFORD PINCHOT, *BREAKING NEW GROUND* 505 (Island Press 1987) (1947).

32. U.S. CONST. amend. I, cl. 1. The Free Exercise Clause reads: "Congress shall make no law . . . prohibiting the free exercise [of religion]." *Id.*

33. U.S. CONST. amend. I, cl. 1. The Establishment Clause reads: "Congress shall make no law respecting an establishment of religion." *Id.*

34. *Badoni v. Higginson*, 455 F. Supp. 641 (D. Utah 1977), *aff'd*, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

35. Barsh, *supra* note 1, at 398.

36. 42 U.S.C. § 1996 (1988).

37. *Wilson v. Block*, 708 F.2d 735, 746 (D.C. Cir. 1983).

38. *See supra* note 4 and accompanying text.

39. Barsh, *supra* note 1, at 411.

40. *Badoni v. Higginson*, 455 F. Supp. 641 (D. Utah 1977) (evaluating the effect of Glen Canyon Dam and Reservoir on use of Rainbow Bridge for prayer), *aff'd*, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981); *Sequoyah v. Tennessee Valley Auth.*, 480 F. Supp. 608

test<sup>41</sup> to a penalty or coercion test<sup>42</sup> to determine when the federal government had impermissibly burdened tribal free exercise rights. In *Lyng v. Northwest Indian Cemetery Protective Ass'n*,<sup>43</sup> the only sacred site case to reach the Supreme Court, the Court relied on the use of the word "prohibit" by the framers in the Free Exercise Clause to hold that, unless the government affirmatively coerces or penalizes an individual or group for its beliefs, the government may infringe upon religious conduct.<sup>44</sup>

This does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs require government to bring forward a compelling justification for its otherwise lawful actions.<sup>45</sup>

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(E.D. Tenn. 1979) (evaluating the effect of Tellico Dam and Reservoir on sacred homelands in Little Tennessee Valley and use of the Valley for communications with the Cherokee gods), *aff'd*, 620 F.2d 1159 (6th Cir. 1980), *cert. denied*, 459 U.S. 953 (1980); *Crow v. Gullet*, 541 F. Supp. 785 (D.S.D. 1982) (evaluating the effect of state park development on use of Bear Butte for the Vision Quest and other communications with the Great Spirit), *aff'd*, 706 F.2d 856 (8th Cir. 1983), *cert. denied*, 464 U.S. 977 (1984); *Inupiat Community of Arctic Slope v. United States*, 548 F. Supp. 182 (D. Alaska 1982) (evaluating the effect of oil and mineral exploration in the Outer Continental Shelf in the Beaufort and Chukchi Seas on traditional hunting and fishing lifestyle based on religious grounds), *aff'd on other grounds*, 746 F.2d 570 (9th Cir. 1984), *cert. denied*, 474 U.S. 820 (1985); *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983) (evaluating the effect of ski resort expansion on the home of the Hopi gods in the San Francisco peaks and communication with those gods), *cert. denied*, 464 U.S. 956 (1984); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

41. The balancing test was developed in *Sherbert v. Verner*, 374 U.S. 398 (1963), and applied in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In the *Sherbert/Yoder* line of cases, the Court held that the federal government must have a compelling interest to justify substantial infringement on religious conduct and that the government has used the least restrictive means available.

42. The 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).

43. 485 U.S. 439 (1988).

44. *Wilson*, 708 F.2d at 741; *Roy*, 476 U.S. at 703-06; *Lyng*, 485 U.S. at 449. In *Lyng*, Indian tribes sought to prevent the Forest Service from completing a road through sacred high country in a national forest. The road in effect would destroy the tribes' religion by foreclosing the religious practices. Even though the welfare of the tribes would be affected, the Court could not distinguish the building of a road or the harvesting of timber on public land from the use of a Social Security number in *Roy*. *Lyng*, 485 U.S. at 449. In *Roy*, American Indian parents sought to prevent the Social Security Administration from assigning a Social Security number to their two-year-old daughter, claiming that a numerical identifier would rob her of her spirit. The Court called the assignment of Social Security numbers an internal procedure of the Social Security Administration and denied the parents' request, adopting the penalty or coercion test. *Roy*, 476 U.S. at 703-06.

45. *Lyng*, 485 U.S. at 450-51.

In addressing the First Amendment claims, the Supreme Court expressed three general concerns. First, the Court might become unduly entangled in determining the legitimacy of each religion if free exercise claims to natural areas were made by non-traditional groups.<sup>46</sup> Second, the Court might overstep the Establishment Clause by acknowledging some claims but not others.<sup>47</sup> Third, the Court might interfere with Congress' ability to manage the federal lands by allowing an individual or group to place a "religious servitude" on a site.<sup>48</sup>

Like the federal courts, Congress has been reluctant to recognize free exercise claims on federal lands,<sup>49</sup> and to date has not amended the AIRFA to create legal rights. However, in four instances, Congress addressed American Indian free exercise claims on a site-specific basis. In two situations, Congress placed sacred land in trust for the particular Indian tribe or pueblo. In the first, Congress reserved 48,000 acres surrounding Blue Lake in the Carson National Forest as a wilderness area in trust for the Taos Indians as part of the Pueblo de Taos Reservation.<sup>50</sup> In the second, Congress reserved 185,000 acres of the Grand Canyon National Park in trust for the Havasupai Indians as part of their reservation.<sup>51</sup> In each case, Indians may use the land for traditional purposes. Non-Indians may have access to the land

46. *Id.* at 452. During the 1980s, nontraditional groups had begun to proliferate and make claims on the government agencies to accommodate their practices on religious grounds. Some of these groups had attached spiritual values to the same sites or sites similar to those used by American Indians. *See, e.g.*, JAMES A. SWAN, SACRED PLACES: HOW THE LIVING EARTH SEEKS OUR FRIENDSHIP (1990); *see also* Barsh, *supra* note 1, at 378-79.

47. *See, e.g.*, Barsh, *supra* note 1, at 402, 406. "The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours." *Lyng*, 485 U.S. at 452.

48. *Lyng*, 485 U.S. at 452. Justice O'Connor's opinion stated:

Nothing in the principle for which they [respondents] contend [a limited religious servitude], however, would distinguish this case from another lawsuit in which they (*or similarly situated objectors*) might seek to exclude all human activity but their own from sacred areas of the public lands. . . . [S]uch beliefs could easily require *de facto* beneficial ownership of some rather spacious tracts of public property. . . .

The Constitution does not permit government to discriminate against religions that treat particular physical sites as sacred. . . . Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land.

*Id.* at 452-53 (O'Connor, J.) (emphasis added); *see, e.g.*, S. Alan Ray, *Lyng v. Northwest Indian Cemetery Protective Association: Government Property Rights and the Free Exercise Clause*, 16 HASTINGS CONST. L. Q. 483, 491 (1989).

49. Barsh, *supra* note 1, at 372.

50. Act of Dec. 15, 1970, Pub. L. No. 91-550, 84 Stat. 1437.

51. Act of Jan. 3, 1975, Pub. L. No. 93-620, 88 Stat. 2092 (codified at 16 U.S.C. § 228(i) (1988)).



for purposes consistent with their status as wilderness or national park but with the consent of the tribe.

In the two other situations, Congress did not place the land in trust for the Indians. Rather, in the third case, Congress set aside part of the Six Rivers National Forest as a wilderness but did not limit public access except by motorized vehicles.<sup>52</sup> In light of the controversy that arose in the Six Rivers case, known as the *Lyng* case, this article examines the fourth situation — El Malpais.

In the fourth situation, Congress set aside the El Malpais lava flows in New Mexico as a national monument under the public trust doctrine,<sup>53</sup> specifically stating that the land shall not be placed in trust for the Indians<sup>54</sup> and that the Indians shall have nonexclusive use for traditional cultural and religious purposes.<sup>55</sup> However, and most importantly, the legislation also allowed the Secretary "from time to time" to close limited areas temporarily for traditional religious practices upon request by an appropriate tribe.<sup>56</sup> This approach may provide a model for addressing American Indian free exercise claims at sacred sites on public lands.

Whatever model is adopted, American Indians must ensure that statutes are sound before they are enacted for no court has ever held any congressional regulation of American Indians to be outside the scope of federal power.<sup>57</sup> Further, the El Malpais statute establishing sets the two cultures apart even as it attempts to reconcile them. El Malpais was designed to allow non-Indians to observe and learn about the natural and cultural landscape. The cultural landscape of interest, however, has been and is strongly shaped by Native

52. California Wilderness Act of 1984, Pub. L. No. 98-425, 98 Stat. 1619, (codified at 16 U.S.C. §§ 46 note, 80 note, 543, 543a-543h, 1132 note, 1274 (1988)), cited in *Lyng*, 485 U.S. at 444-45. In *Lyng*, the Supreme Court noted that the existing unpaved section of road was exempted; but since it lies within the wilderness area, it is closed to general vehicular traffic. *Lyng*, 485 U.S. at 444.

53. El Malpais Act § 101, 101 Stat. at 1539.

54. El Malpais Act §§ 101, 103, 101 Stat. at 1539-40. In § 506(d)(1) of the Act, Congress explicitly stated that "[e]xcept as otherwise provided in this Act, no federally-owned lands located within the boundaries of the monument or the conservation area shall be transferred out of Federal ownership, or be placed in trust for any Indian tribe or group, by exchange or otherwise." *Id.* § 506(d)(1), 101 Stat. at 1547.

55. El Malpais Act § 507(a), 101 Stat. at 1548.

56. El Malpais Act § 507(c), 101 Stat. at 1548. The Act states:

In order to implement this section and in furtherance of the American Indian Religious Freedom Act, the Secretary upon the request of an appropriate Indian tribe, may from time to time temporarily close to general public use one or more specific portions of the monument or the conservation area in order to protect the privacy of religious activities in such areas by Indian people. Any such closure shall be made so as to affect the smallest practicable area for the minimum period necessary for such purposes.

*Id.*

57. Wilkinson & Volkman, *supra* note 18, at 614 n.66.

Americans, and until recently, European Americans and others have not sought to use these sites for religious purposes.

Today though, some European Americans and others have adopted organic-spiritual beliefs<sup>58</sup> to reconcile the schism they feel between themselves, nature and the cosmos. They have begun to use natural sites for religious purposes,<sup>59</sup> sometimes creating conflicts with Native Americans. The courts, though, have deferred to Congress to resolve conflicts between federal land policy and religious use. In *Lyng*, for example, the Court stated:

Nothing in the principle for which they contend, however, would distinguish this case from another lawsuit in which they (or similarly situated religious objectors) might seek to exclude all human activity but their own from sacred areas of the public lands. . . . The Constitution does not permit government to discriminate against religions that treat particular physical sites as sacred . . . . Whatever rights the Indians may have to the use of the areas, . . . those rights do not divest the government of its right to use what is, after all, *its* land.<sup>60</sup>

The Court also said:

[G]overnment simply could not operate if it were required to satisfy every citizen's religious needs and desires. A broad range of government activities—from social welfare programs to foreign aid to conservation projects—will always be considered essential to the spiritual well-being of some citizens, often on the basis of sincerely held religious beliefs. Others will find the very same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion. The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that *do not prohibit* the free exercise of religion. The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours. That task, to the extent that it is feasible, is for the legislatures and other institutions.<sup>61</sup>

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58. James Lovelock, *Foreward*, in JAMES A. SWAN, SACRED PLACES: HOW THE LIVING EARTH SEEKS OUR FRIENDSHIP 11, 11-12 (1990); *see also* THOMAS BERRY, THE DREAM OF THE EARTH (1988); JAY B. MCDANIEL, OF GOD AND PELICANS: A THEOLOGY OF REVERENCE FOR LIFE (1989).

59. *See, e.g.*, SWAN, *supra* note 46, at 12, 208, 214-15, 219-32.

60. *Id.* at 453.

61. *Id.* at 452 (emphasis added).

The courts have also deferred to Congress to protect the interests of Native Americans.<sup>62</sup> At El Malpais and other sacred sites located on federal lands and not placed in trust for Native Americans, Congress will be asked to use its discretion under the Indian trust doctrine and the Property Clause<sup>63</sup> to continue to develop innovative methods for protecting those interests while fulfilling its obligations to the American public.

## II. *El Malpais National Monument Act of 1987*

### A. *Background*

El Malpais National Monument is located south of Grants, New Mexico and seventy-five miles west of Albuquerque, New Mexico. El Malpais (pronounced el mal-pie-ees) means "bad lands" in Spanish.<sup>64</sup> "Approximately 95 percent of the monument is covered by rugged lava fields, which, along with the limited availability of water, have historically restricted human access and development and limited the exploitation of resources."<sup>65</sup>

Even though the lava flows are forbidding, the El Malpais region has been continuously inhabited for at least the last 10,000 years.<sup>66</sup> Thus, long before the Spanish arrived, predecessors of the present Indian tribes had been living in the area and had developed a close relationship with the natural environment.<sup>67</sup> The Acoma, who settled in El Malpais possibly as early as A.D. 1050,<sup>68</sup> are descendants of prehistoric people who had lived in the region for thousands of years.<sup>69</sup> The original Acoma Pueblo, known as the Candelaria Pueblo,<sup>70</sup> was located on top of Las Ventanas Ridge at the eastern edge of McCarty's Flow.<sup>71</sup> This settlement was an important Chaco Canyon outlier and has been dated at A.D. 1150 to A.D. 1200.<sup>72</sup> The Acomas also

62. . See *supra* notes 22-31 and 57 and accompanying text.

63. The Court stated that protection of sacred sites for religious purposes would place a "religious servitude" on the site and "subsid[ize] . . . Indian religion." *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452-53 (1988). But see *supra* note 25.

64. SOUTHWEST PARKS & MONUMENTS ASS'N, *EL MALPAIS NATIONAL MONUMENT I* (1990) (informational brochure) [hereinafter *Brochure*].

65. NATIONAL PARK SERV., U.S. DEP'T OF INTERIOR, *GENERAL MANAGEMENT PLAN/ENVIRONMENTAL ASSESSMENT/WILDERNESS SUITABILITY STUDY 182* (1990) [hereinafter *PLAN*].

66. *Id.* at 123.

67. *Id.* at 124.

68. BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, *EL MALPAIS: A STUDY OF ALTERNATIVES 16* (1971) [hereinafter *STUDY*]; *PLAN*, *supra* note 65, at 124-25. But see *Brochure*, *supra* note 64, at 11 ("By the early fifteenth century the Acoma people were living on the eastern border of the lava flows of El Malpais.").

69. *PLAN*, *supra* note 65, at 125.

70. *Id.*

71. *STUDY*, *supra* note 68, at 16.

72. *PLAN*, *supra* note 65, at 124.

settled Laguna Pueblo,<sup>73</sup> and claim ancestral ties to an area that stretched from the Rio Grande west to El Morro.<sup>74</sup> Today, the Acoma Pueblo and Laguna Pueblo reservations are located to the east of El Malpais.

Of the other tribes that still remain in the region, the Navajo had settled in the region by the thirteenth century. The Ramah Navajo do not have proven ancestral ties to land in El Malpais.<sup>75</sup> The Zuni Tribe claims ancestral ties to as large an area of land as do the Acomos, but the Zuni claim does not include much of the lava flows at El Malpais.<sup>76</sup> Today, the Zuni Pueblo and Ramah Navajo reservations are located to the west of El Malpais.

The eruptions and lava flows that formed El Malpais began approximately 3 million years ago, and lava flows have occurred as recently as 700 years ago. To the native people, the more recent flows "meant wholesale loss of life, abandonment of their villages, and migration to new homes."<sup>77</sup> For example, Acoma Pueblo, now located twenty-five miles from El Malpais, was originally located on top of La Ventanas Ridge, directly adjacent to the most recent flow called McCarty's Flow.<sup>78</sup> Stories of the "Black Rock River" were passed from generation to generation. In one story, the El Malpais is described as the blood of the Blind Kachina, KauBat'.

Hot black lava-blood flowed from the eyes of the angry KauBat'. His sons, the Twins, had blinded their father to punish him for his ruthless gambling. He had wagered with their people until they were destitute.

Now the Twins watched awestruck as the foul liquid poured from KauBat's eyesockets, chasing them home to the pueblo where they were born. The mass of lava curled into deep ravines and wide canyons. Heat waves wore paths into the sky, and singed the feathers of birds flying overhead. The curious raven flew too close and was instantly turned the color of charcoal.

The kachina's thick lava-blood destroyed all that lay in its path. As it cooled, it solidified into serpentine ropes and cresting waves of black rock. Eons of rain and snow had little effect on the frozen lava-stone.<sup>79</sup>

Within the lava flows, caves formed, and in the caves the Indians often found ice. Ice accumulates in the caves and remains throughout the summer due to the unusual microclimatic effects of the lava formations.<sup>80</sup> The Indians

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73. *Id.* at 127.

74. *Id.* at 126.

75. *Id.* at 129.

76. *Id.* at 126-27.

77. Brochure, *supra* note 64, at 10.

78. STUDY, *supra* note 68, at 16.

79. Brochure, *supra* note 64, at 1.

80. *Id.*

maintain shrines at the ice caves, believing that the ice is a gift of water from KauBat' to the people.<sup>81</sup>

To the Spanish explorers who arrived in 1540, El Malpais was forbidding.<sup>82</sup> By the late 1700s, El Malpais had become the common name for the area.<sup>83</sup> American explorers, who came later, also found the area inhospitable.<sup>84</sup> Homesteads built in the 1930s failed.<sup>85</sup> Today, abandoned homesites, an old sawmill, a tourist camp, and traces of old roads are reminders of early attempts to settle El Malpais. Only the trading post at Bandera Crater is still used.<sup>86</sup>

As early as the 1920s, efforts were begun to preserve El Malpais.<sup>87</sup> As just mentioned, an incipient tourist industry was developing at the site.<sup>88</sup> El Malpais, also known as the Grants Lava Flow, was recognized by geologists as one of the nation's most important volcanic regions.<sup>89</sup> In 1969, under the Classification and Multiple Use Act of 1964,<sup>90</sup> the Bureau of Land Management (BLM) withdrew El Malpais from the public domain<sup>91</sup> and began to consolidate federal ownership of property.<sup>92</sup> El Malpais was declared eligible for National Natural Landmark status<sup>93</sup> in 1969 under the Historic Sites Act of 1935.<sup>94</sup>

Within a few years, the Bureau of Land Management (BLM) had prepared a plan for protecting the site as a Landmark and realizing its potential contribution to the region's tourist economy.<sup>95</sup> In the study, BLM suggested two alternatives.<sup>96</sup> Under the first alternative, BLM would continue to manage

81. *Id.*

82. PLAN, *supra* note 65, at 130-33.

83. Brochure, *supra* note 64, at 11.

84. *Id.*

85. *Id.* at 13.

86. PLAN, *supra* note 65, at 132-33.

87. 133 CONG. REC. S18,251 (daily ed. Dec. 17, 1987) (statement of Sen. Domenici).

88. PLAN, *supra* note 65, at 132.

89. STUDY, *supra* note 68, at 5.

90. Pub. L. No. 88-607, 78 Stat. 986 (codified originally at 16 U.S.C. §§ 1411-1418, but omitted from the Code as executed). This act supplemented the Taylor Grazing Act of 1934, ch. 865, 48 Stat. 1269 (codified as amended at 43 U.S.C. 615 (1988)), by providing interim guidance.

91. BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, MULTIPLE-USE MANAGEMENT: A PLAN FOR THE GRANTS LAVA FLOWS AND SURROUNDING AREAS 14 (1972) [hereinafter BLM PLAN].

92. STUDY, *supra* note 68, at 24.

93. 133 CONG. REC. H4073 (daily ed. June 1, 1987) (statement of Rep. Vento); *see* U.S. DEP'T OF THE INTERIOR, NATURAL LANDMARK BRIEF (1969), *reprinted in* STUDY, *supra* note 68, at 38-39. *See generally* National Natural Landmarks Program, 36 C.F.R. § 62.1-62.9 (1990).

94. Historic Sites Act of 1935, Pub. L. No. 74-292, 49 Stat. 666 (codified as amended at 16 U.S.C. §§ 461 to 470vv (1988 & Supp. IV 1992)).

95. STUDY, *supra* note 68, at 21-23.

96. *Id.* at 24-35.

the site as an outstanding natural area.<sup>97</sup> Incompatible uses would be eliminated wherever possible, but the site would generally be managed under multiple-use principles.<sup>98</sup> Under the second alternative, the National Park Service (NPS) would manage the site as a national monument.<sup>99</sup> The NPS would eliminate incompatible uses and manage the site primarily as a park.<sup>100</sup>

The BLM study focused primarily on the geological features of El Malpais based on its eligibility as a national natural landmark<sup>101</sup> and gave relatively little attention to its ecological and cultural resources.<sup>102</sup> BLM continued to manage lands in El Malpais and in 1972 published its final plan.<sup>103</sup> The BLM plan mentioned cultural resources in the opening paragraph.<sup>104</sup> The plan, however, dealt with cultural resources in a single sentence under the heading "Recreation," which was described as one of several types of uses permitted in multiple-use management.<sup>105</sup>

By the time Congress passed the El Malpais National Monument Act of 1987, much more attention was being given to the cultural resources at El Malpais, especially those of American Indian origin. In the mid-1980s, the New Mexico delegation introduced bills in Congress to establish El Malpais as a national monument.<sup>106</sup> These bills included measures to protect the natural and cultural features of El Malpais and to accommodate Native American uses.

During congressional hearings, the senators and representatives stressed the important contribution El Malpais could make to the region's economy by attracting tourists.<sup>107</sup> Local support for creating El Malpais National Monument was strong. Many felt that Grants' economy could be boosted by developing El Malpais as a national monument.<sup>108</sup> Grants was the uranium capital of the world, but the uranium mining industry had collapsed and, as a result, the local economy had declined as a result.<sup>109</sup> The State of New

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97. *Id.* at 24-28.

98. *Id.* at 25.

99. *Id.* at 29-35.

100. *Id.* at 30.

101. *See, e.g., id.* at 16-17.

102. *See, e.g., id.*

103. BLM PLAN, *supra* note 91.

104. *Id.* at 1.

105. *Id.* at 6.

106. H.R. 403, 100th Cong., 1st Sess. (1987), was introduced by Rep. Bill Richardson (D-N.M.), and S. 56, 100th Cong., 1st Sess. (1987), a companion bill, was introduced by Sen. Pete Domenici (D-N.M.) and Sen. Jeff Bingaman (D-N.M.).

107. *See, e.g.,* 133 CONG. REC. H4073 (daily ed. June 1, 1987) (statement of Rep. Lagomarsino); 133 CONG. REC. H4074 (daily ed. June 1, 1987) (statement of Rep. Richardson); 133 CONG. REC. S18,249 (daily ed. Dec. 17, 1987) (statement of Sen. Bingaman); 133 CONG. REC. S18,251 (daily ed. Dec. 17, 1987) (statement of Sen. Domenici).

108. *See, e.g.,* 133 CONG. REC. S18,251 (daily ed. Dec. 17, 1987) (statement of Sen. Domenici).

109. *Id.*

Mexico Department of Economic Development estimated that in the first year alone, the monument would generate 101,000 visits and \$844,000 in gross receipts to local merchants.<sup>110</sup>

The federal government's interest in developing the aesthetic, scientific and economic uses of El Malpais reflects the European-American mechanistic-rational belief under which people may use nature for economic and aesthetic purposes without risk of disturbing the creative spirit.<sup>111</sup> The local community generally supported preservation of at least the lava flows at El Malpais, even though certain uses, such as mining, grazing, commercial logging, and hunting, might be prohibited in the monument.<sup>112</sup>

In contrast to the economic goals of the local community and the multiple-use goals of the federal government, the Acoma, Zuni, Laguna, and Ramah Navajo have used sacred sites at El Malpais for traditional and spiritual uses consistent with their organic-spiritual beliefs. The Acoma have the strongest ancestral ties to that area<sup>113</sup> and asked Congress to return the land to the Pueblo.<sup>114</sup> When Congress settled the Acoma's land claims in 1972,<sup>115</sup> the Acoma Pueblo Indians exchanged 1.5 million acres, including portions of El Malpais, for \$6.2 million from the federal government.<sup>116</sup> However, the Acoma still claimed aboriginal rights to the area.<sup>117</sup> During congressional hearings in 1987, Sen. Pete Domenici (R-N.M.) stated that the El Malpais legislation would not prohibit the Acoma from pursuing their claims.<sup>118</sup> Senator Domenici emphasized, however, that Congress could not and would not return the land to the tribes.<sup>119</sup> Senator Domenici asserted that Congress had done "the next best thing" by accommodating the Acoma's needs.<sup>120</sup>

110. 133 CONG. REC. H4074 (daily ed. June 1, 1987) (statement of Rep. Richardson).

111. See *supra* notes 11-19 and accompanying text. See also HANS HUTH, *NATURE AND THE AMERICAN: THREE CENTURIES OF CHANGING ATTITUDES* (1957) (describing American recognition of the economic value of non-extractive activities such as tourism and recreation).

112. See, e.g., *STUDY*, *supra* note 68, at 21-23.

113. *PLAN*, *supra* note 65, at 127, 129.

114. 133 CONG. REC. S18,247 (daily ed. Dec. 17, 1987) (statement of Sen. Domenici).

115. 133 CONG. REC. S18,252 (daily ed. Dec. 17, 1987) (statement of Sen. Domenici). The Acoma claimed that an error in a 1877 survey by the U.S. government had occurred to the detriment of the Acoma. *Id.* at S18,247.

116. *Id.*

117. *Id.*

118. *Id.*

119. See, e.g., *id.* Senator Domenici stated:

What we could not do, what the committees would not let us do, and what precedent did not permit was to give to the Acoma Indians or sell to them some 13,000 acres of Federal land that they desire to have so they can continue their religious activities. . . . We just cannot do that. We do not do it for other Indian groups around the country. So we have done the next best thing and that is to protect their rights to conduct religious activities on those lands and on the rest of this Federal land that is in the monument and the conservation area.

*Id.*

120. Congress, over the course of two years, worked out ten amendments designed to

After many years of negotiation, Congress enacted the El Malpais National Monument Act, establishing the El Malpais National Monument and the El Malpais National Conservation Area, on December 31, 1987.<sup>121</sup>

### *B. The Plan for El Malpais National Monument*

Congress determined that it must establish a strong federal presence in the area because of the competing demands for economic development, site preservation, and accommodation of Native American uses.<sup>122</sup> Congress' initial concern was to protect the natural and cultural features of El Malpais from looting, accidental damage,<sup>123</sup> vandalism,<sup>124</sup> illegal grazing, woodcutting, hunting, poaching, and boundary disputes,<sup>125</sup> which had plagued El Malpais for some time.

Congress began by classifying the land at El Malpais for different types of uses and clarifying agency responsibilities. Congress directed that the most significant natural and cultural features at El Malpais, comprising more than 114,000 acres or 590 square miles, should be managed as a national monument by the National Park Service (NPS). The legislation further provided that approximately 263,000 acres of federally owned land surrounding the National Monument should be managed as a National Conservation Area by the Bureau of Land Management (BLM). Within the National Conservation Area, 60,000 acres were set aside as the Cebolla Wilderness, 38,210 acres were set aside as the West Malpais Wilderness, and 17,468 acres were set aside for study as the Chain of Craters Wilderness Study Area under the Wilderness Act of 1964.<sup>126</sup> Congress also authorized study and management of other areas within the National Conservation Area for potential inclusion in the Wilderness Preservation System.

The legislation authorized further land consolidation, including a variety of land transfers between agencies, including the National Forest Service,<sup>127</sup> exchanges with Acoma Pueblo<sup>128</sup> and the State of New Mexico,<sup>129</sup> and

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accommodate Acoma Pueblo Indian concerns. Most of the land held in trust for the Acoma Pueblo Indians, especially those lands used by them for grazing, was excluded from the monument boundaries. 133 CONG. REC. S18,251 (daily ed. Dec. 17, 1987) (statement of Sen. Domenici). Congress also excluded Cebollita Spring from wilderness designation, since the Acomas intended to develop the water rights and the Spring is a religious site. Congress created an access corridor to the Acoma's Berryhill Ranch. *Id.*

121. El Malpais Act, Pub. L. No. 100-225, 101 Stat. 1539 (codified at 16 U.S.C. §§ 460uu to 460uu-50 (1988 & Supp. III 1991)).

122. 133 CONG. REC. S18,248 (daily ed. Dec. 17, 1987) (statement of Sen. Domenici).

123. For example, cave explorers may accidentally "damage fragile cave features including biota and mineral and lava formations." PLAN, *supra* note 65, at 78.

124. *Id.* at 69-72.

125. *Id.* at 78.

126. *Id.* at 109; Wilderness Act of 1964, Pub. L. No. 88-577, 78 Stat. 890 (codified at 16 U.S.C. §§ 1131-1136 (1988)).

127. 16 U.S.C. §§ 460uu-1, 460uu-42 (1988).

128. *Id.* § 460uu-45.



mineral exchanges.<sup>130</sup> Congress further directed that: 1) all newly acquired land will be incorporated into the boundaries of the monument or conservation area, 2) no land will be transferred out of federal ownership, and 3) no land will be available for entry, appropriation, or disposal or leasing under the public land laws, mining laws, and mineral leasing and geothermal leasing laws.<sup>131</sup> In the conservation area, grazing and hunting may be permitted, but commercial wood gathering is prohibited.<sup>132</sup> In the monument, all mineral exchanges must take place within three years, and grazing will not be permitted after 1998.<sup>133</sup>

To accommodate traditional and religious uses of El Malpais by American Indians, Congress directed the Secretary to take specific actions. First, Congress recognized that the tribes often prefer to conduct their religious practices in private. Because of the importance of keeping religious practices private, the tribes might not make known to the federal agencies which sites were significant until the sites were in imminent danger of harm. Congress, therefore, directed the Secretary of Interior to ask the leaders of the appropriate Indian tribes to make recommendations concerning access, privacy, and preservation.<sup>134</sup>

Pursuant to this latter provision, National Park Service staff walked over the National Monument site on several occasions with leaders from each of the affected tribes: Zuni Pueblo, Acoma Pueblo, Laguna Pueblo, and Ramah Navajo.<sup>135</sup> The tribal leaders indicated to the NPS staff which areas the tribes thought were important for religious purposes.<sup>136</sup> However, because some tribes sent traditional religious leaders, while others sent political leaders,<sup>137</sup> some sacred sites may not have been identified, while other sites may have been identified as sacred but for reasons other than their religious uses.<sup>138</sup> Nevertheless, the NPS staff felt that the experience of talking with the tribal leaders at each significant site within El Malpais was very useful in developing the plan for the National Monument.<sup>139</sup>

Second, Congress authorized the Secretary to establish an advisory committee.<sup>140</sup> The purpose of the committee would be to advise the

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129. *Id.* §§ 460uu-42 to 460uu-43.

130. *Id.* § 460uu-44.

131. *Id.* § 460uu-46.

132. *Id.* § 460uu-22.

133. *Id.* § 460uu-3.

134. *Id.* § 460uu-47(b).

135. PLAN, *supra* note 65, at 16.

136. Interview with Joan Mitchell, Planning Staff, National Park Service, Santa Fe, N.M. (Dec. 28, 1990).

137. *Id.*

138. *Id.*

139. *Id.*; see also PLAN, *supra* note 65, at 15.

140. 16 U.S.C. § 460uu-47(d) (1988).

Secretary on problems of American Indian access to religious and traditional sites.<sup>141</sup> Congress determined that the committee must include representatives from Acoma Pueblo, Zuni Pueblo, and other appropriate tribes and persons or groups.<sup>142</sup>

Third, and most importantly, the legislation authorized the Secretary to:

[T]emporarily close to general public use one or more specific portions of the monument or the conservation area in order to protect the privacy of the religious activities in such areas by Indian people. Any such closure shall be made so as to affect the smallest practicable area for the minimum period necessary for such purpose.<sup>143</sup>

This third provision directly addressed Justice Sandra Day O'Connor's concern in *Lyng* that Congress, not the courts, must resolve competing demands on government from different groups in such a diverse society as that of the United States.<sup>144</sup>

Once the National Park Service knew which sites were significant to the tribes and had received express authority from Congress to accommodate American Indian uses, the NPS was able to develop a general plan for the El Malpais National Monument. In 1990, the National Park Service issued its General Management Plan/ Environmental Assessment/ Wilderness Suitability Study (the Plan).<sup>145</sup>

In the Plan, the NPS recognized El Malpais as both a natural landscape and an "ethnographic cultural landscape," i.e., "a geographic area containing both cultural and natural resources characterized by use by contemporary peoples, including subsistence hunting and gathering, religious or sacred ceremonies, and other traditional uses."<sup>146</sup> In the Plan, the NPS devoted considerable attention to protecting this landscape.<sup>147</sup> For example, the Plan includes both a natural resources management component and a cultural resources management component. The overall theme of the National Monument will be the history of human occupation and intimate relationship with a unique and changing natural environment. As part of the cultural resources management component of the Plan, the NPS will conduct a cultural landscape study and use the information to explain the landscape to visitors.<sup>148</sup>

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141. *Id.* § 460uu-47(d).

142. *Id.* § 460uu-47(d).

143. *Id.* § 460uu-47(c).

144. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988).

145. PLAN, *supra* note 65.

146. *Id.* at 55 n.10, 63-64.

147. *Id.* at 62-74.

148. *Id.* at 64. Within the ethnographic cultural landscape is a historical landscape. For example, approximately 130 archeological sites have been documented in the monument. *Id.* at

The need to explain both the cultural and natural landscapes to visitors is particularly important because the NPS was unable to identify more than a few sites that would be suitable for visitors to stop and observe El Malpais' features. Much of the El Malpais National Monument is treacherous and fragile. More than ninety-five percent of the monument has been "zoned" for primitive use.<sup>149</sup> This zone is coextensive with the lava flows, which contain many of the important Indian sites. Three percent of the monument has been zoned for semi-primitive use.<sup>150</sup> This zone consists of two relatively rough trails and several small areas adjacent to developed trails and visitor centers.<sup>151</sup> Less than two percent of the monument could be zoned for development.<sup>152</sup>

Most of the development zone lies along the edges of the lava flows, where the black lava abuts the pink sandstone bluffs. This zone includes the major elements of the circulation plan: the two highways that bound the Monument on the east and west, the proposed Masau Trail, and several visitor centers.<sup>153</sup> The Masau Trail will be an auto touring road connecting major cultural sites in New Mexico, including El Malpais.<sup>154</sup> These high-traffic

124. Archeological work has not been completed. Therefore, the sites will not be open for public visits. *Id.* at 125. The information obtained from these sites reiterates the theme of El Malpais, i.e., the close relationship of the people to the environment. This information may be used to help interpret the present cultural landscape:

[These sites] represent the continuum of use by a number of different cultures and are varied in type, period, location, and size. These sites are significant for a number of reasons. Those in El Malpais are often associated with special lava features, illustrating past human religious and subsistence activities. These sites can tell us of specialized use of environmental niches or of selected resources (such as ice) found only in certain areas and can elucidate the complex human adaptation to this rugged, arid landscape.

*Id.* at 124.

149. *Id.* at 19.

150. *Id.*

151. *Id.* at 18.

152. *Id.* at 19.

153. The NPS also decided not to allow concessions (gasoline stations, restaurants, etc.) within the Monument. The NPS determined that the facilities in Grants and other towns were not being used to capacity. *Id.* at 49.

154. 133 CONG. REC. S18,250 (daily ed. Dec. 17, 1987) (statement of Sen. Domenici). Senator Domenici stated:

The trail is named after the great god-man Masau, who welcomed the Indian people to the Earth from the underworld as they came through the sipapu, or place of emergence.

According to the history of the Pueblo Indians, mankind has existed since the beginning of time, but lived for a long time underground. Eventually, mankind emerged from the underworld and was welcomed to the surface of the Earth by Masau. Masau warned the people that they could not just wander over the Earth haphazardly until they found a place to settle. He instructed them on how to migrate across the land, gave them clues on how to recognize the place where they were to settle permanently, and taught them the way they were to live once they

areas will be peripheral to the more sensitive sites of the Monument and will provide access to the surrounding National Conservation Area. A multiagency visitor center will be built in Grants to orient visitors to El Malpais and other features in the region and to the Masau Trail.

The NPS will take several steps to ensure meaningful experiences for visitors to the monument. For example, the roads and the visitor centers will be located and designed so that visitors will be able to view the major features of El Malpais. At all the visitor centers, the NPS will provide displays and audio-visual presentations. Along the roads and trails, the NPS will provide interpretive markers.

The intent of the interpretive aids is to encourage visitors to appreciate El Malpais through the perspective of the Native Americans who still use it. Specifically, the NPS will use interpretive aids for the following objectives:

To instill in visitors a love and respect for El Malpais by viewing it from the perspective of local American Indians.

To provide the sense that this is a special place where if one invests the time one can feel the spirit of El Malpais and find one's heart and mind at rest.

To give visitors an understanding of the complex ecological relationships and the place of humans within those relationships.

To enhance visitor understanding of the forces that created this rugged landscape, encouraging firsthand experiences at selected features.

To give visitors an understanding of the transition from the Chacoan era to present times.

To provide the information necessary to ensure visitor safety and protection of the cultural and natural resources.<sup>155</sup>

Many of the elements of the Plan discussed above appear to treat El Malpais as a living museum. The NPS has planned circulation within the Monument to control visitor intrusions. The NPS has designed visitor access points to give visitors the best views of certain features, but at a distance. The

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got there.

Given a magic water jar to supply them on their migrations, the Pueblo people began their journey, following Masau's huge footprints, each as long as a man's arm. The journey eventually brought them to what is now New Mexico.

As modern travelers follow the Masau Trail, they will follow signs with giant footprints, the footprints of Masau, to Aztec Ruins, Bandelier, Chaco Canyon, El Malpais, El Morro, Pecos, and Gila Cliff Dwellings National Monuments, as well as to other sites of interest . . . providing a comprehensive perspective on the history of the Indian peoples of the region.

*Id.*; see also 133 CONG. REC. H4074 (daily ed. June 1, 1987) (statement of Rep. Richardson); 16 U.S.C. §§ 460uu-11 to 460uu-14 (1988 & Supp. III 1991).

155. PLAN, *supra* note 65, at 52-53.

NPS has also provided interpretive aids to enhance visitor understanding of Native American culture. This understanding will be more objective than subjective, keeping the visitor from becoming part of the landscape. The sixth objective is concerned with ensuring visitor safety.

The fourth objective of the interpretive aids, however, recognizes the importance of learning to appreciate El Malpais through firsthand experiences, while controlled access, with some opportunities for experiencing El Malpais first-hand, will enhance the visitor's appreciation of the site while protecting the visitor's safety and preserving the natural and cultural features.

For example, the NPS has planned a one-way tour road between two visitor centers and along the northern edge of the lava flows, a seven-mile foot-trail through four of the most recent lava flows, several other primitive trails, and several viewpoints along the highway. Some of the viewpoints will include short paths onto the lava flows or to certain features, such as ice caves. Access to some of the ice caves and craters near the visitor centers will be improved. Where improvements are made, wheelchair access will often be created.

El Malpais is not merely a living museum, however. As an ethnographic cultural landscape, it is evolving in time. Native Americans have been and will continue to be an integral element of their cultural landscape. As a result of the continuing influence of Native American culture, the elements of the El Malpais landscape may change. The culture may also change.

To accommodate cultural changes in the El Malpais landscape, the NPS will manage the Monument in the spirit of cooperation with the tribes,<sup>156</sup> and will improve its methods of communicating with the tribes to make the agency more sensitive to tribal concerns and to facilitate cooperation between the tribes and the agency.<sup>157</sup> For example, "American Indians will be consulted regarding the development of interpretive messages that are related to them."<sup>158</sup> The NPS will use Indian names for the features identified on markers, and if several tribes have different names, all will be listed. The NPS will limit visitor access to religious sites to daylight hours, if necessary, and upon request by the tribes, will temporarily close certain sites for tribal use. The NPS will train its employees in the appropriate etiquette to follow if an employee should inadvertently intrude upon American Indian ceremonies.<sup>159</sup>

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156. *Id.*

157. *Id.* at 65-66.

158. *Id.* at 53.

159. *Id.* at 64-65.

### III. Conclusion

The National Park Service's plan for El Malpais demonstrates that American Indian religious beliefs *and practices* can be accommodated on federal public lands if Congress explicitly grants authority to an agency to do so. Federal public lands, including El Malpais, are managed according to the dominant European American worldview which favors aesthetic and economic values. In previous instances, spiritual use of sacred sites on federal land has created extreme conflict. But at El Malpais, Congress preserved the sacred uses at El Malpais consistent with regional economic and aesthetic interests.

The El Malpais Plan presents a new model for cooperation between Congress and Native Americans. Sacred sites at El Malpais will be accessible by all the tribes and by European Americans and other non-Indians who have adopted an organic-spiritual belief and wish to practice their beliefs at El Malpais. The NPS is sensitive to the possibility of such intrusions on Native American sites,<sup>160</sup> and has tried to avoid conflict by maintaining most of the Monument in a "primitive zone," without easy access. The NPS will also limit visitor impact by carefully controlling circulation, carefully siting visitor centers, and providing interpretive aids.

The El Malpais National Monument, as planned, nevertheless may preserve to some degree the differences between the two cultures even as the NPS fosters understanding. Future issues may include the question of how much the Indians can change without disturbing the "picture" the NPS has painted of the cultural landscape for non-Indian visitors. American Indian religion unfolds daily, and as changes in American Indian society or the context of religion occur, religious beliefs may change also. The land may reveal new truths about the proper relationship of people and nature. Those who visit El Malpais must be able to learn these new truths.

The NPS must be sensitive to changes in both Native American and non-Indian religious beliefs and practices. It must be able to reflect changes in Native American religious use of the landscape in its interpretations of that cultural landscape to the public. At the same time, it may need to work out ways to accommodate non-Indian sacred use of the landscapes and still protect Native American sacred sites.

The El Malpais Act and the NPS Plan have not been tested in court to determine the First Amendment rights of non-Indians who want to use El Malpais for spiritual purposes, and Congress has chosen to use its discretion under the Indian trust doctrine and the Property Clause to temporarily limit public access to Native American sacred sites. When that occurs, the courts are likely to defer to Congress again.

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160. Interview with Joan Mitchell, *supra* note 136.

#### IV. Recent Changes

In 1989, Sen. John McCain (R-Ariz.) introduced Senate Bill 1124, the American Indian Religious Freedom Act Amendments of 1989. Representative Udall introduced companion legislation in the House. Representative Udall had recognized that the AIRFA, when it was passed in 1978, "had no teeth."<sup>161</sup> Senate Bill 1124 addressed the issue of access to sacred sites, but not prisoners' rights, peyote use, or use of eagles and other animals.

The AIRFA amendments stated the following burdens of proof:

Petitioners in such cases would have been required to prove that the Federal decision posed a substantial and realistic threat of undermining and frustrating a traditional native American religion or religious practice. If this burden of proof was met, the Federal agency was required to show that its decision was necessitated by law, to protect a compelling governmental interest, or to protect a vested property right. In all cases the agency was required to prove that their decision reflected the course of action which was the least intrusive on the traditional native American religion or religious practice.<sup>162</sup>

According to Senator McCain, Senate Bill 1124 was opposed by the Justice Department, which felt that the amendments would violate the Establishment Clause. Senate Bill 1124 was also opposed by other witnesses who stated that the amendments would unconstitutionally entangle federal agencies in religion.

The Religious Freedom Restoration Act (RFRA)<sup>163</sup> was introduced on March 11, 1993 and passed on November 16, 1993. RFRA overturned the Supreme Court decision in *Oregon Employment Division v. Smith*<sup>164</sup> by restoring the compelling interest standard/least restrictive means test that the Court had applied in earlier cases, including *Sherbert v. Verner*<sup>165</sup> and *Wisconsin v. Yoder*,<sup>166</sup> to state and federal government actions even where the laws were of general applicability.<sup>167</sup> In *Smith*, the Court had applied the rational relationship test to permit a state law of general affect to abridge the free practice of religious rituals, specifically the use of peyote by bona fide members of the Native American Church.<sup>168</sup>

161. See *supra* notes, 4, 22-31, and 57 and accompanying text.

162. 139 CONG. REC. S6464-65 (daily ed. May 25, 1993) (statement of Sen. McCain).

163. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (Supp. V 1993)).

164. 494 U.S. 872 (1990).

165. 374 U.S. 398 (1963).

166. 406 U.S. 205 (1972).

167. 139 CONG. REC. S6462 (daily ed. May 25, 1993) (statement of Sen. McCain); Religious Freedom Restoration Act, §§ 2-3, 107 Stat. at 1488-89.

168. *Smith*, 494 U.S. at 883-85; 139 CONG. REC. S6462 (daily ed. May 25, 1993) (statement of Sen. Hatfield); S. REP. NO. 111, 103d Cong., 1st Sess. 7-8 (1993), reprinted in 1993

However, according to Sen. Paul Wellstone (D-Minn.), referring to testimony by Professor Philip Frickey of the University of Minnesota Law School before the Senate Indian Affairs Committee:

RFRA fails to clearly address the fundamental issue of native access to sacred sites. While, as Professor Frickey points out, RFRA is designed to restore the compelling interest/least restrictive means tests, in the important *Lyng* case,<sup>[169]</sup> where a road was built across a sacred site, the court decided that the Government's action did not burden native religious practice because, and I am citing Professor Frickey's testimony here, it did not "coerce" native Americans 'into violating their religious belief' or 'penalize religious activity by denying any person an equal share of the rights, benefits, or privileges enjoyed by other persons.'" Professor Frickey goes on to say that "*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. Because the RFRA provides no independent, congressional definition of 'burden', it seems reasonable to fear that *Lyng* would be decided the same way under RFRA as it was under the first amendment." In other words, in *Lyng*, Indian religions were understood as if they were just like other religions, a set of beliefs with no particular attachment to the land. RFRA provides no way to address the specificity of native religious practices.<sup>170</sup>

Because of these perceived weaknesses in RFRA, Sen. Daniel K. Inouye (D-Haw.) introduced Senate Bill 1021, the Native American Free Exercise of Religion Act (NAFERA), in 1993.<sup>171</sup> Sen. Mark Hatfield (R-Or.) cosponsored the bill, in part, because the *Smith* lawsuit arose in his district.<sup>172</sup>

Senator Inouye noted that in the American Indian Religious Freedom Act of 1978, Congress required within one year "[f]ederal agencies would examine their policies and procedures and work with Native traditional and tribal leaders to assure minimal interference with the religious practices of native people. In August 1979, the Federal Agencies Task Force charged with this responsibility submitted its report to Congress."<sup>173</sup> The task force made "5

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U.S.C.C.A.N. 1892, 1896-98.

169. *Lyng v. Northwest Indian Cemetery Ass'n*, 485 U.S. 439 (1988).

170. 139 CONG. REC. S6464 (daily ed. May 25, 1993) (statement of Sen. Wellstone).

171. S. 1021, 103d Cong., 1st Sess. (1993); 139 CONG. REC. S6456-57 (daily ed. May 25, 1993) (statement of Sen. Inouye).

172. 139 CONG. REC. S6462 (daily ed. May 25, 1993) (statement of Sen. Hatfield).

173. 139 CONG. REC. S6456 (daily ed. May 25, 1993) (statement of Sen. Inouye).



legislative proposals and 11 recommendations for proposed uniform administrative procedures to correct and remove the identified barriers to Indian Religious freedom.<sup>174</sup> The report cited

522 specific examples of Government infringement upon the free exercise of traditional native American religious practices. The report documented the widespread practice of denying native American people access to sacred sites on Federal land for the purpose of worship, and in cases where they did gain access, they were often disturbed during their worship by Federal officials and the public. In addition, some sacred sites were needlessly put to other uses which have desecrated them.<sup>175</sup>

Senator Inouye further noted that only one recommendation had been implemented, "the Native American Graves Protection and Repatriation Act regarding the theft and interstate transport of sacred objects" and that since 1978 two Supreme Court cases, *Smith* and *Lyng*, "severely undermined the intent of [AIFRA] and have denied protection under the first amendment for the unique and important religious beliefs of native Americans."<sup>176</sup> He said that for these reasons, while AIFRA "is a sound statement of policy, it requires enforcement authority."<sup>177</sup> He noted that "[t]here are currently 44 sacred sites that are threatened by tourism, development, and resource exploitation."<sup>178</sup>

Senator Inouye stated that the committee had held six field hearings and received many recommendations from native American organizations and Indian tribes and "that the response of native peoples to this legislation has been very favorable."<sup>179</sup>

Section 103 of Senate Bill 1021 requires the Secretary of Interior to consult with the tribes in an ongoing process to identify lands that Native Americans consider as sacred sites. The Department of Interior will maintain the confidentiality of the sites.

The Secretary of the department whose land is involved may from time to time [upon request of an Indian tribe, Native Hawaiian organization or Native American traditional leader], temporarily close to general public use one or more specific portions of Federal land in order to protect the privacy of religious cultural activities in such areas by Native Americans. Any such closure

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174. *Id.*

175. *Id.*

176. *Id.*

177. 139 CONG. REC. S6457 (daily ed. May 25, 1993) (statement of Sen. Inouye).

178. *Id.*

179. *Id.*

shall be made so as to affect the smallest practicable area for the minimum period necessary for such purposes.<sup>180</sup>

This provision follows the El Malpais example.

When a federal agency proposes an action in an identified area, the agency must notify the tribes and the tribes must notify the agency that:

The undertaking will or may alter or disturb the integrity of Native American religious sites or the sanctity thereof, or interfere with the access thereto, or adversely impact upon the exercise of a Native American religion or the conduct of a Native American religious practice.<sup>181</sup>

The agency must evaluate and respond to comments on the proposed action and alternatives. This analysis is to be incorporated into documents prepared under the National Environmental Policy Act and the National Historic Preservation Act or other applicable laws.<sup>182</sup>

Senate Bill 1021 specifies the burdens each party must prove. NAFERA would require the aggrieved party to demonstrate that the action will have a substantial threat of undermining or frustrating a Native American religion or religious practice. The government would be required then to demonstrate that it had a compelling interest in taking the action and that it had chosen the least intrusive method.<sup>183</sup> Senator Wellstone stated:

Throughout the series of hearings held around the country on NAFERA, one theme repeated itself over and over again: our traditional understanding of how to protect religious freedom, based on a European understanding of religion, is insufficient to protect the rights of the first Americans. I believe that the bill we are introducing today will move this country toward a broader definition of religion and, in doing so, make it possible for all Americans to enjoy the freedom to worship in their own manner.<sup>184</sup>

Senator McCain has refused to cosponsor NAFERA. Senator McCain expressed concern that NAFERA may be opposed for the same reasons that his 1989 amendments to AIFRA were opposed. Senator Hatfield, in cosponsoring Senate Bill 1021, stated: "NAFERA is designed with native specificity in mind." In that regard, Senate Bill 1021, like the El Malpais legislation, seeks to accommodate Native American free exercise rights on sacred sites in a manner that balances those rights against the broader public

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180. S. 1021, § 102 (c)(3).

181. *Id.* § 104(a)(1).

182. *Id.* § 104(a)(5).

183. *Id.* § 105.

184. 139 CONG. REC. S6463 (daily ed. May 25, 1993) (statement of Sen. Wellstone).

uses for which the lands may be managed under the Property Clause and without impermissibly entangling the federal government in religion or allowing the government to establish religion as Justice O'Connor feared in *Lyng*.