

The Evolution of Federal Agency Authority to Manage Native American Cultural Sites

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IN THE LAST TWENTY-FIVE YEARS, LAW AND POLICY HAVE EVOLVED to provide authority for federal resource managers to identify and manage sites of cultural significance to Native Americans. Native American cultural sites on federal lands may be managed as traditional cultural properties (TCPs) and/or as sacred sites. While the two modalities of site protection and management are often thought of as interchangeable, they are different as matters of law, process, and effect. Not all TCPs are Indian sacred sites, although most sacred sites can also be TCPs. TCPs emanate from the National Historic Preservation Act (NHPA), and the standards for the identification process, that put it into effect, while sacred sites is a creation of policy directives in an executive order. TCPs are identified as properties eligible for inclusion on the National Register of Historic Places, so that harmful impacts to these properties in use and development are “mitigated,” that is, avoided or reduced. The sacred sites policy directs federal land managers to grant access and use to tribes for traditional ceremonial practices. There are further considerations, depending on which federal circuit court controls the land. This article will distinguish Indian sacred sites from traditional cultural properties. It will provide a legal history of Native American cultural site protection in three phases: from the low point of the Supreme Court decision in *Lyng* (also known as the “G–O Road” case), through the transitory period in which laws were added and others amended, to the present era of judicial directives. This article is an analysis of court decisions as guidance for informed decision-making with regard to TCPs. As such, it does not advocate for a certain result. Rather it seeks to distill judicial rules of law to find guidance for land managers in Native American cultural site management, where possible.

Placing traditional cultural properties and Indian sacred sites in legal context

Traditional cultural properties Among other changes in 1980, the NHPA was amended to direct the secretary of the interior to study an extension of the scope of National Register-eligible properties to include places of ethnic heritage and community history. The result was a report recommending that traditional cultural places be systematically addressed.¹ Section 106, which requires federal agency officials to “take into account the effect” of a project using federal funds, permits, or assistance, thus evolved from consideration of buildings, sites, districts, and structures to include landscapes that are traditional cultural places. The intent was

to preserve and conserve the intangible elements of our cultural heritage such as arts, skills, folklife, and folkways, and encourage the continuation of the diverse traditional prehistoric, historic, ethnic, and folk cultural traditions that underlie and are a living expression of our American heritage.²

As noted in National Register Bulletin 38, *Guidelines for Evaluating and Documenting Traditional Cultural Properties*,³ this opened the way to designation of diverse areas for National Register listing, such as Chinatowns and fishing industry areas, based upon the story of historic community life as represented and preserved in the landscape and physical embodiments of historic use. It should be noted that amendment of the NHPA was not the first time cultural landscapes were identified as significant places worthy of protection. In 1896, the United States Supreme Court recognized the battlefield at Gettysburg as a cultural landscape subject to preservation.⁴

Historic landscapes have been consistently viewed in the context of community life, past and ongoing, rather than the embodiment of individual practices or those of immediate family. The designation of a landscape as a TCP does not confer a personal private property interest in the people whose ancestors were part of the actions in an area that contribute to historic significance. For example, bathers who enjoyed a long-time practice of nude swimming in an area later designated as a natural seashore, did not have the ability to compromise the congressionally assigned mission of the park to protect their personal interests.⁵ In similar fashion, during the 1930s individuals were granted special use permits entitling them to build cabins on public lands of the U.S. Department of Agriculture–Forest Service. Upon expiration of the permits the permit holders were responsible for removal of their improvements. The cabin owners sought to invoke National Register nomination of the cabins as a means to stop the removal of the structures. The court found that although the cabins were historic, the special use permits did not convey to the occupants a property right or an entitlement to continued use and enjoyment. The Forest Service could maintain or remove the cabins, and if they were maintained, the cabins could be made available for public use under public management.⁶

It took another amendment of the NHPA in 1992 to extend preservation identification to “properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization,” that is, to have such places determined to be eligible for inclusion on the National Register.⁷ TCPs of significance to tribes could have been part of the regular Section 106 process, applied to non-Native American sites. However, the application of the process to tribal sites seemed to need the statutory boost in the group of NHPA amendments, which gave tribes additional status, including the ability to have tribal historic preservation officers, who could assume the authority of state historic preservation officers (SHPOs) on tribal land.⁸ Just how to work with tribes, to determine the places representing practices of significance, was not specified in the law. Bringing places of customary and traditional use by tribes into the rubric of public lands management, including those which may not be on tribal land, was left to the development of consultation practices and guidance from the courts.

When considering the identification of TCPs, the entirety of the NHPA process is still relevant. It is not the tribal ceremonial practice, or any religious practice, itself that is protect-

ed, and knowledge of the contents of a ceremony is not part of land management assessment for National Register eligibility. Rather, it is the properties, which have a connection to the practices, which are identified and reviewed for eligibility. Of key importance to a discussion of decision-making in the legal environment involving land use for ceremonial purposes is that it is the habitat of historic ceremonial practice determination, which both protects TCPs from constitutional infirmity and highlights the connection of ceremonial practice to specific sites. While the First Amendment of the Constitution protects religious freedom and bars government from advocating religion, protecting a site of traditional use on a historic preservation basis is not the advocacy of religion. Identification of a specific site for its use requires evaluation of the connection between the site and the ceremony. Testing the bounds of TCPs has been a basis of court action, based on the First Amendment, and misinterpretation of NHPA by the courts has repeatedly been seen in the failure of courts to recognize site specificity. This will be discussed further in the next section, using court action as case studies.

Consideration of eligibility for National Register listing requires a look at historic significance, integrity, and context. Significance is still found in: (A) association with events and activities; (B) association with important persons; (C) distinctive design or form; and (D) the potential to yield information, such as is the case with archaeological sites. Evaluation of an Indian TCP begs the question of when a “D” is also an “A,” “B,” or “C.” A site that has been used by tribes for a millennium may hold archaeological data of significance, but excavating the site may cause loss of its integrity, given its current and ongoing use, which also may be significant. Evaluation of a site as a TCP should occur prior to disruption of site context.

In the vocabulary of historic preservation, identification and mitigation of harm to sites is referred to as “protection.” To some extent, a site can be protected by taking into account the impacts on historic properties prior to infrastructure development or other site-impacting activities, referred to in NHPA as “undertakings.” However, once a site is identified, the impacts on it may be avoided, or it may be recorded and excavated. Protection of historic knowledge is not always physical protection of a certain site. Recording academic knowledge is also a form of preservation. This reality of the NHPA compliance mechanism stands in sharp contrast to the management of Indian sacred sites.

Sacred sites The term “sacred sites” was developed by Executive Order no. 13007⁹ in order to mandate that

... the management of Federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (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.

To properly manage a land mass, it is necessary to know the bounds of sacred sites, accommodate access, and avoid adverse impacts, but these sites need not also meet a level of significance to be evaluated as eligible for listing in the National Register of Historic Places. The Indian sacred sites analysis is one of current and ongoing use, not merely historic practice, as in the identification of a TCP. To avoid adverse impacts on an Indian sacred site, the specific site must retain the characteristics which render it a place of ceremonial use.

A sacred site is defined in the executive order as:

Any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion.

In this manner an Indian sacred site is also a TCP when it is “a place where Native American religious practitioners have historically gone, and are known or thought to go today, to perform ceremonial activities in accordance with traditional cultural rules of practice.”¹⁰

Definitions of TCPs and Indian sacred sites can overlap to the extent that all Indian sacred sites may also be considered as TCPs, but only some TCPs are Indian sacred sites. It is helpful to keep separate the analysis required for each; the protection modality available, or required; and the practical results of each designation in a management area. Accounting for Indian sacred sites is not dependent upon planning for an “undertaking,” as in the case of a TCP. It is an affirmative obligation of the land manager. Access and accommodation for tribes under the executive order is not merely a TCP mitigation treatment, which may include study and removal. Identifying sites for protection by avoiding impacts under the NHPA is different from an affirmative duty to accommodate ongoing cultural use at an Indian sacred site. The varied ways in which the federal courts have viewed and confused federal land management of TCPs and Indian sacred sites adds a complex tangle of considerations to the statutory and executive mandates.

Early days of judicial decisions on Native American cultural sites

The 1960s Civil Rights era in the United States concluded with a late-to-the-table consideration of the rights of Native Americans. The American Indian Religious Freedom Act of 1978 (AIRFA)¹¹ set forth the policy of the United States to “protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.” As the court cases that followed made clear, this act only established an unenforceable policy.

Even as Congress was working toward amendments to the NHPA in 1980 in order to provide a mechanism to acknowledge traditional places of cultural use by diverse ethnic groups, the courts were not impressed with traditional cultural use by tribes of places on federal land. The opinion of the Tenth Circuit Court of Appeals in *Badoni v. Higginson*¹² makes this clear. The case was brought by members and chapter houses of the Navajo nation against the commissioner of the Bureau of Reclamation, the National Park Service (NPS), and the Department of the Interior, who were responsible for, respectively, creating a reservoir, on park land, when there were interests of tribes to be considered. For purposes of this discussion, the court case will be identified as “Rainbow Bridge I.”

As the court opinion acknowledges, before Lake Powell was created Rainbow Bridge

National Monument was inaccessible to most tourists. After the lake was created, NPS and Bureau of Reclamation boats provided easy public access. For hundreds of years prior to federal management, Navajo practiced traditional cultural ceremonies in an area beneath the bridge that was submerged under 20 feet of water at the time the court case began, with an estimated depth of 46 feet upon the maximum capacity of the reservoir being reached. The plaintiffs' claimed that impounding water to form Lake Powell violated their First Amendment guarantees to free exercise of religion, and the presence of tourists desecrated the sacred nature of the area, all of which denied them the ability to conduct religious ceremonies. The claim was one for access and quiet use, not land ownership.

The court first looked at the request that the government refrain from destructive use of the site and employ "some measured accommodation to their religious interest, not a wholesale bar to use of Rainbow Bridge by others." The court reasoned that the First Amendment requires that the government not compel or prohibit religious practice, and that "noise, litter and defacement of the Bridge," does not prohibit practice in the area of the bridge, which tribal people can enter "on the same basis as other people." It was noted that tribes could apply for a special assembly permit, but had not done so. The court then determined that the plaintiffs did not have "a constitutional right to have tourists visiting the Bridge act 'in a respectful and appreciative manner.'"

The next notable court decision was that of *Wilson v. Block*, which this discussion will refer to as "Snow Bowl I."¹³ Factually the case considered the expansion and development of the Snow Bowl ski area on Forest Service land, which encompasses the San Francisco Peaks, home to Navajo deities and the place where Hopis believe the creator communicates with those on Earth. Once again, the legal issue was the free exercise of religion. There was no question that the Navajo and Hopi practiced ceremony "rooted in religion." The issue was whether government action placed a burden on religious practice and whether there was a compelling government interest that could not be achieved in a less restrictive manner.

The Supreme Court established a test for First Amendment guarantees, such that the "government burdens free exercise when it forces an individual to choose between a government benefit and fidelity to religious belief."¹⁴ This test, developed for requirements in a workplace that violated religious practice, did not seem to have relevance for such a basic right as protection of a place of worship. The Supreme Court only recognized burden when practicing religion was punished, or required giving up a benefit, or was completely withheld, and not merely limited by lack of access to a place needed for ceremony. Having found no burden on religion, the court relieved itself of going the next step to analyze a compelling government interest in a ski resort, or the least restrictive means to achieve that interest. The court in Snow Bowl I dismissed AIRFA as not applicable to the situation, as the "language does not indicate the extent to which Congress intended that policy to override other land use considerations," such as recreation.

The Wilson trial court had found three violations of NHPA: failure to survey the area for National Register-eligible properties,¹⁵ failure to consult with the SHPO on the effect of the plan on the private land of the Wilsons,¹⁶ and failure to consult with the SHPO on the eligibility of the San Francisco Peaks for nomination to the National Register.¹⁷ All of these issues were resolved prior to the appeal, when the Forest Service conducted an archaeolog-

ical survey and found no National Register-eligible properties, a finding with which the SHPO concurred. The tribes argued to the appeals court that failure to survey all of the land affected by the ski area, not just the area which might affect the private land owner, was insufficient, but the court disagreed. The tribes were simply not treated as an interested party, not being a private land owner, or as entities having a protected right. The nature of the mountain as a TCP was not considered, to the extent use included Indians. The court did not understand the NHPA concept of “area of potential effect.”

This period of legal development ends, at its lowest point, with the much-discussed Supreme Court case of *Lyng v. Northwest Indian Cemetery Protective Association*,¹⁸ also known as the “G–O Road” case.¹⁹ In brief, the Forest Service sought to extend a paved road through the Chimney Rock area of Six Rivers National Forest in order to harvest timber in a pristine area used historically by American Indians for religious ritual. Once again, the litigation issue was First Amendment guarantees to religious practice. The Supreme Court held that incidental impact to religious practice did not rise to the level of a limitation on religious freedom when it did not coerce individuals to act contrary to their beliefs. Therefore, examination of a compelling government interest was not required. Once again the court examination rested narrowly upon restrictive requirements on religious practice to obtain a government benefit, such as a job, rather than use of government property to abridge a long standing cultural practice. The NHPA and TCP identification were not considered.

In *Lyng* two underlying assumptions persist: (1) that needs of the majority for natural resources overcome interests of Native Americans, and (2) that religious practices are not place-specific. The Supreme Court opinion discusses the significance of the area and acknowledges that “too much disturbance of the area’s natural state would clearly render any meaningful continuation of traditional practices impossible.” However, even if the court assumes that religious practice at the site will be impossible, “government simply could not operate if it were required to satisfy every citizen’s religious needs and desires.” The court assumes the Native Americans can go to another church site, one not needed for its natural resources. The court does note with favor the actions of the Forest Service to choose a route for the road, which would lessen audible interference with the site.

Transition and legislative response period

The history of civil rights in the United States came to a high point in the 1960s, when Congress was frozen in its ability to overcome racial prejudice with legislation and the courts stepped into the void with what has become known as judicial activism, or judicial legislation. There was a series of court decisions applying the Constitution to create affirmative action as a matter of law. Since then, when it comes to the cultural property rights of Native Americans just the opposite has been true. When the courts have refused to apply basic constitutional guarantees to tribes, Congress responded with a succession of legislation. The decade of the 1990s was one of Native American rights furthered by congressional action.

The first legislation of the decade was the Native American Graves Protection and Repatriation Act of 1990.²⁰ NAGPRA is human rights legislation, as it merely takes the constitutional Fifth Amendment guarantees of property rights and applies them to the cultural prop-

erty of Native Americans and tribes.²¹ NAGPRA is Indian law.²² The law does not restrict development action on federal land, but it does require that human remains and cultural items exhumed on the land be assessed in the first instance to determine Native American owners, rather than assume everything on federal land is federal property.²³ Federal collections of Native American human remains, in federal and non-federal repositories, are to be itemized on an inventory, identified for cultural affiliation, and published in notices to establish repatriation rights in tribes. Collections of Native American cultural items are to be summarized in order to give notice to tribes of what the collection contains, so that tribes may determine whether they have an interest in specific items and desire to make a claim.

The 1992 amendment to the NHPA, which explicitly addresses identification and protection of traditional cultural properties of significance to tribes, and the Indian sacred sites executive order in 1996, which mandates that the government “shall” accommodate use and provide access to Native American sites, are discussed above. Placed in the context of 1990s congressional and administrative action, they provide a clear message that federal land managers are to consult with tribes and evaluate land management decisions in a manner that is fully cognizant of land use by tribes.

The Religious Freedom Restoration Act of 1993 (RFRA),²⁴ is considered the congressional response to *Lying*. In RFRA, if there is a substantial burden on religion, then it must be overcome by an identified compelling government interest, and, if so, then by the least restrictive means on the religious practice. The difference between an analysis based upon the First Amendment free exercise clause, such as occurred in *Snow Bowl I* and *Rainbow I*, from one based on RFRA, is one of degree. When applying the First Amendment, the courts consistently found against tribes by defining “substantial burden” as a complete inability to practice religion in any location. The RFRA burden analysis is one of undue impact, not absolute inability. Burden may be found in a case-by-case factual assessment of substantial impact, such as the loss of a site of central importance to a tribe, or inability to conduct a ceremony because of noise or conflicting use during the ceremonial period, and not in merely any impact. There is still considerable discretion in federal agency action to manage resources, but it must account for cultural conservation.

The recent decade, 1998–2008

The decade began with *Bear Lodge Multiple Use Association v. Babbitt*.²⁵ The facts of the case surround NPS management of rock climbing at Devils Tower National Monument. Rather than a case brought by Native Americans seeking *free exercise of religion* under the First Amendment, the flip side of the First Amendment’s *establishment clause* was the basis of a claim by rock climbers. They argued based on their dissatisfaction with a land manager’s decision to request a voluntary climbing ban during times of Native American religious use of the site.

In the *Bear Lodge* case, as in the preceding cases, the sincerity of Lakota people, and their religious use of the site for 1,000 years, was not in question. The issue was whether a voluntary commercial climbing ban in the month of June, out of respect for tribal use of the area for religious practice, amounts to government imposition of Native American religion on

others. The court decided this case on a narrow procedural basis. That is, that the climbers bringing the case could not establish harm and therefore they did not have standing to bring a claim. They could not show injury in fact, as the ban was voluntary and individual climbers who chose to climb were able to do so.

The *Bear Lodge* case stands for the principle that a voluntary ban on an activity, to accommodate respect for Native American religious practice, is not unconstitutional. This is a small legal step, but it tied cultural practice to a specific site of required use.

The next court case to address Native American cultural sites management takes this discussion back to Rainbow Bridge, in the case of *Natural Arch and Bridge Society v. Alston* (“Rainbow II”).²⁶ The facts of the case exemplify twenty-four years in the evolution of treatment of Native American cultural sites by federal land managers, as well as the lengths some members of the public will go to in order to resist such decisions. This chapter in the Rainbow Bridge story begins with NPS protection in a way fully responsive to the nature of the site. The area, as a site of historic ceremonial practice by several tribes, is protected by a fence and signage from visitor access to climbing or inscribing graffiti on the sandstone structure, to protect the TCP. Interpretation of the bridge in signage reflects consultation with tribes, in an effort to educate the public. Quiet use of the Indian sacred site is afforded to tribes during ceremonial periods. In an effort to test management policies, two visitors urged their children to breach the fence, and draw attention of park rangers. They then filed a court action claiming violation of the establishment clause of the First Amendment due to forced acquiescence to Native American religion.

The Tenth Circuit Court of Appeals decided the case by looking at harm to the children, much as the court did in the *Bear Lodge* case. The court found that educating the public on Native American historic use of the site and protecting the arch from degradation from traffic and harm from graffiti, as well as allowing for quiet use by tribes during certain limited periods, did not force religious practice on non-Native Americans. The court went a small step beyond *Bear Lodge* to hold that the mandatory protective measures were constitutional. In so doing, the Tenth Circuit moved from the 1980 holding in *Badoni v. Higginson* that “affirmative action by the government to accommodate religious practice violates the Establishment Clause” to holding (in 2004) that “the government may accommodate religious practice without violating the Establishment Clause.”

An additional case provides guidance on identification of TCPs and management of Native American cultural properties. In *Pit River Tribe v. U.S. Forest Service*,²⁷ the appeals court reversed the trial court and found the federal agency violated the NHPA, among other laws, for failure to identify TCPs on leaseholds prior to extending a lease. The case involves a complicated set of facts, but for the purposes of this discussion it can be simplified to recognize that an earlier management plan, which supported the first lease and did not include consultation with tribes in an effort to identify possibly affected Native American cultural sites, could not support a lease renewal. The federal agency was required to step back and correct the situation by consulting with tribes and doing a survey of the area of potential impact, in full compliance with Section 106, as should have occurred in the first instance.

The decade comes to a logical and helpful conclusion in the consideration of *Navajo Nation v. U.S. Forest Service* (“Snow Bowl II”).²⁸ Once again there was no dispute that the

San Francisco Peaks are an area of religious significance to tribes. The issue involved the continued viability of the ski area through the use of treated effluent to make artificial snow. The trial court picked through the facts to find that there was not a burden on religion and therefore no need to continue through the compelling need analysis.²⁹ On appeal, the Ninth Circuit Court wrote an opinion that may be considered a clear RFRA analysis. The court acknowledged that RFRA added to a First Amendment consideration, with the RFRA requiring a finding of burden in this instance, given the undisputed facts. The court focused upon the unhealthy nature of recreation in treated effluent. The court went on to perform a compelling-need analysis and determined that there is no compelling government need to guarantee concessionaire viability, especially in maintaining a ski resort in a semi-desert. There were also comments on the significance of the area, drawing an analogy to washing a church in effluent, but the court did not find the NHPA considerations controlling, or that there was a failure to complete the Section 106 process.

There is a difference in the TCP analysis between the Ninth and Tenth judicial districts, which require land managers to be cognizant of the jurisdiction of their land mass. In the Tenth Circuit, federal land management decisions to preserve Indian TCPs do not need to also have a secular (non-Indian) basis for historic significance to gain court approval. An example of this is *Rainbow II*. In the Ninth Circuit, as seen in the *Cave Rock* case,³⁰ a finding of Native American cultural significance by a federal land manager is still an insufficient basis for preservation. In the Ninth Circuit there must also be a secular basis for preservation of a site, consistent with the religious analysis, upon which to sustain federal agency decision-making that a site is significant and will not be further developed. *Cave Rock* (Figure 1) is sacred to the Washoe people of Lake Tahoe, and the Forest Service decided to ban rock climbing, which was causing structural damage and loss of site integrity. The Access Fund sued, using the establishment clause of the First Amendment as a basis to argue preferential treatment on the basis of religion. The court examined the facts surrounding historic use of the area, including the presence of a road around the lake, and found a “secular purpose—the preservation of a historic cultural area”—to sustain the ban on climbing, with a notation of the incidental effects of preserving Washoe culture.

Epilogue: Spinning, not evolving

The discussion could easily conclude at this point, were it not for the rehearing of the Snow Bowl case, resulting in “Snow Bowl III.”³¹ Rehearing is not often granted, and in the Ninth Circuit this requires a panel chosen from its large membership to consider the matter anew. In this instance, the Court of Appeals vacated its earlier analysis of the law and upheld the trial court in its factual analysis that there was no burden on religion under RFRA. Snow Bowl III also upheld Snow Bowl II on the judgment against the tribes on the NHPA claims, consistent with the *Cave Rock* result. Now the legal progression of the recent decade, exemplified in the Tenth Circuit, is at odds with the fact-dependent determination of the Ninth Circuit. The Tenth Circuit rule of law is that accommodation of traditional cultural use is not a violation of the establishment clause, and burden is defined as substantial impact on a site, while in the Ninth Circuit the bar is set considerably higher: to a more pervasive inability to



Figure 1 Cave Rock, Lake Tahoe. Photo courtesy of the author.

practice religion beyond a site-specific ceremony. The Tenth Circuit will accept Native American TCP designation based on cultural use, which would be upheld in the Ninth Circuit only when there is a non-Indian basis for site significance. This split between judicial circuits will be resolved upon appeal to the Supreme Court. Additional cases, applying the Ninth or Tenth Circuit analysis through the rest of the federal circuits, would heighten the need for Supreme Court resolution.

It is the goal of this discussion to cull guidance for federal land management decision-making from court cases pertinent to Indian sacred sites and TCPs. However, it is difficult to grasp a test for protection and management of these sites from among the various laws, when an appeals court begins its discussion, as it did in *Snow Bowl III*, with weighing the facts like a trial court, rather than with a statement of the narrow legal issue before it to which it can apply the given facts. Courts are to give deference to land management decisions based upon full consideration of the available facts and consultation with tribes and interested parties.³² When a court of appeals weighs facts, particularly those not in dispute, such as the significance of a site to Native Americans, they fail to give deference to land managers.

Conclusion

In the absence of unified guidance from the courts, land managers can either follow the legal tests of the Tenth Circuit in applying RFRA, the Indian sacred sites executive order and

NHPA, or the fact-driven approach of the Ninth, which holds to a pre-RFRA analysis and requires a secular, non-Indian cultural basis for identifying site significance in a TCP. The Ninth Circuit relies on a strict First Amendment construction regardless of congressional attempts to set forth additional processes.

Given all of the attention to Native American cultural sites in the courts, this is no longer an issue of first impression. The area of legal inquiry is certain to grow. Hopefully, the availability of clear guidance from the courts will increase. Federal land managers can aid in obtaining better guidance from the courts by making clear distinctions in decisions between Indian sacred sites, RFRA, and TCP determinations. Understanding, expressly stating, and acting upon Indian sacred sites as a matter of ongoing access, use, and preservation of sites for tribes—as distinguished from TCPs, which may encompass Indian sacred sites, but which are a means to identify sites of cultural historic significance and evaluate government actions based on impacts on those sites—will aid education of the courts. When the courts evidence an understanding of the NHPA process and that the Indian sacred sites executive order acknowledges a tie between access and use of a specific site integral to a cultural practice, then consistency in court opinions and a logical progression in analysis may follow. Until then, the best guidance that can be offered in managing lands containing cultural sites is to consult with all interested parties, be respectful of a need for traditional ceremony in a traditional place, and document decision analysis.

Endnotes

1. NHPA, Section 106, 16 U.S.C. 470f.
2. 16 U.S.C. 470a.
3. NPS 1990; rev. 1992, 1998.
4. *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668 (1896).
5. *Williams v. Kleppe*, 539 F.2d 803 (1st Cir. 1976).
6. *Paulina Lake Historic Cabin Owner's Association v. USDA Forest Service*, 577 F. Supp. 1188 (D. Ore. 1983).
7. 470a(d)(6)(A).
8. 470a(d)(C)(2).
9. May 24, 1996.
10. Bulletin 38.
11. 42 U.S.C. 1996.
12. 638 F.2d 172 (1980).
13. 708 F. 2d 735 (D.C. Cir., 1983).
14. *Sherbert v. Verner*, 450 U.S. 398 (1963).
15. 16 U.S. C. 470f.
16. 36 C.F.R. § 800.4(b).
17. § 800.4(a)(1).
18. 485 U.S. 439 (1988).
19. King 1998, 161–162.
20. NAGPRA, 25 U.S.C. 3001 et seq.

21. Hutt and McKeown 1999.
22. Title 25 U.S.C., Indians.
23. 25 U.S.C. 3003.
24. 42 U.S.C. § 2000bb et seq.
25. 175 F.3d 814 (10th Cir., 1998).
26. 98 Fed. Appx. 711 (10th Cir., 2004).
27. 469 F.3d 768 (9th Cir., 2006).
28. 479F.3d 1024 (9th Cir., 2007).
29. 408 F. Supp.2d 866 (D. Ariz, 2006).
30. *The Access Fund v. USDAFS*, 499 F.3d1036 (9th Cir., 2007).
31. 535 F.3d 1058 (9th Cir., 2008).
32. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

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