

The Sacred and the Profaned: Protection of Native American Sacred Places That Have Been Desecrated

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From Standing Rock to San Francisco Peaks, Native American efforts to protect threatened sacred places in court have been troubled by what this Article identifies as the profanation principle: a presumption that places already profaned or degraded by development or pollution can no longer be sufficiently sacred to Native peoples to merit protection. When the Supreme Court of Hawai'i rejected Native Hawaiian challenges to a massive new telescope on Mauna Kea because its summit was already developed, the sole dissenting justice termed it the "the degradation principle": a view that because eleven telescopes had already despoiled the summit, the new telescope would cause no substantial adverse impacts on natural and cultural resources. This Article draws on religious studies training to show that, from the Ganges River to Jerusalem's Western Wall, what makes the holy places of the world's religions sacred seldom hinges on their natural purity. A presumption that Native American sacred places must be pristine to be authentically sacred is discriminatory, rooted in romanticized stereotypes of Native religions as nature piety rather than complex systems of obligation and relationship to sacred places. If the profanation principle seldom manifests as an explicit legal reason for an outcome, the Article demonstrates how consistently it plays out in cases under religious liberty, historic preservation, and environmental law. The Article suggests moving beyond the profanation principle, likening desecrated sacred places to sick relatives in need of healing and intensifying Native obligations to defend the sacred.

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The magnitude of a legal wrong is no reason to perpetuate it.¹

McGirt v. Oklahoma, 591 U.S. __ (2020)

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1. *McGirt v. Oklahoma*, No. 18-9526, slip op. at 38 (U.S. July 9, 2020).

INTRODUCTION: THE PROFANATION PRINCIPLE

This Article explores a major obstacle to the legal protection of Native American sacred places that has largely eluded the legal studies literature: a presumption that places already profaned or degraded by development or pollution can no longer be sufficiently *sacred* for Native Americans to merit protection.² From a comparative religion or religious studies perspective, this presumption makes little sense. This Article will show that, in most world religions, the sacredness of holy places is no function of their being naturally pristine or historically untouched. The Article argues that judges apply a double standard to Native American claims to sacred places. The double standard comes from a longstanding misrecognition of diverse and complex Native American religions in terms of a romanticized and simplified *Nature Spirituality* that says more about Euro-American longing than it does about place-specific Native traditions themselves. What is more, since courts uniquely apply this double standard in Native American cases, it is plainly discriminatory.³ Other religious groups that regard churches, temples, or other built worship structures as their most sacred places enjoy far broader protections from various regulations, even when their condition is anything but pristine.

The presumption that an already desecrated, polluted, or urbanized place can no longer be sacred to Native American peoples generally operates either below the surface or at the periphery of legal reasoning. But in the rare instances where the presumption is framed as an argument, the irony and circular logic are laid bare: sacred places are already so degraded by settler-colonial processes that they merit no notice for protection against further desecration.

Recent litigation over a proposed massive telescope at the summit of Mauna Kea is an exemplar of this dynamic. Mauna Kea is a sacred mountain and living divine presence for Native Hawaiians.⁴ Despite years of legal challenges and on-the-ground mobilizations, in 2018 the Hawai'i Supreme Court affirmed a permit for the massive Thirty Meter Telescope (TMT) by virtue of what its sole

2. For important earlier statements of this dynamic, see Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061, 1113 (2005); Laurie Ann Whitt, Mere Roberts, Waerete Norman & Vicki Grieves, *Belonging to Land: Indigenous Knowledge Systems and the Natural World*, 26 OKLA. CITY U. L. REV. 701, 722 (2001). For a helpful recent statement of the field, see generally Kristen A. Carpenter, *Living the Sacred: Indigenous Peoples and Religious Freedom*, 134 HARV. L. REV. 2103 (2021) (discussing Supreme Court jurisprudence on Native American religious freedom under the First Amendment and the Religious Freedom Restoration Act).

3. I am grateful to Kristen Carpenter for this important insight.

4. See, e.g., Leon No'eau Peralto, *Portrait. Mauna a Wākea: Hānau ka Mauna, the Piko of Our Ea*, in A NATION RISING: HAWAIIAN MOVEMENTS FOR LIFE, LAND, AND SOVEREIGNTY 232, 232–44 (Noelani Goodyear-Ka'ōpua, Ikaika Hussey & Erin Kahunawaika'ala Wright eds., 2014); Marie Alohalani Brown, *Mauna Kea: Ho'omana Hawai'i and Protecting the Sacred*, 10 J. SOC'Y FOR STUDY RELIGION, NATURE & CULTURE 150 (2016); Iokepa Casumbal-Salazar, *A Fictive Kinship: Making "Modernity," "Ancient Hawaiians," and the Telescopes on Mauna Kea*, 4 NATIVE AM. & INDIGENOUS STUD. 1 (2017).

dissenting justice called the “*degradation principle*.”⁵ Mauna Kea’s summit was already so degraded by the presence of seven other telescopes (also challenged by Native Hawaiian traditional practitioners) that further development of the TMT would make no appreciable further adverse impact. The desecration was already complete. Justice Michael Wilson’s dissent begins thus:

The degradation principle. The Board of Land and Natural Resources (BLNR) grounds its analysis on the proposition that cultural and natural resources protected by the Constitution of the State of Hawai’i and its enabling laws lose legal protection where degradation of the resource is of sufficient severity as to constitute a substantial adverse impact. . . . Under this analysis, the cumulative negative impacts from development of prior telescopes caused a substantial adverse impact Thus, addition of another telescope—TMT—could not be the cause of a substantial adverse impact on the existing resources because the tipping point of a substantial adverse impact had previously been reached.⁶

I will explore the decision in some detail below, but the blunt dissent highlights how the logic of the degradation principle in environmental law can seem so natural. This Article extends what Justice Wilson says about environmental law to explore how religious claims to sacred places by Native peoples are contained and weakened by virtue of various forms of physical and sensorial degradation of these places under settler colonialism, facets of dispossession. In these cases, the degradation principle is no mere technical matter of environmental law, assigning when and where key adverse impacts happened. It roots itself more deeply in what I will call the *profanation principle*: an assumption steeped in a long tradition of Euro-American thinking about Native peoples that authentic claims to sacred places apply only to pristine, “natural” places, and that where that physical integrity no longer exists, claims to sacred places can no longer be considered authentic. If they register at all, those claims register only as concerns of interior spiritual fulfillment, not justiciable claims to the exercise of religion.

Litigation over the TMT sounded in environmental law, but Native Hawaiian opposition to the massive TMT project, like opposition to previous telescopes on Mauna Kea, had been set in the key of the *sacred*, environmental degradation equated to desecration. The two are often twinned.⁷ Yet, regardless of environmental concerns, Mauna Kea is sacred. Threats to its integrity are not only questions of environmental degradation but also questions of desecration. The mountain’s integrity is of urgent importance to the well-being of Native Hawaiian people and, in the view of many traditional practitioners, the well-being of the cosmos itself. Much is at stake.

5. *In re* Contested Case Hearing re Conservation Dist. Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Sci. Rsv. (*Mauna Kea II*), 431 P.3d 752, 794 (Haw. 2018) (Wilson, J., dissenting).

6. *Id.* at 794–95 (Wilson, J., dissenting).

7. See *infra* Part II.F and Part II.A (discussing Standing Rock and San Francisco Peaks, respectively).

The profanation principle is invidious in religious freedom caselaw. Courts have consistently been unconvinced that grave threats to Native American sacred places constitute a substantial burden on religious free exercise. The substantial burden threshold is required for protection under either the First Amendment's Free Exercise Clause⁸ or the Religious Freedom Restoration Act (RFRA) (1993).⁹ Citing *Lyng v. Northwest Indian Cemetery Protective Association*, which held that there was no First Amendment protection for the Native sacred lands at issue, the Ninth Circuit's 2008 decision in *Navajo Nation v. U.S. Forest Service* applied the same standard to desecration claims of sacred places under RFRA.¹⁰ The *Navajo Nation* court ruled that the spraying of treated wastewater to make artificial snow for recreational skiing on the San Francisco Peaks, a holy mountain for the Navajo Nation, Hopi Tribe, and four other litigating Tribes, did not "substantial[ly] burden" Native religious exercise, but merely diminished Native "spiritual fulfillment"¹¹ on the sacred mountain. After all, the court reasoned, the ski area in question had been operating on the Peaks in some capacity since the late 1930s, and Navajo and Hopi religious exercise had continued despite failed efforts to block the ski area's expansion in the early 1980s as a violation of Navajo and Hopi religious freedom under the First Amendment.¹² The Ninth Circuit's decision did not overtly turn on this reasoning—it didn't have to. But the reference to the ski area's ongoing existence and the previous religious freedom litigation¹³ was not mere dicta. It animated the decision. As demonstrated later, similar facts animate courts to flatten and deflate religious freedom claims that Native peoples make to protect specific places.¹⁴ The effect is to regard asserted beliefs as pretextual without overtly questioning their sincerity.

The argument from profanation seldom, if ever, deems the religious claims of Native peoples as pretextual or insincere. To do so openly would likely prompt reversal by appellate courts.¹⁵ No court has openly declared religious beliefs of

8. See *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 456 (1988) (finding that logging road through Native sacred place does not violate First Amendment).

9. See 42 U.S.C. § 2000bb; *Navajo Nation v. U.S. Forest Serv. (Navajo Nation)*, 535 F.3d 1058, 1066–67 (9th Cir. 2008) (en banc) (holding that artificial snow made with wastewater on holy mountain does not violate RFRA).

10. See *Lyng*, 485 U.S. at 442, 447–49; *Navajo Nation*, 535 F.3d at 1071.

11. *Navajo Nation*, 535 F.3d at 1070.

12. See *Wilson v. Block*, 708 F.2d 735, 744–45 (D.C. Cir. 1983).

13. See *Navajo Nation*, 535 F.3d at 1064–65.

14. There are many names associated with Native people (e.g., American Indian, Indigenous). Where applicable, I refer to Native peoples using the names they use to describe themselves. When that is not possible, I use *Native peoples*. I specifically use the language of *peoples*, not Tribes, because sacred place protection is of concern to Native collectivities who are federally recognized as Tribes but also to many who are not thus recognized. Additionally, the use of *peoples* allows me to signal the human rights aspect at issue here.

15. *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) ("Nor is it in the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons

Native peoples in such cases as insincere or pretextual. But the result is the same. The profanation principle colors the analysis of substantial burden in religious freedom law and thereby understates the reach of the harm.¹⁶ Accordingly, Native peoples have also sought protection for sacred places under historic preservation and environmental law. But the profanation principle, or variations thereof, seeps into both fields.¹⁷ There too, the argument that existing degradation means Native claims to sacred places are exaggerated or pretextual can also hinder protections within these legal domains.

This Article analyzes the salience of the profanation principle in judicial and administrative proceedings under the National Historic Preservation Act (NHPA), the National Environmental Policy Act (NEPA), and a number of state environmental statutes.¹⁸ Congress passed NHPA in 1966 after the destruction of New York's Penn Station largely to protect buildings important to architectural history, as well as archeological sites, from damage due to various forms of development.¹⁹ Eligibility for listing on the National Register of Historic Places, the threshold determination for any of the procedural protections of NHPA to set in, includes among its listed criteria, "integrity."²⁰ As discussed later, the integrity of a property is necessary for its protection under NHPA, and concerns about profanation or degradation can be implicated in threshold determinations under the act.²¹ This remains an issue in spite of 1992 amendments to NHPA that clarify how traditional cultural properties and properties of traditional religious and cultural importance to Indian Tribes and Native Hawaiian organizations are eligible for listing on the National Register of Historic Places.²²

By turns, NEPA has evolved to take a hard look not simply at the immediate impacts of a government action on the "human environment," but also cumulative impacts of such actions.²³ Under NEPA, the human environment

delivered at religious meetings"); *United States v. Seeger*, 380 U.S. 163, 184 (1965) ("The validity of what he believes cannot be questioned. Some theologians, and indeed some examiners, might be tempted to question the existence of the registrant's 'Supreme Being' or the truth of his concepts. But these are inquiries foreclosed to Government."); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 727 (2014) ("[I]t is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our 'narrow function . . . in this context is to determine' whether the line drawn reflects 'an honest conviction.'" (citing *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 716 (1981))).

16. Litigators and law scholars consulted in the research (Joel West Williams, Wes Furlong, and Kristen Carpenter) cited examples where they have encountered the profanation principle in their work.

17. See *infra* Part III (discussing historic preservation law and the profanation principle) and Part IV (discussing environmental law and the profanation principle).

18. See *infra* Part III.A (discussing judicial and administrative proceedings under the NHPA) and Part IV (discussing the judicial and administrative proceedings under NEPA and several state environmental statutes).

19. See National Historic Preservation Act, Pub. L. No. 89-665, 80 Stat. 915 (1966).

20. See 36 C.F.R. § 800.5 (2022).

21. See *infra* Part III.B.

22. 36 C.F.R. § 800.5 (2022).

23. National Environmental Policy Act, 42 U.S.C. §§ 4321-4335.

includes cultural as well as natural resources. But cumulative impact analysis hews more closely to the quantifiable effects on natural resources.

From the perspective of scholarship in comparative religion, the qualities that endow a place with sacred power, purity, or presence seldom correspond to the presumption of necessary pristineness animating jurisprudence. For Hindus, the Ganges River is a holy and pure embodiment of divinity; it is all this at the same time that devotees know it to be a devastatingly polluted river in environmental terms. For Jews, the Western Wall on the Temple Mount in Jerusalem is unquestionably a holy site, a place of pilgrimage and prayer.²⁴ But the sacred here does not issue from an unobscured continuous history of temple-based worship at the place. The sacredness of the Wailing Wall encompasses the interruptions of that history at that place, including the Romans' profanation of the Second Temple on the site in 70 CE. If Jewish piety there asserts a kind of triumph over those discontinuities, it gains its force in and through, not in spite of, the historical destruction of the Temple and the diaspora that ensued.²⁵ Santiago de Compostela, Rome, Canterbury, and other great pilgrimage sites of Christianity have remained for the devout deeply sacred places even amid the consistent mixing of the sacred and profane that pilgrims have encountered at those places.²⁶

If each of the major world religions has places that remain sacred despite various forms of degradation and desecration, the world's Indigenous religions are entitled to the same standard. Vine Deloria, Jr., strongly distinguished the bases for the overall philosophical orientations of Euro-Americans and Native peoples in terms of time and space, respectively:

The vast majority of Indian [T]ribal religions have a center at a particular place, be it river, mountain, plateau, valley, or other natural feature. Many of the smaller non-universal religions also depend on a number of holy places for the practice of their religious activities. In part the affirmation of the existence of holy places confirms [T]ribal peoples' rootedness, which Western man is peculiarly without.²⁷

A more fitting way to construe Native claims for the protection of sacred places already profaned is to regard them as duties and obligations as would be due a sickly relative. Such a relationship is fitting since Tribes' relationship with

24. KOBİ COHEN-HATTAB & DORON BAR, *THE WESTERN WALL: THE DISPUTE OVER ISRAEL'S HOLIEST JEWISH SITE, 1967–2000*, at 1–3 (2020).

25. SIMON COLEMAN & JOHN ELSNER, *PILGRIMAGE: PAST AND PRESENT IN THE WORLD RELIGIONS* 36–46 (1995).

26. Scholars have identified that it was unbridled commerce—a sort of medieval tourist economy at these pilgrimage centers—that generated their urban development in the first place. See Simon Coleman & John Eade, *Introduction* to *PILGRIMAGE AND POLITICAL ECONOMY: TRANSLATING THE SACRED* 1, 1–16 (Simon Coleman & John Eade eds., 2018); *CONTESTING THE SACRED: THE ANTHROPOLOGY OF CHRISTIAN PILGRIMAGE* 1–26 (John Eade & Michael J. Sallnow eds., 1991).

27. VINE DELORIA, JR., *GOD IS RED* 81 (1973).

those sacred places is borne of tradition and long experience since time immemorial.

Part One will explore examples from comparative religion to place in relief the flawed logic of current jurisprudence on Native sacred places. It will also help frame why the argument from profanation seems to stick. Parts Two through Four, in turn, identify the workings of the profanation principle in three fields of law in which most sacred place claims are made: religious freedom, historic preservation, and environmental law. In Part Five, I turn by way of conclusion to a more wholesome account of the kin relationship that gives shape to Native claims on behalf of sacred places and a brief consideration of the U.N. Declaration on the Rights of Indigenous Peoples (2007)²⁸ as a corrective to domestic jurisprudence on these matters.

I.

A RELIGIOUS STUDIES PERSPECTIVE

From the perspective of the academic study of comparative religion, the argument from profanation makes little sense as a hindrance to protecting Native sacred places. Claims to sacred places are no less genuinely religious if the places have already been developed or otherwise degraded. Indeed, dispossession or development can sharpen the focus of religious obligations and experiences. Compelling examples abound in world religious history of sacred places that bear the scars of physical or environmental degradation yet still remain sacred.

The Ganges River remains sacred despite plenty of environmental pollution. Hindus regard the Ganges River as a goddess.²⁹ Tradition teaches that its waters are so ritually pure, even drops can cleanse the karmic effects of bad deeds; many believe that cremations along its banks in the holy city of Varanasi, with ashes dropped in the river to bring liberation, free souls from an otherwise endless cycle of birth and death.³⁰ In 2019, 150 million devotees were expected to make pilgrimage and bathe in the Ganges during Kumbh Mela, a sacred festival that brings together the largest gathering of human beings on earth every twelve years.³¹ On one day, an estimated 15 million devotees bathed in her waters.³² These devotees were not unaware of how much pollution industrial and human activity puts into the Ganges. One estimate is that 800,000 gallons of sewage, much of it untreated, flow daily into the river, and water-borne illness

28. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

29. DIANA L. ECK, BANARAS: CITY OF LIGHT 211–51 (1999).

30. *Id.* at 215–20.

31. Lauren Frayer & Furkan Latif Khan, *Welcome to the World's Largest Gathering of Humans*, NPR (Jan. 20, 2019), <https://www.npr.org/sections/goatsandsoda/2019/01/20/686482390/welcome-to-the-worlds-largest-gathering-of-humans> [<https://perma.cc/BG97-X5AM>].

32. *Id.*

not surprisingly flourishes in the population.³³ Activists are certainly working to reduce pollution, but this environmental pollution does not negate the conviction among the devout that the ritual purity of Ganges water is worth the risk and expense. Indeed, acting on behalf of a sacred being in this manner can itself be considered an act of devotion.

Other places share a similar story of remaining sacred despite histories of desecration. Jerusalem's Western Wall on the Temple Mount is holy to Jews not because it is pristine, but because, like them, it has survived a long history of violence and desecration. The wall is a remnant of the ancient second temple, destroyed by the Romans in 70 CE, and ever since, the scars of its history have been a place of intense prayer and longing in the tradition.³⁴ For Muslims, the pilgrimage to Mecca and other holy places takes the Ka'ba as a focal point, as it is believed to be the site of Ibrahim's sacrifice of Ismail. Many people have a clear sense of what the Ka'ba looks like at the center of concentric circles of praying pilgrims or spiraling pilgrim crowds circumambulating it, but are largely unaware that the Ka'ba itself had been destroyed and rebuilt at points in its history. The sacred stone ensconced in it had even been removed and held for ransom by schismatics for years in the tenth century.³⁵ Many Muslims regard as holy certain places that bear the mark of centuries of violent struggle between Shiites and Sunnis.³⁶ Karbala and Najaf in Iraq and Mazar-I-Sharif in Afghanistan are among Shiite holy places whose shrines mark what Shiites regard as persecution and sacrifice at the hands of Sunnis.³⁷

In important respects, desecration and sacrifice can serve to further sanctify holy places. Abraham Lincoln was crystal clear on this point in his Gettysburg Address given at a key site of American civil religion: "we can not dedicate—we can not consecrate—we can not hallow—this ground. The brave men, living and dead, who struggled here, have consecrated it, far above our poor power to add or detract. The world will little note, nor long remember what we say here, but it can never forget what they did here."³⁸ There are a host of places sacred to

33. See Amberly Polidor, *Ganges River*, SACRED LANDS FILM PROJECT (Sept. 1, 2014), <https://sacredland.org/ganges-river-india/> [<https://perma.cc/VN6B-V3P9>].

34. COLEMAN & ELSNER, *supra* note 25, at 40–45.

35. See SIMON O'MEARA, *THE KA'BA ORIENTATIONS: READINGS IN ISLAM'S ANCIENT HOUSE* 63–79 (2020). The author is grateful to Kambiz GhaneaBassiri, Professor of Religion and Humanities at Reed College, for this insight.

36. See JOHN L. ESPOSITO, *ISLAM: THE STRAIGHT PATH* 111–12 (rev. 3d ed. 1998).

37. See SOPHIA ROSE ARJANA, *PILGRIMAGE IN ISLAM: TRADITIONAL AND MODERN PRACTICES* 65–102 (2017). See generally SYED AKBAR HYDER, *RELIVING KARBALA: MARTYRDOM IN SOUTH ASIAN MEMORY* (2006).

38. See President Abraham Lincoln, *Gettysburg Address* (Nov. 19, 1863), https://americanhistory.si.edu/documentsgallery/exhibitions/gettysburg_address_2.html [<https://perma.cc/MYR8-8NK4>].

American civil religion—Pearl Harbor and Ground Zero among them—whose sacred character is linked to sacrificial loss and destruction at those places.³⁹

Many of the world's sacred places remain sacred even when overlaid by other religious traditions. In Ireland, holy wells, mountains like Croagh Patrick, islands like Station Island at Patrick's Purgatory in Lough Derg, and even Neolithic monuments believed sacred by pagans became associated with Christian saints and devotion to them.⁴⁰ The Hill of Tepeyac in Mexico City, which Aztecs had associated with Tonantzin, the earth goddess, became associated with Mary's appearances to Juan Diego as Our Lady of Guadalupe.⁴¹ As the anthropologists of religion Victor and Edith Turner found, the devotion to Guadalupe and pilgrimages to her places near Mexico City are complex affairs, with the Indigenous and colonizer traditions in creative tension.⁴² The Turners argued that this tension is generative of the devotion and pilgrimage that deposit the sacred at *la Virgen's* places in Mexico City.⁴³

Pilgrimage centers around the world are often characterized by a blurring of the sacred and the profane that the faithful often decry at such places. Northwest Spain's Santiago de Compostela became a bustling urban center in the late Middle Ages through pilgrim expenditures and commerce. Pilgrim hostels, taverns, and souvenir shops are still filled today with people completing their journey on various pilgrim routes to Santiago Cathedral and the relics of St. James the Apostle said to repose there.⁴⁴ It is a truism about such pilgrimage places that the people come despite the mixing of the sacred and profane, and, if the Wife of Bath's Tale from Chaucer's *Canterbury Tales* is a reliable measure, *because of* the mixing of the sacred and the profane.⁴⁵ A historian of contemporary American Christian pilgrimages to holy places in Israel and Palestine argues persuasively that commodification of commercial tourism,

39. See EDWARD TABOR LINENTHAL, SACRED GROUND: AMERICANS AND THEIR BATTLEFIELDS 173–212 (1991) (exploring Gettysburg as pilgrimage site in American civil religion). See generally GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA (2006) (elaborating on how the Gettysburg Address does the work of public theology in American civil religion).

40. See PATRICK LOGAN, THE HOLY WELLS OF IRELAND 16–17, 136 (1980); Suzanne J. Crawford O'Brien, *Talking Place: Ritual and Reciprocity at Holy Wells and Mass Stones in the Republic of Ireland*, 22 J. RITUAL STUD. 1, 9 (2008).

41. JEANETTE RODRIGUEZ, OUR LADY OF GUADALUPE: FAITH AND EMPOWERMENT AMONG MEXICAN-AMERICAN WOMEN 16–17 (1994).

42. See VICTOR TURNER & EDITH TURNER, IMAGE AND PILGRIMAGE IN CHRISTIAN CULTURE 40–103 (1st ed. 1978).

43. See *id.*

44. See *id.* at 234; Coleman & Eade, *supra* note 26, at 1.

45. See Geoffrey Chaucer, *The Wife of Bath's Prologue and Tale*, in THE CANTERBURY TALES (Harvard Univ. trans) (1387), <https://chaucer.fas.harvard.edu/pages/wife-baths-prologue-and-tale-0> [<https://perma.cc/HW4R-SX59>]; see also CONTESTING THE SACRED, *supra* note 26, at 1–29 (challenging views of pilgrimage as solely sacred).

souvenir sales, and the like not only enables but becomes the very means through which pilgrims realize and share experiences of the holy.⁴⁶

Finally, world religious history shows that even when the devout are in the condition of exile—which can itself be a form of profanation—the ties of religious belief and practice can keep them bound to those places. For example, Tibetan Buddhists live in exile around Dharamsala, India, or elsewhere in the world.⁴⁷ For them, Tibet is still a sacred place.⁴⁸ The logic of exile and diaspora tends to intensify rather than dissipate religious attachment to original sacred places. Not so for Native sacred places in Western jurisprudence.

A. Native Sacred Places

It bears repeating that what makes certain places sacred is the *relationship* between a community and their place. From the perspective of a community of practitioners, what makes a place sacred is not solely its physical, outward, objective features—it is a conviction borne of tradition and ratified in experience.⁴⁹ Narratives like scriptures, oral traditions of myth, religious authorities, and even law are sacred because they are borne of tradition. A sacred place is ratified in experience when the traditions and practices of a community venerate it.

This is emphatically not to say that the sacred is merely subjective. Such a view invites the slippery slope arguments raised by the Ninth Circuit in *Navajo Nation*, following the *Lyng* Court: the concern that a proliferation of claims to subjective experiences of sacred places will over-encumber government management of public lands.⁵⁰ Cultural geographers, phenomenologists, and some religious studies scholars insist that human experience is always *placed*; to be human is in part to form sacred attachments to place. One cultural geographer famously called it *topophilia*.⁵¹ While at an individual scale, such topophilia may always be in play, this subjective set of attachments to place is not generally what Native claimants seek when litigating protections for sacred places.

46. See HILLARY KAELL, *WALKING WHERE JESUS WALKED: AMERICAN CHRISTIANS AND HOLY LAND PILGRIMAGE* 199 (2014).

47. See generally R.P. MITRA, *TIBETANS OF DHARAMSALA IN EXILE: NEGOTIATIONS AND SURVIVAL* (2017).

48. *Id.*

49. See *supra* Part I.

50. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988) (“However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen’s religious needs and desires 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.”).

51. See MIRCEA ELIADE, *THE SACRED AND THE PROFANE: THE NATURE OF RELIGION* (Willard R. Trask trans., Harcourt, Inc. 1959) (1957); YI-FU TUAN, *TOPOPHILIA: A STUDY OF ENVIRONMENTAL PERCEPTION, ATTITUDES, AND VALUES* 4 (1974); Yi-Fu Tuan, *Geopietty: A Theme in Man’s Attachment to Nature and to Place*, in *GEOGRAPHIES OF THE MIND* 11–41 (David Lowenthal & Martyn J. Bowden eds., 1976).

In most Native sacred place cases, claims are not raised based on subjective belief. This is especially true where Native Nations, rather than individual Native practitioners, assert claims.⁵² Rather, Native places are sacred through established tradition and reinforced by sensibility, experience, and sets of ethical and ritual duties to those places. Importantly, many Native religious traditions *as traditions* can acknowledge a highly decentered authority, such that individuals might seek visions or gain revelation at particular places or at places associated with familial, clan, or other lineage.⁵³ The point here is that not all claims to sacred places are rooted primarily in subjective experience, as suggested by the Ninth Circuit in the San Francisco Peaks case and even by Judge Fletcher's dissent.⁵⁴ This kind of spirituality—interiorized, subjective, and individual—can be “diminished” without burdening religious exercise.

From a religious studies perspective, communities can deem or recognize places as sacred not merely as a function of the quality of subjective experiences at those places. This does not mean that subjective experiences are dispensable, or that the safeguarding of conditions to make those experiences possible is superfluous—far from it. In such places as the California High Country in the *Lyng* case, Bear Butte, or other places where Native traditions instruct practitioners to seek visions, revelations, or sacred knowledge, the quality of the experience can be crucial to religious exercise. However, this must not be conflated with vague notions of Nature Spirituality that can happen anywhere in something called “nature.”⁵⁵ Courts often hear Native American religious claims through the filter of Nature Spirituality.⁵⁶ In doing so, they miss the tangible specificity of Native teachings about their sacred places: this mountain is sacred, not that mountain or all mountains.⁵⁷ And when a sacred place already bears the marks of degradation and no longer strikes a court as untouched “nature,” courts

52. See *Navajo Nation*, 535 F.3d 1058, 1058 (9th Cir. 2008), where the litigants were six Native governments: Navajo, Hopi, White Mountain Apache, Havasupai, Hualapai, and Yavapai Apache Nations.

53. See generally LEE IRWIN, *THE DREAM SEEKERS: NATIVE AMERICAN VISIONARY TRADITIONS OF THE GREAT PLAINS* (1996).

54. *Navajo Nation*, 535 F.3d at 1096 (Fletcher, J., dissenting) (“Religious exercise sometimes involves physical things, but the physical or scientific character of these things is secondary to their spiritual and religious meaning. The centerpiece of religious belief and exercise is the ‘subjective’ and the ‘spiritual.’”). As I observe elsewhere, “Fletcher’s view surely pertains to many contemporary religious phenomena but does not speak with precision about the misrecognition of Native religious claims in the case.” MICHAEL D. MCNALLY, *DEFEND THE SACRED: NATIVE AMERICAN RELIGIOUS FREEDOM BEYOND THE FIRST AMENDMENT* 108 (2020).

55. *Lyng*, 485 U.S. at 439. For Bear Butte, see *Crow v. Gullet*, 541 F. Supp. 785 (D.S.D. 1982), *aff’d*, 706 F.2d 856 (8th Cir. 1983).

56. MCNALLY, *supra* note 54, at 109–12.

57. See Vine Deloria, Jr., *Sacred Lands and Religious Freedom*, in *FOR THIS LAND: WRITINGS ON RELIGION IN AMERICA* 203, 205 (James Treat ed., 1999) (discussing the problem with viewing Native religion through a westernized lens); Michael D. McNally, *From Substantial Burden on Religion to Diminished Spiritual Fulfillment: The San Francisco Peaks Case and the Misunderstanding of Native American Religion*, 30 *J.L. & RELIGION* 36, 49 (2015).

overlook the urgency for Native peoples in facing new threats to the health or integrity of those places.⁵⁸

What many courts fail to recognize is the notion of a people's *relationship* with a place. Many Native peoples speak of lands, waters, and sacred places not so much as "nature" in some abstract sense, but as relatives, often in kinship terms.⁵⁹ This kind of relationship to a sacred place, and the obligations that come with it, remain in force whether or not a Native people currently owns or controls the place. As Rebecca Tsosie has observed, "[t]he mere fact that the land is not held in Native title does not mean that the people do not hold these obligations, nor . . . that they no longer maintain the rights to these lands."⁶⁰ What is more, relationships with sacred places, as with other relationships, are not contingent on the natural purity of the place. It is useful to imagine already degraded sacred places as sick relatives.⁶¹ Obligations and relationships do not disappear because a relative is ill. Indeed, the sense of obligation can intensify. So too with many Native claims on behalf of sacred places.⁶²

To briefly illustrate, consider Kaho'olawe Island in Hawai'i. From 1941 until recently, a naval bombing range littered with unexploded ordnance and toxic waste occupied the island.⁶³ However, the island remains no less sacred than it had been since time immemorial. It is hard to imagine any clearer example of profanation: film footage shows just how unholy the practices were at the island for fifty years.⁶⁴ Yet, it did not mean that the island was no longer sacred to Native Hawaiians. Rather, like a sick relative, its healing became even more urgent. Showing remarkable courage, in 1976, Native Hawaiian activists took small boats and occupied the island, which was still an active bombing range littered with unexploded ordnance.⁶⁵ Some individuals were even lost at sea.⁶⁶ Their activism drew attention to how *this* island had always figured prominently in their religion.⁶⁷ Buoyed in 1978 by the American Indian Religious Freedom Act (AIRFA) and its directive to federal agencies, Native Hawaiians and their advocates in Washington succeeded in negotiating with the Department of

58. See *infra* Parts II.A, III.B, IV.

59. DELORIA, JR., *supra* note 27, at 150–64.

60. Rebecca Tsosie, *Land, Culture, and Community: Reflections on Native Sovereignty and Property in America*, 34 IND. L. REV. 1291, 1306 (2001).

61. I am grateful to Kristen Carpenter for this insight.

62. For a full discussion of the Onondaga Nation's consideration of its efforts on behalf of sacred Onondaga Lake in terms of healing sick relatives, see *infra* notes 389 and 392.

63. See *Kaho'olawe History*, KAHO'OLAWE ISLAND RSRV. COMM'N, <http://kahoolawe.hawaii.gov/history.shtml> [<https://perma.cc/L3G7-4VHF>].

64. See Lacy Deniz, *The Bombing of Kaho'olawe Went on for Decades. The Clean-up Will Last Generations*, HAW. NEWS NOW (Feb. 27, 2018), <https://www.hawaiiinewsnow.com/story/37604472/the-bombing-of-kahoolawe-went-on-for-decades-clean-up-will-take-generations/> [<https://perma.cc/5GAH-VVS9>].

65. See *Timeline of Kaho'olawe History*, PROTECT KAHO'OLAWE OHANA (2021), <http://www.protectkahoolaweohana.org/history.html> [<https://perma.cc/LJ8L-T87U>].

66. See *id.*

67. See *id.*

Defense for safe ceremonial access.⁶⁸ Hard work carried that momentum into a series of laws to restore the island, including the creation of a commission to oversee cleanup of the naval ordnance and other waste. In 2003, the U.S. Department of Defense fully transferred control of Kaho'olawe to the state of Hawai'i.⁶⁹ The state, in turn, created the Kaho'olawe Island Reserve to be "used solely and exclusively . . . and reserved in perpetuity for the . . . [p]reservation and practice of all rights customarily and traditionally exercised by [N]ative Hawaiians for cultural, spiritual, and subsistence purposes."⁷⁰

The story of Kaho'olawe is a story of how profaned sacred places can work for Native peoples. Sacredness prevails even when its desecration appears to obliterate all sanctity from the perspective of those who do not share a religious relationship with *that* place. Kaho'olawe also illustrates how there can be considerable distance between how environmentalists, other non-Native allies, and Native people regard sacred places. Petroglyphs, mounds, ceremonial grounds, and graves notwithstanding, many Native sacred places are natural landforms or water features, such as mountains, caves, islands, lakes, springs, and waterfalls. It is thus understandable that non-Native people might equate the sacred with the *pristine* or become allies for their protection out of a belief they are fully in league with Native peoples. Such alliances or shared goals can be fruitful. But non-Native allies must recognize these divergent beliefs and respect how Native peoples choose to protect sacred places.

But there can also be a false cognate: for Native peoples whose traditions teach them certain places are sacred, those places can remain sacred even when they have been sullied and degraded. As we have seen, this does not mean that continued degradation of Native sacred places is not burdensome—just the opposite. But Native religious regard for and practice at sacred places does not stop just because colonization has transformed those places. That religious practice only steps up in intensity and devotion.⁷¹ Actions on the ground and in court can be understood as themselves generative of religious renewal and vitality in the face of interruptions of various kinds.⁷² Similar to other religious movements, many credit the turnaround at Kaho'olawe in the 1970s, 80s, and 90s to have augured a new spirit of resolve among Native Hawaiians to push for

68. See 42 U.S.C. § 1996.

69. See Suzan Shown Harjo, *American Indian Religious Freedom Act After Twenty-Five Years: An Introduction*, 19 WICAZO SA REV. 129, 132 (2004).

70. HAW. REV. STAT. § 6K-3 (2022).

71. See *supra* Introduction.

72. See Greg Johnson, *Engaged Indigeneity: Articulating, Anticipating, and Enacting Tradition on Mauna Kea*, in INDIGENOUS RELIGION(S): LOCAL GROUNDS, GLOBAL NETWORKS 154, 154–81 (Siv Ellen Kraft, Bjørn Ola Tajhord, Arkotong Longkumer, Gregory D. Alles & Greg Johnson eds., 2020); Greg Johnson, *Materialising and Performing Hawaiian Religion(s) on Mauna Kea*, in HANDBOOK OF INDIGENOUS RELIGION(S) 156, 156–175 (Greg Johnson & Siv Ellen Kraft eds., 2017).

other elements of religious, cultural, and political sovereignty, including the defense of Mauna Kea.⁷³

B. Why the Profanation Principle Sticks

If, from a religious studies perspective, the argument from profanation should not stick, what explains the traction it so consistently gains in court? Native American Studies offers a ready answer. The profanation argument sticks because of a widespread predilection to view Native peoples and their religions through the prism of Nature Spirituality. A romanticized view of Native peoples runs deep in American society and culture, where “real Indians” and “real Indian religions” exist only prior to contact and colonization.⁷⁴ Marks of colonization, including various forms of acculturation, dispossession, and degradation of territories, signify in this view the loss of tradition, not its ongoing presence.⁷⁵

A prime example of this jurisprudential view is the argument against assertions of off-reservation treaty rights to fishing and hunting in the Great Lakes regions in the 1980s. According to opponents of treaty rights in Wisconsin, like S.T.A. (Stop Treaty Abuse) and P.A.R.R. (Protect American Resources and Rights), the treaties of 1854 and 1855 only protected fishing as practiced using traditional technologies from the 1850s, not the rights of Anishinaabe to spear fish from aluminum boats with outboard motors and battery-powered lights.⁷⁶ In his classic study of the long cultural history of the American romance with the noble savage, *The White Man's Indian*, Robert Berkhofer identified its corollary: the powerful representation of the “degraded . . . Indian.”⁷⁷ In the trope of the degraded Indian, living, breathing Native people who no longer conform to the romanticized stereotype of the “real Indian” in literature, film, and popular imagination are seen as dysfunctional, no longer *real* Indians.⁷⁸ Because the imagined “real Indian” exists in a time outside of history (taking place on an unsullied virgin landscape), any marks of history, including the degradation of natural environments and lifeways depending on those environments, are seen to nullify the authenticity of Indianness. Berkhofer paid close attention to change over time in representations such as the “degraded

73. See Haunani-Kay Trask, *Native Social Capital: The Case of Hawaiian Sovereignty and Ka Lahui Hawaii*, 33 POL'Y SCI. 375, 375–85 (2000); Aislyn Greene, *What Is the Hawai'i Sovereignty Movement?*, AFAR (Sept. 2, 2021), <https://www.afar.com/magazine/understanding-the-hawaii-sovereignty-movement> [https://perma.cc/R9KK-YCQQ].

74. See, e.g., Michael D. McNally, *Religion and Culture Change in Native North America*, in PERSPECTIVES ON AMERICAN RELIGION AND CULTURE 207, 207–85 (Peter Williams ed., 1999).

75. *Id.*

76. See LARRY NESPER, THE WALLEYE WAR: THE STRUGGLE FOR OJIBWE SPEARFISHING AND TREATY RIGHTS 7 (2002); see generally Charles F. Wilkinson, *To Feel the Summer in the Spring: The Treaty Fishing Rights of the Wisconsin Chippewa*, 1991 WIS. L. REV. 375 (1991) (providing historical and legal background to Anishinaabe assertions of treaty fishing rights).

77. ROBERT BERKHOFFER, JR., THE WHITE MAN'S INDIAN: IMAGES OF THE AMERICAN INDIAN FROM COLUMBUS TO THE PRESENT 29–31 (1978).

78. See *id.* at 29.

Indian,” but he stressed that “the remarkable thing about the idea of the Indian is not its invention but its persistence and perpetuation.”⁷⁹ Such tropes run deep in non-Native culture. Berkhofer wrote:

Living neither as an assimilated White nor an Indian of the classic image, and therefore neither noble nor wildly savage but always scorned, the degraded Indian exhibited the vices of both societies in the opinion of White observers. Degenerate and poverty-stricken, these unfortunates were presumed to be outcasts from their own race, who exhibited the worse qualities of Indian character with none of its redeeming features.⁸⁰

Jurists, be they judges or attorneys, are also shaped by the deep cultural indoctrination of these powerful representations. Judges view evidence and legal arguments through this stubbornly persistent lens.⁸¹ For instance, laches defenses against Tribal claims can hold sway, exploiting the perceived distance between an idealized Native past and the current-day claims of Native peoples.⁸² Attorneys, both for and against sacred place protection, can set their arguments in this representational lens because they know such representations will capture the imaginations of judges and juries. For example, attorneys representing energy development interests have gained credence by asserting Tribal objections that make appeals to sacred places look like pretexts for environmental interests.⁸³

For their part, attorneys representing Tribal interests, in their efforts to collapse that distance, can also tap unwittingly into the romanticization of a Native past that ultimately bolsters the perceived distance between the authentic past and the checkered reality of the present. For example, in oral argument before the Ninth Circuit in the San Francisco Peaks case, the Navajo Nation’s lead attorney couched the claims of his clients in terms of subjective experience on the mountain, thinking this would be the more rhetorically effective way to represent either the religiousness or authenticity of his clients’ claims.⁸⁴

The result is that courts gravitate toward a subjective experience analysis rather than an analysis of place. When it came to the *Navajo Nation* ruling, the majority and dissent disagreed about whether a substantial burden on religious exercise had been effected, but both were of one mind that the claims at hand

79. *Id.* at 31.

80. *Id.* at 30.

81. *See infra* Part II (discussing religious freedom law and the profanation principle).

82. *See, e.g., City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 221 (2005) (applying laches to preclude land claims brought by the Oneida Indian Nation against the State of New York).

83. *See Sequoyah v. TVA*, 620 F.2d 1159, 1162 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980) (noting an eleventh-hour religious freedom claim followed on the heels of a failed effort to block dam completion under environmental law).

84. *See* Plaintiffs’/Appellants’ Opening Brief at 32–33, *Navajo Nation*, 535 F.3d 1058 (9th Cir. 2008) (Nos. 06-15371, 06-15436, 06-15455).

were too subjective, based on spiritual fulfillment or experience.⁸⁵ In a crucial exchange of footnotes with the dissent on the question of the subjective nature of religion, the majority voiced its agreement that “spiritual fulfillment is a central part of religious exercise,” adding that “the Indians’ conception of their lives as intertwined with particular mountains, rivers, and trees, which are divine parts of their being, is very well explained in the dissent.”⁸⁶ But as the majority continued, it revealed its assumption of what Native American spirituality is really about. The majority reduced more than ninety accepted factual findings detailing specific beliefs, practices, and obligations related to the mountain to a vague nature piety on the mountain:

For all of the rich complexity that describes the profound integration of man and mountain into one, the burden of the recycled wastewater can only be expressed by the Plaintiffs as damaged spiritual feelings. Under Supreme Court precedent, government action that diminishes subjective spiritual fulfillment does not “substantially burden” religion.⁸⁷

Reducing complex and specific Native claims regarding particular sacred places to matters of vague Nature Spirituality also cements a view that Native religions only really work when their sacred places are pristine. The upshot is that sullied places, by definition, are no longer places of genuine Native spirituality.

II.

RELIGIOUS FREEDOM LAW AND THE PROFANATION PRINCIPLE

We now turn to how the profanation principle is applied to reject Native claims for legal protection under religious freedom law. This dynamic can be distinguished into two eras. The first era began in the early 1980s after the passage of AIRFA in 1978, basing claims on the First Amendment. The second era began after passage of RFRA in 1993. A range of examples below from both eras reveals how operative the profanation principle can be in judicial outcomes. The profanation principle is identifiable even when it is not cited specifically as a legal basis for finding no substantial burden on religious exercise in the case of sacred places. Recent decisions by the Supreme Court would appear to support Tribal claims, but as discussed later, circuit courts are loath to apply those recent interpretations of RFRA and the Religious Land Use and Institutionalized Persons Act (RLUIPA) to Native plaintiffs.

We begin with a further analysis of *Navajo Nation v. U.S. Forest Service* about the San Francisco Peaks. First, this case demonstrates how Native challenges to development under the First Amendment and RFRA have faltered on account of the profanation principle. Second, the Ninth Circuit’s en banc

85. *Navajo Nation*, 535 F.3d at 1096 (Fletcher, J., dissenting) (“Contrary to what the majority writes, and appears to think, religious exercise invariably, and centrally, involves a ‘subjective spiritual experience.’”).

86. *Id.* at 1070 n.12.

87. *Id.*

holding in *Navajo Nation v. U.S. Forest Service* has to date controlled subsequent legal challenges seeking protection for Native sacred places under RFRA.⁸⁸ But the legal reasoning behind this case is not unique, as demonstrated below. Seven additional examples represent the breadth of the profanation principle at work in religious freedom law.

A. *San Francisco Peaks*

The Navajo Nation (Diné), Hopi Tribe, and a dozen other Native Nations who regard the San Francisco Peaks as sacred have long struggled to protect this mountain (now federal land) from desecration. *Navajo Nation* was the latest litigation in the attempt by Native peoples to protect this sacred place. This particular threat of profanation clustered around the operation of the Snowbowl on Forest Service land, a recreational ski area that began as a small-scale operation in the 1930s and has only grown as skiing and snowboarding increased in popularity. On Arizona's highest mountain and not far from Flagstaff, development at the Snowbowl expanded in the early 1980s, surviving court challenges that argued expansion violated Diné and Hopi religious freedom rights under the First Amendment.⁸⁹ But the great drought jeopardized investments in the expanded ski resort, because the 2001-2002 season allowed only four skiable days.⁹⁰ To address these conditions, the Snowbowl proposed to pump 1.5 million gallons per day of treated sewage effluent and spray it as artificial snow to support recreational skiing.⁹¹

For the Native peoples that consider San Francisco Peaks to be holy, the plan would bring unacceptable desecration in violation of their freedom to exercise religious practices on and obligations to the mountain. To the Navajo/Diné, the San Francisco Peaks are *Dook'oo'osliid*, the westernmost of the sacred mountains defining Diné sacred geography.⁹² They are associated with Diné origins and, along with other sacred mountains, are prayed to daily and are crucial to efficacious ceremonial healing.⁹³ The Peaks are so important to Diné life that they hold pride of place in the Navajo legal code. Title 1 reads in part, "Diné Natural Law declares and teaches that . . . the six sacred mountains . . . must be respected, honored and protected for they, as leaders, are the foundation of the Navajo Nation"; "the Diné have the sacred obligation and duty to respect,

88. Decisions drawing on *Navajo Nation* to reject RFRA claims to sacred places include *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1214–15 (9th Cir. 2008); *S. Fork Band Council of W. Shoshone v. U.S. Dep't of Interior*, 643 F. Supp. 2d 1192, 1208 (D. Nev. 2009), *aff'd in part, rev'd in part*, 588 F.3d 718 (9th Cir. 2009); *Battle Mt. Band v. U.S. Bureau of Land Mgmt.*, No. 16–CV–0268, at 1, 17–18 (D. Nev. Aug. 25, 2016); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 239 F. Supp. 3d 77, 91–92 (D.D.C. 2017); *Slockish v. U.S. Dep't. of Transp.*, No. 21-35220, 2021 WL 5507413, at *2 (D. Or. Nov. 24, 2021); *Apache Stronghold v. U.S.*, 38 F.4th 742, 757 (9th Cir. 2022).

89. *See Wilson v. Block*, 708 F.2d 735, 737, 742 (D.C. Cir. 1983).

90. *See Navajo Nation*, 535 F.3d at 1082.

91. *See id.* at 1102–03.

92. *See id.* at 1098, 1101.

93. *See id.* at 1100–01.

preserve and protect all that was provided for we were designated as the steward for these relatives through our use of the sacred gifts of language and thinking.”⁹⁴ Curiously, neither the majority nor the dissent in *Navajo Nation* made reference to this formulation of a Navajo natural law obligation to the Peaks.⁹⁵ For the Hopi, the peaks are *Nuvatukya ’ovi*, the home of the Kachinas and the place where they go to become ancestors and from which they come back to the Hopi mesas as life-giving rain.⁹⁶ For the White Mountain Apache, whose name makes reference to the Peaks as White Mountain, the San Francisco Peaks are among four sacred mountains demarcating their sacred geography. Further, the Peaks are particularly associated with a principal deity of the Apache, Changing Woman, and an important Apache ceremony that transforms girls into women and that renews the cosmos renewed for another year.⁹⁷

The Forest Service studied and approved the wastewater snowmaking, along with certain other enhancements, despite consistent, unanimous Tribal opposition. Navajo Nation and Hopi Tribe were joined by the White Mountain Apache, Yavapai-Apache, Havasupai, and Hualapai Nations in a legal challenge to federal approval as, *inter alia*, a violation of their religious freedom rights under the 1993 RFRA.⁹⁸ The Native Nations lost in an Arizona federal district court.⁹⁹ On appeal, a three-judge panel of the Ninth Circuit reversed in 2007, holding that the Forest Service violated RFRA.¹⁰⁰ But rehearing the case *en banc* the following year, the Ninth Circuit overruled its panel decision. It held that the Native Nations had failed to show that spraying treated sewage effluent on their sacred mountain posed a “substantial burden” to their religious exercise as that court interpreted the statutory meaning of “substantial burden.”¹⁰¹ Rejecting the three-judge panel’s (now the dissent’s) interpretation of “substantial burden” as part of an expanded approach to free exercise protection in RFRA, the *en banc*

94. NAVAJO NATION CODE ANN. tit. 1, § 205 (2014).

95. Referring to these foundational obligations, the Navajo Nation Human Rights Commission resolved to make a formal complaint to the Inter-American Commission on Human Rights, arguing “the Navajos have a responsibility to remain on and care for the land where the Holy People placed the Navajo people.” Resolution of the Navajo Nation Human Rights Commission, Doc. No. NNHRCMAR-27-13, at 1 (Mar. 27, 2013), <https://nmhrc.navajo-nsn.gov/docs/NewsRptResolution/NNHRCMAR-27-13.pdf> [<https://perma.cc/H2UL-8NZM>].

96. See *Navajo Nation*, 535 F.3d at 1099; Justin B. Richland, *Paths in the Wilderness? The Politics and Practices of Hopi Religious Freedom in Hopitutskwa*, 31 MD. J. INT’L L. 217, 224–25 (2016).

97. See *Navajo Nation v. U.S. Forest Serv.*, 408 F. Supp. 2d 866, 888–90 (D. Ariz. 2006).

98. See Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4. The Native Nations initially challenged the federal approval as also violating NEPA, NHPA, the Endangered Species Act, the Grand Canyon National Park Enlargement Act, and the National Forest Management Act. *Navajo Nation v. U.S. Forest Serv.*, 408 F. Supp. 2d at 871. The appeal to the Ninth Circuit concerned whether federal approval violated RFRA, NEPA, and NHPA only. *Navajo Nation*, 535 F.3d at 1062–63.

99. *Navajo Nation v. U.S. Forest Serv.*, 408 F. Supp. 2d at 908.

100. *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1060 (9th Cir. 2007), *rev’d on reh’g en banc*, 535 F.3d 1058 (9th Cir. 2008).

101. *Navajo Nation*, 535 F.3d at 1067.

court narrowed its interpretation to align with the Supreme Court's view in *Lyng v. Northwest Indian Cemetery Protective Association* (1988).¹⁰² *Lyng* held that a logging road through a precinct held sacred by California Native Nations did not violate their First Amendment rights because the Yurok, Karuk, and Tolowa were not "coerced by the Government's action into violating their religious beliefs" nor was their religious activity penalized.¹⁰³

The en banc Ninth Circuit accepted more than ninety factual findings detailing Native religious beliefs and practices related to the mountain and acknowledged them as sincerely held, but it nevertheless found no such coercion in the spraying of wastewater on San Francisco Peaks. Applying *Lyng*, it ruled against the six Native Nations:

Where, as here, there is no showing the government has coerced the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions, or conditioned a governmental benefit upon conduct that would violate the Plaintiffs' religious beliefs, there is no "substantial burden" on the exercise of their religion.¹⁰⁴

The opinion went on to support its rejection of alternative constructions of what Congress meant by "substantial burden" in RFRA. But, what colors the court's analysis is what comes out of the gate in the majority opinion: that the ski area represents only one percent of the mountain, that no access is limited, and that no plants or sites would be destroyed by the snowmaking.¹⁰⁵ The court wrote: "On the mountain, they continue to pray, conduct their religious ceremonies, and collect plants for religious use."¹⁰⁶ Thus, "the sole effect of the artificial snow" is on the Native peoples' "subjective spiritual experience," which amounts merely to diminished "spiritual fulfillment":

That is, the presence of the artificial snow on the Peaks is offensive to the Plaintiffs' feelings about their religion and will decrease the spiritual fulfillment Plaintiffs get from practicing their religion on the mountain. Nevertheless, a government action that decreases the spirituality, the fervor, or the satisfaction with which a believer practices his religion is not what Congress has labeled a "substantial burden"—a term of art chosen by Congress to be defined by reference to Supreme Court precedent—on the free exercise of religion.¹⁰⁷

The court heard collective claims about clearly bounded religious obligations to the mountain that were rendered inoperable by the physical and ritual pollution

102. See *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988). For an argument that the Supreme Court's subsequent ruling in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), which took that latter view, should cause courts to revisit this Ninth Circuit construal of "substantial burden," see McNally, *supra* note 57, at 36.

103. *Lyng*, 485 U.S. at 440.

104. *Navajo Nation*, 535 F.3d at 1063.

105. See *id.* at 1070.

106. *Id.* at 1063.

107. *Id.*

of the wastewater snow and reduced those claims to a diffused diminishment of individual spiritual fulfillment.¹⁰⁸ The legal question appears to turn solely on the proper definition of substantial burden in RFRA, but it is clear from a religious studies perspective that the substantial burden analysis cannot be so neatly contained to the type of burden involved. Questions about the extent of any burdens are inevitably also questions about the shape of the religious practices at issue. Here, that shape is shrunk, subtly but decidedly, by a confidence that the Snowbowl had been operating since the 1930s and that Native religious beliefs and practices were still flourishing enough to be asserted as claims. Thus, there could be no cognizable burden on religion but only diminishable spiritual fulfillment.

This version of the argument from profanation was in fact the lead argument made in the Snowbowl's brief for summary judgment in the case.¹⁰⁹ "It must be remembered," the Snowbowl's brief began, "that the Snow Bowl permit area comprises only 777 of the 75,000 acres of the Peaks, and that prior construction on the Peaks has not prevented the plaintiffs from practicing their religions."¹¹⁰ The brief continued:

The [T]ribal religious fears raised by the plaintiffs in the *Wilson* lawsuit, of course, did not come to fruition, and traditional [N]ative practitioners continue to practice their religions on the Peaks today. Now, they raise these exact same claims again here.¹¹¹

The Snowbowl likely felt this argument would have cachet with the court, since the D.C. Circuit Court had rejected similar claims two decades prior that argued Snowbowl's expansion in that decade would violate Native American free exercise rights under the First Amendment.¹¹²

The trial court judge in *Wilson v. Block*, which involved the 1980s expansion of skiing on San Francisco Peaks and included claims under the First Amendment, had made the profanation principle central to his reasoning that the Snowbowl area was not "indispensab[le]" to Native religion.¹¹³ The D.C. Circuit's affirmation quoted him liberally—the trial court judge, Judge Richey, wrote: "Prior construction on the Peaks has not prevented the plaintiffs from practicing their religions," noting that "[a]mong the structures currently on the Peaks are natural gas, telephone, and electric transmission lines, water tanks for stock, unpaved roads, and the present Snow Bowl ski resort."¹¹⁴ The D.C. Circuit wrote:

Judge Richey found that the "Snow Bowl operation has been in

108. See McNally, *supra* note 57, at 36.

109. See Ariz. Snowbowl Resort LP's Motion for Summary Judgment at III.A, *Navajo Nation v. U.S. Forest Serv.*, 408 F. Supp. 2d 866 (D. Ariz. 2006) (No. 305CV01824).

110. *Id.* (quoting *Wilson v. Block*, 708 F.2d 735, 744–45 (D.C. Cir. 1983)).

111. *Id.*

112. See *Wilson*, 708 F.2d at 739.

113. *Id.* at 743–44.

114. *Id.* at 745, 745 n.6.

existence for nearly fifty years and it appears that plaintiffs' religious practices and beliefs have managed to coexist with the diverse developments that have occurred there."¹¹⁵

For his part, Judge Richey went a step further to suggest Snowbowl development had enhanced, not hindered, Native religious practice on the Peaks. Rather remarkably, he observed that because of chairlifts and roads, the Native plaintiffs "have utilized the Arizona Snow Bowl facilities to further their religious practices by gaining access to high levels of the Peaks."¹¹⁶ The D.C. Circuit affirmed the district court decision "that the plaintiffs ha[d] not shown an impermissible burden on religion."¹¹⁷

A decade later, Congress passed RFRA, which renewed Native hopes that religious freedom protections for sacred places would finally succeed.¹¹⁸ The Comanche Nation used RFRA in its efforts to protect Medicine Bluff from the effects of an expanded military base.¹¹⁹ Twenty-five years after *Wilson*, the Ninth Circuit's en banc opinion in *Navajo Nation* reiterated that since religious activities on the Peaks have continued ever since, religious exercise was not cognizably burdened under RFRA, as earlier litigation similarly held under the First Amendment claims.¹²⁰ Emphasizing this point enabled the court to bypass a more nuanced engagement with the particular harms that concerned the Native Nations about spraying treated sewage—as distinct from, say, the presence of a ski lodge or the building of a road.¹²¹ Instead, the decision springboarded over the issue to declare how unworkable it would be to acknowledge the "substantial burden" in this case:

Were it otherwise, any action the federal government were to take, including action on its own land, would be subject to the personalized oversight of millions of citizens. *Each citizen would hold an individual veto to prohibit the government action solely because it offends his religious beliefs, sensibilities, or tastes, or fails to satisfy his religious desires. Further, giving one religious sect a veto over the use of public park land would deprive others of the right to use what is, by definition,*

115. *Id.* at 745 (citing *Hopi Indian Tribe v. Block*, Civil Action Nos. 81-0481, 81-0493, 81-0558, at *4 (D.D.C. June 15, 1982)).

116. *Hopi Indian Tribe v. Block*, Civil Action Nos. 81-0481, 81-0493, 81-0558, at *14 (D.D.C. June 15, 1982) (citing Joint Stipulation of Material Facts No. 2). Judge Richey went on to rely on the affidavits of an anthropologist and an archeologist that "the Snow Bowl will not impinge upon the continuation of all essential ritual practices." *Id.* at *4.

117. *Wilson*, 708 F.2d at 740.

118. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (Nov. 16, 1993).

119. *See, e.g., Comanche Nation v. U.S.*, 393 F. Supp. 2d 1196 (W.D. Okla. 2008).

120. *See Navajo Nation*, 535 F.3d 1058, 1063–65 (citing *Navajo Nation v. U.S. Forest Serv.*, 408 F. Supp. 2d 866, 884 (D. Ariz. 2006)).

121. Specific engagement would have required considering how treated Flagstaff wastewater that had come into some contact with the dead was thus utterly and completely ritually impure no matter how few parts per million of physical pollutants remained after treatment or how white and natural the snow appeared. *See Navajo Nation v. U.S. Forest Serv.*, 408 F. Supp. 2d at 888.

*land that belongs to everyone.*¹²²

The reasoning here raises several grave problems.¹²³ What bears illumination is how existing development on the mountain enabled the court to reduce Tribal concern about spraying of treated wastewater on an admittedly holy site as merely a “perceived slight.” The court wrote:

“[W]e are a cosmopolitan nation made up of people of almost every conceivable religious preference.” [citation omitted] Our nation recognizes and protects the expression of a great range of religious beliefs. Nevertheless, respecting religious credos is one thing; requiring the government to change its conduct to avoid *any perceived slight* to them is quite another.¹²⁴

Such reasoning has been imported into subsequent case law. In a federal magistrate judge’s rejection of religious freedom claims that a road expansion would harm sacred places in Oregon, the judge cited the above passage in whole.¹²⁵ The argument from profanation enabled the court here to color, without expressly calling into question, the sincerity analysis. One need only look at the decision to find the clues. Since the result in *Navajo Nation* conforms to a broader pattern of mis-construal of Native presence, these clues merit closer attention as legal drivers, not just dicta.

The opinion’s first footnote does more than qualify the concerns of the Native Nations, and the second sentence all but nullifies these concerns. The footnote states: “It appears that some of the Plaintiffs would challenge any means of making artificial snow, even if no recycled wastewater were used.”¹²⁶ And among the trial court’s factual findings, which the Ninth Circuit accepted, was the observation that the plaintiff White Mountain Apache Tribe operates a ski resort on its own reservation that “relies upon artificial snowmaking, and the water source for this snowmaking is, in part, reclaimed water.”¹²⁷ The district court intimated that this fact was inconsistent with the Tribe’s claim, since the White Mountain Apache regard their entire reservation as sacred.¹²⁸ Other district court findings of “fact” included that “[t]he Forest Service would be hard pressed to satisfy the religious beliefs of all Plaintiffs,” since the “Navajo

122. *Navajo Nation*, 535 F.3d at 1063–64 (emphasis added).

123. Among them are the facts that the plaintiffs were Native governments, not just individuals; that their practices on the Peaks predated the U.S. Constitution, much less the creation of the Cococino National Forest; that official U.S. policy between the 1880s and 1930s criminalized Native religious practices and perforce prohibited access to off-reservation sacred places; and that in 1978, Congress in AIRFA expressly declared these policies, and subsequent ones with even inadvertent effects, infringing on Native religious exercise to have been in error and unjust.

124. *Navajo Nation*, 535 F.3d at 1064 (emphasis added).

125. See *Slockish v. U.S. Fed. Highway Admin.*, No. 08-cv-01169, 2018 WL 4523135, at *4 (D. Or. Mar. 2, 2018).

126. *Navajo Nation*, 535 F.3d at 1062 n.1 (citing Panel Oral Argument (Sept. 14, 2006) at 12:25-12:45 (Hopi Plaintiffs)).

127. *Navajo Nation v. U.S. Forest Serv.*, 408 F. Supp. 2d at 898.

128. See *id.*

Plaintiffs' official position is that the Snowbowl should be shut down completely" and they "oppose snowmaking . . . even if the snow was made from fresh water."¹²⁹

The court went further in failing to acknowledge the reach of the factual findings by discounting religious practices that did not require physical presence on the mountain but that were nonetheless impacted by the wastewater. The court expressly accepted this impact as fact when Diné witnesses explained that when water comes into contact with the dead, it nullifies the efficacy of religious practices both on the mountain and throughout Diné territory connected to the Peaks.¹³⁰

Thus, the profanation principle figures heavily into the judicial decisions about the 1984 and 2006 legal claims over the San Francisco Peaks even when it was not cited as the key legal reasoning. In *Wilson v. Block*, the continued practice of Navajo and Hopi religions even amid operation of the Snowbowl proved to be an obstacle to showing the indispensability of that portion of the San Francisco Peaks to the Navajo and Hopi religions.¹³¹ In *Navajo Nation*, the court narrowed the statutory interpretation of "substantial burden" in RFRA to align with Supreme Court precedent under the First Amendment in *Lyng*. Still, the substantial burden analyses of those courts have reflected misrecognition of the character of Native claims to sacred places. Judicial analysis has focused on the existing degradation of the places, gesturing to how Native religious practices have continued in spite of that degradation, and the inference that the despoiled places can no longer be sacred. Courts have accepted these reasons despite what Native peoples have asserted in their legal complaints that demonstrate genuine religious exercise.

B. First Era: Post-AIRFA

The early 1980s saw five Native sacred land cases arise in as many federal appellate courts.¹³² Tribal assertion of First Amendment rights in those cases was surely emboldened by Congress's passage in 1978 of AIRFA, which identified use of "sacred sites" among the distinctive facets of Native religious exercise

129. *Navajo Nation v. U.S. Forest Serv.*, 408 F. Supp. 2d at 900.

130. This would be akin to concluding that the Roman destruction of the Jerusalem Temple was only subjectively a big deal, since its destruction only occasioned the blossoming of rabbinic Judaism from the position of exile.

131. The indispensability, or centrality test, was obviated by Congress's passage of RLUIPA, which amended RFRA to enlarge the definition of protected religious exercise to "whether or not compelled by, or central to, a system of religious belief." Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc to 2000cc-5.

132. See *Sequoyah v. TVA*, 620 F.2d 1159 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980); *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981); *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983); *Crow v. Gullet*, 706 F.2d 856 (8th Cir. 1983); *Nw. Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688 (9th Cir. 1986), *rev'd*, *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

that were vulnerable to burdens from government actions.¹³³ Four of the five circuit courts drew in some measure on the profanation principle to reject Native claims that religious exercise was burdened in violation of the First Amendment.

1. *Chota and Little Tennessee Valley*

Looking back on sacred place case law, judicial reliance on profanation is not new. The initial round of San Francisco Peaks litigation took place in the 1980s alongside four other major sacred land cases across as many federal circuit courts of appeal. The jurisprudence of those contemporary cases intersected. In *Wilson*, the court relied on *Sequoyah v. Tennessee Valley Authority* to reject the entire First Amendment claim by questioning the “indispensability” of the Snowbowl’s acreage on the Peaks to Navajo and Hopi religions.¹³⁴ In *Sequoyah*, the Sixth Circuit rejected the argument by Ammoneta Sequoyah and other Cherokee traditional practitioners that the proposed Tellico Dam violated the Free Exercise Clause of the First Amendment by submerging ancestral Cherokee villages, burials, medicine gathering places, and knowledge.¹³⁵ It was undisputed that the Little Tennessee Valley carried profound significance to Cherokee traditional people. In the valley, an ancient Cherokee capitol town, Chota, would be submerged by the dam’s reservoir.¹³⁶ In addition, the Tellico Dam would flood numerous burial sites, medicine gathering areas, and a ceremonial ground associated with Cherokee origins.¹³⁷ But the Sixth Circuit held that there was “no such claim of centrality” of the flooded valley to Cherokee religion.¹³⁸ The court was persuaded by non-Native expert anthropologists, archaeologists, and historians, who argued that the claimed losses were not central to Cherokee religion.¹³⁹ Also significant for the court was the refusal of the Oklahoma-based Cherokee Nation to join the litigation, even though the Eastern Band of Cherokees in North Carolina had long opposed the Tennessee Valley Authority (TVA) project. The Sixth Circuit’s view was that the removal of Cherokees from the Little Tennessee Valley on the Trail of Tears and their subsequent settlement in Indian Territory, now the state of Oklahoma, meant that claims that Sequoyah and others had made in the register of religious exercise could only amount to claims made in the register of culture and history.¹⁴⁰

The profanation principle here took shape in terms of the interruption of Cherokee religious practice at these holy places through enforcement in 1838 of the Indian Removal Act and the forced Trail of Tears march of nearly 15,000

133. American Indian Religious Freedom Act, 42 U.S.C. § 1996.

134. *Wilson*, 708 F.2d at 743–44 (citing *Sequoyah*, 620 F.2d at 1161).

135. *See Sequoyah*, 620 F.2d at 1161.

136. *See id.* at 1162; PETER NABOKOV, WHERE THE LIGHTNING STRIKES: THE LIVES OF AMERICAN INDIAN SACRED PLACES 52–72 (2007).

137. *See Sequoyah*, 620 F.2d at 1162.

138. *Id.* at 1164.

139. *See id.*

140. *See id.* at 1164–65.

Cherokee people from their homelands to Indian Territory. Contemporary Cherokee practices, the Sixth Circuit concluded, were not centrally *religious* but better understood as efforts to connect with culture and history.¹⁴¹ After all, the land acquired by the TVA in the valley had long been in the private possession of non-Cherokee people.

Many of the tragic implications of the Trail of Tears are well understood, as is the resilience of the Cherokee Nation and other peoples displaced from homelands who resourcefully made new lives in what is now Oklahoma. *Sequoyah v. TVA*, however, rejected the possibility that the Cherokee could continue to be in a cognizably religious relationship with sacred places and traditional territories from their place of exile. From a religious studies perspective, such reasoning is out of step with how religious relationships with sacred places continue for people living in exile. Indeed, those relationships can even intensify.

Consider members of the Church of Jesus Christ of Latter-Day Saints (LDS), whose history was one of flight from persecution in the eastern United States to the Great Basin in present-day Utah. LDS members have maintained continuous relationships with places associated with revelation and sacred events in New York, Illinois, and Missouri.¹⁴² Their temple site in Illinois, designed in the 1840s according to divine revelation and under the direction of the prophet Joseph Smith, was of potent cultural and historical value to LDS members. The temple did not lose its *religious* value because anti-Mormon mobs had forced the LDS members' removal and an arsonist had subsequently burned it down, or because they had moved on to build other temples in Salt Lake City and elsewhere.¹⁴³

Nonetheless, the U.S. District Court for the Eastern District of Tennessee made quick work of the matter, denying the Cherokee plaintiffs' motion for a preliminary injunction on the ground that they lacked a property interest in the TVA lands in question and granting TVA's motion to dismiss.¹⁴⁴ The Sixth Circuit found the question of property ownership a "factor to be considered" but not "conclusive in view of the history of the Cherokee expulsion."¹⁴⁵ As in other

141. *See id.*

142. According to the National Park Service, which manages the Mormon Pioneer National Historical Trail, Nauvoo "serves as a living history museum and a pilgrimage site for many Mormons active in the Church today." *Historical Buildings Survey Update: Mormon Pioneer Trail, July 2022*, NAT'L PARK SERV. (Sept. 9, 2022), <https://www.nps.gov/articles/000/historical-buildings-survey-update-mormon-pioneer-trail-july-2022.htm> [<https://perma.cc/RAA5-YHFC>].

143. On Mormon memory of persecution at Nauvoo and migration as sacred history, see generally JAN SHIPPS, *MORMONISM: THE STORY OF A NEW RELIGIOUS TRADITION* (1987).

144. *See Sequoyah v. TVA*, 480 F. Supp. 608, 612 (E.D. Tenn. 1979).

145. *Sequoyah*, 620 F.2d at 1164. The Sixth Circuit considered but distinguished a cognate case then on appeal in the Tenth Circuit. There, a district court judge in Utah cited a lack of property interest to reject Navajo claims that rising water levels on Lake Powell violated the Free Exercise Clause by drowning landforms believed to be divine presences and equipping tourists to interrupt ceremonial practices. *See Badoni v. Higginson*, 455 F. Supp. 641, 644 (D. Utah 1977).

sacred land cases of the era, the Sixth Circuit never questioned the sincerity of the Cherokee religious beliefs.¹⁴⁶ It did not have to; it only had to query whether the claims were centrally *religious*.¹⁴⁷ But this did not stop the court from insinuating that the traditionalists' claims were far-fetched, even pretextual. The Tellico Dam had been in the works since the mid-1960s, with its construction nearly complete after surviving the high-profile Snail Darter litigation under the Endangered Species Act.¹⁴⁸ Cherokee religious freedom claims could be viewed by many as a last ditch "Hail Mary pass" to stop the dam. Indeed, the Sixth Circuit hastened to observe that it was the salvage archeology done in preparation for the dam that put "the exact location of Chota and the other village sites" on the map for the plaintiffs:

It appears that the plaintiffs are now claiming that the entire Valley is sacred. Yet none of the affidavits stated this explicitly. For more than 100 years prior to its acquisition by TVA the land in the Valley was owned by persons other than the plaintiffs or members of the class. There is no showing that any Cherokees other than Ammoneta Sequoyah and Richard Crowe ever went to the area for religious purposes during that time. At most, plaintiffs showed that a few Cherokees had made expeditions to the area, prompted for the most part by an understandable desire to learn more about their cultural heritage.¹⁴⁹

"The overwhelming concern of the affiants," the Sixth Circuit continued, "appears to be related to the historical beginnings of the Cherokees and their cultural development. It is damage to [T]ribal and family folklore and traditions, more than particular religious observances, which appears to be at stake."¹⁵⁰

Those who would practice Cherokee religion by renewing interrupted traditions were held accountable for the very interruptions to those traditions by U.S. law and policy. According to the court, the lands that would be submerged could no longer meaningfully be seen as sacred, since they had already been profaned through settler-colonial dispossession, exile, and ensuing private property transactions. Claims of continued relationships with sacred places were viewed as "personal preference[s]" rather than convictions "shared by an organized group."¹⁵¹

146. See *Sequoyah*, 620 F.2d at 1163.

147. It bears mentioning that a fuller acknowledgement of the religiousness of those claims would hardly have, under current Free Exercise Clause jurisprudence, spelled the unconstitutionality of the Tellico Dam. There would be plenty of room for the court to weigh how compelling the state interest in the project was and whether the least restrictive means to that interest had been obtained.

148. See *TVA v. Hill*, 437 U.S. 153, 194–95 (1978).

149. *Sequoyah*, 620 F.2d at 1163.

150. *Id.* at 1164.

151. *Id.* at 1164 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 215–16 (1972)).

2. *Bear Butte*

In the 1980s, the Eighth Circuit also considered and affirmed a district court's rejection of First Amendment protections as applied to a Native sacred place.¹⁵² Here too, the profanation principle is evident in judicial opinions. At issue was Bear Butte, which was managed by the state of South Dakota as a state park but regarded by Cheyenne as *Noavose*, or Holy Mountain.¹⁵³ *Noavose* is a place of prophetic revelation and annual ceremonial renewal in Cheyenne religion.¹⁵⁴ It is also a place of profound importance to Lakota vision fasts and other religious practices.¹⁵⁵ Frank Fools Crow, along with other religious leaders of the Lakota and Cheyenne Nations, argued that park construction and management plans violated their First Amendment religious exercise rights by restricting ceremonial use during construction, desecrating ceremonial sites with access roads and parking lots, and subjecting ceremonies to the ogling and interruption of tourists.¹⁵⁶

The religious leaders' concerns about tourist behavior and enhanced access through improved walkways and viewing platforms were fairly specific. Of particular concern was noise from radios and cars in the lower reaches of the Butte, tourists taking snapshots of devout people engaged in ceremony or of ceremonial objects, and access by menstruating non-Native women during vision quests in violation of ceremonial protocol.¹⁵⁷ The state park development sought to increase tourist access through the viewing platforms and other improvements.

The Eighth Circuit affirmed, with little additional reasoning, the conclusion of the U.S. District Court for the District of South Dakota that the Native claims "failed to establish any infringement of a constitutionally cognizable first amendment right."¹⁵⁸ The district court had concluded there was no showing of an actionable burden on religious exercise.¹⁵⁹ Indeed, the Eighth Circuit held that any "temporarily restricted" access at the ceremonial grounds was "outweighed by compelling state interests in preserving the environment and the resource

152. See *Crow v. Gullet*, 706 F.2d 856 (8th Cir. 1983); *Crow v. Gullet*, 541 F. Supp. 785 (D.S.D. 1982).

153. See *A List of the 2019 National Sacred Places Prayers Days Across the Country*, INDIAN COUNTRY TODAY (June 21, 2019), <https://indiancountrytoday.com/the-press-pool/a-list-of-the-2019-national-sacred-places-prayers-days-across-the-country> [<https://perma.cc/JT6G-SSDQ>]; MCNALLY, *supra* note 54, at 172–73.

154. See *Crow*, 706 F.2d at 857.

155. See *id.*

156. See *Crow*, 541 Supp. at 791 ("In this case plaintiffs contend that the free exercise of their religion has been burdened by the conduct of defendants in several respects: (1) defendants diminish the spiritual value of the Butte by constructing roads, parking lots, buildings, and platforms on or near the Butte; (2) defendants restricted plaintiffs' use of the traditional ceremonial area during the period of construction; (3) defendants allow tourists at Bear Butte to disrupt religious practices in numerous ways; and (4) defendants restricted the religious practices of plaintiffs at Bear Butte Lake, where they were required to camp during the period of construction.").

157. See *id.* at 791–92.

158. *Id.* at 794; *Crow*, 706 F.2d at 858–59.

159. See *Crow*, 541 F. Supp. at 791–93.

from further decay and erosion, in protecting the health, safety, and welfare of park visitors, and in improving public access to this unique geological and historical landmark.”¹⁶⁰

The district court judge turned to a version of the argument from degradation to reject Native claims. “For many years the State has administered this area as a state park,” the court observed.¹⁶¹ “During this time it appears that plaintiffs’ religious practices managed to coexist with the diverse developments that occurred there,” it continued.¹⁶² The judge found it significant that plaintiff Grover Horned Antelope testified that he successfully completed his vision quest the year before in spite of distractions by tourists.¹⁶³ “Therefore,” the court concluded, “defendants have not burdened the exercise of plaintiffs’ religion by ‘allowing’ tourists to act on occasion in a manner which does not conform to the dictates of plaintiffs’ religion.”¹⁶⁴ Here, the district court judge cited *Badoni v. Higginson*, in which the Tenth Circuit held that the First Amendment does not require the government “to police the actions of tourists” who might navigate their boats to observe Navajo ceremonial activity in Rainbow Bridge National Monument.¹⁶⁵

As with the Cherokee objections to the Tellico Dam’s utter destruction of sacred places in the Little Tennessee Valley, the very real concerns Lakota and Cheyenne had with Bear Butte State Park management were undermined by the fact that tourist infiltration of the site for years had not stopped Native people from conducting ceremonies at Bear Butte.¹⁶⁶ The court even took pains to point out that building ample viewing platforms was part of park managers’ efforts to contain tourist activity.¹⁶⁷

In all, the early 1980s saw five Native sacred land cases rise in as many federal appellate courts.¹⁶⁸ Four of the five circuit courts drew in some measure on the profanation principle to reject Native claims that religious exercise was burdened in violation of the First Amendment: at Bear Butte, the Little

160. *Crow*, 706 F.2d at 858 (citing *Crow*, 541 F. Supp. at 794).

161. *Crow*, 541 F. Supp. at 791.

162. *Id.*

163. *See id.* at 789.

164. *Id.* at 792.

165. *Id.* (citing *Badoni v. Higginson*, 638 F.2d 172, 179 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981)).

166. *See id.* at 791.

167. *See id.* at 789.

168. *See Sequoyah v. TVA*, 620 F.2d 1159 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980); *Badoni v. Higginson*, 638 F.2d 172, 179 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981); *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983); *Crow v. Gullet*, 706 F.2d 856 (8th Cir. 1983); *Nw. Indian Cemetery Protective Ass’n v. Peterson*, 795 F.2d 688 (9th Cir. 1985), *rev’d*, *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988).

Tennessee Valley, Rainbow Bridge, and as we have seen at the San Francisco Peaks.¹⁶⁹

3. *Chimney Rock High Country (California)*

Only one circuit court affirmed First Amendment protection for a Native sacred place, in the case of *Northwest Indian Cemetery Protective Ass'n v. Peterson*.¹⁷⁰ The case involved a successful challenge to U.S. Forest Service approval of a Northern California logging road through the sacred High Country of the Yurok, Karuk, and Tolowa Nations.¹⁷¹ However, the Supreme Court overturned the Tribes' Ninth Circuit victory three years later in the previously discussed *Lyng* case.¹⁷² However, a key fact differentiated *Lyng* from the unsuccessful claims in other circuit courts: the sacred place in question was regarded as pristine old-growth forest, to which a more straightforward argument from profanation could not stick.

The Supreme Court's reversal in *Lyng* acknowledged the "disquiet" the logging road would bring to Native religious practice but found no constitutional burden when the government was making decisions about its own lands. The court wrote: "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."¹⁷³

Just as Native people had been emboldened by the 1978 passage of AIRFA to bring religious freedom claims in these 1980s cases, passage of RFRA in 1993 buoyed claims to religious freedom protections for Native sacred places.

C. *Second Era: Post-RFRA*

We turn now to several cases in which RFRA claims to protect sacred places failed in part because of the profanation principle. As discussed, *Navajo Nation* applied the analysis of *Lyng* to sacred place claims under RFRA and has controlled Native religious freedom claims to sacred places in the Ninth Circuit, which encompasses all sacred places on federally managed lands in the Far West, including the threatened Snoqualmie Falls in Washington and Mount Tenabo in Nevada.

169. See *Sequoyah*, 620 F.2d at 1163–64; *Wilson*, 708 F.2d at 744–45; *Crow*, 706 F.2d at 858. In the case of the Rainbow Bridge National Monument, the Tenth Circuit affirmed a lower court's ruling that the Navajo lacked a sufficient property interest to succeed in their First Amendment claim that Lake Powell's levels were submerging landforms they regarded as deities and were enabling boaters to disrupt ceremonial practices. See *Badoni*, 638 F.2d at 180; *Badoni v. Higginson*, 455 F. Supp. 641, 644 (D. Utah 1977). But the case involved management of the water level, not the building of the dam that created the reservoir in the first place. See *Badoni*, 638 F.2d at 179. In this regard, the argument that the contested places were already profaned by a human-made reservoir was at play. See *id.*

170. See *Nw. Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d at 688.

171. See *id.*

172. See *Lyng*, 485 U.S. at 445.

173. *Id.* at 453.

1. *Snoqualmie Falls*

The profanation principle also hindered protection of Snoqualmie River Falls near Seattle, which the Snoqualmie Nation, the people of the falls, regards as a sacred place of origin, ceremony, and ancestral presence. Through its mist, the falls is a place of communion with an important spirit.¹⁷⁴ It has also been the site of hydroelectric power generation in some industrialized form since the turn of the twentieth century.¹⁷⁵ When a utility company sought renewal of its license to the plant and the Federal Energy Regulation Commission (FERC) granted continued operation, Snoqualmie Nation brought an administrative challenge, arguing that shutting down the falls to route the flow through the power plant burdened religious exercise by interrupting sacred rhythms and preventing mist formation necessary for religious experience at the falls.¹⁷⁶ Arguing that the license violated its rights under RFRA, the Snoqualmie petitioned for review of the hearing by the Ninth Circuit, which granted review of the license and administrative ruling but ultimately held against the Nation.¹⁷⁷ As with other cases considered in this Article, the decision applied *Navajo Nation* and turned explicitly on the narrower interpretation of “substantial burden” that aligned RFRA cases with the requirement of a showing of coercion seen in *Lyng* under First Amendment jurisprudence.¹⁷⁸

As in other cases, existing degradation at the place mattered to the legal outcome. For more than a century, the falls were drawn on for power generation.¹⁷⁹ In recent years, Snoqualmie Falls all but completely shut down at times so diverted water could drive the turbines.¹⁸⁰ More than a finding of fact, the history of the degradation implicitly colored the weight of the claim to burdened religious exercise. In its reasoning that the FERC permit did not violate RFRA, the Ninth Circuit made no explicit reference to the long history of the dam and the diversion of water over the falls. Here, as elsewhere, the profanation principle operated in the background, but it operated no less. To seal its analogy, the Ninth Circuit cited not simply *Navajo Nation*’s controlling interpretation of “substantial burden” but also that decision’s reasoning that “the use of recycled wastewater on a ski area that covers one percent of the Peaks” does not constitute unlawful coercion.¹⁸¹ Although the Ninth Circuit allowed the license for decades to come, in 2019 the Snoqualmie were able to halt further development around

174. See *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1211 (9th Cir. 2008).

175. See *id.* at 1210.

176. See *id.* at 1213.

177. See *id.* at 1210.

178. *Id.* at 1213–14.

179. See *id.* at 1210.

180. Water ordinarily flows 1,000 cubic feet per second over the falls during eight months of the year, and the mandated minimum flows at nighttime between September 1 and May 15 were 25 cubic feet per second—a cut of 97.5 percent. See *id.* at 1211.

181. *Id.* at 1214 (citing *Navajo Nation*, 535 F.3d 1058, 1069–70). The suggested analogy is that diversions of water, including dramatic ones, never completely obstruct water from going over the falls.

the sacred place by purchasing forty-five acres of land immediately around the falls.¹⁸²

2. *Mount Tenabo*

The *Navajo Nation* decision limited sacred place protection yet again in 2009 litigation concerning Mount Tenabo. Nevada's Mount Tenabo is sacred to a number of Western Shoshone peoples. When a proposed gold mine expansion threatened it, the South Fork Band of Te-Moak, Timbisha Shoshone, and the Battle Mountain Band of Te-Moak challenged federal approval of the mine with a variety of claims, including RFRA. The U.S. District Court for the District of Nevada rejected the claim that federal approval violated RFRA, citing *Navajo Nation* to find no substantial burden on Shoshone religious exercise, and rejected the Tribes' motion for a preliminary injunction.¹⁸³ Mining had been operating near Mount Tenabo for years, including in a large open pit adjacent to the holy mountain.¹⁸⁴ The Western Shoshone peoples challenged the Bureau of Land Management's (BLM) approval of the expansion in no small part because it even more directly ate into one side of Mount Tenabo, desecrating the holy mountain and the religious practices associated with it.¹⁸⁵ The district court judge rejected the federal agency's contention that the Tribal Nations lacked standing under RFRA, but it declined to issue a preliminary injunction because it found the Tribes would be unlikely to succeed on the merits of their RFRA claim.¹⁸⁶ The court found that, under the *Navajo Nation* precedent, the "burden in demonstrating a substantial burden on the exercise of their religion is high."¹⁸⁷ Plaintiffs had failed to show that government approval of the expansion

(1) forces Plaintiffs to choose between following their religion and receiving a government benefit or (2) coerces Plaintiffs into violating their religious beliefs by threat of civil or criminal sanctions. To the contrary, the evidence demonstrates that Plaintiffs will continue to have access to the areas identified as religiously significant, including the top of Mt. Tenabo.¹⁸⁸

The Tribes appealed the district court's denial of an injunction under NEPA and the Federal Land Policy Management Act; they did not appeal under

182. See Paige Cornwell, *Snoqualmie Tribe Buys Salish Lodge and Adjacent Land for \$125 Million, Halting Nearby Development*, SEATTLE TIMES (Nov. 1, 2019), <https://www.seattletimes.com/seattle-news/eastside/snoqualmie-tribe-buys-salish-lodge-and-adjacent-land-for-125-million/> [<https://perma.cc/3BCQ-7BQ6>].

183. See *S. Fork Band v. U.S. Dep't of Interior*, 643 F. Supp. 2d 1192, 1206, 1208 (D. Nev. 2009), *aff'd in part, rev'd in part sub nom. S. Fork Band Council of W. Shoshone v. U.S. Dep't of Interior*, 588 F.3d 718 (9th Cir. 2009). No appeal was made to the Ninth Circuit on the RFRA issue.

184. See *S. Fork Band*, 643 F. Supp. 2d at 1195.

185. See *id.*

186. See *id.* at 1206, 1208.

187. *Id.* at 1208.

188. *Id.*

RFRA.¹⁸⁹ The Ninth Circuit reversed on the NEPA claims and issued an injunction until the BLM completed a proper review of the effects on air and water quality resulting from the mine's expansion.¹⁹⁰

The Battle Mountain Band of Western Shoshone later drew on RFRA and NHPA in separate litigation to challenge a new powerline providing power to a distinct but similar expansion of open pit gold mining on its traditional lands, arguing that traditional cultural properties in the Tosawihi Quarries and a sacred spirit trail would be harmed.¹⁹¹ A Nevada district court judge rejected the motion for an injunction to powerline construction, citing an unlikelihood to succeed on the merits under either NHPA or RFRA.¹⁹² There, the argument from profanation was even clearer than in the case of expansions of existing gold mines. The district court held that the Te-Moak Band was unlikely to succeed on the merits of its RFRA claim because the new powerline followed an existing roadway. "As the power line follows the road, and the Band has not argued that the road impacts its religious freedom," the court found "that the similarly situated power line would [not] impact [*sic*] its religious freedom."¹⁹³

D. Persistence of the Profanation Principle

In recent years the Supreme Court's expansion of free exercise protection in other contexts has breathed life into Native religious freedom claims to protect their sacred places. These cases should unseat *Navajo Nation* as controlling in the substantial burden analysis of Native sacred place claims under RFRA.¹⁹⁴ Yet *Navajo Nation* is still controlling.¹⁹⁵ The profanation principle sticks, and a different standard is applied to religious claims by Native peoples. Native religious freedom claims in two recent cases of threatened sacred places included strong arguments based on Supreme Court holdings issued subsequent to *Navajo Nation* that had expanded religious free exercise protections for evangelical Christians under RFRA and for a Muslim prison inmate under RLUIPA.¹⁹⁶ Those newer arguments were not successful. Given the favorable trajectory for those seeking more robust protections for religious exercise, the outcome in each case is surprising. But the outcome is less surprising if one considers how the weight of the plaintiff's claims to burdened religion was also beset by an implicit argument from profanation.

189. See *S. Fork Band*, 588 F.3d at 723–26.

190. See *id.* at 726, 729.

191. See *Battle Mt. Band v. U.S. Bureau of Land Mgmt.*, No. 16-CV-0268, at 8 (D. Nev. Aug. 25, 2016).

192. See *id.* at 21.

193. *Id.* at 17.

194. Regarding RFRA, see *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367 (2020). Regarding RLUIPA, see *Holt v. Hobbs*, 574 U.S. 352 (2015).

195. See, e.g., *La Cuna de Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep't of Interior*, 603 F. App'x 651 (9th Cir. 2015).

196. *Burwell*, 573 U.S. at 682; *Holt*, 574 U.S. at 352.

1. *Standing Rock*

Public opinion was captivated by the encampments of water protectors in a movement that had become synonymous with their banner proclaiming “Defend the Sacred.” But court opinions largely were not similarly captivated.¹⁹⁷ In multiple rounds of litigation, the Standing Rock Sioux Tribe and the neighboring Cheyenne River Sioux Tribe brought challenges to federal approval of the Dakota Access Pipeline’s crossing of the Missouri River under NHPA (*Standing Rock I*),¹⁹⁸ RFRA (*Standing Rock II*),¹⁹⁹ and NEPA (*Standing Rock III*).²⁰⁰

In *Standing Rock II*, issued in March 2017, Judge Boasberg of the District Court for the District of Columbia rejected the intervenor Cheyenne River Sioux Tribe’s request for an injunction to the Dakota Access Pipeline’s crossing of the Missouri River.²⁰¹ Judge Boasberg rejected Cheyenne River’s request for a preliminary injunction based both on laches and on the unlikelihood of succeeding on the merits with their RFRA claim, drawing on the *Navajo Nation* interpretation of substantial burden as controlling.²⁰² But Judge Boasberg could not make such quick work of applying *Navajo Nation*’s requirement that a substantial burden requires sufficient coercion to act in violation of one’s beliefs. For its part, Cheyenne River had tried to distinguish the nature of the burden on its religious exercise from cases like *Navajo Nation* by likening the burden to cases involving religious freedom in prisons, where Native and other religious minority claimants had made considerably more gains.²⁰³ In keeping with beliefs about a Black Snake Prophecy, Cheyenne River argued that the pipeline’s crossing under the Missouri River rendered its waters impure whether or not a physical spill occurred.²⁰⁴ The Tribe argued that, because the United States had seized the sacred Black Hills and polluted other waters, Missouri River water was the only available ritually pure water for use in a range of Lakota ceremonies.²⁰⁵

197. See MCNALLY, *supra* note 54, at 123–26.

198. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs (Standing Rock I)*, 205 F. Supp. 3d 4 (D.D.C. 2016).

199. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs (Standing Rock II)*, 239 F. Supp. 3d 77, 80 (D.D.C. 2017).

200. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs (Standing Rock III)*, 255 F. Supp. 3d 101 (D.D.C. 2017).

201. See *Standing Rock Sioux II*, 239 F. Supp. 3d at 80. In the first round of the litigation the previous fall, the Tribes failed to persuade Judge Boasberg that the Army Corps of Engineers’ efforts to adequately consult the Tribes were sufficiently unlawful under NHPA to halt construction on the pipeline. See *Standing Rock I*, 205 F. Supp. 3d at 37. Eventually, the Tribes would garner a modest victory in a mixed ruling several months later requiring a fuller environmental review under NEPA. See *Standing Rock III*, 255 F. Supp. 3d at 160.

202. See *Standing Rock II*, 239 F. Supp. 3d at 80, 87–88.

203. See *id.* at 94–96.

204. See *id.* at 89–91.

205. See *id.* 89–90.

Judge Boasberg dutifully rehearsed these Cheyenne River claims over several pages, under the heading “Sincerely Held Religious Belief.”²⁰⁶ But immediately after that sensitive rehearsal, Judge Boasberg turned to a number of facts spelling out the profanation principle:

As the Corps and Dakota Access note, Lake Oahe is not untouched by manmade projects. DAPL’s crossing, for instance runs parallel, at a distance of 22 to 300 feet, to a natural-gas pipeline that was built under the lake in 1982. It also tracks an already existing overhead utility line. Several other oil pipelines cross the Missouri River upstream of Lake Oahe, including one located just 7.5 miles north of the lake And a wastewater-treatment plant is authorized to discharge into a tributary to a river that flows through the Reservation into Lake Oahe.²⁰⁷

The judge proceeded to recount how Cheyenne River distinguished the existing natural gas pipeline from the Dakota Access Pipeline by establishing that “the crude oil that [wa]s proposed to flow through the latter [wa]s the fulfillment of a Lakota prophecy of ‘a Black Snake that would be coiled in the Tribe’s homeland and which would harm . . . [and] devour the people.’”²⁰⁸

After all this scrutinizing, Judge Boasberg backed off from explicitly questioning the sincerity of the claimed beliefs but curiously took pains to cite *Hobby Lobby* along the way:

To qualify for RFRA’s protection, an asserted belief must be “sincere,” not pretextual In light of instructions to tread gently with its sincerity inquiry, therefore, the Court finds that the Tribe is likely to successfully establish a sincerely held belief that the presence of oil in the Dakota Access pipeline running under Lake Oahe interferes with its members’ religious ceremonies.²⁰⁹

A case can be made that Judge Boasberg did not merely see Cheyenne River’s religious claims through the determining prism of *Navajo Nation*, which controlled his stated reasoning that the RFRA claims, though keyed to sincerely held beliefs, would not succeed on the merits. The profanation principle appears to have colored his analysis. A rhetorical analysis suggests that, given the degradation of the Missouri River, which he chose to speak of in terms of the human-made reservoir Lake Oahe, the judge was more than unsure whether the claimed Black Snake Prophecy was sincere.

The Army Corps of Engineers’ brief addressed apparent contradictions in Cheyenne River’s brief. In doing so, the defendant implicitly cast aspersions on the sincerity of the plaintiffs’ religious claims, thereby introducing the profanation principle. These arguments seemed to leak into the ultimate judicial decision in the case, which bears elements of the profanation principle:

206. *Id.* at 89–91.

207. *Id.* at 90 (internal citations omitted).

208. *Id.*

209. *Id.* at 90–91 (internal quotations and citations omitted).

Cheyenne River asserts that Lake Oahe, a man-made reservoir completed in 1959 and which is crossed by man-made infrastructure at several points, contains the “only natural, unadulterated, and ritually pure water available to the [T]ribe” Cheyenne River suggests that other sources of water, including “ground water,” “aquifers” and rivers might serve as substitutes if not for inaccessibility or contamination. However, Cheyenne River has not established that water upstream of the proposed pipeline cannot be used. Notably, water from the portions of Lake Oahe that lie upstream of the disputed pipeline crossing would not have come into contact with the proposed buried pipeline, which Cheyenne River has identified as the event that makes the water unpure.²¹⁰

Unlike environmental adverse effects, which can be seen as cumulative in nature, substantial burdens on religious exercise hinge on a dichotomy between the sacred and the profane, and any previous profanation is dispositive. That did not stop the Corps from making such an argument. The Corps also argued in its brief that the

Cheyenne River does not demonstrate that the Dakota Access pipeline easement will substantially burden its religious exercise beyond any burden imposed by the other infrastructure located over, in, and under Lake Oahe. In particular, Cheyenne River does not address the Mandan oil pipeline located approximately eight river-miles north of the Lake Oahe project boundary, as the water that flows from the Missouri River into Lake Oahe flows over that pipeline.²¹¹

Glossing over the human-made creation of Lake Oahe naturalizes its existence and obscures the history of federal coercion that continues to burden religious practice for Native peoples. The Corps dammed up the sacred Missouri River to make Lake Oahe in 1958 in the first place. This important history gets only brief mention and scarcely any analysis in the Dakota Access litigation.²¹² Vine Deloria, Jr., observed that the Pick-Sloan Plan, of which Oahe Dam was a part, “was without doubt, the single most destructive act ever perpetrated on any [T]ribe by the United States.”²¹³ Without consultation, much less consent, the Corps drove over Native opposition, secured eminent domain condemnations of Tribal lands for nickels on the dollar, and built the largest earthworks dam in the world at the time. In doing so, the Corps created a reservoir that it flooded for a

210. United States Army Corps of Engineers’ Opposition to Cheyenne River Sioux Tribe’s Motion for Preliminary Injunction at 15, *Standing Rock II*, 239 F. Supp. 3d 77, 80 (D.D.C. 2017) (Feb. 21, 2017) (No. 16-cv-01534) (internal citations omitted).

211. *Id.*

212. See *Standing Rock I*, 205 F. Supp. 3d at 13; *Standing Rock II*, 239 F. Supp. 3d at 80–81; *Standing Rock III*, 255 F. Supp. at 114; *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 282 F. Supp. 3d 91, 94–95 (D.D.C. 2017); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 301 F. Supp. 3d 50, 54–55 (D.D.C. 2018).

213. Vine Deloria, Jr., *Foreword* to MICHAEL L. LAWSON, *DAMMED INDIANS REVISITED: THE CONTINUING HISTORY OF THE PICK-SLOAN PLAN AND THE MISSOURI RIVER SIOUX*, at xii, xv (2009).

staggering 250 miles upstream, the length of Lake Ontario, and submerged the bottomlands that had been the lifeblood of Standing Rock and Cheyenne River peoples. Lake Oahe submerged the choicest reservation lands: Lakota villages, burial sites, sacred places, medicine gathering places and other traditional cultural properties (TCPs).

Construction on the dam continued even as a court challenge to the eminent domain condemnation was playing out in negotiations over compensation. A month before the dam would be closed and the waters began rising, Standing Rock and Cheyenne River settled for half of the \$26 million and \$23 million they respectively sought. And when it came time to distribute the electricity or to share in its revenue (even revenue from tourism to the reservoir), the Tribes were shut out. It would be a half century before final monetary settlements were reached. In 1992, Standing Rock won a recovery trust fund capitalized with \$90.6 million, much of which was funded from Oahe Dam hydroelectric power revenues.²¹⁴ In 2000, the Cheyenne River Sioux Tribe Equitable Compensation Act created an additional \$291 million recovery trust fund.²¹⁵ The lack of sustained analysis about Lake Oahe's history in court decisions is not surprising. Neither Lake Oahe nor management of its levels was the subject of litigation.

But by not problematizing Lake Oahe, much less the role of the Corps in its making, the decisions serve to *naturalize* Lake Oahe and activate the profanation principle. This has implications. If the Missouri River is already so denatured, so *profaned*, how serious can Cheyenne River's religious claims of the new pipeline's desecration of its sacred waters *really be*? Applying the profanation principle allows those claims to be viewed as environmental opposition to a pipeline's operation cloaked in religious freedom. But from the perspective of the Lakota Nations, these are still waters of the sacred Missouri River, albeit in altered form. Thus, the court views the Dakota Access Pipeline crossing as just one more piece of desecration. Even if the profanation principle was not a key legal reason for the rejection of Native religious claim, it clearly was at work in the proceeding.

2. Mount Hood Area

The argument from profanation also contributed to a recent Oregon federal magistrate judge's rejection of claims by individual Tribal members from Yakama and Grand Ronde Nations that the 2008 widening of a highway violated their religious freedom rights under RFRA.²¹⁶ The Native people claimed the

214. See Three Affiliated Tribes and Standing Rock Sioux Tribal Equitable Compensation Act, Pub. L. No. 102-575, §§ 3501-3511, 106 Stat. 4731 (1992) (as cited in LAWSON, *supra* note 213, at 285).

215. See Cheyenne River Sioux Tribe Equitable Compensation Act, Pub. L. No. 106-511, §§ 101-107, 114 Stat. 2365 (2000) (as cited in LAWSON, *supra* note 213, at 280).

216. *Slockish v. U.S. Fed. Highway Admin.*, No. 08-cv-01169, 2018 WL 4523135, at *1 (D. Or. Mar. 2, 2018).

expansion would violate their religious freedom by “damaging and destroying a historic campground and burial grounds through tree cutting and removal, grading, and ultimately burying the campground and burial grounds.”²¹⁷ Although the federal government had already bulldozed the burial ground and stone altar by the time the complaint was filed, the magistrate judge rejected the RFRA claim, citing *Lyng* and *Navajo Nation*.²¹⁸ The court, like other courts before, found that the plaintiffs had not demonstrated substantial burden on religious exercise because they could not show the requisite coercion.²¹⁹ The sacred place in question here, like so many sacred places, was not pristine. The sacred place was at the edge of U.S. Highway 26 connecting Portland and nearby Mount Hood in a busy, developed two-lane road where left turns had become perilous, absent space for a turn lane.²²⁰

The judge in the case never questioned the sincerity of beliefs of the Yakama and Grand Ronde plaintiffs or suggested in print that their concerns were pretextual. But the Native plaintiffs were joined in the lawsuit by an association of non-Native landowners and others. The burden analysis here, as in the other cases, was not hermetically sealed from the broader opposition to highway expansion. Indeed, the magistrate judge’s order not only cited the Ninth Circuit’s substantial burden analysis in *Navajo Nation*, but its dicta also effectively trivialized the claims of Native Nations and citizens of those Nations whose religious traditions at their sacred places predate the United States. The dicta treated these claims as obstreperous. The court took the occasion to quote the reductive language of *Navajo Nation* and *Lyng* in full:

Were it otherwise, any action the federal government were to take, including action on its own land, would be subject to the personalized oversight of millions of citizens. *Each citizen would hold an individual veto to prohibit the government action solely because it offends his religious beliefs, sensibilities, or tastes, or fails to satisfy his religious desires. Further, giving one religious sect a veto over the use of public park land would deprive others of the right to use what is, by definition, land that belongs to everyone* Our nation recognizes and protects the expression of a great range of religious beliefs. Nevertheless, respecting religious credos is one thing; requiring the government to change its conduct to avoid any perceived slight to them is quite

217. *Id.* at *2 (citing Fourth Am. Compl. ¶ 95).

218. *See id.* The Ninth Circuit issued a memorandum dismissing an appeal, finding the case moot because the federal agency could offer no effective remedy. *See Slockish v. U.S. Dep’t of Transp.*, No. 21-35220, 2021 WL 5507413, at *1 (9th Cir. Nov. 24, 2021).

219. *See Slockish*, No. 08-cv-01169, 2018 WL 4523135, at *2.

220. “Fourteen accidents occurred between 2000 and 2004, including one fatality. Numerous driveways and streets access U.S. 26 in this section. ‘Motorists making left turns from the highway [were] frequently required to stop in the fast lane to wait for a gap in oncoming traffic while those turning left onto the highway [had] no median refuge to enter.’” *Id.* at *2 n.2 (citing ECF No. 292-36, at 119).

another.²²¹

3. *Oak Flat*

Oak Flat is a place of ceremony, traditional food and medicine gathering, sacred springs, and ancestral presence for various Apache peoples. Now located in Arizona's Tonto National Forest, Native people are litigating to prevent its eventual destruction by collapse as a result of a massive underground copper mine. Known to Apache people as Chi'chil Bildagoteel, a number of Apache clans remember their origins in the Oak Flat area and many have returned to it physically for ceremony and traditional practices, or through practices of collective memory, even after their confinement on the nearby San Carlos Apache Reservation from the late nineteenth century.²²²

Both the federally recognized Apache Tribes in the region and an organization of traditional practitioners, Apache Stronghold, have challenged proposals for destructive copper mining there. They have also secured the listing of Oak Flat and its environs as a district on the National Register of Historic Places. But a rider to the 2014 National Defense Authorization Act stipulated that Oak Flat and its environs be transferred by the Tonto National Forest to Resolution Copper in exchange for other lands immediately following successful completion of an environmental review.²²³ At the time of this writing, an initial Final Environmental Impact Statement (EIS) that was issued in January of 2021 is under additional scrutiny by federal agencies,²²⁴ and a number of lawsuits are pending over the permitting process.²²⁵ The Ninth Circuit recently agreed to rehear the case after a three-judge panel denied the Apache Stronghold's RFRA claim by drawing on *Navajo Nation* to hold that the land transfer and ensuing mining project would not violate Apache religious freedom.²²⁶

221. *Id.* at *3–4 (citing *Navajo Nation*, 535 F.3d 1058, 1063–64 (citing *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988))).

222. See generally KEITH H. BASSO, WISDOM SITS IN PLACES: LANDSCAPE AND LANGUAGE AMONG THE WESTERN APACHE (1996) (discussing the sophistication of Western Apache practices of place-based collective memory).

223. National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 3003, 128 Stat. 3732–41 (2014) (codified at 16 U.S.C. § 539p). For the provision that is particularly salient to this discussion, see *id.* § 3003(c)(9)(A).

224. In September 2022, the BLM offered a third-party review of the Final EIS and found that it left unanswered questions relating to impacts of water usage. As of November 12, 2022, the U.S. Forest Service is considering whether and how to act on calls for supplemental EIS. See *Federal Report Exposes Serious Deficiencies in Required Environmental Study for Proposed Resolution Copper Mine*, INDIAN COUNTRY TODAY (Sept. 12, 2022), <https://ictnews.org/the-press-pool/federal-report-exposes-serious-deficiencies-in-required-environmental-study-for-proposed-resolution-copper-mine> [<https://perma.cc/5PQS-SCQC>].

225. Other litigation includes *San Carlos Apache Tribe v. U.S. Forest Serv.*, No. 21-CV-00068 and *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 33 F.4th 1202 (9th Cir. 2022).

226. *Apache Stronghold v. United States*, 38 F.4th 742 (9th Cir. 2022), *vacated, reh'g granted*, No. 21-15295, 2022 WL 16986232 (9th Cir. Nov. 17, 2022) [hereinafter *Apache Stronghold*].

To surmount the Ninth Circuit's holding in *Navajo Nation* that had controlled in each of the subsequent RFRA challenges discussed in this section, Apache Stronghold sought to distinguish the harm to religious exercise at Oak Flat by calling attention to the undisputed fact that the mining plan would result in an enormous crater that would destroy Oak Flat. This, it argued, did amount to a substantial burden because it would completely destroy the sacred place, rendering religious exercise there impossible and not simply diminishing subjective experience.²²⁷ Apache Stronghold also argued that even in the unlikely event Resolution Copper did not follow through on the mining plan, the privatization of the land alone would deprive Apache of the benefit of ceremonial access they currently enjoy at Oak Flat as federal land.²²⁸

The split three-judge panel disagreed, finding that the case aligned sufficiently with the substantial burden analysis in *Navajo Nation* and *Lyng* and elaborating that Congress, in RFRA, only intended to restore the types of substantial burdens to religious exercise found expressly in *Sherbert v. Verner* and *Wisconsin v. Yoder*.²²⁹

The profanation principle was not so easily applied because there was no previous despoliation of this site. Within an hour's drive of Phoenix, Oak Flat's scenic nature made it a popular picnicking and recreation area—so much so that since the 1950s, Oak Flat Picnic Area was closed to any development.²³⁰ Under continued Forest Service management, Oak Flat could be a place of relatively easy access by Apache people for ceremonial and other traditional activities at this important ancestral place.

Still, there were two related ways in which the profanation principle helped the court find no substantial burden on religious exercise even where all parties agreed Oak Flat would be destroyed as the mine hollowed out ore beneath it and resulted in its collapse as a crater. Here again, neither the government, the district court, nor the three-judge panel questioned the sincerity of Apache claims to affected religious exercise. Neither did they dispute the extent to which the new mine would damage Oak Flat.²³¹ But the courts were no doubt aware of a century-long tradition of mining in the area around Superior, Arizona, which beginning in the 1870s hinged on the forced confinement of Western Apache groups in the area to the nearby San Carlos Reservation.²³² Although neither the district court nor the Ninth Circuit mentioned the area's long mining tradition in their opinions, the local mining history could focus judicial concern on how recent the religious exercise at Oak Flat was.

227. *See id.* at 760.

228. *See id.* at 752.

229. *See id.* at 753, 774–75.

230. President Eisenhower's Public Land Order 1229, 20 Fed. Reg. 7337 (Sept. 27, 1955).

231. *See Apache Stronghold*, 38 F.4th at 752, 756–59; *Apache Stronghold v. United States*, 519 F. Supp. 3d 591, 604 (D. Ariz. 2021).

232. *See* RICHARD JOHN PERRY, *APACHE RESERVATION INDIGENOUS PEOPLES AND THE AMERICAN STATE* (1993).

The Ninth Circuit observed that Western Apache ceremonies had only recently been practiced at Oak Flat.²³³ In reciting the factual background of the case, the court began by recounting Apache claims to Ga'an spirits at Oak Flat. Yet the court went on to intimate that the religious import of Oak Flat to Apache peoples was only recently held:

In recent years, Oak Flat has been used for a variety of purposes, both religious and secular. After decades of holding religious rituals on their reservations, the Apache have recently returned to worship in Tonto Forest. In 2014, the Apache held a "Sunrise Dance" on Oak Flat for just the second time in "more than a hundred years." That 2014 ceremony closely followed another Sunrise Dance held the previous year at Mt. Graham, another sacred site elsewhere in Arizona.²³⁴

The reference to Mount Graham here is curious because it is so clearly superfluous. Apache traditional people, including some figures in the Apache Stronghold movement, had unsuccessfully challenged a large telescope development project at Mount Graham in the 1990s.²³⁵ The reference may well indicate the majority's implicit view that ceremonial activity at Oak Flat, as at Mount Graham, was opportunistic, inserting itself into controversial development.²³⁶

E. Government Coercion, Native Peoples, and Substantial Burden

Michalyn Steele and Stephanie Hall Barclay have argued that the *Lyng-Navajo Nation* substantial burden analysis takes a myopic view on coercion when it comes to Native American sacred places.²³⁷ In both *Slockish* and *Standing Rock*, courts followed *Navajo Nation*:

Where . . . there is no showing the government has coerced the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions, or conditioned a governmental benefit upon conduct that would violate the Plaintiffs' religious beliefs, there is no "substantial burden" on the exercise of their religion.²³⁸

But what if, as Steele and Barclay argue, courts acknowledged that where off-reservation sacred places are concerned, Native peoples start from a baseline level of government coercion? From 1883 to 1934, the United States enforced administrative laws and attendant policies known commonly as the Code of

233. See *Apache Stronghold*, 38 F.4th at 749.

234. *Id.*

235. See *Apache Survival Coal. v. United States*, 21 F.3d 895 (9th Cir. 1994); see generally Joel Helfrich, *Cultural Survival in Action: Ola Cassadore Davis and the Struggle for dził nchaa si'an (Mount Graham)*, 1 NATIVE AM. & INDIGENOUS STUD. 151, 151–75 (2014).

236. See *Apache Stronghold*, 38 F.4th at 749.

237. See Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 HARV. L. REV. 1294, 1299–1302 (2021).

238. *Navajo Nation*, 535 F.3d 1058, 1063.

Indian Offences or the Civilization Regulations.²³⁹ The regulations criminalized specific ceremonies, such as the Sun Dance and the Potlatch, and granted federal agents broad latitude to prosecute traditional healing and other practices the United States had deemed inimical to civilization.²⁴⁰ Ceremonies at sacred places were subject to this prosecutorial latitude. For the fifty years of the Civilization Regulations, Native peoples were largely confined to reservations and arrested if they left, even to gather medicines at sacred places or make pilgrimages to shrines.²⁴¹ For the many sacred places now found on public lands, federal or state governments have often managed them in ways that have either intentionally or unintentionally constrained or prohibited their ceremonial access or use. This baseline of coercion is especially salient for sacred places that became government lands through unlawful and unjust processes.²⁴²

If applied to the cases above, Steele and Barclay's view would produce different results because long-standing conditions of governmental coercion have become the lay of the land, as it were, and often the source of the profanation principle. The court in *Sequoyah v. TVA*, for example, might have incorporated and acknowledged the fact that U.S. policies of forced removal precluded continuous exercise of traditional Cherokee religions at Chota and the Little Tennessee River Valley. In the *Standing Rock* cases, the court could have incorporated into its substantial burden analysis the damage that federal damming of the Missouri to create Lake Oahe itself had already done to numerous sacred places. If the court in *Apache Stronghold* had understood a baseline level of coercion, perhaps the curtailment of Native religious practices through military enforcement by the federal government would account for the perceived recentness in Native religious practices.

Indeed, the very dispossession of traditional territories created conditions for the desecration of sacred places, since those dispossessed territories abound in sacred places. The Black Hills in South Dakota and Wyoming offer a clear example. A place of origin and ceremony to the Lakota and revered by other Tribes, the Black Hills were expressly protected in the Fort Laramie Treaty of 1868.²⁴³ But rumors of gold emboldened American prospectors, and with the support of federal troops, they tore through the Black Hills in clear violation of that treaty.²⁴⁴ The United States abrogated the treaty in an 1876 agreement that

239. See MCNALLY, *supra* note 54, at 33–68.

240. Letter from Henry Teller, Secretary, U.S. Dep't of the Interior, to Hiram Price, Comm'r, Off. of Indian Affs. (Dec. 2, 1882), in DEP'T OF THE INTERIOR, OFF. OF INDIAN AFFS., ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS, at xv (1883).

241. See MCNALLY, *supra* note 54, at 44–54.

242. See *generally id.* (discussing the Civilization Regulations as they relate to contemporary Native claims to the sacred).

243. Fort Laramie Treaty, Apr. 29, 1868, 15 Stat. 635.

244. See *generally* EDWARD LAZARUS, BLACK HILLS/WHITE JUSTICE: THE SIOUX NATION VERSUS THE UNITED STATES: 1775 TO THE PRESENT (1991) (providing historical context and narrating the legal battle leading up through the 1980s).

carved out the Black Hills from the reservation without lawful consent of the Sioux Nation.²⁴⁵

It was not until 1980 that the Supreme Court held these actions an unlawful taking.²⁴⁶ A large monetary settlement to compensate some of those harms sits in escrow but remains uncashed by descendent Nations of the Treaty of 1868 signatories, who, despite considerable impoverishment, regard the Black Hills as sacred and not for sale, then and now.²⁴⁷ Although there are some encouraging developments in management of the federal lands in the Hills, such as Wind Cave National Monument, the Lakota and other Native Nations remain largely excluded from control of the sacred places.²⁴⁸ The State of South Dakota manages a 71,000-acre state park in the sacred hills, ironically named after George Custer, who is venerated for waging war with Native Nations.²⁴⁹ Of course, Mount Rushmore National Monument, a shrine to the American nation, was built by cutting into a Lakota holy place.²⁵⁰ Mount Rushmore represents a sort of ritualized profanation of a Native sacred place and its reconsecration as a marker of dispossession.²⁵¹ Such activity is not new. Erasure of Native histories and presence has been crucial to the ideological transformation of spectacular places like Yosemite and Yellowstone from Native places into *American* places. Federal protection of such places as national parks, national monuments, wildlife refuges, or wilderness areas has often turned on such erasure to effect a sense of such places as threatened wilderness.²⁵²

III.

HISTORIC PRESERVATION LAW AND THE PROFANATION PRINCIPLE

Given how judges have failed to grant protections of Native sacred places within a religious freedom law framework, Native peoples have looked to historic preservation law. Unlike religious freedom law, which can turn on the dichotomy between the sacred and the profane, historic preservation procedural protections equip Native Nations with a fuller range of ways to articulate what

245. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 420–24 (1980) (holding that an 1877 Act implementing an agreement that unlawfully abrogated an 1868 treaty effected a taking of treaty-protected Tribal property, obligating the government to make just compensation with interest).

246. *Id.*

247. See LAZARUS, *supra* note 244, at 403–28.

248. See *Wind Cave National Park*, NAT'L PARK SERV. (Feb. 9, 2022), <https://www.nps.gov/wica/learn/management/index.htm> [<https://perma.cc/5S2K-JQLC>].

249. See *Custer State Park*, S.D. GAME, FISH & PARKS (2023), <https://gfp.sd.gov/parks/detail/custer-state-park/> [<https://perma.cc/BEZ9-V87P>].

250. See Matthew Glass, “Alexanders All”: *Symbols of Conquest and Resistance at Mount Rushmore*, in *AMERICAN SACRED SPACE* 152–86 (David Chidester & Edward T. Linenthal eds., 1995).

251. See KATHLEEN M. SANDS, *AMERICA’S RELIGIOUS WARS: THE EMBATTLED HEART OF OUR PUBLIC LIFE* 139–40, 170 (2019); Glass, *supra* note 250, at 152–86.

252. See Sarah Krakoff, *Public Lands, Conservation, and the Possibility of Justice*, 53 HARV. C.R.-C.L. L. REV. 213, 230–54 (2018); MARK DAVID SPENCE, *DISPOSSESSING THE WILDERNESS: INDIAN REMOVAL AND THE MAKING OF THE NATIONAL PARKS* 115–33 (1999).

matters to them about significant places without making a public showing of “religion.”

Historic preservation law is particularly apt as it allows for a wider range of possibilities with which Native peoples can speak of places as “sacred.” For example, some sacred places are sacrosanct, places where no one is authorized by religious law or custom to go, or where only certain spiritual leaders are authorized to go under certain conditions.²⁵³ Other sacred places may be regarded as sacred, but also as places where Native religious law or custom would allow some range of other uses, including economic uses. As Vine Deloria, Jr., writes, “there is immense particularity in the sacred and it is not a blanket category to be applied indiscriminately.”²⁵⁴ So, in theory, the procedural protections of historic preservation law give Native Nations a place at the table to shape development according to what matters to them. In practice, however, there is a wide range of what counts as government compliance and few legal teeth to rein in that range.²⁵⁵

Environmental review and historic preservation review are often combined in the range of government actions that may impact cultural resources: agency management plans, land transfers, approvals, and licenses for resource extraction. Most Native Nations have created offices to manage consultation and their roles in these review processes.

In this part, I explore how the profanation principle has affected protections specifically under NHPA, especially as it was amended in 1992 to incorporate Native peoples through consultation and the creation of Tribal historic preservation offices. Although elements of the profanation principle are visible to a degree in the case law, NHPA offers no substantive protections, and courts have broadly deferred to agency prerogatives. The profanation degradation principle plays out with more frequency in administrative review under 54 U.S.C. § 106 (Section 106). Profanation in administrative law can be most easily observed in determinations of “integrity” as they relate to eligibility for listing on the National Register and in analyses of “adverse effect,” which is tied to integrity.

A. NHPA and Section 106

NHPA has a checkered history with Native peoples in their struggle to protect sacred sites. Galvanized by the demolition of New York’s Pennsylvania Station a few years earlier, historic preservationists advocated for and won

253. See DELORIA, JR., *supra* note 27, at 271–78.

254. *Id.* at 274.

255. For a fuller discussion, see MCNALLY, *supra* note 54, at 127–70; see also THOMAS F. KING, OUR UNPROTECTED HERITAGE: WHITEWASHING THE DESTRUCTION OF OUR CULTURAL AND NATURAL ENVIRONMENT 73–90 (2009) (arguing standard cultural resource management practices fail to protect cultural heritage and fail to attain the lofty aims of National Historic Preservation Act).

passage of NHPA in 1966.²⁵⁶ NHPA is rooted in a concern over the loss of the nation's architectural history and archeological resources.²⁵⁷ As a result, its application eclipsed efforts by Native American peoples whose relationships with sacred and culturally significant places are not merely matters of aesthetic or scientific value. Fortunately, developments in the 1980s and 1990s made NHPA's Section 106 review a key arena in which Native peoples could hope to shape projects involving their sacred places.²⁵⁸

Under Section 106 of NHPA, federal agencies in charge of proposed federal or federally assisted undertakings must "take into account the effect of the undertaking on any historic property" and "afford the [Advisory Council on Historic Preservation] a reasonable opportunity to comment with respect to the undertaking."²⁵⁹ Nothing in the law requires federal agencies to do more than identify historic properties and take into account any adverse effects, but courts have said the each step of the review process, elaborated in the regulations at 36 C.F.R. 800, must be properly followed.²⁶⁰

Specifically, agencies must engage consulting parties to identify any historic properties within the undertaking's area of potential effect; determine what, if any, adverse effects on those historic properties the undertaking will have; and then consult to resolve those adverse effects through avoidance, minimization, or mitigation. This consultation often results in a Memorandum of Agreement or Programmatic Agreement, which guides how the undertaking will be implemented to ensure the agreed-upon resolution of effects is carried out. If agreement among the consulting parties cannot be achieved, the Advisory Council on Historic Preservation renders a comment to the head of the agency.

The first significant determination to be made is whether there are any historic properties—that is, those eligible for listing on the National Register of Historic Places—within an area of potential effect. To be eligible, properties must meet one or more of the following the following four criteria:

- (A) that are associated with events that have made a significant contribution to the broad patterns of our history; or
- (B) that are associated with the lives of significant persons in our past; or
- (C) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master,

256. National Historic Preservation Act, 54 U.S.C. §§ 300101–307108.

257. For the history of NHPA, see THOMAS F. KING, *CULTURAL RESOURCE LAWS AND PRACTICE* 109–13 (2012); THOMAS F. KING, *PLACES THAT COUNT: TRADITIONAL CULTURAL PROPERTIES IN CULTURAL RESOURCE MANAGEMENT* 11–28 (2003).

258. KING, *CULTURAL RESOURCE LAWS AND PRACTICE* 41–45 (discussing 1992 amendments to National Historic Preservation Act to engage Native nations through creation of Tribal historic preservation offices).

259. 54 U.S.C. § 306108.

260. See, e.g., *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999); *Pueblo of Sandia v. United States*, 50 F.3d 856, 859 (10th Cir. 1995).

or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or

(D) that have yielded or may be likely to yield, information important in prehistory or history.²⁶¹

The regulations also categorically exclude certain kinds of properties from eligibility:

Ordinarily cemeteries, birthplaces, or graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings, properties primarily commemorative in nature, and properties that have achieved significance within the past 50 years shall not be considered eligible for the National Register.²⁶²

But the regulations contain notable exceptions for religious properties that also meet other criteria for historical significance. For instance, “[a] religious property deriving primary significance from architectural or artistic distinction or historical importance” can be eligible, as can a property “achieving significance within the past 50 years if it is of exceptional importance.”²⁶³ And properties can still be eligible “if they are integral parts of *districts* that do meet the criteria.”²⁶⁴ An important step in determining the eligibility of religious properties, including places of ongoing sacred significance to Native peoples, is whether they have sufficient integrity in terms of this “primary significance from architectural or artistic distinction or historical importance.”²⁶⁵

The profanation principle operates in and around integrity determinations. Properties must retain “integrity of location, design, setting, materials, workmanship, feeling, and association” to be included on or determined eligible for the National Register.²⁶⁶ The regulations also exclude properties from eligibility if they no longer retain “integrity” in terms of the significance that makes them eligible for the Register.

Because the process was given its early shape by architectural historians and archeologists, “integrity” had been a more straightforward matter of physical condition and keyed to its valuation in aesthetic and scientific, not religious, terms. Questions of integrity concerned whether a historic building structure had retained enough of its original elements to count on the National Register. Another common question of integrity had been whether an archaeological site had been “disturbed,” such that accurate scientific information could no longer

261. 36 C.F.R. § 60.4 (2022).

262. *Id.*

263. *Id.*

264. *Id.* (emphasis added).

265. *Id.*

266. *Id.*

be obtained. Such determinations had typically been made by specialists: archeologists and architectural historians.

The prominence of archeological and architectural concerns in NHPA also meant that the process overlooked many places of sacred significance to Native peoples. This is particularly true where no built structures or archeological “sites” existed, but where natural places, entire landforms, or waterbodies constituted the sacred place.²⁶⁷ In the 1990s, two key developments extended what counted for NHPA protection. In 1990, *National Register Bulletin 38* clarified that properties that possess traditional cultural significance to living communities—TCPs—were eligible for the National Register, and thus to be factored into Section 106 review.²⁶⁸ In 1992, NHPA was amended to mandate consultation with Native Nations, to create an infrastructure of Tribal Historic Preservation Officers, and to codify elements of *Bulletin 38* into eligibility for listing on the National Register:

Property of traditional religious and cultural importance to an Indian [T]ribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register. . . . In carrying out its responsibilities under section 306108 of this title, a federal agency shall consult with any Indian [T]ribe or Native Hawaiian organization that attaches religious and cultural significance to property described in subsection (a).²⁶⁹

Enhancing NHPA has allowed Section 106 review to be one of the few key tools available to Native peoples in the protection of their sacred places. But just as a federal court rejected arguments about NHPA violations in *Standing Rock*, NHPA’s overall effectiveness is highly dependent on the government agencies acting in good faith. Difficulties arise because the same agency tasked to conduct historic preservation review is frequently a proponent of the project endangering the sacred place.²⁷⁰ Agencies, in turn, can use several techniques to reduce the exposure of projects to potential conditions of Section 106 review. Here, the profanation principle can *and does* set in. It works in two areas of Section 106 review: (1) determinations of “integrity” and (2) adverse effect analysis.

B. Integrity

To be eligible for listing on the National Register, a property must “possess integrity of location, design, setting, materials, workmanship, feeling, and association.”²⁷¹ This list has been boiled down to two prongs of analysis: integrity of condition (encompassing the first five attributes on the list) and

267. KING, PLACES THAT COUNT, *supra* note 257, at 24–28.

268. See PATRICIA L. PARKER & THOMAS F. KING, NATIONAL REGISTER BULLETIN 38: GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES 1 (1990).

269. 54 U.S.C. § 302706(a)–(b).

270. For a fuller critical appraisal of NHPA in sacred place protection, see MCNALLY, *supra* note 54, at 134–70.

271. 36 C.F.R. § 60.4 (2022).

integrity of relationship (encompassing feeling and association). In either case, the regulations tie integrity to the significance that makes a property eligible for the National Register: “Integrity is the ability of a property to convey its significance.”²⁷²

I fully expected the integrity requirement for register eligibility to be a common point of entry for the profanation principle in NHPA reviews, given that development or pollution are widely misconstrued as precluding the sacredness of Native sacred places, and because the integrity standard could apply differently to TCPs as compared with mere archeological sites or architectural structures.

For instance, an archeological site has dramatically diminished value to science if it has been disturbed. So, too, with historic buildings and other structures in terms of their aesthetic and pedagogical value. Thomas F. King wrote “whether the property retains the ability to convey its significance” is rooted in earlier architectural history versions of the work. Another rule of thumb is asking, “would a person from the property’s period of significance recognize it? . . . A resurrected Clovis mastodon hunter probably wouldn’t today recognize central Cleveland . . . but the place where he made spear points may well retain integrity as an archeological site.”²⁷³

But a key finding of research for this Article is that the integrity determination, fertile as it might seem for the profanation principle to crowd out NHPA protections, has been mostly headed off at the pass by *National Register Bulletin 38*. The Register’s *Bulletin 38* has been regarded by courts as guidance, not formal administrative law,²⁷⁴ but it has successfully shaped much of the discussion around TCPs and has given explicit guidance that it is up to the Native or other communities of interest to determine the integrity of TCPs. *Bulletin 38* clarifies that:

[T]he integrity of a possible traditional cultural property must be considered with reference to the views of traditional practitioners; if its integrity has not been lost in their eyes, it probably has sufficient integrity to justify further evaluation.²⁷⁵

Bulletin 38 frames the question of integrity in terms of the “relationship to traditional cultural practices or beliefs” and whether the “condition of the property” is such that “the relevant relationships survive,” even if the place has been substantially modified.²⁷⁶ “Cultural values are dynamic,” *Bulletin 38* says, “and can sometimes accommodate a good deal of change.”²⁷⁷ What *Bulletin 38*

272. NATIONAL REGISTER BULLETIN 15: HOW TO APPLY THE NATIONAL REGISTER CRITERIA FOR EVALUATION 44 (1990).

273. KING, CULTURAL RESOURCE LAWS AND PRACTICE, *supra* note 257, at 96.

274. See *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 807 (9th Cir. 1999).

275. PARKER & KING, *supra* note 268, at 10.

276. *Id.*

277. *Id.*

has to say about integrity, especially integrity of relationship, or feeling and association, is a model for how agencies, courts, and potential plaintiffs can rebut the profanation principle. *Bulletin 38* does not describe integrity as merely subjective in nature, but it acknowledges that sacred significance issues from the *relationship* between a Native people and their sacred place, not from the physical condition of the place itself.²⁷⁸ Thus, even sullied places can remain sacred if the sacred relationship remains.

With its clarity on these points, *Bulletin 38* calls for a relational, fact-specific integrity analysis that does not preclude eligibility based on degradation. It has also helped create conditions in which few federal agencies would dare come out and declare a culturally significant place to lack integrity.

The agencies have tools aplenty, after all, to reduce the exposure of projects in review. Agencies seeking to avoid considering alternatives and modifications to proposed development undertakings need not impugn the integrity of potential sacred places; they can arrive at a finding of no adverse effect through reductive application of the adverse effect criteria. An agency finding of no adverse effect, after some review by the state and Tribal historic preservation officers, can end Section 106 obligations.²⁷⁹ This finding can, in some cases, draw on the profanation principle to minimize additional effects of a given project on integrity already affected by previous development.

Still, questions of integrity can become salient in instances where the area of the TCP is large.²⁸⁰ Questions of integrity enter in because sacred places can be so expansive, and varied in terms of condition, that making NHPA determinations for the whole domain becomes more complex. To illustrate, I turn to two mountains regarded entirely as sacred by Native peoples: Mount Shasta in California and Mount Taylor in New Mexico.

1. *Mount Shasta*

The Advisory Council on Historic Preservation, the federal body overseeing NHPA review, touts as an NHPA “success story” the thwarting of a planned major ski resort on Mount Shasta in the 1980s. Development of the ski area threatened, among other places, Panther Meadows, a place near the timberline that the Winnemem Wintu consider profoundly sacred.²⁸¹ A very small-scale ski area, the Shasta Ski Bowl, was destroyed in a 1978 avalanche. In

278. *See id.*

279. Virtual Interview with Wesley Furlong, Staff Att’y, Native Am. Rts. Fund (Aug. 5, 2021).

280. *See* KING, PLACES THAT COUNT, *supra* note 257, at 120.

281. *See Section 106 Success Story: Protecting Traditional Cultural Places on Public Lands: Mount Shasta*, ADVISORY COUNCIL ON HIST. PRES., <https://www.achp.gov/success-stories/mount-shasta> [<https://perma.cc/HK4B-PCYU>]. See an extended segment of interviews about Panther Meadows in Sacred Land Film Project’s 2001 documentary IN THE LIGHT OF REVERENCE (Bullfrog Films 2001), <http://www.bullfrogfilms.com/catalog/ilrc.html> [<https://perma.cc/9WMZ-KW8R>], and another 2007 documentary THE SPRING AT PANTHER MEADOWS (Sacred Land Film Project Nov. 20, 2007), <https://sacredland.org/the-spring-at-panther-meadows/> [<https://perma.cc/B8FD-NU4N>].

1988, the U.S. Forest Service, which manages the upper reaches of the mountain, issued a permit for development of a full-scale ski resort, replete with golf course and condominium development.²⁸²

A NHPA Section 106 review for the proposed development found that no historic properties would be affected within the proposed ski area. In 1990, equipped anew with *Bulletin 38*, and after consulting with Tribes, the Forest Service conducted a study and found a large portion of Mount Shasta eligible for the National Register and thus NHPA protection, including Panther Meadow and everything above 8,000 feet, which was designated the “Native American Cosmological District.”²⁸³ In 1994, the Keeper of the National Register listed the entire 150,000 acres of the mountain on the Register, discouraging various kinds of future development.²⁸⁴

Had the story ended here, it would be a triumph of administrative protection—but officials would soon apply the profanation principle. Originally, the listed area on the Register included over one thousand parcels of private land at lower elevations.²⁸⁵

Under political pressure from local landowners, the Keeper of the National Register later reconsidered the decision and listed only the portion of the mountain at a higher elevation, which was about 19,000 acres under Forest Service control.²⁸⁶

Here is where the profanation principle crystallized around determinations of integrity: how could an area so inundated with development be meaningfully sacred for the purpose of Register eligibility? As a coda to the story, the Forest Service determined that the ski development would have both direct and indirect adverse effects on that TCP, and in 1998, it revoked the ski area’s permit.²⁸⁷ The outcome prevented further desecration of Panther Meadows, but the process had laid bare the workings of the profanation principle in such administrative determinations.

2. *Mount Taylor*

Developers and government officials have engaged the profanation principle more clearly still in a New Mexico sacred mountain case. In 2009, the New Mexico Supreme Court upheld an emergency designation of the entirety of Mount Taylor as a TCP under a state law aligned with NHPA.²⁸⁸ Proposed uranium mining on its northern flank threatened Mount Taylor, which Acoma,

282. See *Section 106 Success Story*, *supra* note 281.

283. *Id.*

284. *Id.*

285. See *id.*

286. See *id.*

287. See *id.*

288. See *Rayellen Res., Inc. v. N.M. Cultural Props. Rev. Comm.*, 319 P.3d 639, 656 (N.M. 2014).

Laguna, Zuni, Hopi, and Navajo regard as holy.²⁸⁹ The Forest Service had already determined that upper reaches of the mountain within the Cibola National Forest constituted a TCP and were eligible under NHPA. Native Nations had been successful in a state heritage board's designation of the entire mountain as a TCP under state law.²⁹⁰

But a state district court agreed with those challenging the designation under state law and found "that both the mountain's sheer size and the private property exclusions made it impracticable to comply with provisions in the Cultural Properties Act relating to integrity of place, required inspections, and required maintenance."²⁹¹ "Mount Taylor is simply too large," the state district court reasoned, "to be reasonably inspected and maintained and that 'such a massive . . . area, whose acreage has yet to be correctly and finally defined . . . cannot "possess integrity of location" as set out as . . . criteria under federal guidelines followed by the [Committee].'"²⁹²

Fortunately, the New Mexico Supreme Court found nothing in the state NHPA analogue statute limiting the size of a listed property and reversed the lower court's decision. Furthermore, it cited a number of larger TCPs listed on the National Register: Tahquitz Canyon in California, Kaho'olawe Island in Hawai'i, and the San Francisco Peaks in Arizona.²⁹³ The court saw "no reason, either in the text of the Act or in logic, why our state authorities are prohibited from listing a property simply because it is large."²⁹⁴

The court's reference to the entirety of San Francisco Peaks being a TCP points ironically to the relative weakness of historic preservation law to protect Native sacred places, since courts found no violation of law in the sewage to snow scheme there.²⁹⁵ But this litigation at Mount Taylor and the administrative process at Mount Shasta show that efforts to avert historic preservation protections by going after the integrity of a place do not stick. It is encouraging that courts have rejected applicability of the profanation principle here as to NHPA.

C. Adverse Effect Analysis

Nonetheless, the profanation principle can and does enter into historic preservation law in a subtler respect. It can color a subsequent determination in the Section 106 review process before any discussion of resolution of adverse

289. Along with the San Francisco Peaks, Mount Taylor is among the four mountains bounding Diné sacred geography. *See Navajo Nation*, 535 F.3d 1058, 1098 (Fletcher, J., dissenting).

290. *See* New Mexico Cultural Properties Act, N.M. STAT. ANN. §§ 18-6-1 to 18-6-17 (1969, as amended through 2005), <http://new.nmhistoricpreservation.org/assets/files/registers/CPA2006.pdf> [<https://perma.cc/DG74-VFLP>].

291. *Rayellen Res.*, 319 P.3d at 645.

292. *Id.* at 649.

293. *See id.* at 650.

294. *Id.*

295. *See Navajo Nation*, 535 F.3d 1058, 1064–65.

effects is required: the determination of whether any effects of an undertaking on historic properties are adverse. Because NHPA regulations tie analysis of any adverse effect directly to the analysis of National Register eligibility, including integrity, the process allows proponents of development to question the integrity of an asserted sacred place indirectly.²⁹⁶ In this regard, the profanation principle works in a manner that resembles its workings within religious freedom law—subtly but potently calling into question the full sincerity of professed religious exercise without formally doing so.

The NHPA regulations say that an effect is adverse when it “diminishes the integrity” of a place: an adverse effect exists “when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register [of Historic Places] in a manner that would diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling, or association.”²⁹⁷

The regulations also specify that adverse effects can be cumulative, including “reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.”²⁹⁸ What is more, effects can be adverse even if indirect, as when, for example, they include the “[i]ntroduction of visual, atmospheric or audible elements that diminish the integrity of the property’s significant historic features.”²⁹⁹

1. *Huckleberry Mountain*

A case involving Huckleberry Mountain in Washington is illustrative. In the late 1990s, the Ninth Circuit Court of Appeals reviewed whether the U.S. Forest Service met NHPA requirements to take into account any effects on historic sites sacred to the Muckleshoot Nation. The Forest Service had approved a land exchange for logging in the high country around Washington’s Huckleberry Mountain through which a Muckleshoot ancestral trail threaded.³⁰⁰

“The Forest Service ha[d] already concluded that previously logged and ‘obliterated’ portions of the trail [were] ineligible for listing,” consequently placing the integrity of the entire trail system in doubt.³⁰¹ The Ninth Circuit found no fault with this determination.³⁰² Still, the Forest Service had not challenged the integrity of many sites within the land exchange project area, and it found that the exchange would have adverse effects on those sites because the land exchange would result in logging.³⁰³ But the adverse effects the Forest

296. The author is grateful to Wesley Furlong, Staff Attorney at the Native American Rights Fund, for this insight.

297. 36 C.F.R. § 800.5(a)(1) (2022).

298. *Id.*

299. 36 C.F.R. § 800.5(a)(2)(v) (2022).

300. *See* Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 808 (9th Cir. 1999).

301. *Id.*

302. *See id.*

303. *See id.*

Service found related to certain archeological sites, which it took to be exhaustive of places of significance to the Muckleshoot, and thus did not consider adverse effects to the high country or trail itself.³⁰⁴ Also, the mitigation plan pursued by the Forest Service involved studying and documenting those archeological sites before the land exchange would likely destroy them.³⁰⁵ In other words, the sites would not be protected; their archeological significance would be documented. Recall that findings of adverse effects are tied to the integrity of a historic property, which is in turn impacted its historic significance.

The Ninth Circuit reversed the lower court decision on this NHPA issue, agreeing with the Muckleshoot that the significance of the Divide Trail and Huckleberry Mountain did not consist in the scientific value of archeological sites alone.³⁰⁶ The Ninth Circuit held that the Trail was a TCP with which the Muckleshoot were in an ongoing relationship.³⁰⁷ The Ninth Circuit found:

the district court determined erroneously that the Forest Service had proceeded under c(1) [to address adverse effects] and concluded that the agency acted properly because any adverse effect may be “negated” if the historical and archeological value of the property can be preserved by conducting research on the site The Muckleshoots value the Divide Trail for more than its “potential contribution to . . . research.”³⁰⁸

2. *Rattlesnake Mountain*

The profanation principle informed agency determinations of adverse effect in a 2015 case, also in Washington state. In *Confederated Tribes and Bands of the Yakama Nation v. U.S. Fish & Wildlife Service*, a federal district court similarly found the agency had been “arbitrary and capricious” in its NHPA Section 106 duties in conducting a series of public wildflower tours at Rattlesnake Mountain, or *Laliik*, a place of traditional religious and cultural significance to the Yakama, Umatilla, Nez Perce, and Wanapum.³⁰⁹ The mountain rises prominently in the Hanford Reach National Monument, which the United States seized during the Cold War for plutonium production and closed to all except some Tribal uses.³¹⁰

Recognized as a TCP, the court noted that “*Laliik* retains integrity of condition as it remains relatively unblemished More importantly, *Laliik* retains integrity of association with [T]ribal cultural beliefs and practices.”³¹¹ The Fish and Wildlife Service had set up monthly consultation meetings with the

304. *See id.* at 808–09.

305. *See id.* at 808.

306. *See id.* at 809.

307. *See id.* at 808.

308. *Id.*

309. *See* *Confederated Tribes & Bands of the Yakama Nation v. U.S. Fish & Wildlife Serv.*, No. 14-CV-3052, 2015 WL 1276811, at *1 (E.D. Wash. Mar. 20, 2015).

310. *See id.* at *2.

311. *Id.*

stakeholder Tribes about management of the monument. In 2011, the Fish and Wildlife Service proposed offering a public “[shrub steppe] wildflower tour,” and the Yakama and Umatilla Nations opposed, noting “the nature of [*Laliik*’s] cultural significance is not conducive to tourism and recreation and will adversely affect the TCP.”³¹²

Still, the agency issued a finding of no adverse effect, noting that “the wildflower tour is a transitory event. Like a jet and its contrail high over a wilderness area, the wildflower tour is a fleeting intrusion.”³¹³ The Umatilla and the Washington State Historic Preservation Office opposed the agency finding. In response, the agency scaled back the plan to two pilot wildflower tours in one day with a cap of fifty people, which took place outside the actual TCP boundary. In 2014, the agency increased the number of tours. The agencies allowed up to twelve tours on six different days, engaging as many as 1,500 members of the public over five years, but didn’t consult with the Tribes about the change, according to the Tribes.³¹⁴

A judge from the Eastern District of Washington sided with the Tribes. The judge wrote:

Although the NHPA and its accompanying regulations do not mandate a particular substantive outcome, its procedural requirements are obligatory. . . . [B]ecause the Service has not complied with the mandatory procedural requirements leading to its “no adverse effect” finding, on this record such finding is necessarily “arbitrary and capricious” or otherwise “without observance of procedure required by law and must be set aside.”³¹⁵

NHPA protections are difficult to enforce in court because courts defer to government agencies and there are steep requirements for convincing a court that an agency action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” under the Administrative Procedure Act.³¹⁶ Thus, most of the options available to Native Nations seeking protections of sacred places under NHPA are found in the consultation requirements and the Section 106 process itself. Of course, such protections are subject to the vicissitudes of agency good faith and the availability of Tribal resources, time, and expertise to challenge administrative determinations. As discussed, the profanation principle plays a role conditioning the terms of those Section 106 administrative determinations.³¹⁷

312. *Id.* at *2.

313. *Id.* at *3.

314. *Id.* at *5–8.

315. *Id.* at *9.

316. 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“The scope of review under the ‘arbitrary and capricious’ standard is narrow and a court is not to substitute its judgment for that of the agency.”).

317. It is outside the scope of this Article to survey all administrative determinations of TCP impacting Native peoples.

IV.

ENVIRONMENTAL LAW AND THE PROFANATION PRINCIPLE

Environmental law, especially NEPA, has provided the other primary arena for protection of sacred places.³¹⁸ Under NEPA, the profanation principle largely operates in consideration of *cumulative impacts*. As with NHPA, NEPA protections for sacred places are procedural, not substantive. Even with procedural protection, Native peoples face steep challenges to court enforcement. NEPA requires government agencies to consider the impacts of their actions on “the human environment,” which federal regulations define as “the natural and physical environment and the relationship of present and future generations of Americans with that environment.”³¹⁹ In this regard, agencies must consider impacts on cultural as well as natural resources. Courts have required agencies to take “a hard look” and will hold agencies accountable for violations of process. However, NEPA only requires that agencies identify and manage impacts or provide public reasons for not doing so.³²⁰ Any judicial remedy will only set aside an administrative decision based on a deficient process. It does not stop the agency from reaching the same outcome through a non-deficient process. If integrity and adverse effect analyses keyed to integrity are the places where the profanation principle sets in under NHPA, under NEPA, the profanation principle takes shape largely in the consideration of cumulative impacts.

Before federal agencies can take major actions like licensure and permit approval, NEPA requires scientific and social scientific analysis of effects of those actions on the human environment. In most cases, the NEPA analysis rests on a preliminary *environmental assessment* (EA) with a “finding of no significant impact” or a mitigated finding of no significant impact that includes preemptive mitigation of possible significant impacts.³²¹ But where the preliminary EA determines that the issue is one of a “major federal action significantly affecting the quality of the human environment,” NEPA requires a lengthier and more thorough analysis.³²² The agency must produce an EIS and must consider alternatives to the proposed government action.³²³ Having taken what courts call “a hard look” at these impacts, the agency issues a Record of Decision where the agency details how it will mitigate harmful effects and where it must provide public reasons for whatever alternative it has chosen.³²⁴

318. See National Environmental Policy Act, 42 U.S.C. §§ 4321–4335. A deep analysis into all venues where the profanation principle exists in environmental law is beyond the scope of this Article.

319. 40 C.F.R. § 1508.14(m) (2022).

320. For a fuller discussion of NEPA and sacred place protection, see MCNALLY, *supra* note 54, at 132–70.

321. *Id.* at 132.

322. *Id.*

323. See KING, CULTURAL RESOURCE LAWS, *supra* note 257, at 64–69.

324. *Id.* at 74 (citing 40 C.F.R. § 1505.2).

Under NEPA regulations, effects on the human environment can be “cumulative” in nature. A cumulative impact is defined as:

[T]he impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over time.³²⁵

Cumulative impacts can be “hard to figure out,” as one expert put it.³²⁶ The ambiguities around quantifying cumulative impact have largely served pro-development interests in environmental review processes under NEPA. Smaller projects with modest impacts may be part of a much broader pattern, as in the case of the BLM’s approval of more than three hundred natural gas drilling permits near Chaco Canyon. Foreseeable future actions can be hard to pin down. And there are plenty of project proponents who oppose fuller cumulative impact inquiries. In an effort to speed up and to narrow the reach of NEPA review, the Trump administration completely deleted any mention of cumulative impacts in its 2020 NEPA rule changes.³²⁷ Some of these changes have been challenged in court, and at the time of this writing the Biden administration is in the process of restoring previous rules, including the language of cumulative impacts.³²⁸

Given the further uncertainties about cumulative impact assessment under NEPA going forward, my aim here is to highlight how the profanation principle registers in discussions of cumulative impacts on Native sacred places. Curiously, the profanation principle can undercut Native peoples’ claims in one of two seemingly opposite ways. Where project proponents have carved up environmental review into compartmentalized projects, impacts may appear too indirect to merit sacred place protection. In the case of natural gas fracking in the vicinity of Chaco Canyon in New Mexico, a separate EA was performed for each fracking drill site individually. The report did not consider the cumulative effects on the water table of more than three hundred drill sites clustered together and ignored any cumulative air, noise, and light pollution effects on practitioners engaging with their sacred places.³²⁹

But aided with the profanation principle, cumulative impact analysis can be weaponized against Native peoples’ claims to sacred places. In the Mauna Kea

325. 40 C.F.R. § 1508.7 (2022).

326. KING, CULTURAL RESOURCE LAWS, *supra* note 257, at 68.

327. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43304, 43375 (July 16, 2020) (to be codified at 40 C.F.R. pts. 1500–1508, 1515–1518).

328. Proposed rule changes are found at National Environmental Policy Act Implementing Regulations Revisions, 86 Fed. Reg. 55757-01 (proposed Oct. 7, 2021) (to be codified at 40 C.F.R. 1502, 1507, 1508).

329. See *Diné Citizens Against Ruining Our Env. v. Bernhardt*, 923 F.3d 831, 844, 849 n.11 (10th Cir. 2019), *reh’g denied* (June 24, 2019).

case raised earlier, the Supreme Court of Hawai'i held that the TMT did not itself further ruin the human environment at the summit because eleven other telescopes had already effectively spoiled the place.³³⁰ Additionally, Nevada's Mount Tenabo illustrates how the profanation principle informs the avoidance of cumulative impact analysis.

A. Mount Tenabo

Recall from our discussion above that Mount Tenabo is sacred to various Western Shoshone Nations and is increasingly encroached upon by further development of gold mining in the area. The South Fork Band of the Te-Moak persuaded the Ninth Circuit in 2009 to revisit an EIS supporting the expansion of the Cortez gold mining operations.³³¹ But expansion of a different segment of the mine complex, the Pediment Cortez Hills Project, raised a new set of challenges. In 2010, the Ninth Circuit reversed the district court's decision and held that the BLM had not sufficiently analyzed the cumulative impacts of an amended plan and thus failed to "take a hard look at the cumulative impacts of the Amendment and other projects within the cumulative effects area."³³²

Mount Tenabo is an apt sacred place for considering the profanation principle because the area around it has been a center of mineral mining since the 1860s.³³³ The Western Shoshone had been dispossessed of the mountain and had lost the power to keep Mount Tenabo pristine. Tribal efforts more recently have focused on mitigating the cumulative adverse effects of gold and other mining on the sacred mountain and on religious practices related to it. The Ninth Circuit acknowledged this:

Mount Tenabo, located within the project area, is considered a traditional locus of power and source of life for the Western Shoshone, and figures in creation stories and world renewal. The top of Mount Tenabo is used by the Western Shoshone for prayer and meditation and although mining activities have impeded this practice, the association of the top of the mountain to Western Shoshone beliefs, customs, and practices remains.³³⁴

The BLM conducted an EA that considered the impact of exploratory drilling in a fifty-acre area, despite the amended mining plan proposed for a mine consisting of 250 acres.³³⁵ Even though a second phase of mining development was likely, the BLM confined its EA to the exploratory actions and not the compounded

330. See *supra* Introduction.

331. See *S. Fork Band Council of W. Shoshone v. U.S. Dep't of Interior*, 588 F.3d 718, 725–26 (9th Cir. 2009).

332. *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 606 (9th Cir. 2010).

333. See *id.* at 596.

334. *Id.* at 597.

335. See *id.* at 596.

effects on the sacred places in question.³³⁶ The Ninth Circuit found that the agency's gesture toward its cumulative effects analysis was vague at best:

[A]lthough the EA refers to cumulative effects in two paragraphs in the Cultural Resources and Native American Religious Concerns sections, the EA does not, in fact, discuss the existence of any cumulative impacts on these resources. Instead, it concludes that “[n]o incremental cumulative effects would occur to cultural resources as a result of the proposed project.”³³⁷

The BLM maintained that it was up to the Te-Moak to demonstrate more fully what those cumulative effects referred to by the EA might be. The Ninth Circuit concluded that the Te-Moak only needed to show “the potential for cumulative impact.”³³⁸ Indeed, the court noted that the Tribe had bolstered its claim by resubmitting an ethnographic study for the original mining project, which predicted impeded “visible and physical access” by Western Shoshone to Mount Tenabo, disturbance of burials, and diminishment of pinyon pine.³³⁹ “These same concerns could be affected by the exploration activities conducted under the Amendment, potentially resulting in a total impact that is greater than that caused by either the Pediment/Cortez Hills project or the Amendment.”³⁴⁰ The Ninth Circuit held the BLM accountable for segmenting the NEPA analysis. The BLM had not taken a “hard look” at the full effects and potential cumulative effects on a sacred place and the ongoing Western Shoshone relationship to that place.

A contemporary satellite view of Mount Tenabo shows plainly how the open pits on the mountain's western flank would burden religious practice on the mountain. This is especially true when accounting for the attendant noise, traffic, lights, and disturbance of ancestral places.³⁴¹ Thus, it is unlikely that the further environmental review ordered by the Ninth Circuit will lead to protections acceptable to the Western Shoshone. However, the Western Shoshone have not given up on Mount Tenabo now that it is no longer pristine. How could they, given that it remains a site associated with their creation story and a place of ongoing prayer?

B. *Mauna Kea*

Proposed construction of the TMT near the summit of Mauna Kea renewed Native Hawaiian resolve to defend their sacred mountain. Native Hawaiians built encampments, staged construction roadblocks, and held ceremonies to reaffirm

336. *See id.* at 603–05.

337. *Id.* at 604.

338. *Id.* at 605.

339. *Id.* at 606, 606 n.14.

340. *Id.* at 606.

341. Mount Tenabo, Eureka Cnty., Nev., GOOGLE MAPS (Satellite view, coordinates 40.16272°N, 116.58267°W), <https://www.google.com/maps/place/Mt+Tenabo/@40.1629737,-116.6023146,3720m/data=!3m2!1e3!4b1!4m5!3m4!1s0x80a44fe9d702b1cd:0xc9050990d5ad8a48!8m2!3d40.1629756!4d-116.584805?hl=en-US> [https://perma.cc/MHA7-NAK6].

relationships with the mountain and protest the TMT. In 1968, the State of Hawai'i assigned the summit to the University of Hawai'i as the Mauna Kea Science Reserve, and a total of eleven telescopes were built in ensuing years. Native Hawaiians opposed previous telescope development, especially expansion of the Keck Observatory in the mid-2000s. As Greg Johnson and others have shown, efforts on the ground to protect Mauna Kea are rooted in ancient ceremonies, customs, and traditions; they are also generative of Native Hawaiian religion.³⁴² Thwarted by *Lyng* and *Navajo Nation*, no legal challenges materialized under religious freedom, even with the powerful religious claims and practices taking place on Mauna Kea. Instead, challenges took shape largely under Hawai'i state environmental law. While Hawai'i's political history and distinctive state law make this case somewhat unique,³⁴³ the profanation principle is so prominent that the case bears consideration here.

Following a final EIS for the proposed TMT in 2010, Hawai'i's Board of Land and Natural Resources (BLNR) issued a Conservation District Use Permit for the TMT in 2013.³⁴⁴ The permit was challenged in court but was ultimately affirmed by a state appeals court.³⁴⁵ On review, the Supreme Court of Hawai'i called for a contested case hearing to preserve the due process rights for those who could assert Native Hawaiian traditional and customary rights, which are guaranteed in the state constitution.³⁴⁶ The relevant provision reads

The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.³⁴⁷

A contested case hearing took place over six months, and in September 2017, the BLNR approved a hefty *Findings of Fact, Conclusions of Law, and Decision and Order*.³⁴⁸ The Supreme Court of Hawai'i agreed to hear challenges to the BLNR's findings and conclusions, asking, *inter alia*,

342. See Johnson, *Engaged Indigeneity*, *supra* note 72, at 152–81; Johnson, *Materialising and Performing Hawaiian Religion(s) on Mauna Kea*, *supra* note 72, at 56–75; GREG JOHNSON, RELIGION IN THE MOMENT: CONTEMPORARY INDIGENEITY AND THE POLITICS OF PRESENCE (forthcoming).

343. Many Native Hawaiians do not recognize the legitimacy of Hawaiian statehood or its status as part of the United States, and many reject efforts to integrate under the aegis of federal Indian law. See, e.g., J. KĒHAULANI KAUANUI, PARADOXES OF HAWAIIAN SOVEREIGNTY: LAND, SEX, AND THE COLONIAL POLITICS OF STATE NATIONALISM, 1–9, 43–76 (finding paradoxical debates to locate Hawaiian sovereignty in Kingdom or Indian law discourses).

344. *Mauna Kea Anaina Hou v. Bd. of Land & Natural Res. (Mauna Kea I)*, 363 P.3d 224, 235 (Haw. 2015).

345. *Id.* at 236.

346. *Id.* at 247.

347. *Id.* at 238 (citing HAW. CONST. art. XII, § 7).

348. See Findings of Fact, Conclusions of Law and Decision and Order, Contested Case Hearing Re Conservation Dist. Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Sci. Rsrv. (Sept. 28, 2017) (No. BLNR-CC-16-002),

[w]hether the BLNR erred in concluding that the Hawai'i Constitution does not protect contemporary Native Hawaiian cultural practices; . . . [w]hether the TMT project violates religious exercise rights of Native Hawaiians protected by federal statutes; . . . [and w]hether the Hearing Officer should have excluded challenges to the legal status of the State of Hawai'i and its ownership of Mauna Kea as well as the existence of the Kingdom of Hawai'i.³⁴⁹

The state supreme court agreed with the BLNR conclusion, based on *Lyng*, that threatened sacred places do not substantially burden religious exercise under the First Amendment.³⁵⁰ The court also agreed that RFRA did not apply to state-level actions.³⁵¹ On the question of the state constitution's protections for traditional and customary rights, the state supreme court agreed with the BLNR that "customary and traditional" cultural practices (that is, practices that are consistent with practices as of 1892, the standard) may happen on Mauna Kea, but not in the specific "relevant area" of the TMT Observatory site or Access Way.³⁵²

Having narrowed the project area to the access road and observatory site itself, the Supreme Court of Hawai'i affirmed that other threatened shrines, much less the entirety of the mountain itself, were not impacted cultural resources:

The BLNR found no evidence . . . of Native Hawaiian cultural resources, including traditional and customary practices, within the TMT Observatory site area and the Access Way, which it characterized as the relevant area It correctly concluded that the two ahu constructed on the TMT Access Way in 2015 as protests against TMT are not protected as Native Hawaiian traditional or customary rights.³⁵³

Most tellingly, in terms of the profanation principle, the court noted that "the BLNR also found that since 2000, cultural and/or spiritual practices have been occurring while astronomy facilities have existed, and that those activities would not be prevented by the TMT Observatory, which would be located 600 feet below the summit ridge."³⁵⁴

The decisive issue confronting the Supreme Court of Hawai'i involved state environmental laws in the Hawaiian Administrative Rules, which prohibit a "proposed land use" if it will "cause substantial adverse impact to existing

<https://dlnr.hawaii.gov/occl/files/2019/08/3568-TMT-Final-Decision-and-Order.pdf>

[<https://perma.cc/2NHL-UGLQ>].

349. *Mauna Kea II*, 431 P.3d 752, 761.

350. *Id.* at 771.

351. *Id.* (citing *State v. Sunderland*, 168 P.3d 526, 533 (Haw. 2007)).

352. *Id.* at 769–70.

353. *Id.* at 769. For a religious studies perspective on how the court misconstrues traditional Native Hawaiian religion in the holding about the Ahu, see Johnson, *Materialising and Performing Hawaiian Religion(s) on Mauna Kea*, *supra* note 72, at 160–65.

354. *Mauna Kea II*, 431 P.3d at 770.

natural resources within the surrounding area, community, or region.”³⁵⁵ But the Supreme Court of Hawai‘i drew on the degradation principle to reject as “substantial” the incremental impact of the TMT:

The BLNR concluded that the TMT Project will not cause substantial adverse impacts to existing natural resources within the surrounding area, community, or region. Appellants agree with the BLNR’s conclusion that the cumulative effects of astronomical development and other uses in the summit area of Mauna Kea, even without the TMT, have already resulted in substantial, significant and adverse impacts, but challenge the BLNR’s conclusion that, therefore, the impacts on natural resources within the Astronomy Precinct of the MKSR would be substantially the same even in the absence of the TMT Project.³⁵⁶

In dissent, Justice Michael Wilson wrote, “Using the fact that the resource has already suffered a substantial adverse impact, the BLNR concludes that further land uses could not be the cause of substantial adverse impact.” Justice Wilson identified the circular logic of what he called “the degradation principle”:

Under this new principle of natural resource law, one of the most sacred resources of the Hawaiian culture loses its protection because it has previously undergone substantial adverse impact from prior development of telescopes. The degradation principle portends environmental and cultural damage to cherished natural and cultural resources. It dilutes or reverses the foundational dual objectives of environmental law—namely, to conserve what exists (or is left) and to repair environmental damage; it perpetuates the concept that the passage of time and the degradation of natural resources can justify unacceptable environmental and cultural damage.³⁵⁷

Here, the profanation principle was not merely implicit, as it had been in the San Francisco Peaks case under religious freedom law. Rather, it became the direct legal reason for the court’s affirmation of the TMT permit. To be sure, the astronomical benefits of the TMT informed the court’s approval of the use permits for the TMT. But what tipped the scale was the reasoning that eleven telescopes already near the summit had posed no thoroughgoing obstacle to the continuation of Native Hawaiian traditional practices. The court even noted that the access road for the telescopes had actually facilitated Native Hawaiian practices on Mauna Kea or had been so degrading as to have already spoiled the summit such that Native Hawaiian claims were tragically beyond remedy.³⁵⁸ The trouble is that neither of these possibilities comprehends what the Native

355. HAW. CODE R. § 13-5-30(c)(4) (West 2022). HAW. CODE R. § 13-5-2 (West 2022) defines “natural resource” to mean “resources such as plants, aquatic life and wildlife, cultural, historic, recreational, geologic, and archeological sites, scenic areas, ecologically significant areas, watersheds, and minerals.”

356. *Mauna Kea II*, 431 P.3d at 776.

357. *Id.* at 795 (Wilson, J., dissenting).

358. *Id.* at 758 (“The roads have also increased access to the summit area of Mauna Kea for at least some Native Hawaiian cultural practitioners.”).

Hawaiians had said in months of testimony or along the access road in encampments and ceremonies.

V.

BEYOND THE PROFANATION PRINCIPLE

This Article has explored legal processes and cases where the degradation principle, or its corollary—what I have called profanation principle, operates to thwart legal protection for Native sacred places. Each of the cases explored demonstrated how the profanation principle gained sufficient traction to undermine Native claims, especially when made in the language of religious liberty. Rarely is the profanation principle the express legal reason behind decisions against Native claimants, but the profanation principle is also evocatively present in the reasoning of those decisions.

In this final part, I suggest an approach to sacred place protection that encompasses both the sacred and the profane by stressing the ongoing relationships that Native peoples have with sacred lands and waters. This is hardly a novel insight: Native peoples have consistently articulated what lands and waters, including sacred places, mean to them in terms of relationships. This point was famously made plain in Vine Deloria, Jr.'s influential book, *God is Red*.³⁵⁹ But as law and religion scholar Dana Lloyd argues in a forthcoming book on the *Lyng* decision, conceptualizing Native regard for sacred places in terms of relationships between kin corrects misguided thinking about sacred places as untouched wilderness on which the profanation principle turns.³⁶⁰

Native peoples can affirm, in their own distinct ways, relationships with lands, waters, and non-human life in terms of kin relationships. Famously, the Lakota and Dakota people cry *mitak oyasin*, “all my relations,” as something like an “amen!” in ceremony. Like a wedding vow, it is also a performative utterance, a recommitment to viewing the world in terms of relationship. Something like it suffuses the thought and practice of any Native people, but kinship relations—I hesitate to call them systems because they are so much more than complexes of rules—take discrete shape variously among different Native peoples. For

359. See generally DELORIA, JR., *supra* note 27.

360. DANA LLOYD, ARGUING FOR THIS LAND: RETHINKING INDIGENOUS SACRED SITES (forthcoming). Lloyd considers the *Lyng* case in terms of competing narratives about land. The California Wilderness Act of 1984, which ultimately protected the Siskiyou High Country from the anticipated logging, spoke of land as *wilderness*. *Id.* The majority opinion in the Supreme Court decision, which proceeded despite the wilderness designation, rests on a narrative about land as *property*. *Id.* For its part, Justice Brennan's dissent rests on a narrative of land as *sacred* in the rights-based sense of the First Amendment religion clauses. *Id.* But even this narrative of land as *sacred*, Lloyd argues, fails to understand why the Yurok and other Native peoples consider the High Country a sacred place. *Id.* Yurok people speak of the High Country, Lloyd observes, as *home*, and specifically through a narrative of kinship. *Id.* Lloyd's final chapter describes the Yurok Nation's 2019 resolution recognizing the legal rights of the Klamath River as a bold assertion of sovereignty informed by a reflection on the failures of the legal struggle in the *Lyng* litigation. See *id.* Efforts to protect the Klamath River are imagined in terms of an injured relative. See *id.*

example, in the Dakota and Lakota languages, the collective name for bison, *oyate*, is the same term that applies to various Dakota and Lakota peoples. A stone, including the formation that gives the Standing Rock Sioux Tribe its name, is customarily addressed as *tunkasila*, or grandfather.³⁶¹

This view of relationality is not a Disney-esque trope.³⁶² Indeed, to address a stone or a place as a grandparent is not even to hold a warm feeling for it, but rather indicates a specific kind of respect. It is to place oneself in a network of reciprocal obligations established by tradition, rejecting its “it-ness” altogether. This does not come easy in human kinship relations, much less in kinship relations extended to non-human life and to places. But this is the point: seeing oneself in the complex web of kinship relationships and fulfilling one’s obligations does not come *naturally*; it comes because of hard work. And this hard work, observed the Dakota anthropologist Ella Deloria, becomes an ultimate concern:

The ultimate aim of Dakota life, stripped of accessories, was quite simple: One must obey kinship rules; one must be a good relative. In the last analysis, every other consideration was secondary—property, personal ambition, glory, good times, life itself. Without that aim and the constant struggle to attain it, the people would no longer be Dakotas in truth. They would no longer even be human.³⁶³

Deloria elaborated on how the kinship and relational approach extends beyond the human to include all beings.³⁶⁴ “*Mitak oyasin*, All my Relations!” makes reference to bison and other animals, sage and other plants, Standing Rock and other stone formations, the Missouri River, Bear Butte, the Black Hills, and so on. The urgency of these ongoing relationships hardly turns on whether the kin is in good shape.

For an analogous comparative religion example, one can look to a Christian marriage vow: “for better for worse, for richer for poorer, in sickness and in health.”³⁶⁵ As with *mitak oyasin*, the obligation called forth in the public marriage vow expressly anticipates that the relationship will encounter experiences of physical decline and hardship. In this respect, kin obligations to animals, plants, and sacred places do not wither even in the face of decline and hardship because the relationship itself is sacred. The marriage vows of the *Book of Common Prayer* are a good analogy but by no means a complete one. Where the parties to a marriage ceremony are interchangeable, Native relationships with specific sacred places take various concrete forms according to specific

361. For a fuller elaboration in the context of a different Native tradition, see MICHAEL D. MCNALLY, *HONORING ELDERS: AGING, AUTHORITY, AND OJIBWE RELIGION* 82–106 (2009).

362. Cf. ELTON JOHN, *CIRCLE OF LIFE* (BOP Recording Studios 1994) (popularizing Indigenous ethics at the expense of due complexity).

363. ELLA CARA DELORIA, *WATERLILY*, at x (1988).

364. *Id.* 40–41, 44–45, 54–57.

365. *The Celebration and Blessing of a Marriage*, BOOK OF COMMON PRAYER 427, <https://www.bcponline.org/PastoralOffices/marriage.html> [<https://perma.cc/N6H8-G6NY>].

teachings in various traditions. For example, Vine Deloria, Jr., characterized Lakota efforts to secure a voluntary ban on rock climbing on *Mato Tipila* (Bear Lodge, Devil's Tower National Monument) during the month of the summer solstice in this way:

It's not that Indians should have exclusive rights there. It's that that location is sacred enough that it should have time of *its own*. And once it has time of its own, then the people who know how to do ceremonies should come and *minister to it*. And, see, that's so hard to get across to people.³⁶⁶

The marriage vow analogy indicates that when kinship relations are involved, it can be the tough times, not just the good times, that underscore the obligations to which one has committed. Sacred places can and do offer healing, and this is frequently how people in the West today think about sacred places. But what if those places can still be meaningfully sacred while also needing healing at the same time? Thus, we can view the ski area on one face of San Francisco Peaks as a scar that does not obliterate the mountain's sacredness but, through its wounding, amplifies Native obligations to its well-being. The profanation principle can seem contradictory to the logic of a sacred place when considering a Native people's relationship with the sacred place.

A. *Towards Better Legal Protection of Native Sacred Places: The Framing of the United Nations Declaration on the Rights of Indigenous Peoples*

Native peoples may look to international law to rebut the profanation principle. The United Nations Declaration on the Rights of Indigenous Peoples (2007) is an international standard for addressing the insufficiencies of domestic law with respect to Native peoples. The United States adopted the *Declaration* in 2010, and government entities like the Advisory Council on Historic Preservation are beginning to approach Native peoples in accord with the *Declaration's* norms.³⁶⁷

In an April 2021 *Harvard Law Review* article, Kristen Carpenter charted a comprehensive course for courts, legislatures, and administrations to revise domestic U.S. law and policy concerning Native sacred places and other

366. This excerpted interview from IN THE LIGHT OF REVERENCE, *supra* note 281, can be found at Sacred Land Film Project, *Vine Deloria Jr. - "Time of Its Own" - Clashing Worldviews at Devils Tower*, YOUTUBE (May 7, 2015), <https://www.youtube.com/watch?v=syflkkaQfBg> [<https://perma.cc/PT7L-VLKG>] (verbal emphasis in original).

367. See President Barack Obama, Remarks by the President at the White House Tribal Nations Conference (Dec. 16, 2010), <https://obamawhitehouse.archives.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference> [<https://perma.cc/S9UP-4C7L>]; see, e.g., ADVISORY COUNCIL ON HISTORIC PRES., ACHP PLAN TO SUPPORT THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (Mar. 1, 2013), <https://www.achp.gov/sites/default/files/guidance/2018-07/ACHPPlanToSupportTheUnitedNationsDeclarationOnTheRightsofIndigenousPeoples.pdf> [<https://perma.cc/3BEA-72SY>].

religious freedom matters.³⁶⁸ I only wish to suggest that recasting legal protection for sacred places in light of the *Declaration*'s framework can help address the profanation principle in three main respects. Finally, I elaborate on several concrete steps that can help remove the principle as an obstacle to legal protection of Native sacred places.

First, the *Declaration* identifies the kin relationship at the heart of Native approaches to their sacred places. Article 12 expressly affirms Indigenous Peoples' rights to religious freedom, including "the right to maintain, protect, and have access in privacy to their religious and cultural sites."³⁶⁹ But the *Declaration* also clarifies the ongoing relationship with lands and waters that distinguishes Indigenous Peoples from other groups with ties to territories. Article 25 recognizes Indigenous Peoples' rights to "maintain and strengthen their distinctive spiritual relationship" with traditional "lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard."³⁷⁰ The *Declaration* affirms these spiritual relationships and rights to them, whether or not an Indigenous People has title to or control over those lands. Importantly, those rights have a temporal dimension; the right includes obligations to future generations regarding these spiritual relationships. The rights in question are rights to relationship and to fulfill the obligations of such relationships.

Second, the *Declaration* contextualizes sacred place protection in terms of Indigenous peoplehood and self-determination by keying a number of provisions to the norm of "free, prior, and informed consent," both as a prospective and retrospective matter.³⁷¹ In some cases, this is prospective, requiring Indigenous consent prior to government actions that affect Native lands. Article 19 requires consultation and cooperation "in good faith with the [I]ndigenous [P]eoples in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."³⁷² Article 32 acknowledges Indigenous Peoples' rights "to determine and develop priorities and strategies for the development or use of their lands or territories and other resources" and clarifies that governments shall "consult and cooperate in good faith with the Indigenous [P]eoples concerned . . . in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources."³⁷³ There are workable ways that the norm of free, prior, and informed consent can be implemented to render the

368. See Carpenter, *Living the Sacred*, *supra* note 2, at 2138–49; WALTER R. ECHO-HAWK, IN THE LIGHT OF JUSTICE: THE RISE OF HUMAN RIGHTS IN NATIVE AMERICA AND THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 194–95 (2013).

369. G.A. Res. 61/295, U.N. Declaration on the Rights of Indigenous Peoples, art. 12 (Sept. 2007).

370. *Id.* art. 25.

371. *Id.* art. 10.

372. *Id.* art. 19.

373. *Id.* art. 32, ¶¶ 1–2.

consultation required in historic preservation and environmental review processes discussed above less perfunctory and more in line with federal commitments to Native self-determination.

In other cases, the norm of free, prior, and informed consent applies retroactively. The *Declaration* speaks to cases where free, prior, and informed consent was not secured prior to actions affecting Native peoples and their lands, including appropriation of Native sacred places and, inferentially, any degradation following from that appropriation. The *Declaration* invokes this principle in several places commending redress for damages occurring where Indigenous consent was not obtained. Article 11, for example, concerns a range of cultural rights, “includ[ing] restitution,” for “cultural intellectual, religious and spiritual property taken without their free, prior and informed consent.”³⁷⁴

Third, the *Declaration*’s broad affirmation of Indigenous self-determination as peoples articulates all facets of the exercise of that peoplehood, including cultural development and collective religious exercise, in international human rights terms. With respect to sacred places, including those that have already suffered desecration, the *Declaration* affirms that Native Nations are in the best position to speak for their own sacred places, to determine what is required to respect the integrity of those places, and to facilitate the healing and recovery from past desecration.

In addition to what others have urged Native Nations to consider, there are concrete steps that courts, legislatures, and agencies can take to operationalize the *Declaration*’s framework to more effectively protect Native sacred places that have already been desecrated.³⁷⁵ First, at a minimum, courts must be more aware of the profanation principle operating in the arguments before them. Second, under a future RFRA claim, courts should revisit whether *Lyng* and *Navajo Nation* still control or if they have been superseded by Supreme Court decisions expanding the reach of religious free exercise under RFRA. Finally, courts could factor a baseline of religious coercion created by the histories of appropriation of Native sacred places, of inhibition and criminalization of Native access to those sacred places, or of previous desecration without Native peoples’ free, prior, and informed consent.³⁷⁶ And, as Kristen Carpenter argued, courts should rethink the substantial burden analysis in RFRA and First Amendment cases in terms of the ongoing spiritual relationship with lands and waters affirmed by Article 25 of the *Declaration*.³⁷⁷ Affirming a spiritual relationship, whether or not a sacred place has suffered previous desecration or was in Native control, could keep at bay any logical creep of the profanation principle.

374. *Id.* art. 11, ¶ 2.

375. *Tribal Implementation Toolkit: United Nations Declaration on the Rights of Indigenous Peoples*, NATIVE AM. RTS. FUND (Apr. 12, 2021), <https://www.narf.org/tribal-implementation-toolkit-united-nations-declaration-on-the-rights-of-indigenous-peoples/> [<https://perma.cc/CLW3-Y789>].

376. Again, this is the compelling argument put forward by Barclay & Steele, *supra* note 237, at 1294.

377. See Carpenter, *Living the Sacred*, *supra* note 2, at 2143–44.

When Native peoples seek protections under environmental preservation laws, courts should weigh cumulative effects more rigorously as they apply to the human environment. In this view, previous environmental degradation would help clarify the adverse impacts of further development of sacred places, not nullify those impacts, as happened at Mauna Kea. When courts consider the thoroughness of Section 106 review under NHPA, they should discount an agency's narrow project site plan or generalized integrity and adverse effects analysis because these government agencies typically undermine Native claims to sacred places and TCPs, just as they do when agencies interpret statutes impacting federally recognized Tribes.³⁷⁸

Beyond the courts, Congress could intervene to either transfer title of sacred places to Native Nations or designate Native Nations as custodians of those sacred places. Such action is not unprecedented.³⁷⁹ Moreover, Congress could again enhance protections for sacred places as it did under the NHPA or even establish a private cause of action under AIRFA.³⁸⁰ Congress could also require that agency consultation with Native Nations under NEPA, NHPA, and other statutes be more fully aligned with the *Declaration's* norm of free, prior, and informed consent to create the conditions for Native Nations to heal and prevent further damage to their desecrated sacred places.³⁸¹

For their part, administrative agencies need not wait for Congress to align their consultation practices with the norms of the *Declaration*. U.S. policy already mandates substantive and timely consultation.³⁸² What is more, agencies, like the Advisory Council on Historic Preservation, are already incorporating the *Declaration* into their work.³⁸³ Agencies need not rush to judgment that such steps would necessarily create a Tribal veto power over any federal action. As

378. See *Cobell v. Salazar*, 573 F.3d 808, 812 (D.C. Cir. 2009) (holding *Chevron* deference to agency statutory interpretation applies “with muted effect” when an agency interprets Indian legislation).

379. Carpenter cites the successful return to Taos Pueblo of the sacred Blue Lake as an example. Carpenter, *Living the Sacred*, *supra* note 2, at 2145–46.

380. See *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 455 (1988) (holding that AIRFA did not provide for a private cause of action). Alternatively, as Kristen Carpenter suggested, Congress could provide statutory protection for Native sacred places modeled on the human rights legislation of the Native American Graves Protection and Repatriation Act. See Carpenter, *Living the Sacred*, *supra* note 2, at 2144–45; 25 U.S.C. §§ 3001–3013.

381. Carpenter, *Living the Sacred*, *supra* note 2, at 2145; Carla F. Fredericks, *Operationalizing Free, Prior and Informed Consent*, 80 ALB. L. REV. 429, 457, 466 (2016). At the time of this writing, two bills are before committees of the 117th Congress. While neither bill references the *Declaration* or its norms, both advance consultation in the direction of those norms. H.R. 8108, The Advancing Tribal Parity on Public Lands Act, was introduced by Rep. Grijalva (June 16, 2022) and was referred to the House Natural Resources Committee. See *Advancing Tribal Parity on Public Land Act*, H.R. 8108, 117th Cong. (2022). S. 4423, The Tribal Cultural Areas Protection Act, was introduced by Sen. Heinrich (June 16, 2022) and was referred to the Senate Committee on Indian Affairs. See *Tribal Cultural Areas Protection Act*, S. 4423, 117th Cong. (2022).

382. See Exec. Order No. 13175, 3 C.F.R. § 13175 (2001); Memorandum on Tribal Consultation, 2009 DAILY COMP. PRES. DOC. (Nov. 5, 2009); Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 2021 DAILY COMP. PRES. DOC. (Jan. 26, 2021).

383. ADVISORY COUNCIL ON HIST. PRES., *supra* note 367.

Carla Fredericks wrote, “U.S. law and policy should move toward viewing [I]ndigenous consultation as involving a spectrum of requirements—with good-faith, meaningful consultation as a minimum and with consent required in certain contexts, including large-scale extractive industries.”³⁸⁴

Perhaps the most concrete way for government agencies to move from consultation to consent and to operationalize the *Declaration* is through the pursuit of consent and co-stewardship agreements with Native Nations. This would go a long way to address the obstacles to legal protection identified in this Article because so many Native sacred places are on public lands managed by agencies like the U.S. Forest Service, the National Park Service, or the BLM. Approaching the protection of sacred places from a one-size-fits-all approach lacks the nuance required to ground decisions about managing sacred places in *that* place.³⁸⁵ Native peoples know what is necessary to protect the places sacred to them. Such delegation is consistent with federal Indian policy of self-determination and allows flexibility for the full complexity of Native sacred places.³⁸⁶

Positive examples of such agreements include the cooperative management agreement the BLM and other federal agencies made with Cochiti Pueblo for Kasha-Katuwe Tent Rocks National Monument³⁸⁷ and the evolving cooperative management underway for Bears Ears National Monument with significant input from the five Nations represented in the Bears Ears Commission.³⁸⁸ Relying on a Nation-to-Nation approach to protect sacred places through consent or co-stewardship agreements can operationalize the norms of the *Declaration* in a manner that honors the full range of ways that Native peoples’ relationships with sacred places take shape. But it requires a strong backdrop of legal protection to ensure Native people have bargaining power when negotiating these agreements.

384. Fredericks, *supra* note 381, 464–65.

385. See *supra* Part III (considering the nuance of various sacred places and how the religious practices of Native peoples who are impacted by those places also varies).

386. See Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified at 25 U.S.C. §§ 5301–5310, 5321–5332, 5351–5356); see also Kevin K. Washburn, *Facilitating Tribal Co-Management of Federal Public Lands*, 2022 WIS. L. REV. 263, 283–84 (2022).

387. See Sandra Lee Pinel & Jacob Pecos, *Generating Co-Management at Kasha Katuwe Tent Rocks National Monument, New Mexico*, 49 ENV’T MGMT. 593, 593–604 (2012).

388. See Inter-Governmental Cooperative Agreement Between the Tribal Nations Whose Representatives Comprise the Bears Ears Commission, the Hopi Tribe, Navajo Nation, Ute Mountain Ute Tribe, Ute Indian Tribe of the Uintah and Ouray Reservation, and the Pueblo of Zuni and the United States Department of the Interior, Bureau of Land Management and the United States Department of Agriculture, Forest Service for the Cooperative Management of the Federal Lands and Resources of the Bears Ears National Monument, June 18, 2022, <https://www.blm.gov/sites/default/files/docs/2022-06/BearsEarsNationalMonumentInter-GovernmentalAgreement2022.pdf> [https://perma.cc/454H-53VH].

CONCLUSION: ONONDAGA LAKE

What the Onondaga Nation is doing on behalf of Onondaga Lake offers a fitting, if brief, example to rethink the profanation principle and put its explanatory power to rest in future Native sacred place cases. Onondaga Lake is the powerful, exceptional place that was made sacred when the Haudenosaunee prophet, the Peacemaker, first taught the Great Law of Peace on its shores, establishing the Haudenosaunee (Iroquois) Confederacy and creating the conditions for respectful relations of all beings.³⁸⁹ But Onondaga Lake is commonly spoken of as the most polluted lake in the country, a catchment for toxic sludge and waste for a soda ash processing plant in the 1880s and, later, industrial plants by Allied Chemical, Honeywell, and General Motors.³⁹⁰ Nine distinct Superfund sites overlap the lake's bottom sediments, shores, and immediate tributaries.³⁹¹ There are some initial signs of clean up, but as Tadodoho Sid Hill put it, an agreed-upon remedy between Honeywell and the State of New York to cap contaminated lake bottom sediments has been more akin to "a cover-up, not a clean-up."³⁹²

The recognized current reservation of the Onondaga Nation lies several miles up Onondaga Creek from the lake, but the Onondaga claim the entirety of the lake and its environs not only as part of their aboriginal territories but as lands secured by a series of treaties.³⁹³ A recent Onondaga Nation land rights action moves beyond the logic of property acquisition to encompass the authority to heal Onondaga Lake and its people. The complaint begins:

The Onondaga People wish to bring about a healing between themselves and all others who live in this region that has been the homeland of the Onondaga Nation since the dawn of time. The Nation and its people have a unique spiritual, cultural, and historic relationship with the land, which is embodied in Gayanashagowa, the Great Law of Peace. This relationship goes far beyond federal and state legal concepts of ownership, possession or legal rights. . . . It is the duty of the Nation's leaders to work for a healing of this land, to protect it, and to pass it on to future generations.³⁹⁴

389. See *Onondaga Lake*, ONONDAGA NATION, <https://www.onondaganation.org/land-rights/onondaga-lake/> [<https://perma.cc/7RQU-FTF7>].

390. See *id.*

391. See *id.*

392. *Onondaga Nation Calls for Better Cleanup of Onondaga Lake*, ONONDAGA NATION (Jan. 29, 2016), <https://www.onondaganation.org/news/2016/onondaga-nation-calls-for-better-cleanup-of-onondaga-lake-point-to-cap-failures-as-sign-remedy-of-superfund-site-needs-to-be-improved/> [<https://perma.cc/7WQ3-9APN>]. The Tadodoho is a spiritual leader in the lineage of the eminent convert to the Great Law of Peace at Onondaga Lake. *Id.*

393. See Treaty of Fort Stanwix, Oct. 22, 1784, 7 Stat. 15; Treaty of Fort Harmar, Jan. 9, 1789, 7 Stat. 33; Treaty of Canandaigua, Nov. 11, 1794, 7 Stat. 44.

394. Complaint for Declaratory Judgment at 1–2, *Onondaga Nation v. State of New York*, (N.D.N.Y. 2010) (No. 05-CV-0314), 2010 WL 3806492, *aff'd*, 500 F. App'x 87 (2d Cir. 2012) (No. 10–4273). For more information, see *The Complaint*, ONONDAGA NATION, <https://www.onondaganation.org/land-rights/complaint/> [perma.cc/Q93K-GCVX].

Dismissed by federal courts, the future of such legal action by Onondaga Nation remains uncertain.³⁹⁵ But this much is certain: Onondaga Lake remains sacred even amidst its profanation. More than one hundred years of industrial pollution disrupts, but ultimately does not destroy, the workings of the sacred at Onondaga Lake and the obligation to bring healing to it, with or without legal title. Onondaga Nation issued its own *Vision for a Clean Onondaga Lake*, and, in an exercise of sovereignty, Onondaga Nation acts on the lake's behalf in government-to-government consultations and through coalitions of neighbors.³⁹⁶ Onondaga Nation's struggle is specific to Onondaga Lake, informed by what that Nation knows is required to care for that particular sacred place. If the example of Onondaga Lake shows the failure of the courts and settler law to protect degraded Native sacred places, it also shows the resolve and imagination with which Native peoples press on to protect the sacred and the profaned.

395. See *Onondaga Nation*, 500 F. App'x. 87, 89. In 2014, Onondaga Nation petitioned the Inter-American Commission on Human Rights to hear its land rights claim, and at the time of this writing, is awaiting an opportunity to present the case. *Onondaga Nation Files Suit in World Court*, ONONDAGA NATION (Apr. 2014), <https://www.onodaganation.org/land-rights/onondaga-nation-files-suit-in-world-court/> [<https://perma.cc/H2AJ-UWD8>].

396. See *Onondaga Nation's Vision for a Clean Onondaga Lake*, ONONDAGA NATION, <https://www.onodaganation.org/land-rights/onondaga-nations-vision-for-a-clean-onondaga-lake/> [<https://perma.cc/E93X-ZJCS>].