

CULTURE IN DANGER:
PROTECTING NATIVE AMERICAN SACRED SPACES IN THE 21ST CENTURY

By

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ABSTRACT OF THE THESIS

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For centuries, indigenous and tribal communities around the globe have upheld the celebrated roles and responsibilities of their ancestors as custodians of sacral lands. These sites, identified by cultural heritage professionals as Sacred Natural Sites, have been of increasing interest to heritage experts since UNESCO implemented its cultural landscape criteria for outstanding universal value in 1992. These sites are indispensable to Native American communities for it is in these domains that religion and nature intersect to recognize profound ancient and cultural traditional values that are still prevalent in their everyday lives. Despite their vital significance, sacred natural sites in the United States are faced with increased pressures of globalization and landscape development that threaten to extinguish not only the fragile ecosystems that custodians have spent centuries curating, but also the cultural values that utilize them. This thesis aims to investigate the current national frameworks that govern sacred natural site protection, namely religious freedom acts, land treaty claims and federal regulatory acts. Case studies involving the San Francisco Peaks, Arizona; Yucca Mountain, Nevada; and Lake Oahe, North Dakota will highlight the efficiency and effectiveness, if any, of current jurisprudence.

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Chapter One: Introduction

The protests concerning the construction of the 1,770-kilometer Dakota Access Pipeline on Standing Rock Sioux sacred tribal land in North Dakota¹ has heightened public interest and ignited a genuine need for a serious discussion about the United States' protection of Native American sacred landscapes, cultural rights, authority, and compliance with United States cultural resource legislation. For centuries, indigenous and tribal communities around the globe have upheld the celebrated roles and responsibilities of their ancestors as custodians of sacral lands. These Sacred Natural Sites (hereinafter SNS) offer a means for expression and transmission of culture over generations and are manifestations of spiritual values of nature. Identified by heritage specialists as a subcategory of cultural landscapes, SNS are part of a wider spectrum of conservation and cultural values that connect spiritual, ecological, religious, and traditional importance to the Earth and “fulfill humankind’s need to understand, and connect in meaningful ways, to the environment of its origin and to nature.”² These areas of religious veneration are frequently associated with indigenous peoples that have long since intertwined themselves and their culture within the very fabric of their natural surroundings. It is here in these biospheres, areas comprising terrestrial, marine, and costal ecosystems, in which nature, culture, and religion interact as one. They are imbued with distinct sacred meanings and customs through formal teaching, folklore, mythology, history, and oral traditions. Despite the vital significance

¹ Andrew Cullen and Ruth Munoz, “Standing Rock Standoff: How North Dakota’s Native Protest became an American Movement,” *Global News*, last modified September 9, 2016, <http://globalnews.ca/news/2929770/standing-rock-standoff-how-the-north-dakota-pipeline-protest-sparked-native-american-activism/> (accessed September 15, 2016).

² Alan Putney, “Building Cultural Support for Protected Areas through Sacred Natural Sites,” in *Benefits Beyond Boundaries: Proceedings of the Vth IUCN World Parks Congress* (Cambridge: Thanet Press Limited, 2005), 132.

of cultural landscapes, SNS are faced with increased pressures of globalization and landscape development that threaten to extinguish not only the fragile ecosystems that custodians have spent centuries curating but also the cultural rights and values of the sovereign nations that utilize them.

Conservation and implementation strategies are far from simple or easy. Part of the issue lies in the contradiction and inconsistencies in the ways in which these strategies are governed by national policy. Despite the increasing recognition of SNS's role in the transmission of cultural identity and bio-cultural diversity, legal protection of SNS and related policies, though present, are insufficient, absent, or intentionally vague- especially in the United States. Although intergovernmental bodies such as the United Nations Environmental, Scientific and Cultural Organization (hereinafter UNESCO), International Union for the Conservation of Nature (hereinafter IUCN), World Wildlife Fund (hereinafter WWF), and the World Bank (hereinafter WB) have developed comprehensive guidelines for the safeguarding of SNS and cultural rights that accompany them, there is still a discordance between maintaining the cultural and environmental significance of SNS and economic development. Though the United States has many national laws that govern the protection of sovereign land, culture, and burial grounds, their sacred sites and reservations often become places of major contention due to government encroachment and private industry expansion. This is, in part, caused by linguistic discrepancies in national doctrine and weak political commitment to cultural rights and sacred sites protection.³ Legal frameworks are often discriminatory against traditional communities and have historically been used to undermine the governance systems customary to the same communities.

³ Robert Albro and Joanne Bauer, introduction to "Cultural Rights: What They Are, Why They Matter, How They Can be Realized," *Human Rights Dialogue Series* 2, no. 12 (2005) 2-3.

This thesis examines how the United States' federal agencies manage tensions that arise when sacred sites become the battleground between developers and Native Americans. To start, this thesis will offer a brief discourse on what constitutes a SNS in the United States while also examining national frameworks that govern their protection. This thesis will assess the three most commonly utilized methodologies for sacred natural site protection in the United States' court system: religious legal claims, land treaty claims, and federal regulatory consultation processes and will address how these traditional legal approaches have failed in safeguarding cultural identity more often than they have succeeded. Each case study will represent a different approach to sacred natural site protection; the addresses speak to evaluate the United States Forest Service site San Francisco Peaks which will address religious legal claims;⁴ the Department of Energy site Yucca Mountain speaking to land treaty claims⁵; and the sacred burial ground and compromised sacred water source, Lake Oahe, part of the Dakota Access Pipeline controversy in North and South Dakota evaluating federal regulatory consultative processes.⁶ My investigation of the three sites will discuss the history of the sacred sites, including but not limited to, tribal relevance of the sites to Native Americans, past and current ownership, past and current ways in which they are utilized, and the legal approaches taken to safeguard the sites.

⁴ United States Department of Agriculture, "Coconino National Forest," accessed September 10, 2016, <http://www.fs.usda.gov/main/coconino/about-forest/about-area> (accessed September 10 2016).

⁵ United States Department of Energy, "Yucca Mountain," <http://energy.gov/photos/yucca-mountain>.

⁶ Jessica Ravitz, "The Sacred Land at the Center of the Dakota Pipeline Dispute," CNN, last modified November 1, 2016, <http://www.cnn.com/2016/11/01/us/standing-rock-sioux-sacred-land-dakota-pipeline/>; "Cannonball Ranch," *North Dakota Cowboy Hall of Fame*, accessed September 10, 2016, https://www.northdakotacowboy.com/?id=67&form_data_id=118; "Lake Oahe Guides," North Dakota Tourism Division, accessed November 2, 2016, <http://www.ndtourism.com/bismarck/attractions/lake-oahe-guides>.

This thesis will conclude with recommendations and suggestions for policy adjustments for future sacred site conflicts.

Despite the expansive anthropological and historical scholarship on Native American culture and religion, intangible heritage, and cultural appropriation, it was not until recently that academic literature began to shift focus towards the significant interdependent nature of geomorphic locations and Native American cultural rights and spirituality. Thankfully, this deficiency has been changing due to a number of relevant books and articles published within the past twenty years in fields such as cultural heritage, anthropology, and environmental policy. This scholarship deficiency was highlighted in IUCN's 2008 *Sacred Natural Sites: Guidelines for Protected Area Managers* in which nature conservation practitioner Robert Wild addressed the significant but limited material built up during the 21st century cultural heritage movement. Collaborative primary source materials by IUCN and UNESCO, especially *The Importance of Sacred Natural Sites for Biodiversity Conservation* (2003), *Conserving Cultural and Biological Diversity: The Role of Sacred Natural Sites and Cultural Landscapes* (2005), and the aforementioned *Guidelines for Protected Area Managers* (2008), clarify the importance of sacred natural sites to cultural and biodiversity studies. These documents include working definitions of sacred natural sites while simultaneously spearheading preliminary preservation guidelines for planning and management. While invaluable to the introductory study of sacred sites, these documents predominantly center their focuses on outlining existing threats without offering opinions on how to mitigate or reduce them.

It is scientist Bas Verschuuren's book *Sacred Natural Sites Conserving Nature and Culture* (2010), however, which spearheaded the modern heritage movement of sacred natural sites protection and offered new perspectives of site management on a global scale. He aims his

work at policy-makers so that they may understand the complex nature of SNS in order to advocate for their protection. Verschuuren and case study authors published within the volume, assess SNS through the lenses of conservation, botany, ecology, environmental law, religious studies, and anthropology. Verschuren highlights the need to incorporate multidisciplinary approaches to SNS conservation. The use of the 27 peer reviewed case studies created a high-quality body of cutting edge work that offered recourse management recommendations that involved custodial inclusion in decision-making processes. Verschuuren's work has been essential in the study of cultural landscapes and sacred sites protection.

Additional works of relevance to this thesis include Michele Langfield, William Logan, and Mairead Nic Craith's *Cultural Diversity, Heritage and Human Rights* (2010) and Ken Taylor and Jane Lennon's *Managing Cultural Landscapes* (2012). Unlike the scholarship that preceded it, Langfield, Logan, and Nic Craith contributed to the study of sacred natural sites and cultural protection by examining them under the lens of cultural and human rights. Its publication noted that while SNS awareness had been growing rather consistently, focuses of study had stayed predominantly in environmental and geographic disciplines. The authors added comprehensive studies of cultural heritage, cultural diversity, and human rights into the larger SNS discourse. Along a similar vein, Taylor and Lennon additionally examine cultural landscapes with attached spiritual value and address how cultures find identities in those spaces. Similar to the aforementioned collaborative guidelines, *Managing Cultural Landscapes* offers additional frameworks for a deeper discussion of management issues arguing for a new heritage place paradigm. These works, along with subsequent publications on the multidisciplinary topic, have promoted the desire for a shift in sacred space conservation research on a global scale.⁷

⁷ Hannes Palang and Gary Fry, *Landscape Interfaces: Cultural Heritage in Changing Landscapes* (Dordrecht, Kluwer Academic Publishers, 2003); Tobias Plieninger and Claudia Bieling, *Resilience and*

While the aforementioned publications have worked to advance the study and protection of SNS, their focus has often centered on sacred sites abroad, namely Europe and Asia. Equipped with comprehensive scholarship regarding the international definitions and practices for preservation set in place by other countries, this thesis focuses on United States protection and national policy. Thomas F. King's *Anthropology in Historic Preservation: Caring for Culture's Clutter* (1977), *Federal Planning and Historic Places* (2000), *Our Unprotected Heritage* (2009), and *Cultural Resource Laws and Practice* (2010) offers scholarly research on current US federal regulatory processes, notably the National Historic Preservation Act and the National Environmental Policy Act, used by national agencies to protect all forms of cultural heritage. Comprehensive analysis of civic court cases as well as Freemon J. Lyden and Lyman H. Legters *Native Americans and Public Policy* (1992) and Gary A. Sokolow's *Native Americans and the Law* (2000) have been invaluable resources that delivers readers foundational understandings of the history of Native American policy in the United States. The works of these specialists have been guiding resources in understanding sacred natural sites from various angles.

This thesis contributes to the cultural heritage perspective on Native American SNS in the way that it identifies an absence of consistent and useful jurisprudence for SNS protection in the United States. It should be noted that while SNS are compromised in the federal court system for a number of reasons, larger vested financial government interests pose a noteworthy threat and will be the focal point of this thesis. Overall, this thesis aims to address what constitutes a SNS in America and compare that understanding with current methodologies utilized in Indian

the Cultural Landscape: Understanding and Managing Change in Human-Shaped Environments (Cambridge: Cambridge University Press, 2012); Amareswar Galla, *World Heritage Benefits Beyond Borders* (Cambridge: Cambridge University Press, 2012); Ken Taylor, Archer St. Clair and Nara J. Mitchell, *Conserving Cultural Landscapes: Challenges and New Directions* (New York: Routledge, 2015).

law. This juxtaposition will culminate in an assessment of national frameworks to address their effectiveness on sacred site preservation in the United States. Chapter Two will next address the current legislative definitions employed to define characteristic aspects of SNS.

Chapter Two: A Brief Contextual Background Concerning Sacred Natural Sites

Since UNESCO's World Heritage Committee updated the cultural criteria for Outstanding Universal Value in 1992, SNS have been of increased interest in cultural landscape, environmental justice, and indigenous scholarship. Numerous preliminary studies have yielded working statements of what constitutes a sacred site, but there is no widely accepted definition.⁸ Culturally-significant areas have been characterized by the term "sacred natural site" because, as the Gaia Foundation states in their "Sacred Sites Overview," no term has emerged to challenge it.⁹ "Sacred" is used in a generic sense and encompasses western ideologies and has historically been skewed towards the scholarship of tangible cultural heritage. To many researchers, the term is often synonymous with religion. This characterization is problematic when addressing places of significance to traditional communities because customary native practices of indigenous culture do not follow conventional institutional models like most organized religious faiths. Cultural resource manager Thomas F. King interviewed several tribal elders who explained the discrepancies in the term "sacred" between western constructs and traditional ideologies: "To you, it means a particular place, where Jesus was born or something. What's spiritual to us is a lot bigger. Everything's got a spirit, and you've got to respect that spirit."¹⁰

"Sacred," "natural," and "site" all have limitations when concerning Native American culture because the terms offer distinctive meanings to different communities. Combining the

⁸ Mercedes Oteguil-Acha, "Developing a Methodology and Tools for Inventorying Sacred Natural Sites of Indigenous and Traditional Peoples in Mexico," (Gland: IUCN-The World Conservation Union: 2007) 210.

⁹ Anthony Thorley and Celia M. Gunn, "Sacred Sites: An Overview," <http://www.sacredland.org/media/Sacred-Sites-an-Overview.pdf> (accessed July 17, 2016).

¹⁰ Thomas F. King, "'Sacred Sites' Protection: Be Careful What You Ask For," *Sacred Land Film Project*, last modified May 28, 2002, http://www.sacredland.org/PDFs/Thomas_King.pdf.

three terms together suggests that there is a holy, venerated, or sacrosanct element that contributes to a highly spiritual purpose. While that assumption may be true to a certain extent, the understanding of revered to non-indigenous peoples is that of something inviolably divine whereas “sacred” to indigenous culture may mean something culturally essential, spiritually alive, or merely deserving of respect.¹¹ Protection efforts may otherwise be ignored because of the lack of a more substantial word or definition. As a result, indigenous peoples have had to conform to more Western constructs of sacristy.

Since the early 1990s, several cultural heritage and environmental organizations have attempted to create a better working definition of a sacred natural site. The IUCN offers the broad definition of SNS as “areas of land or water having special spiritual significance to peoples and communities.”¹² This includes any sacred entities and physical landscapes that contribute to symbolic significance in which cultural and spiritual norms intersect within a geographic limit, sacred physiological feature, flora and fauna, and spatially diverse landscapes having at least one geographical influence zone. Found in various ecological biomes, SNS are not limited to one specific environment; they range from lakes, rivers, caves, forests, mountains, valleys, groves, coastal waters, wetlands, and islands. Humanity and nature overlap in these places and people’s deeper purposes and aims intersect.¹³ While many of these revered sites are places of pilgrimage, some are virtually unknown to anyone but the custodians that utilize them. SNS are products of

¹¹ Christopher McLeod, “What is a Sacred Site?” <http://www.sacredland.org/home/resources/tools-for-action/protection-strategies-for-sacred-sites/what-is-a-sacred-site/> (accessed September 17, 2016).

¹² Gonzalo Oviedo, Sally Jeanrenaud, and Mercedes Otegui, “Protecting Sacred Natural Sites of Indigenous and Traditional Peoples,” *International Union for Conservation of Nature*, June 2005, https://www.iucn.org/sites/dev/files/import/downloads/sp_protecting_sacred_natural_sites_indigenous.pdf.

¹³ Bas Verschuren, Robert Wild, Jeffrey A. McNeely, Gonzalo Oviedo, *Sacred Natural Sites Conserving Nature and Culture* (London: Earthscan, 2010), 2.

a complex system of nature-culture interaction formed by centuries of traditional use and reverence.

Working definitions from intergovernmental organizations (hereinafter IGO) have aided countries in outlining their understanding of the term SNS. In order to better define, preserve, and protect the culture and physical landscape of Native American sacred spaces, the United States has contributed to global conversations. Unlike the overarching definition used by IGOs to determine SNS, the United States offers an overly specific description. In 1996, then-President Bill Clinton issued Executive Order 13007, which formally defined sacred sites of Native Americans for the first time in United States history. The Order directed federal agencies to allow Native Americans to worship on sacred land and to avoid adversely affecting their physical integrity. E.O. 13007 defined sacred sites as:

...any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site.¹⁴

While the United States' federal description of a sacred site is tied to a specific location, tribal nations have suggested that the definition be revised to reflect that SNS are not necessarily site-specific and do not always maintain fixed within a constrained boundary.¹⁵ The characterization was further expounded in 2002 at the National Congress of American Indians to reflect this request. A resolution was passed that states that Native American sacred spaces

...are to be defined only as places that are sacred to practitioners of Native Traditional religions and that sacred places include land (surface and subsurface), water and air;

¹⁴ Exec. Order No. 13007, 3 C.F.R. 1 (1996).

¹⁵ Advisory Council of Historic Preservation, *The Protection of Indian Sacred Sites: General Information*, <http://www.achp.gov/docs/sacred-sites-general-info-july-2015.pdf> (accessed July 19, 2016).

burial grounds, massacre sites and battlefields; and spiritual commemoration, ceremonial, gathering, and worship areas.¹⁶

This indigenous perspective and clarification is essential because it further takes into consideration the intangible aspects associated with the natural environment.

As the study of cultural landscapes and SNS further advanced, cultural resource managers in the United States sought to produce new terminology that attempted to categorize historic properties containing traditional cultural significance. In 1990, Patricia L. Parker and Thomas F. King first created the term “traditional cultural property” (hereinafter TCP) in National Register Bulletin 38. National Register Bulletin 38 was mandated by Congress and directed the National Parks Service (hereinafter NPS) to evaluate the needs of tribal historic preservation needs.¹⁷ Prior to its publication, SNS were not receiving the proper conservation considerations due to a deficiency in tribal cultural understanding of historic preservation professionals. Parker and King identified TCPs as places that are significant because some kind of community identifies with it as part of their cultural heritage.¹⁸

A TCP is a property eligible for listing on the National Register of Historic Places because of its association with cultural practices of a living community that is rooted within the group’s history or is important in maintaining the continual cultural identity of that group of people.¹⁹ TCPs acknowledge that in certain cultural landscapes, the land acts as a physical representation of beliefs of a living group and are often deeply rooted within that community’s history. Bulletin 38 was meant to assist federal agencies, State Historic Preservation Offices

¹⁶The National Congress of American Indians, Resolution #SD-02-207 (2002).

¹⁷ Patricia Parker and Thomas F. King, *Guidelines for Evaluating and Documenting Traditional Cultural Properties*, National Register Bulletin 38. Washington, DC: National Parks Service, 1990.

¹⁸ Thomas King, *Our Unprotected Heritage: Whitewashing the Destruction of our Cultural and Natural Environment*, (Walnut Creek: Left Coast Press, 2009) 102.

¹⁹ “National Register of Historic Places-Traditional Cultural Properties (TCPs),” *National Parks Service*, accessed November 30, 2016, <https://www.nps.gov/history/tribes/Documents/TCP.pdf>.

(hereinafter SHPO), Indian Tribes, and historic preservation practitioners determine if this type of cultural significance made the site eligible for the National Register of Historic Places.²⁰

While TCPs are not exclusively associated with Native American sites, the term has been used effectively to obtain their eligibility for the National Register of Historic Places.

Despite having been studied under various heritage lenses, the rights of IPs and traditional communities have recently emerged as a primary concern within the study and practice of cultural landscapes, cultural resources, and human rights.²¹ Cultural heritage, preservation, and intangible heritage are the hot topic buzzwords in the present-day study of conservation; however, in the case of SNS, a stronger emphasis should be placed on cultural identity in conjunction with biodiversity conservation because of the strong interrelationship between spirituality and nature. Indigenous livelihoods are contingent upon their physical and spiritual interaction with their environment. The mutual dependency between biodiversity and sociocultural systems of traditional indigenous religious practice has inadvertently led to the conservation of the environment as a result of the scarcity in which indigenous peoples care for their sacred spaces.²² Religious and traditional practices are so embedded within the framework of sacred natural sites that there is no manner in which to detangle one from the other. The intangible belief system and deep-rooted spirituality should in itself be seen as an essential component of the SNS but unfortunately is often not as readily recognized by policy makers. Leading experts in SNS advocate for the facilitation of better communication standards between

²⁰ Ibid.

²¹ Ken Taylor and Jane Lennon, *Managing Cultural Landscapes* (New York: Routledge 2012) 1-2; Michele Langfield, William Logan, and Máiréad Nic Craith, *Cultural Diversity, Heritage, and Human Rights: Intersections in Theory and Practice*, (London: Routledge, 2010), 5.

²² Leena Heinämäki and Thora Martina Hermann, "The Recognition of Sacred Natural Sites of Arctic Indigenous Peoples as Part of Their Right to Cultural Integrity," *Arctic Review on Law and Politics* 4 (2013), 207.

indigenous populations and these guidelines, but the discrepancy between traditional peoples' cultural identity and the globalized purview do not always coincide.²³

Implementation of conservation programs and interlocking concepts of cultural diversity and heritage is far from simple or easy. Part of the issue lies in the contradiction and inconsistencies in the way government preservation policies are presented and utilized. They are paradoxes. They outline the basic framework for protection methods so that cultural and traditional sacred sites have the potential to be conserved and yet contradict themselves when put into practice. The potential for a deeper cultural enrichment of SNS has yet to be fully embraced by conservation and preservation specialists because core protection values of SNS offer opposing ethical concerns between the western ideals of conservation and traditional indigenous cultures. When analyzed through a western preservation perspective, indigenous cultures and SNS are viewed often as ancient artifacts or commercial commodities with the potential to become catalysts for tourism or profitable revenue. They are devalued as merely sources of inspiration for contemporary cultures when in fact, they are just as integral to the study of preservation and cultural heritage. Intangible values, though not necessarily in line with the physical hands-on value attributed to physical sites of worship, should be viewed as global heritage and not merely site-specific niche heritage. Due to the inherent differences beyond the general scope of cultural, economic, historic, and religious principles, organizations and individual nations must create new terminology and law practices to evaluate and express subjective values in order to incorporate them into new preservation practices. Chapter Three

²³ Robert Wild, Christopher McLeod, and Peter Valentine, *Sacred Natural Sites: Guidelines for Protected Area Managers*, (Gland, Switzerland: IUCN, 2008); Nigel Dudley, *Guidelines for Applying Protected Area Management Categories*, (Gland, Switzerland: IUCN, 2008); Verschuren, 2010.

will next assess current legal defense in the United States regarding sacred Native American sites.

Chapter Three: United States Protection of Sacred Sites

At present, the United States' cultural resource protection system is ill suited for its defense of sacred natural Native American sites. From the earliest days of the nation, federal legislation has been interpreted broadly and used to enact clauses to define and punish crimes, regulate trade and commerce, prohibit liquor traffic, and acquire Native American lands and property. Though Indian law has evolved considerably since the birth of the nation, United States domestic policy regarding Native American sites protection continues to cling to semblances of its roots that date back to the 17th century and the Doctrine of Discovery.²⁴

Native Americans have long since been the subjects of the United States' ultimate power. Prior to the passage of the Indian Civil Rights Act of 1968, Congress discovered that a line of federal court decisions determined that the Constitution and the Bill of Rights did not apply to tribal nations- specifically, individual rights.²⁵ Upon being enacted, the Indian Civil Rights Act (hereinafter ICRA) extended certain provisions from both the Constitution and Bill of Rights to Indian Country, which allowed the provisions operate, but only as limitations on federal or state powers. Since most disputes involving the destruction of sacred property have occurred on public land, federal land management agencies such as the United States Forest Service, Department of Energy, etc. have often been responsible for making decisions regarding sacred sites. Historically, these agencies have disregarded or minimized the significance of religious practices when land use conflicts arose such as in the cases to be outlined in this thesis.

²⁴ Blake A. Watson, "The Doctrine of Discovery and the Elusive Definition of Indian Title," *Lewis & Clark Law Review* 15, no. 4 (2011), 996.

²⁵ Bryan H. Wildenthal, "Introduction" in *Native American Sovereignty on Trial*, (Santa Barbara: ABC-CLIO, Inc., 2003): 4; Gary A. Sokolow, *Native Americans and the Law*, (Santa Barbara: ABC-CLIO, Inc., 2003): 113-115.

The existing cultural resource management and religious freedom laws are likely to be unsuccessful for Native American sacred site protection. At best, the current jurisprudence might achieve an opportunity for mitigation to a proposed project but even that is questionable. The absence of any definitive statutory protections of sacred sites has forced Native Americans to utilize a patchwork of statutory laws for challenging decisions that could detrimentally impact their sacred sites and religious rights. These laws and entitlements include, but are not limited to, land treaty claims, the National Historic Preservation Act (1966), the National Environmental Policy Act (1969), the American Indian Religious Freedom Act (1978), the Archaeological Resource Protection Act (1979), the Native American Graves Protection and Repatriation Act (1990), and the Religious Freedom Restoration Act (1993).

Native American Land Treaty Claims

Treaties were among the primary mechanisms for Native American land delineation when America was a new nation and claims for their acknowledgment have since been utilized in contemporary court cases to defend sacred sites. From the 18th to the 20th century, The United States entered into hundreds of treaties with tribal nations in order to garner rights of passage, open trade, secure military aid, obtain Native American land, and settle property disputes.²⁶ The treaty-making process is referenced in Article II of the United States Constitution which stated that: “The President . . . shall have Power, by and with the Advice and Consent of the Senate, to make Treaties [with Indian nations].”²⁷ Since the United States began formally engaging tribal nations, 600 agreements have been made and recognized through executive

²⁶ Donna L. Akers, “Decolonizing the Master Narrative Treaties and Other American Myths,” *Wicazo Sa Review* 29, no 1 (2014): 59.

²⁷ U.S. Const. art. II, § 2, cl. 2.

orders, congressional acts, and judicial decision.²⁸

United States administrations sought to work out agreements to ensure working relations and trade with tribal nations who were considered to be sovereign, independent states that possessed defined territories. Though not always voluntary or balanced, treaty negotiations were based on the ideas that tribal nations were sovereign peoples and maintained legal, legitimate rights to their land and transfer of Native American property would be based on fair compensation and consent.²⁹ Unfortunately, the benevolence of the U.S. treaty system has been put into question over the centuries. While the United States held to the opinion that entering into treaty agreements with tribal nations was to seek peaceful relations and equality, the reality was that these arrangements often ignored tribal interests.

Early treaties were fraught with Euro-centric ideals citing the doctrine of discovery that had been used historically to allow explorers to assume absolute title to any land they discovered.³⁰ The system set in place by British colonizers in the 15th century set the basis for Indian/non-Indian treaty models for colonial America and beyond.³¹ Built around these ideals, the Supreme Court defined the legal rights and obligations pertaining to Native American treated land in three canonical cases commonly referred to as the Marshall Trilogy.³² The central premise of the trilogy, presided over by Chief Justice John Marshall, was that tribal nations were

²⁸ Arthur Spirling, "U.S. Treaty Making with American Indians: Institutional Change and Relative Power, 1781-1911," *American Journal of Political Science* 56, no. 1 (2012): 84.

²⁹ Angela R. Riley, "The History of Native American Land and the Supreme Court," *The Journal of Supreme Court History* 38, no. 3 (2013): 370.

³⁰ Blake A. Watson, "The Doctrine of Discovery and the Elusive Definition of Indian Title," *Lewis & Clark Law Review* 15, no. 4 (2011), 996.

³¹ Stan Hoig, *White Man's Paper Trail: Grand Councils and Treaty-Making on the Central Plains*, (Boulder: University of Colorado Press, 2006), 1.

³² *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 US (6 Pet.) 515 (1832).

divested of certain natural rights that white settlers possessed based on religion and race.³³ The 1823 legal case *Johnson v. M'Intosh* addressed the fundamental question of Indian title; it was in this determination that Marshall formally established the doctrine of discovery as a valid and legal governmental claim to land previously possessed by tribal nations. It laid the foundation of land ownership in the United States and has become the cornerstone of Indian treaty claims in America in many subsequent cases.

Historically, the Supreme Court has maintained aspects of the vague exercise of the Marshall Trilogy and employed two mechanisms that have detrimentally affected the processes in which Native Americans can protect their sacred sites. These instruments are the concepts of trusteeship and plenary power. The trusteeship claim entitles the United States government to stand as a guardian or trustee over indigenous peoples and their land. Under plenary power, the United States asserts an authority to unilaterally rescind or greatly limit rights of Native Americans living within federally recognized areas of the United States.³⁴

National Historic Preservation Act

Enacted in 1966, The National Historic Preservation Act (hereinafter NHPA) has been one of the more frequently utilized procedural mechanisms for sacred site protection because of the Section 106 review process. The purpose of the NHPA is to “encourage the preservation and

³³ Julie Cavanaugh-Bill, “Defining Human Rights when Economic Interests are High: the Case of the Western Shoshone,” in *The Local Relevance of Human Rights* ed. Koen De Feyter, Stephan Paramenter, Christine Timmerman, and George Ulrich (Cambridge: Cambridge University Press, 2011), 214.

³⁴ Cavanaugh-Bill, 209. For description on federal-tribal relationships that are similar to guardians or wards, see *Cherokee Nation v. Georgia*, 30 US 1, 16-17 (1831); The US Supreme Court in *United States v. Kagama* first mentions the affirmation of plenary power over all Native American tribes in 1886. *United States v. Kagama*, 118 U.S. 375, (1886.) *Delaware Tribal Business Comm. v. Weeks*. 430 U.S. 73, 83-84 (1977).

protection of America's historic and cultural resources.”³⁵ The initial provision was established to expand and maintain a national register of “significant historic properties;” it gave structure and purpose to a previously nebulous inventory of sites and gave the government the responsibility of identifying and maintaining them.³⁶ NHPA additionally created the Advisory Council on Historic Preservation (hereinafter ACHP) to advise the president and Congress on issues of historic preservation and it additionally authorized grants to states administered through state liaisons.³⁷

In its infancy, the government-wide policy focused solely on properties already included on the National Register. It was not until Executive Order 11593 was passed in 1971 that eligible properties were considered with the same respect as listed properties.³⁸ Amended often since its implementation, one of NHPA's key provisions has remained the same: the Section 106 consultation process is required for any undertaking subjected to federal agency review. Section 106 determined that federal agencies must take into consideration the effects of their actions on historic properties. These activities include actions that the agencies perform themselves, permit someone to do, or aid another to do.³⁹ The consultation process begins by a federal agency initiating a discussion with the State, Tribal Historic Preservation Officer (hereinafter THPO), Native American tribal nations, or interested parties. In conjunction with the above stakeholders, the agency determines a scope of work, areas of potential effect, and undertakes in identifying

³⁵ 16 U.S.C. § 470-470x-6 (as amended 2000).

³⁶ Thomas F. King, *Anthropology In Historic Preservation: Caring for Culture's Clutter*, (New York: Academic Press, 1977) 46-47.

³⁷ Thomas F. King, *Cultural Resource Laws & Practice Fourth Edition*, (Lanham: AltaMira Press, 2013), 19.

³⁸ Executive Order 11593 of May 13, 1971, Protection and enhancement of the cultural environment, *Code of Federal Regulations*, title 3 (1971): 1971-1975, <https://www.archives.gov/federal-register/codification/executive-order/11593.html>

³⁹ King, *Our Unprotected Heritage*, 18. I

already existing historic sites within the undertaking's viewshed. The agency then regulates if the proposed undertaking will have an adverse effect on historic properties using criteria outlined by the ACHP. If an adverse effect is determined, the consulting parties must be notified; this often leads to a memorandum of agreement (hereinafter MOA). If an MOA is not achieved, the ACHP comments to the head of the consulting federal agency. The comments should be considered in deciding how to amend or carry out the undertaking, but the agency is not required to follow them.⁴⁰

The 1992 amendments contained several provisions specifically important to Native Americans in that they clearly recognized the importance of traditional, religious, and cultural properties. One provision addressed the substitution of tribal preservation programs for SHPO functions on tribal lands.⁴¹ Mirroring UNESCO's adoption of cultural landscapes in the same year, sacred cultural properties could be considered eligible for inclusion on the National Register of Historic Places. In addition to potential inclusion, the amendments also required federal agencies to consult with American Indian and Native Hawaiian tribes if substantial religious or cultural significance was attached to a site. Regulations that implemented these amendments indicated that Native American tribes were to be treated as consulting parties in the process when a designation is requested.⁴² For Native Americans, the Section 106 process was often triggered when a proposed undertaking affected a TCP, but only on federally recognized tribal nations. The process applies regardless of land ownership status.

On paper, NHPA and Section 106 appears to be a promising statute in which Native Americans

⁴⁰ King, *Our Unprotected Heritage*, 30-31.

⁴¹ Thomas F. King, *Cultural Resource Laws & Practice Fourth Edition*, (Lanham: AltaMira Press, 2013), 42.

⁴² Lyuba Zarsky, "Is Nothing Sacred? Corporate Responsibility for the Protection of Native American Sacred Sites," Appendices 75.

can protect their sacred sites, but in actuality years of broad, political interpretation has rendered it highly ineffective. Every federal agency has its own set of regulatory guidelines for NHPA. Therefore, interpretations tend to vary upon the reviewing agency. As a result, inter-agency Section 106 review processes are inconsistent. Moreover, the Section 106 process is merely a consultation; it offers no legal protection and does not guarantee the protection of any sacred site. The NHPA does not demand that all historic properties be protected, but insists that an effort should be made. Effort can be rather subjective in this context considering there is no overarching inter-agency guideline. The consultation regulations are, however, subject to ACHP review upon agency completion.

National Environmental Protection Act:

The National Environmental Protection Agency (hereinafter NEPA,) though not initially intended for the direct protection of Native American culture and landscapes, has become a preservation tool that tribal nations have begun utilizing for advocacy of the protection of sacred sites. Upon its enactment in 1969, NEPA established a national policy for promoting and enhancing the human environment with the intent to

...use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.⁴³

It does so by providing specific consultation processes for which all federal agencies are required to follow.⁴⁴ Similar to NHPA, the NEPA review process must address every action a federal

⁴³ Federal Emergency Management Agency, "FEMA's NEPA Desk Reference," 4.

⁴⁴ Ibid, 2.

agency plans to undertake, aid, or permit another party in performing.⁴⁵ NEPA provides an interdisciplinary framework for federal agencies to insure integrated use of social and natural sciences in planning and decision making to prevent further damage to the environment. In addition, NEPA requires federal regulatory agencies to develop alternative scopes of work in the event that the original proposal involves an unresolved conflict of available resources.

The NEPA process provides four levels of environmental review depending on the acting agency: Statutory Exclusions (hereinafter STATEX), Categorical Exclusions (hereinafter CATEX), Environmental Assessments (hereinafter EA), and Environmental Impact Statements (hereinafter EIS).⁴⁶ STATEX and CATEX reviews are those that are excluded from detailed environmental analysis whereas EA and EIS are more comprehensive assessments that include public disclosure of environmental ramifications imposed by federal agencies.⁴⁷ Studies done pursuant to the NEPA process will often work in conjunction with the NHPA, but they do not necessarily need to take each other into consideration. EIS and EA require public involvement, but maintain a very science-minded purview that leaves little room for interpretation. In regard to cultural resources, NEPA does not provide a private cause of action, but claims may be brought to the Administrative Procedures Act (hereinafter APA), which provides a judicial review of actions thought to bring “suffering under agency action, or adversely affected or aggrieved by agency action.”⁴⁸ Native American traditional views have been reviewed under the NEPA

⁴⁵ King, *Our Unprotected Heritage: Whitewashing the Destruction of our Cultural and Natural Environment*, 29.

⁴⁶ *Ibid*, 9.

⁴⁷ Erica Novack, “Segmentation of Environmental Review: Why *Defenders of Wildlife v. U.S. Navy* Threatens the Effectiveness of NEPA and the Sea,” *Boston College Environmental Affairs Law Review* 42 no. 1 2015, 248.

⁴⁸ 5 U.S.C. § 702 (1966).

process in the past, but are vaguely defined under “cultural resources.”⁴⁹ They are not often addressed unless a natural resource is at risk.

Many academic legal writers have praised the required inclusion of Native Americans in the consultation process, but discussion is centrally positioned around what happens solely in “Indian Country.”⁵⁰ By only consulting Native Americans when the proposed scope of work is located on Native American reservations, agencies greatly limit the Native American voice of concern related to human health and environmental issues that can inadvertently affect them. NEPA, like NHPA Section 106 consultations, vary depending on the respective agency.

NEPA does not have a built in clause for action when tribal nations find a project to be an adverse effect; this means that additional and extensive evidence is needed for legal action if the property does not meet the federal finding of an adverse effect.⁵¹ All things considered, NEPA is a viable option for tribes attempting to protect their sacred landscapes; Native Americans are at least consulted in the process to determine potential effects of proposed undertakings. The NEPA process and EIS drafting may take anywhere from several months to several years depending on the political climate and complexity of the scope of work. It would not be the suggested tool of choice for site protection if the project were time-sensitive.

American Indian Religious Freedom Act and the First Amendment

In an effort to reverse land disputes between the government and tribal nations, joint resolutions of Congress were passed in 1978 to attempt to incorporate Native Americans in the

⁴⁹ James M. Grijalva. *Closing the Circle: Environmental Justice in Indian Country*, (Durham: Carolina University Press, 2008), 35.

⁵⁰ Kurt E. Dongoske, Theresa Pasqual, & Thomas F. King, “The National Environmental Policy Act (NEPA) and the Silencing of Native American Worldviews,” *Environmental Practice* 17 no. 1 2015, 41.

⁵¹ Karly C. Winter, “Saving Bear Butte and Other Sacred Sites,” *Great Plains Natural Resources Journal* 13 no. 1 (2010), 83.

decision-making process of sacred site protection. This Act, American Indian Religious Freedom Act (hereinafter AIRFA), was designed to ensure that federal and state agencies take Native American religious beliefs into consideration when making decisions that could potentially affect religious practices.⁵² The Act acknowledged that Native Americans often suffered from federal infringement of the First Amendment and Free Exercise clause. Despite its recognition, however, the law does very little in safeguarding Native American spiritual practices on public land and crucially, it was not intended to. AIRFA was established as a policy statement rather than policy itself. Its original intent was to establish a context so that subsequent substantive law could later be set in motion.⁵³

Throughout the 1980s, Native American tribes attempted to seek legal recourse through AIRFA and the First Amendment by challenging the constitutionality of development on traditionally sacred property. These legal cases based their challenges on the grounds of free exercise claiming that development would unconstitutionally prevent the observation of religious practice required in conjunction with the sacred space; these cases were met with very little success.⁵⁴ Circuit courts made it clear that suits that attacked land agencies for development on sacred sites would not be met sympathetically. A well-known case relating to the suppression of Native American religious freedom is that of the highly controversial 1988 *Lyng v. Northwest Indian Cemetery Protective Association*. In *Lyng v. Northwest Indian Cemetery Protective Association*, the United States Forest Service proposed the construction of a paved road and timber harvesting through federal land including Chimney Rock, an area located within the Six

⁵² Sokolow, 36.

⁵³ Suzan Shown Harjo, "Keynote Address: The American Indian Religious Freedom Act: Looking Back and Looking Forward," *Wicazo Sa Review* 19 no. 2 (2004), 148.

⁵⁴ Marcia Yablon, "Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land," *Yale Law Journal* 113 no. 7 (2004), 1628.

Rivers National Forest. Chimney Rock, as noted in the Environmental Impact Statement created by the Forest Service. Chimney Rock had historically been considered sacred and used by the Hupa, Yurok, and Karuk tribes for religious rituals that depended on privacy, silence, and an undisturbed natural setting.⁵⁵ Native Americans argued that the construction of the road through Chimney Rock would irreparably damage the sacred site. After exhausting all administrative remedies, Native Americans filed a suit under AIRFA and the Free Exercise clause seeking to bar the construction of the road that would affect Chimney Rock.⁵⁶ It should be noted that some Native people wanted the construction of the Chimney Rock road. The controversy still divides the community.

The First Amendment Free Exercise clause is only implicated by government actions that coerce individuals into violating their beliefs.⁵⁷ As long as the government did not restrict Native America beliefs, it was free to impede upon their right to practice their religion. The ruling concluded that the government was aware that the proposed action would have a severe adverse effect on the sacred site but concluded:

No disrespect for these [religious] practices is implied when one notes that such beliefs could easily require de facto beneficial ownership of some rather spacious tracts of public property.... 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.⁵⁸

The Supreme Court found that the Free Exercise Clause could afford an individual the security from certain governmental undertakings, but did not have the right to dictate the internal procedures of federal agencies. Justice O'Connor, writing for the majority opinion, stated that the

⁵⁵ Cornell University Law School, "Lyng v. Northwest Indian Cemetery Protective Association," <https://www.law.cornell.edu/supremecourt/text/485/439> (accessed October 1, 2016).

⁵⁶ Ibid.

⁵⁷ Donald Falk, "Lyng v. Northwest Indian Cemetery Protective Association: Bulldozing First Amendment Protection of Indian Sacred Lands," 16 Ecology L.Q. (1989) <http://scholarship.law.berkeley.edu/elq/vol16/iss2/5> (accessed October 26, 2016), 525,

⁵⁸ *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988)

government did not violate the Free Exercise Clause because it did not coerce Native Americans to abandon their religious beliefs.⁵⁹ Essentially, the government found that destroying a tribe's sacred site and marginalizing their human right to exercise their spiritual practice did not constitute a compelling interest to halt development.

The Court believed that restricting the government's right to develop its own land on the ground of Free Exercise was a substantial "diminution of the Government's property rights."⁶⁰ *Lyng v. Northwest Indian Cemetery Protective Association* has become the standard for First Amendment disregard for Native American sacred sites protection insomuch as it has established the precedent that Native American religious practice on federal lands do not have automatic First Amendment protection if there is a compelling government interest. The verdict greatly reduced the likelihood favorable opinions under the First Amendment and Free Exercise Clause in future federal cases. After *Lyng v. Northwest Indian Cemetery Protective Association*, it became clear that the courts would not mandate protection for Native American sacred sites through this avenue of legal redress. The government's rights to physical land ownership trumped any interest the tribe may have had in utilizing or practicing at the sacred site.

As it stands, federal courts refuse to sanction what they believe is the Native American attempt to impose "religious servitude" on federal property.⁶¹ Instead of engaging in the critical balancing act that should be required when presiding over sacred sites cases, the federal court system has focused their analysis on a singular aspect of property law concepts and the right to exclude. If the site is on tribal land, the tribe has a better ability to protect it. Sacred lands located on public property, however, have very little to no legally protectable interest and adds to a

⁵⁹ Matthew L. M. Fletcher, "The Supreme Court's Indian Problem," *Hastings Law Journal* 59 no. 3 2007-2008, 59.

⁶⁰ Falk, 526.

⁶¹ *Lyng*, 452.

larger First Amendment issue of creating a protected religious class. AIRFRA is more a statement of intent rather than a useful tool. Instead it is useful as the moral statement it was intended to be. It imposes no penalty and offers no cause of action that would enable Native Americans to challenge federal agencies in a court of law.

Archaeological Resource Protection Act:

Enacted in 1979, Archaeological Resource Protection Act (hereinafter ARPA) was legislated as a concerted effort from the archaeological community to strengthen federal response to looting on public lands as well as to provide standards for archaeological data recovery.⁶² ARPA is an improvement upon the 1906 Antiquities Act (hereinafter AA), which was the first law in the United States to provide protection of any kind to cultural and natural resources.⁶³ ARPA included two improvements over the AA. It required a more thorough description of prohibited activities and larger financial and criminal penalties for convicted violators. Additionally, it outlawed the selling, purchasing, and other trafficking activities of historic artifacts within the United States or abroad.⁶⁴ APRA prohibits the removal, excavation, or defacing of archaeological resources on both federal and tribal lands without a permit issued by the responsible land management agency. A crucial incentive behind the Act was to establish a more effective law enforcement to protect public archaeological sites. The statute claimed:

...to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands, and to

⁶² Sherry Hutt, "The Archaeological Resource Protection Act at 30: Permits for Data Recovery on Federal Lands, A Law and Policy Analysis," *Great Plains Natural Resources Journal* 13 no. 1 2010, 13.

⁶³ National Parks Service, "Antiquities Act of 1906,"

<https://www.nps.gov/archeology/tools/laws/AntAct.htm> (accessed October 26, 2016).

⁶⁴ National Parks Service, "Archaeological Resources Protection Act of 1979,"

<https://www.nps.gov/archeology/tools/laws/ARPA.htm> (accessed October 26, 2016).

foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals.⁶⁵

ARPA also imposed a standardized basic permit requirement, which applies to all federal agencies.⁶⁶ Consideration of tribal property and actions on those lands are suggested throughout ARPA but there is no definitive support for legal redress. Section 4(g)(2) stipulates that tribal governments must consent to archaeological excavation on tribal land and must receive notice if an excavation is set to take place on the site of religious or cultural importance. When a permit is issued on federal lands that have the potential to cause harm or destruction to a cultural site, the tribe is to be given 30 days prior notice by the issuing agency. In 1988, ARPA was amended to include provisions or consultation with Native American tribes based upon potential titles to the area of the proposed scope of work.⁶⁷

Native American Graves Protection and Repatriation Act:

The Native American Graves Protection and Repatriation Act (hereinafter NAGPRA) was enacted in 1990 as human rights legislation intended to provide restitution for the displacement and exploitation of Native American cultural property associated with grave sites. The Act offers protection for human remains, burial objects, and other items associated with funerary rights conducted by Native Americans. NAGPRA takes into consideration the civil rights of lineal descendants to obtain previously repatriated funerary and sacred objects as well as objects of cultural patrimony from federally-funded institutions.⁶⁸ NAGPRA requires several conditions from these organizations. Federally funded or federal institutions that may be in possession of human remains must inventory them and make a reasonable effort to ascertain their

⁶⁵ Archaeological Resources Protection Act (16 U.S.Code 470aa-470mm)

⁶⁶ 16 U.S.C. C. § 470cc.

⁶⁷ 16 U.S.C. §§ 470aa-mm

⁶⁸ Sokolow, 176.

origin; this had to have been completed five years after the statute was enacted.⁶⁹ The organization must then notify any tribal organization presumed to be in connection with the remains.

Cultural affiliation is a key in the implementation of NAGPRA. Cultural affiliation is defined as a relationship of shared group identity that can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.⁷⁰ Claimants must provide affiliation evidence in the form of kinship, genealogy, oral traditions, historical, anthropological, archaeological, or other relevant information regarding lineage. In order to execute this provision, NAGPRA requires collaborative participation from federal agencies, tribal nations, and all federally-funded museums.

In addition to repatriation of tribal objects, NAGPRA also applies to archaeological excavations or other work that involve excavation of tribal or federal lands. NAGPRA requires that whenever a party intends to intentionally excavate a known burial site, the party must obtain a permit from the land management agency. The statute applies to all tribal land whether public or privately-owned. If tribal land is located within a proposed development or excavation site, the tribal nation must be notified and consulted. NAGPRA has played an important role in burial ground and sacred object protection for Native Americans, but is limited in scope. For example, NAGPRA cannot extend its reach past federally- or tribally-owned property. Since its implementation in 1990, NAGPRA has become a significant advancement in protection of Native American cultural property for which a federal nexus exists but is only moral guidance for claims asserted on private land.

⁶⁹ NAGPRA, 1990.

⁷⁰ Ibid.

Religious Freedom Restoration Act

A dispute over the use of peyote for religious practices in the 1990 case *Employment Division v. Smith* saw the creation of the Religious Freedom Restoration Act (hereinafter RFRA) in 1993.⁷¹ RFRA revived the precarious balancing act between the First Amendment and the compelling interest argument that Congress had vacillated between prior to the *Lyng v. Northwest Indian Cemetery Protective Association* verdict. The Act provides that governmental activity “shall not substantially burden a person’s exercise to religion even if the burden results from a rule of general applicability” unless the burden of religion furthers “compelling governmental interest” and is the “least restrictive means” of furthering that interest.⁷² Under RFRA, any person whose free exercise is burdened by a governmental activity has the opportunity to seek judicial redress.

To determine whether the RFRA protects the rights of Native Americans, three key interests must be taken into consideration: (a) central nature of the asserted right, (b) whether the burden on religion is substantial, and (c) what would constitute a compelling government interest.⁷³ Only compelling interests can impede upon the free exercise of this right; unfortunately, there is neither much clarification of the meaning of the term “compelling interest” nor “substantial burden.” The only aspect RFRA does define is the breadth of what constitutes the exercise of religion: “any exercise of religion, whether or not compelled by, or central to, a system of religious beliefs.”⁷⁴ The RFRA very much mimics AIRFA, which offers similar addenda that claim governmental precedence when there is an element of substantial

⁷¹ *Employment Division v. Smith*, 494 U.S. 872 (1990).

⁷² The Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (November 16, 1993)

⁷³ Jason Gubi, “The Religious Freedom Restoration Act and Protection of Native American Religious Practices,” *Modern American* 4 no. 2 2008, 73.

⁷⁴ *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1033 (9th Cir. 2007).

interest. RFRA's main aim is to establish a right of action for individuals that were suffering from infringement on their right to freely exercise their religion as a direct result of government action. The government essentially created a law that gave individuals a tool for legal recourse as long as the property was privately owned. Many Native American sacred sites and religious practices are located on federal property. As a result, RFRA becomes not void, but unavailable as a legal tool. RFRA presents the same problem that tribes' First Amendment claims are faced with; it does nothing to further tribes' interest in sacred site protection.

Thus Native American's search for sacred sites protection comes nearly full circle. Despite the fact that the federal government is obligated to consult with native communities, the lack of a stronger legal base for Native American religious freedom or cultural resource management laws diminishes native peoples' bargaining power in both consultations and a court of law. Marcia Yablon, has argued that sacred sites legislation is not the protective tool Native Americans should be seeking.⁷⁵ Instead, Yablon maintains that protection offered by federal agencies is the best instrument for sacred site security. That argument asserts that legal protection falls short of bridging the knowledge gap between Native Americans and Western ideals of sacred; therefore federal agencies would have the best tools to maintain them. While the article correctly notes discrepancies in understanding, allowing federal agencies to maintain ownership of Native American sacred sites is counterproductive for the most glaring reason: the government can override Native American complaints. This will be discussed in greater depth in subsequent case studies in Chapters Four, Five, and Six.

It is clear that Native Americans in the United States have few legal frameworks to address the dire need to protect revered land. Site protection through application of US cultural

⁷⁵ Yabon, 1626.

resource legislation seems like a worthwhile alternative, but in actuality can have a hand in the desecration of a sacred space. The following case studies will analyze three different sacred Native American sites: San Francisco Peaks, Arizona; Yucca Mountain, Nevada; and Lake Oahe, North Dakota. All three of the sites have unfortunately lost significant resources as a result of a combination of ineffective jurisprudence and ownership by federal agencies.

Chapter Four: Religious Freedom Claims: a Case Study of the San Francisco Peaks

Agassiz Peak stands as a sentinel fifteen miles northwest of Flagstaff, Arizona. Nearly 13,000 feet above sea level, the Peak is one of several summits on a giant dormant stratovolcano collectively known as the San Francisco Peaks (Figure 3.1).⁷⁶ Once the sweltering core of one of Arizona's most explosive volcanoes, the summits surround a now dormant caldera and protect land that many Native American tribes consider to be sacred.⁷⁷ Twenty-two Native American tribes regard the San Francisco Peaks with "great respect," and at least thirteen consider the site "culturally or spiritually significant."⁷⁸ Of those thirteen, the Navajo and Hopi tribes view the Peaks as "indispensable to their religious beliefs and practices."⁷⁹

Significance of the San Francisco Peaks

To more than a quarter of a million Navajo people, the Peaks are considered the apex of Navajo spiritual life. They call the massif *Do'ok'oos-lííd*, meaning "Shining on Top," in reference to the mountain's peak.⁸⁰ The mountain defines the sacred precincts of Navajoland and orients the tribe's prayer and daily life. The Navajos believe that contained in the Peaks is

⁷⁶ "History of the San Francisco Peaks and How they got Their Names," United States Forest Service, <http://www.fs.usda.gov/detail/coconino/about-forest/about-area/?cid=stelprdb5340115>.

⁷⁷ *Ibid.*

⁷⁸ Boone Cragun, "A Snowbowl Déjà Vu: The Battle Between Native American Tribes and the Arizona Snowbowl Continues," *American Indian Law Review* 30 no. 1 2005, 165.

⁷⁹ Katie Showalter, "A Chill over Agassiz; Tribes Fight an Arizona's Ski Resort's Plan to Make Snow from Wastewater," *Los Angeles Times*, last modified February 10, 2004, <http://articles.latimes.com/2004/feb/10/news/os-peaks10>; James A. Hardy, "The History of the San Francisco Peaks in Flagstaff," *KachinasPeaks*, accessed November 26, 2016, http://www.kachinapeaks.org/pdf/peaks_history.pdf

⁸⁰ Michael D. McNally, "From Substantial Burden on Religion to Diminished Spiritual Fulfillment: the San Francisco Peaks Case and the Misunderstanding of Native American Religion," *Journal of Law and Religion* 30 no. 1 2015, 39.

the spiritual “Mother” and that the massif itself is the physical geomorphic manifestation of that body;⁸¹ it is considered to be the site of creation for all Navajo people. The Navajos understand that the Peaks are a source of power and healing in which the deity Changing Woman resides. Changing Woman is essential in the practice of *kinaalda*, or puberty ceremony, which is a rite of passage for all young Navajo females coming into their womanhood. It is considered to be one of the most sacred component of the Blessingway cultural-spiritual traditional ceremony coda for spiritual practices and a treasured ritual of the Navajo people.⁸² *Kinaalda* is believed to be a ritual renewal of community and cosmos.

In addition to the *kinaalda* ceremony, the Peaks are the location of a ritualized gathering by *hitaali*- singers or medicine men. It is here that flora and fauna found on the Peaks are gathered and utilized for the creation of medicine bundles; they are the ritual items that anchor healings and other ceremonies of Navajo life. Medicine bundles are essential to the Blessingway and contain soil from six sacred Navajo mountains. The site is not only where elements are garnered for spiritual practice, it is a place in which the power required for the effectiveness of the medicine bundles resides.⁸³ Navajo Blessingway practices are essential to the generative healing power that benefits tribal and individual life. San Francisco Peaks are prayed to in the name of Blessingway; the spiritual presence that resides at the mountain is evoked in nearly every Navajo ceremony. It is not a locality in which the Navajos frequent and yet it is a fundamental component to the most sacred of Navajo religious practice and one of the holiest shrines noted in their practice. Offerings must be given before herbs can be harvested or

⁸¹ Ibid, 39.

⁸² Charlotte Johnson Frisbie, *Kindaaldá A Study of the Navaho Girl's Puberty Ceremony* (Middletown: Wesleyan University Press, 1967), 348-49.

⁸³ McNally, 40.

observances can commence.⁸⁴

The Peaks are just as culturally and religiously significant to the Hopi, who call the Peaks *Nuvatukya’ovi* loosely translated to “The Place of Snow on the Peaks” or “Place of the High Snows.”⁸⁵ The Hopi believe that the Peaks are home to sacred spirits called Katsinam, or kachinas. Kachinas are not gods, but spiritual helpers who have guided the Hopi since their emergence from the bottom of the mountain.⁸⁶ Kachinas bring rain and blessings to the Hopi; they are the epicenter to all Hopi cosmology, ethics, and spiritual practice.⁸⁷ Kachinas reside at the site from mid-summer through mid-winter. For the second half of the year, the Hopi believe that the kachinas acts as mediators to the deity on the behalf of the tribal nation. They travel from village to village where they bring guidance and advise the Hopi of the right way to live. They participate in ceremonies and bring rain to the Hopi and all people.⁸⁸ The kachinas rejuvenate the Hopi’s faith and way of life.

Sacred Hopi narrative identifies that ancestors of the Hopi came to the Peaks after they surfaced from the underworld. It was at the Peaks that they received their spiritual guidance and established a promise to *Ma’Saw*, the divine figure that teaches the Hopi how to live wholesome lives on Earth. The Hopi people, like the Navajo, utilize the plants found on the Peaks to use in their ceremonies.⁸⁹ The ceremonial pilgrimages culminate in the ritual practices that foster the integral relationship between the Hopi people and their spiritual divinities. Their spiritual lives

⁸⁴ *Navajo Nation v. U.S. Forest Service*, 129 S. Ct. 2763 (2009).

⁸⁵ McNally, 166; Hardy, “The History of the San Francisco Peaks in Flagstaff,”

⁸⁶ Brad Olsen, *Sacred Places of North America: 108 Destinations*, (Santa Cruz: Consortium of Collective Consciousness), 2003, 40-41.

⁸⁷ Maria Glowacka, Dorothy Washburn, and Justin Richland, “Nuvatukya’ovi, San Francisco Peaks Balancing Western Economies with Native American Spiritualities,” *Current Anthropology* 50 no. 4 2009, 566.

⁸⁸ *i*Bid, 556.

⁸⁹ *Wilson v. Block*, 708 F.2d 735, 740 (D.C. Cir. 1983).

center on these practices in which they foster intimate relationships with their deities. Due to the massif's extreme cultural importance to the Navajo and Hopi, the Forest Service determined the site eligible as a TCP in a 2004 Draft Environmental Assessment.⁹⁰

Brief History of the Arizona Snowbowl

One of the oldest ski resorts in the country is also located on the San Francisco Peaks.⁹¹ The Arizona Snowbowl (hereinafter Snowbowl) has been the site of a contentious history between the ski resort and Native Americans since its construction in 1938. The San Francisco Peaks is part of a larger environmental park called Coconino National Forest that was established in 1908⁹². The Peaks, as well as parts of Black Mesa, Tonto National Forest, and all of the Grand Canyon National Forest south and east of the Colorado River were consolidated to make a larger national forest maintained by the United States Department of Agriculture's National Forest Service.⁹³ As such, the San Francisco Peaks are subjected to Forest Service and federal agency protection guidelines. The Navajo and Hopi had to come together twice, along with Hualapai, Havasupai, White Mountain Apache, and Yavapai-Apache tribes and environmental advocacy groups to stop the efforts to expand the Snowbowl and halt the defacement of sacred land. Under opposition, the Snowbowl was built in 1937 and existed until the mid-1950s as a rudimentary lodge with car engine- powered towrope.⁹⁴

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⁹¹ Michael Kiefer, "The Big Steep: The Only Thing Slick About Arizona Snowbowl is the Snow," *Phoenix New Times*, last modified Feb. 20, 1997, <http://www.phoenixnewtimes.com/issues/1997-02-20/news/feature2.html>.

⁹² "Coconino National Forest Celebrates 100 years," *United States Forest Service*, accessed November 1, 2016, <http://www.fs.usda.gov/main/coconino/about-forest>.

⁹³ "About the Forest," *United States Forest Service*, accessed November 1, 2016, <http://www.fs.usda.gov/main/coconino/about-forest>.

⁹⁴ Ophir Sefiha and Pat Lauderdale, "Sacred Mountains and Profane Dollars: Discourses about Snowmaking on the San Francisco Peaks," *Social and Legal Studies* 17, no. 4 (2008): 492.

After a fire destroyed the original resort in 1952, a new, larger lodge was constructed and has undergone multiple expansions since. In 1977, development reached its pinnacle when the Forest Service authorized the transfer of the operating permit to a new contractor. The contractor, Northland Recreation, established a master plan that included new ski lifts, lodge facilities, road improvements, and additional parking totaling 50 acres of expansion.⁹⁵ Despite heavy opposition, the Forest Service approved the Snowbowl's request for the 50-acre expansion. Hopi and Navajo filed lawsuits in the District Court of Washington, D.C. to stop the proposed Snowbowl expansion in March 1981. The result was the *Wilson v. Block*, 708 F.2d 735 (D.C. CIR. 1983).

First Amendment Rights and Protection Under AIRFA

The Navajo and Hopi complaint was that by approving the plan for the Snowbowl expansion, the Forest Service was violating the tribal members' First Amendment rights of free exercise for religion.⁹⁶ The tribal nations argued that development would greatly hinder the ability to conduct their religious practices as well as collect sacred objects and fauna essential to the practice of many ceremonies. In addition to their statements on the violation of the First Amendment, the plaintiffs claimed a violation of AIRFA, NEPA, the Endangered Species Act (hereinafter ESA), the Wilderness Act, the Multiple-Use Sustained-Yield Act, and NHPA. They also claimed that statutes governing the issuance of permits had violated trust relationships between the Forest Service and Native Americans. They sought phased removal of the structures relating to the Snowbowl or, at minimum, an injunction to stop proposed expansion.⁹⁷

⁹⁵ Glowacka, 547.

⁹⁶ *Wilson v. Block*, 708 F.2d 735 (1983).

⁹⁷ *Ibid.*

Having been tried prior to the aforementioned *Lyng v. Northwest Indian Cemetery Protective Association* case that established that the First Amendment and Free Exercise Clause was not a viable option for legal recourse, it is no wonder the issued verdict did not fall in favor of the Native Americans. The D.C. Circuit rejected the tribes' constitutional argument stating that if a plaintiff raises the Free Exercise claim under the First Amendment, they must be able to demonstrate that the religious practice in question could not be performed anywhere else in order to gain legal validity. The presiding judge noted that the Peaks were indispensable and would cause substantial burden to the Native Americans, but argued that the Forest Service did not impose an impermissible burden on the tribes' religious practices when they approved Snowbowl expansion.

First Amendment rights were disregarded under the aforementioned *Wilson v. Block* decision that the plaintiffs could not demonstrate that the development of the Snowbowl would affect their religious practices. In addition, the courts determined that the Snowbowl comprised merely 1% of surface area of the San Francisco Peaks so therefore resort expansion was not too heavy of a religious burden considering the tribes and resort had been able to coexist for nearly fifty years.⁹⁸ In addressing the AIRFA claim, the courts assessed previous United States legislative history concerning religious freedom claims. It was determined that AIRFA only required federal agencies to consider religious beliefs, not defer them.

The Forest Service recognized that there would be an adverse effect on Native American religious sites and beliefs, but found that public use of the land was enough to constitute a

⁹⁸ Ibid, 745.

compelling and substantial reason for Snowbowl development.⁹⁹ *Wilson v. Block* was a devastating blow to the Navajo, Hopi, and eleven other tribal nations that viewed the Peaks as a spiritual and religious space. It became eminently clear that the rights of Native Americans ranked below the interests of seasonal recreation. That fact alone contributed to much of the animosity that emerged nearly 30 years later when, once again, Snowbowl submitted plans for continued expansion.

The Arizona Snowbowl transferred ownership in 1992 to Arizona Snowbowl Resort Limited Partnership. The new proprietors submitted a proposal to the Forest Service ten years later to significantly expand the facilities and increase infrastructure. The plan's expansion proposal was similar to that of the 1979 EIS. In addition to the expansion, the new Snowbowl proposal included one particularly contemptuous new element. The proposal added that Arizona Snowbowl owners would like to invest in artificial snowmaking capacities so that the resort could increase its revenue and lengthen its season. The owners of Snowbowl proposed to pump water uphill 15 miles from the City of Flagstaff, which agreed to sell the resort 1.5 million gallons of wastewater per day.¹⁰⁰

Native Americans and environmental advocacy groups strongly objected to the proposal; the reclaimed wastewater particularly insulted the Native Americans. A Navajo activist likened its use to "going into a church and defecating."¹⁰¹ Native Americans believe that the use of treated water on the Peaks would be unnatural and impure. They have voiced concern that it

⁹⁹ "Coconino National Forest (N.F.), Snow Bowl ski area proposal: environmental impact statement." *United States Forest Service*, accessed November 1, 2016, <https://catalog.hathitrust.org/Record/100978645>, Summary of Effects III.A.1.C.

¹⁰⁰ Showalter, "A Chill over Agassiz; Tribes Fight an Arizona's Ski Resort's Plan to Make Snow from Wastewater."

¹⁰¹ Daniel Kraker, "On Sacred Snow," *American Indian Report* 20, no. 4 (2004): 1.

would have a negative impact on the spiritual nature of the landscape and would harm the animals and endangered plants located on the mountain slopes.

The Forest Service claimed that treated water met the safety and health requirements of the Arizona Department of Environmental Quality (hereinafter ADEQ) and the United States Environmental Protection Agency (hereinafter EPA)¹⁰² but there have been instances where the “requirements” have proven faulty. The ADEQ developed the Reclaimed Water Permit Program to define conditions and requirements of treated water utilized for municipal purposes. The program identifies that water standards have five classifications. Class A is considered the highest quality; The State of Arizona is stated as using A and A+ reclaimed water for direct reuse in snowmaking in the EIS published by the Forest Service in 2005.¹⁰³ While the water classifications are ideal, there are no federal standards for reclaimed sewer water and the EPA does not require testing for pharmaceuticals or hormones in sewage effluent.¹⁰⁴ They are subjective. Studies of the Snowbowl runoff have also exhibited the presence of antibiotic resistant bacteria and levels of selenium, cyanide, and fecal matter.¹⁰⁵

RFRA Claims

In 2005, the Navajo, Hopi, eleven other southwestern tribes, and environmental advocacy groups filed an appeal in which the decision to expand the resort and utilize reclaimed

¹⁰² “Final Environmental Impact Statement for Arizona Snowbowl Facilities Improvements,” *United States Forest Service*, last updated February 2005, https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprd3831728.pdf

¹⁰³ *Ibid*, 2-50.

¹⁰⁴ “Priority Pollutant List,” *Environmental Protection Agency*, accessed October 23, 2016, <https://www3.epa.gov/region1/npdes/permits/generic/prioritypollutants.pdf>; 40 CFR Part 423, Appendix A.

¹⁰⁵ Mari Cleven and Melanie Cuthbertson, *Water is Life*, directed by M. Cleven (2013; Flagstaff, AZ) Film.

wastewater was upheld. Simultaneously, a lawsuit was filed against the United States Forest Service and the Arizona Snowbowl; the *Navajo Nation v. United States Forest Service* claimed that the federal agency had once again violated multiple federally regulatory processes stating that spraying treated effluent on a sacred site would permanently desecrate the Peaks. The environmental and historic claims were dismissed on summary judgment in favor of the defendant. The only claim heard at bench trial came under the new legal tool that had emerged since the *Wilson* verdict: RFRA.

As mentioned in Chapter 3, RFRA was intended to overturn the Supreme Court's Free Exercise Clause test which required the government to both show a compelling need to substantially burden religion and prove that its actions were the least restrictive means of furthering that interest.¹⁰⁶ In 2000, RFRA clarified the definition of religious exercise by cross-referencing the Religious Land Use and Institutionalized Persons Act of 2000. This new definition determined that the government was forbidden to cause substantial burden of which "any type of religion, whether or not compelled by, or central to a system of religious beliefs."¹⁰⁷ This new definition allowed the courts to determine if the use of treated effluent was a substantial burden on *any* exercise of religion. The courts determined that there were two primary burdens to the Native Americans' religious practice: (1) some of the tribes would be unable to perform religious ceremonies because the natural resources in question would be too contaminated both physically and spiritually and (2) the sewage contamination would reduce the purity of the Peaks therefore limiting the ability to perform spiritual practices central to the tribes' cultural identity.¹⁰⁸

¹⁰⁶ Jeffrey Merchant, "Religion and Public Lands Management: Will Snowbowl Snowball?" *Natural Resources & Environment* 22, no 2 (2007): 54.

¹⁰⁷ 42 U.S.C. § 2000cc-5(7); 42 U.S.C. § 2000b-2(4).

¹⁰⁸ Merchant, 54.

In January 2006, the District Court ruled in favor of the Forest Service and Snowbowl stating that the expansion of the Arizona Snowbowl would not hinder or interfere with religious practices of the Native American tribes. As in the *Wilson v. Block* case, the courts stated that only 1% of the Peaks surface area was utilized by the Snowbowl and therefore could not be a significant enough burden.¹⁰⁹ Native Americans could practice their religion on the other 99%. Notably, the court stated: "if the facts alleged by plaintiffs were enough to establish a substantial burden, the Forest Service would be left in a precarious situation as it attempted to manage the millions of acres of public lands in Arizona, and elsewhere that are considered sacred to Native American tribes."¹¹⁰ Considering the Coconino National Forest is roughly a 1.8 million acre reserve with ten federally-designated United States Wilderness Areas either within or near its vicinity, one overarching blanket management style seems not only idealistic but a frankly terrible preservation effort.¹¹¹ To assume that all parks and wilderness areas require one static conservation plan does not take into consideration the diversity of the landscapes found in those parks. By asserting that Coconino National Forest should be interpreted in only one context goes against the framework of historic and environmental conservation and establishes exclusion within the protection agenda. In an effort to maintain the verdict, the court determined that the plaintiffs failed to present how the presence of reclaimed water would impact or violate their religious practice. The courts were able to utilize the inherently vague nature of TCP definitions in the cultural lexicon to their advantage. The narrow interpretation of religious expression indicates the discrepancies between Native Americans and the western ideologies of religion.

¹⁰⁹ *Navajo Nation*, 408 F. Supp. 2d at 883-897.

¹¹⁰ *Ibid*, 905.

¹¹¹ "Coconino Celebrates 100 Years."

The Navajo and Hopi appealed the verdict to the three-judge panel of the U.S. Ninth Circuit Court of Appeals in March 2007, which granted *a certiorari*. The Ninth Circuit overruled the verdict and recognized the violation of RFRA. The court found the burdens outlined in the original case to be substantial enough to infringe upon Native American religious practices especially in the case of the Hopi, who held that “were the proposed action to go forward, contamination by effluent would undermine their entire system of belief.”¹¹² The Ninth Circuit rejected the argument that the treated effluent was a compelling government interest. It held that the use of wastewater for snowmaking would contaminate and weaken the spiritual environment needed to perform holy rituals. The Ninth Circuit went much more into depth discussing the repercussions of the sewage water on religious practices. The court noted that despite the Forest Service’s claim that the effluent would be treated to an A+ level that it still would not produce pure water. Post-treatment, water would contain “fecal coliform bacteria,” “detectable levels of enteric bacteria, viruses, and protozoa, including *Cryptosporidium* and *Giardia*,” and “many unidentified and unregulated residual organic contaminants” as previously mentioned.¹¹³ The court held that they were unwilling to authorize the use of the water, making a similar note the District Court had made of the Native American practice locations in the previous case. The District Court had determined that tribes could practice elsewhere on the Peaks; the Ninth Circuit offered that if the Snowbowl closed, there would still be recreational activities in the area.¹¹⁴ During the trial, Judge Fletcher, a member of the three-judge decision, took into account the metaphysical understanding of sacred in the exercise of Native American religion.

¹¹² Merchant, 1.

¹¹³ *Navajo Nation v. U.S. Forest Service*, 479 F.3d 1024, 1043 (9th Cir. 2007).

¹¹⁴ *Ibid*, 1044-45.

Additionally, the Ninth Circuit offered what was, at the time, a beacon of hope for all future sacred site trials:

...[w]e uphold the RFRA claim in this case in part because otherwise we cannot see a starting place. If Appellants do not have a valid RFRA claim in this case, we are unable to see how any Native American plaintiff can ever have a successful RFRA claim based on beliefs and practices tied to land that they hold sacred. The court is correct in stating that the current interpretation of RFRA provides little protection for Native American religious exercise.¹¹⁵

While the Ninth Circuit's decision to uphold RFRA was groundbreaking in the legal history of sacred site protection, an ominous suggestion subtly emerged. Sacred site protection is clearly not a priority of the federal justice system. The verdict, although positive, stated openly that RFRA has minimal effectiveness when put into practice. This is further solidified by a congressional explanation in a Senate report for RFRA that noted that the act is not necessarily a classification of the result reached in any Free Exercise court judgment, merely a restoration of the legal standards applied to those decisions.¹¹⁶ Additionally, it expressed that strict scrutiny does not apply to government actions involving internal government affairs, a statement that very much mirrors Justice O'Connor's decision in the *Lyng v. Northwest Indian Cemetery Protective Association* verdict discussed in Chapter 3. The Ninth Circuit's decision to uphold RFRA, had it been maintained, would have been pivotal in the future legal protection of sacred sites and public land management. The resolution showed that the courts do have the potential to safeguard Native American resources if they choose to do so. It offered, if briefly, the hopeful opportunity to stop public land projects from continuing when religious significance is argued.

In 2008, the Department of Justice, on behalf of the Forest Service, appealed the Ninth Circuit ruling to an 11-judge *en banc* court under the petition to clarify once again the term

¹¹⁵ Ibid, 1048.

¹¹⁶ Religious Freedom Restoration Act of 1993 P.L. 103-141 Stat. 1488 (1993).

“substantial burden” under RFRA.¹¹⁷ The Forest Service argued that the Ninth Circuit maintained a narrow interpretation of “substantial burden.”¹¹⁸ This thesis does not agree that the interpretation was narrow but acknowledges that there was a difference in assessment. The interpretation shifted its purview from Euro-western ideals of spirituality and religion to a new understanding that addressed the discrepancies between United States and tribal understanding of religion. Spirituality is often used as an ostensibly neutral synonym to encompass everything Native American, including religion. These terms, however, are not mutually exclusive and should not be seen as such. The understanding behind the term spiritual emerged from the late-twentieth century Euroamerican ideology that romanticized the idea of a Native American noble savage. It is an unnatural construction used by western cultural historians to differentiate an already forcefully marginalized people. The United States court system utilizes the lens of Native American spirituality to further establish authoritative governance over something that cannot be put into conventional religious lexicons. Procedural logic of the American legal system assumes this authority because of this very inconsistency. This logic is unmistakably still present in many contemporary courts and will be addressed further in Chapter 5.

The *en banc* court overturned the Ninth Circuit court ruling determining that there was no infringement of RFRA. The court held that despite the 2000 amendment to the RFRA, expansion did not alter what the courts found substantial enough to trigger the compelling government interest test. Citing similar cases such as *Sherbert v. Verner*¹¹⁹ and *Wisconsin v. Yoder*,¹²⁰ the court determined that substantial burden was imposed only when the individuals are forced to choose between the principles of their religion and receiving government benefits or forced to act

¹¹⁷ *Navajo Nation et. al. v. United States Forest Service*, 535 F.3d 1058, 1067 (2008).

¹¹⁸ Glowacka, 550.

¹¹⁹ *Sherbert v. Verner*, 374 U.S. 398 (1963).

¹²⁰ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

contrary to their belief. The court ruled that the Native American practices were less essential to their cultural identity and more an emotionally subjective religious experience.¹²¹ Thus, this ruling brings into question the validity of any religion.

Dismissal of AIRFA, RFRA, and First Amendment claims is certainly not exclusive only to the San Francisco Peaks; many Native American sacred site disputes within the past 20 years have concluded a similar result. In addition to *Wilson v. Block*, high-profile cases *Sequoyah v. Tennessee Valley Authority*,¹²² *Badoni v. Higginson*,¹²³ and *Frank Fools Crow v. Gullet*¹²⁴ set an unfortunate precedent for religious freedom lawsuits. The heart of the issue lies in the fact that the United States court system has failed in recognizing the nuances and uniqueness of Native American religion and spiritual practices. Unlike western religions that are based on static, commemorative doctrines, dogmas, and creeds, tribal nations understand a different universal truth. Tribal nations commemorate in a site-specific way meaning that they require the place itself in order for the ceremony or belief to be significant. A Catholic, for instance, may practice their faith at any church they wish. A Native American does not have that luxury. Tribal religions are so imbued within environmental contexts because they are mutually inclusive.¹²⁵

The discordance between the constitution of Indian and non-Indian religion and spirituality becomes problematic when talk of substantial burden arises. To a court system

¹²¹ Cleven, film.

¹²² *Sequoyah v. Tennessee Valley Authority*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980). The Cherokee nation attempted to halt flooding of the Little Tennessee River and Tellico Dam. The Cherokee considered the area to be a sacred site where medicine gathering and ceremonies took place.

¹²³ *Badoni v. Higginson*, 638 F. 2d 172 (1980). Navajo fought to reduce Lake Powell's water level and restrict tourist's access to Rainbow Bridge. They considered the geomorphic arch to be the incarnate of the gods.

¹²⁴ *Frank Fools Crow v. Gullet*, 706 F. 2d 856 (1983). The Lakota nation fought the state of South Dakota under AIRFA for undertaking in a number of construction projects near ceremonial Bear Butte.

¹²⁵ Samuel D. Brooks, "Native American Indian's Fruitless Search for First Amendment Protection of their Sacred Religious Sites," *Valparaiso University Law Review* 24 (1990): 526.

founded upon western law and practice, substantial burden will not hold the same meaning. Courts hold that as long as undertaking does not impinge upon the ability to practice or force a group to do something they feel is sinful then there is no violation. The caveat that the court system is failing to take into consideration, however, is that the sacred space itself is imperative to the whole nature of Indian spiritual practice. To deface the physical entity is to deface the religion itself. Given the stark differences in fundamental understandings, it is likely that the US court system will never believe tribal nations are substantially burdened. Judicial history has proven its cultural bias and insensitivity in this area or SNS protection. The precedent set forth by *Lyng v. Northwest Indian Cemetery Protective Association* that determined internal governmental affairs never constitute substantial burden or free exercise rights effectively prevent any chance of tribal nations utilizing AIRFA and RFRA.

The Navajo and Hopi are still actively attempting to reverse the federal court's decision. The Arizona Snowbowl has been using reclaimed wastewater to make artificial snow for three years. On July 14, 2014, its management began to seek a long-term contract with the City of Flagstaff. The United States Supreme Court has denied a petition to revisit the Ninth Circuit Court of Appeals decision. In 2012, the Save the Peaks Coalition- a group of concerned citizens, tribal leaders, and others- filed suit against the Forest service in *Save the Peaks v. United States Forest Service* to litigate an additional NEPA wastewater claim.¹²⁶ *Save the Peaks* was also ruled in favor of the defendant. It is abundantly clear that religious freedom claims offer minimal if any protection for sacred sites. Any additional litigation must offer another avenue of defense.

¹²⁶ *Save the Peaks Coalition v. United States Forest Service*, 669 F.3d 1025 (9th Cir. 2012)

Chapter Five: Treaty Claims: a Case Study of Yucca Mountain, Nevada

Claims of land and property rights serve as an additional legal approach to sacred site protection because it involves the concept of preserving a physical location rather than an intangible belief system. Despite land claims being grounded in more tangible notions of ownership, they do not always guarantee sacred site protection nor do they take sacred sites and/or indigenous rights into consideration. One example of failed land claims stems from an equally long and contentious 70-year political fight over Yucca Mountain, Nevada. Located within the Great Basin, Yucca Mountain meanders across nearly 20 miles of remote terrain in southwest Nye County just south of the Nevada Test and Training Range and located on the Nevada National Security Site (Figure 4.1).¹²⁷ The mountain is part of a larger zone of basaltic volcanism that stretches from Death Valley, California to Lunar Crater, Nevada.¹²⁸ Also the site of a proposed Nuclear Waste Repository, Yucca Mountain has existed as a political hotbed of conflicting ideologies between government development and Native American reverence.

Significance of Yucca Mountain

The Western Shoshone tribe recognizes Yucca Mountain as part of their unique, sacred homeland granted to them by the Treaty of Ruby Valley in 1863.¹²⁹ This motherland stretches across Nevada, Utah, California, and Idaho; it is comprised of a million acres that the Shoshone call, *Newe Sogobia*, which translates as “People’s Mother Earth.” Shoshone are the *Newe*,

¹²⁷ “Location of Yucca Mountain,” *United States Nuclear Regulatory Commission*, accessed October 18, 2016, <http://www.nrc.gov/waste/hlw-disposal/yucca-lic-app/photo-loc.html>

¹²⁸ Eugene I. Smith, Deborah L. Keenan, and Terry Plank, “Episodic Volcanism and Hot Mantle: Implications for Volcanic Hazard Studies at the Proposed Nuclear Waste Repository at Yucca Mountain, Nevada,” *Geological Society of America Today* 12, no. 2 (2002): 4.

¹²⁹ Danielle Enders, “Sacred Land or National Sacrifice Zone: The Role of Values in the Yucca Mountain Participation Process,” *Environmental Communication* 6, no. 3 (2012): 334.

meaning “people,” and believe they were put on the land as caretakers of the sacred mountain. The Shoshone believe that Yucca Mountain is a physical, living being. Creation stories say that the Shoshone were placed at Yucca Mountain to care for it through song and prayers so that they may preserve the Shoshone religion for future generations.¹³⁰ The Western Shoshone refer to Yucca Mountain as Snake Mountain or “serpent swimming west” because of the belief that the mountain is home to a snake spirit.¹³¹ The sharp crested geomorphic crag that resembles a snake’s spine is employed in creation stories to explain the seismic activity of the Mountain. The crag stands as a warning, signaling a readiness to cause harm if the place is damaged. The basaltic rock rings within the massif transmit prayers to the Great Spirit. In return, the Spirit grants the Shoshone supernatural responsibility to manage and protect the massif and all of its resources. Ancestors of the *Newe* are buried on Yucca Mountain and the spirits of the dead are said to reside there. The massif has been used for hundreds of years for quarrying a white stone, cert, used for ceremonies and tools.¹³² Additionally, like many Native American tribes, the Shoshone regard the water source in the surrounding area, especially Cactus Spring, as sacred.¹³³

The Paiute also recognize Yucca Mountain as part of their ancestral homeland; it is a source of cultural and spiritual connection that nourishes the souls of their people. The Paiute believe that they were created by the Supernatural near Charleston Peak, or *Nuvagantu* in Paiute, within the Spring Mountains located just south of Yucca Mountain. Paiute creation stories tell of

¹³⁰ Cavanaugh-Bill, 210.

¹³¹ Enders, Danielle. “Animist Intersubjectivity as Augmentation: Western Shoshone and Southern Paiute Arguments Against a Nuclear Waste Site at Yucca Mountain.” *ARGUMENTATION* 27, no. 2 (2013): 194.

¹³² Richard O. Clemmer, “Land Rights, Claims, and Western Shoshones: The Ideology of Loss and the Bureaucracy of Enforcement,” *PoLAR: Political & Legal Anthropology Review* 32, no.2 (2009): 279.

¹³³ Anne Key and Candace C. Kant, “The Temple of Goddess Spirituality Dedicated to Sekhmet,” in *Heart of the Sun: An Anthology in Exaltation of Sekhmet*, ed. Anne Kant and Candace C. Kant (Bloomington: iUniverse Books, 2011), 58.

Wolf and his brother, Mystic Coyote, living on *Nuvugantu*. To the Paiute, there is no site more sacred or essential to their cultural wellbeing than the Spring Mountains and surrounding areas, which include Yucca Mountain. Yucca is a place of serenity and powerful spiritual energy to Paiute and Shoshone tribes. It is a location in which they perform a number of religious ceremonies.¹³⁴ As the social and cultural embodiment of the Western Shoshone and Paiute people, the massif is fundamentally linked to their spirituality and cultural way of life.

The animistic ideology that the environment, plants, and animals have feelings and souls establishes spiritual ecology within Native American religious practices and protection. This belief system creates an inseparable bond between nature and humans that reflects a deeper historic and cultural understanding of the Earth; it emphasizes the connectivity between all things.¹³⁵ Tribal Chair of the Big Pine Paiute, Jessica Owens, states:

The Big Pine Paiute Tribe of the Owens Valley still maintains close historic and cultural ties with the Yucca Mountain range. The Paiute people regard the total ecosystem as a living entity and the spirits and beings that dwell there to this day are still meaningful to us.¹³⁶

Understanding this animistic interaction as life force energy reinforces Native American relationships with plants and animals.¹³⁷

Decades of legal battles to maintain and protect the sacred site of Yucca Mountain have forced the Shoshone to become very familiar with the United States legal system. Unfortunately, indigenous jurisprudence in the United States has contributed to a significant neglect for Native

¹³⁴ Amy Corbin, "Yucca Mountain," *Sacred Land Film Project*, last updated October 2004, <http://www.sacredland.org/index.html?p=473.html>.

¹³⁵ Donna Houston, "Environmental Justice Storytelling: Angels and Isotopes at Yucca Mountain, Nevada," *Antipode* 45, no.2 (2013): 427.

¹³⁶ Enders, "Animist Intersubjectivity," 192.

¹³⁷ Catherine S. Fowler *et. al.* "Native Americans and Yucca Mountain A Revised and Updated Summary Report on Research Undertaken between 1987 and 1991," State of Nevada, Agency for Nuclear Projects/Nuclear Waste Project Office, 1991, 20-21.

Americans' social and cultural security and the case of Yucca Mountain is no exception. The battle between these two interests hit its pinnacle in 2002, when, despite being revered by Shoshone and Paiute tribes, Yucca Mountain was commissioned as a Nuclear Waste Repository (hereinafter NWR) and made into a metaphorical sacrifice zone by the United States government.¹³⁸

Brief History of Contention over Yucca Mountain

In 1863, the Western Shoshone entered into the Treaty of Ruby Valley with the United States which allowed for safe passage for Americans across Shoshone territory to the fields of California. The United States recognized Shoshone land boundaries and in return agreed to financially compensate the Native Americans for damages caused by the movements of settlers.¹³⁹ The treaty allowed the United States and private citizens to construct roads and telegraph lines as well as a railroad on Western Shoshone Country. In exchange, the tribes agreed to share parcels of their territory with a small number of settlers. Congress sent out an Indian agent to negotiate this "Treaty of Peace and Friendship" with the Western Shoshone people; the federal agent was specifically instructed not to purchase the land as the treaty was merely meant to appease the tribal nation and solidify peaceful passage.¹⁴⁰ Additionally, the Treaty of Ruby Valley allowed the president of the United States the authority to establish a permanent reservation for the tribal nation within their already-existing territory.¹⁴¹ The Shoshone neither ceded their rights to Yucca Mountain nor did they waive their entitlements to decision-making regarding their ancestral territory. After the discovery of a process to extract

¹³⁸ J. Samuel Walker, *The Road to Yucca Mountain: The Development of Radioactive Waste Policy in the United States*, (Berkeley: University of California Press, 2009), 178.

¹³⁹ Treaty with the Western Shoshoni, U.S.-W. Shoshone, Oct. 1, 1863, 18 Stat. 689.

¹⁴⁰ *The Congressional Globe*, Senate, 37th Congress, 2d Session, p. 2092 (1862).

¹⁴¹ O'Connell, 768.

microscopic gold from within Yucca Mountain soil in 1962, a quasi-judiciary agency called the Indian Claims Commission (hereinafter ICC) determined that the tribal nation's aboriginal title had been extinguished through gradual encroachment.¹⁴² This meant that the Shoshone were therefore unable to assert treaty claims in the US courts.¹⁴³

Congress established the ICC in 1946 as a response to more than 100 years of struggle by tribal nations for the recognition of land claims stemming from the inequities of 19th century treaty affairs briefly outlined in Chapter Three. Prior to ICC's conception, land claim cases involving tribal nations often went unheard due to a provision passed in 1863 that expressly removed the court's jurisdiction from claims that surfaced from treaties with Indians.¹⁴⁴ The ICC did not operate under the same constitutional protections as the U.S. judicial court system. Congress authorized the commission to adopt its own bureaucratic guidelines for fair and efficient determination claims.¹⁴⁵ While it seemed to be an innovative idea at the time of conception, Congress limited the jurisdiction of the ICC. It was merely a tool to establish monetary payments with a statutory bar for further claims to the same land once payment had been issued.¹⁴⁶ Eventually, ICC determined that they did not have the authority to return land; its jurisdiction was limited to awarding monetary compensation for ancient wrongs.¹⁴⁷ The ICC's stipulations on how claims could be filed were rather nebulous, however, which allowed for a broader interpretation and manipulation of the ICC system. ICC was a questionable legal forum

¹⁴² Cavanaugh-Bill, 212.

¹⁴³ Julie Ann Fishel, "United States Called to Task on Indigenous Rights: The Western Shoshone Struggle and Success at the International Level," *American Indian Law Review* 31, no. 2 (2006/2007): 623-624.

¹⁴⁴ Caroline L. Orlando, "Aboriginal Title Claims in the Indian Claims Commission: *United States v. Dann* and its Due Process Implications," *Boston College Environmental Affairs Law Review* 12, no. 2 (1986): 251.

¹⁴⁵ *Ibid.*, 252.

¹⁴⁶ Indian Claims Commission Act of 1946, §§ 1-28, ch. 959, 60 Stat. 1049 (codified at 25 U.S.C. §§ 70 to 70v-3 (1976) (repealed 1978)); Cavanaugh- Bill, 212.

¹⁴⁷ O'Connell, 781.

for Native Americans. While it did seek to address injustices done to tribal nations prior to 1946, Congress encouraged Indians to sever their ties to tribal land in order to assimilate into American society.¹⁴⁸ This was done with clever legalese found in the Indian Claims Commission Act, which determined that ICC was to accommodate and dispose of all land claims with complete finality.¹⁴⁹ Once payments were made, tribal nations would officially be disposed of

...all rights, claims, or demands which said petitioners or any of them . . . could have asserted with respect to said tract . . . and said petitioners, and each of them...shall be barred thereby from asserting any such rights, claims, or demands against defendant [the United States.]¹⁵⁰

Additionally, the representation standard for claimants and its reluctance to permit intervention from other interested parties severely restricted its effectiveness and led to its ultimate dissolution.¹⁵¹ Despite now being defunct, ICC decisions are still upheld in U.S. court.

A claim from the neighboring Te-Moak band, a faction only partially rooted in the Western Shoshone socio-political organization, was brought before the ICC on behalf of the whole Western Shoshone nation in 1951 in a proceeding known as *Northwestern Bands of Shoshone Indians v. United States*.¹⁵² The Shoshone attempted to halt the trials arguing that the Te-Moak did not speak for the entirety of the Shoshone and attempted to fire the attorneys who claimed to represent them. Despite the formal withdrawal of council, the proceedings were permitted to continue.¹⁵³ In 1962, the ICC held that

...by gradual encroachment by whites, settlers, and others and the acquisition, disposition, or taking of their lands by the United States for its own use and benefit, or the use and benefit of its citizens, the way of life of [the Western Shoshone] was

¹⁴⁸ H.R. REP. No. 1466, 79th Cong., 2d Sess. (1945); Orlando, 254.

¹⁴⁹ John D. O'Connell, "Constructive Conquest in the Courts: A Legal History of the Western Shoshone Lands Struggle- 1861 to 1991," *Natural Resources Journal* 42, no. 4 (2002): 790.

¹⁵⁰ 9 Ind. Cl. Comm. 417 (1961)

¹⁵¹ Orlando, 250.

¹⁵² Clemmer, 291.

¹⁵³ Cavanaugh-Bill, 216.

disrupted and they were deprived of their lands.¹⁵⁴

There was not enough substantial evidence to support this claim, however, as very few non-Indians lived within the Shoshone territory prior to or during the time of the ICC claim.¹⁵⁵ Despite this, the ICC declared that the Shoshone land title had been extinguished in 1872 and would be valued according to land, timber, and mineral prices in that year.¹⁵⁶ The U.S. government opposed this finding, but not because they believed that the Shoshone owned the ancestral land. The government contended that the tribal nation had never possessed any part of the property and therefore no title extension should exist at all.¹⁵⁷ The government held that the treaty was that of peace and friendship; the land had never been the tribal nations' to begin with. Ultimately, the ICC determined that the Western Shoshone *de facto* lost possession of their ancestral homeland, Yucca Mountain; as such, the Shoshone could no longer assert exclusive ownership of it.¹⁵⁸ As compensation, the ICC determined a payment amount of \$26 million equating to approximately 15 cents per acre.¹⁵⁹ The payment was certified and placed into an interest-bearing trust account in the United States Treasury under the trusteeship of the Department of the Interior (hereinafter Interior) where it has yet to be accepted by the Western Shoshone.¹⁶⁰

Multiple litigations followed the *Northwestern Bands of Shoshone Indians v. United States* verdict, the most notable being *United States v. Dann*. Again, the validity of the ICC

¹⁵⁴ O'Connell, 772.

¹⁵⁵ Ibid, 773.

¹⁵⁶ "Annex II: Background on Matter Raised by Certain Western Shoshone Descendants," *Department of the State*, accessed December 15, 2016, <https://www.state.gov/documents/organization/83519.pdf>

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Valerie Tailman, "Shoshones want negotiated land settlement," *Indian County Media Network*, last updated October 15, 2002, <https://indiancountrymedianetwork.com/news/shoshones-want-negotiated-land-settlement/>.

¹⁶⁰ O'Connell, 790.

determination that the Western Shoshone land claims had been terminated was brought into question. At the initial *Northwest Bands of Shoshone Indians v. United States* appeal, the district court determined that the Western Shoshone land title had not been extinguished at the original 1872 date determined in *Northwestern Bands of Shoshone Indians v. United States*. Instead, the courts determined that the Western Shoshone lands formally became public domain in December 1979 by the final judgment and acceptance of the monetary award certified in the ICC proceedings. Any acceptance of payment by the Interior as a trustee on behalf of the Western Shoshone was considered the equivalent of the tribe receiving the payment.¹⁶¹ Despite the Western Shoshone refusing to accept the compensation and refusing the legitimacy of the settlement, the United States continues to claim that they have met their obligations. To this day the government asserts full ownership of nearly 90 percent of previously determined Western Shoshone lands as public or federal.¹⁶² The ruling has established a dangerous precedent that the U.S. government can unjustly acquire Native American land for profit. This ruling has also made it nearly impossible for the Shoshone to file suits against the construction of the NWR.

Protection Under Treaty and Land Title Claims

At the time of the conclusion of the *United States v. Dann* litigation, the United States began seeking locations for a national nuclear waste storage facility. Congress passed the Nuclear Waste Policy Act of 1982 (hereinafter NWPA) determining a need for an isolated, deep geologic repository for America's nuclear waste storage. Nuclear reactors had been in operation for decades, but never before had there been a provision created for permanent disposal of high

¹⁶¹ Orlando, 215, 241.

¹⁶² Cavanaugh-Bill, 213.

radioactive waste.¹⁶³ NWPA established a process in which the Department of Energy (hereinafter DOE) was to evaluate and assess sites for potential geologic repositories.¹⁶⁴ This major piece of legislature outlined a number of responsibilities for licensing, constructing, and operating a repository. The NWPA established an Office of Civilian Radioactive Waste Management within the DOE; directed the DOE to nominate five sites that maintain suitable characterization for the first national repository and recommend three to the president; established a Nuclear Waste Fund to cover the expenses of developing waste repository facilities; endorsed monitored retrievable storage as a viable nuclear fuel management option; and limited the quantity of waste to be placed at the first repository to 70,000 metric tons of heavy metal. A future second repository would be surveyed and later established on the east coast of the United States.¹⁶⁵

In addition to the stipulations, the NWPA created a timeline for when the list of viable options had been created.¹⁶⁶ Once a permanent site had been proposed to the president, the president was required to submit a recommendation to Congress. The site designation would become effective 60 days after the proposal unless a Notice of Disapproval was submitted by the governor of the state in which the site is located or by the governing Native American tribe on whose reservation the repository would be situated. When a specified site was determined operative, the DOE would be required to submit an application to the Nuclear Regulatory

¹⁶³ Robert Vandenbosch and Susan E. Vandenbosch, *Nuclear Waste Stalemate*, (Salt Lake City: University of Utah Press, 2007), 52.

¹⁶⁴ “Summary of the Nuclear Waste Policy Act,” *United States Environmental Protection Agency*, accessed October 16, 2016, <https://www.epa.gov/laws-regulations/summary-nuclear-waste-policy-act>.

¹⁶⁵ Nuclear Waste Policy Act of 1982, Public Law 97-425, 97th Cong., 2nd Sess. (January 7, 1983).

¹⁶⁶ Bruce E. Johansen, “Yucca Mountain: Nuclear Storage at the ‘Serpent Swimming West,’” *Indigenous Peoples and Environmental Issues: An Encyclopedia*, accessed October 18, 2016, <https://ratical.org/ratville/IPEIE/YuccaMtn.pdf>.

Commission (hereinafter NRC) within 90 days.¹⁶⁷ If the state or tribe objected to the construction of the waste repository, they could file a motion, but the veto would only be considered if one house of Congress passed a resolution to support it.¹⁶⁸

The NWPA recognized the Shoshone and Paiute as sovereign tribes and stated that the tribal nation had an opportunity to vocalize their concern. That being said, only one out of five final EAs conducted for Yucca Mountain concluded that Native Americans had the potential to be affected by the proposed undertaking. The NWPA outlined “affected Indian tribe” as:

...any Indian tribe (A) within whose reservation boundary a monitored retrievable storage facility, test and evaluation facility, or a repository for high-level radioactive waste or spent fuel is proposed to be located (B) whose federally defined possessory usage rights to other lands outside of the reservation’s boundaries arising out of congressionally ratified treaties may be substantially and adversely affected by the location of such a facility.¹⁶⁹

Based on the above definition, the 1986 EA determined that no Native American tribes would be affected by the construction of a NWR.¹⁷⁰ To the Shoshone especially, this determination was an insult as it solidified the ICC decision that the Shoshone had relinquished their rights to Yucca Mountain.

In 1987, five years later and fueled by time constraints, the NWPA was amended within a budget bill to establish Yucca Mountain as the only viable site to be studied as a possible national nuclear waste repository. The amendment directed the DOE to stop exploratory investigations at other locations and nullified the original NWPA’s procedures for choosing a

¹⁶⁷ Vandebosch, 49.

¹⁶⁸ Walker, 178.

¹⁶⁹ Nuclear Waste Policy Act of 1982

¹⁷⁰ “Environmental Assessment Overview: Yucca Mountain Site, Nevada Research and Development Area, Nevada: U.S. Department of Energy” *Department of Energy*, accessed November 4, 2016, http://www.iaea.org/inis/collection/NCLCollectionStore/_Public/23/009/23009044.pdf C 4-23; C 7-42; C 7-15.

repository site.¹⁷¹ By 2001, the DOE had spent more than \$4.5 billion to build a five-mile U-shaped exploratory tunnel and drill bore holes thousands of feet beneath the surface of Yucca Mountain in order to study the sustainability of the site as the future NWR.¹⁷² The exploratory tunnels marked the location of imminent geological surveys to determine the safety of storing nuclear waste within the mountain. The total surface area of the repository would amount to roughly 1,100 acres and 35 miles of 18-foot diameter emplacement tunnels were required to support the 70,000 metric tons of statutory waste allowed by the EPA.¹⁷³ In addition to the exploratory tunnels, the DOE conducted surveys of the water table located roughly 2,000 feet below the surface of Yucca Mountain. The DOE planned to place the nuclear waste 1,000 feet above the table in an unsaturated zone.¹⁷⁴ The volcanic tuff was more complex at the depth of the burial tunnels than originally perceived.¹⁷⁵ The environment was not as dry as anticipated and there were a number of fractures within the rock, which provided a pathway for water transport. Studies were conducted using chlorine isotope measurements, which resulted in several geologic inconsistencies.¹⁷⁶

Despite the geologic discrepancies and active rebuff from the Western Shoshone, Yucca Mountain was formally nominated as the official site of the NWR in February 2002. In the Site Authorization Report, DOE Secretary Spencer Abraham stated that the Yucca Mountain facility was “...important to achieving a number of our [United States] national goals.”¹⁷⁷ He expressed

¹⁷¹ Ibid, 182.

¹⁷² Vandenbosch, 105.

¹⁷³ Ibid, 106.

¹⁷⁴ “Yucca Mountain Science and Engineering Report Rev. I: Technical Information Supporting Site Recommended Consideration,” *Department of Energy*, accessed October 28, 2016, <https://energy.gov/sites/prod/files/edg/media/SER.PDF>

¹⁷⁵ Walker, 183.

¹⁷⁶ Vandenbosch, 106-107.

¹⁷⁷ Spencer Abraham, “Recommendation by the secretary of energy regarding the suitability of the Yucca Mountain Site for a repository under the Nuclear Waste Policy Act of 1982.” Department of Energy:

that Yucca Mountain had unique characteristics that would make it technologically suitable for safe nuclear waste storage, but its most exceptionally defining feature was its location in a remote desert “wasteland.”¹⁷⁸ Describing a highly revered Native American site as a “wasteland” openly insulted the Shoshone and Paiute tribes. Yucca Mountain is where they originated; it is considered a sacred landscape and yet the DOE diminished its significance to nothing more than a toxic dump. In fact, when the argument that Yucca Mountain is a considered a sacred homeland to multiple tribal nations is addressed in the DOE site recommendation comment summary, it is clear that the DOE and Indian understandings of the meaning of sacred and the understanding of property rights are vastly different.

To its credit, the 2002 DOE summary document did recognize that Yucca Mountain held cultural and spiritual significance. A brief recognition constituted the extent of that sympathetic consultation, however. It argued that the agency had worked in conjunction with Native American perspectives, but offered the following:

...people from many Native American tribes have used the area proposed for the repository as well as nearby lands; that the lands around the site contain cultural, animal, and plant resources important to those tribes; and that the implementation of a Yucca Mountain repository would continue restrictions on free access to the area around the repository site. Furthermore, the presence of a repository would represent an intrusion into what Native Americans consider an important cultural and spiritual area. Restrictions on public access to the area, however, have also been generally beneficial and protective of cultural resources, sacred sites, and traditional cultural properties.¹⁷⁹

The DOE admitted that there would be an adverse effect to cultural and spiritual wellbeing by restricting their access to sacral land, but argued that controlled access would be beneficial to cultural resources. Abraham was correct in saying that on occasion controlled access has the

Washington, DC. (2002), accessed January 5, 2017,
http://www.yuccamountain.org/pdf/secretary_eis_recommendation.pdf.

¹⁷⁸ “Why Yucca Mountain: Remote location,” *Department of Energy*, accessed October 28, 2016,
<http://www.ocrwm.doe.gov/ym/about/remote.shtml>.

¹⁷⁹ “Yucca Mountain Science and Engineering Report.”

ability to aid in conservation practices. What he failed to understand was that controlled access does not and should not mean restricting the Western Shoshone from their sacred homeland in order to desecrate it with radioactive waste.

Controlled access is a policy that the NPS has initiated in order to better collaborate with tribal nations on especially revered landscapes in order to reach mutually beneficial agreements. Far from the early days of the NPS' strategy of Native American displacement,¹⁸⁰ contemporary cases of controlled access have limited the amount of foot-traffic of non-Indians around culturally important sites. At sites such as Bear Butte, Wyoming limited access explicitly restricted non-indigenous people from utilizing the sites, not the Native Americans themselves. Bear Butte is sacred to the Cheyenne, Lakota, and numerous other tribes. The NPS, in collaboration with the Native Americans, has issued a voluntary ban on climbing during the month of June when Native American ceremonies are numerous. These closures have been intensely publicized and have reduced the number of climbers by 80%.¹⁸¹ While this example is not without its share of disputes, it addresses the same type of ideal in which Abraham unsuccessfully attempted to argue.

Restricting the Shoshone and Paiute's access to their sacred land would neither benefit Yucca Mountain nor the tribal nations. First, the restriction would solely limit Indian access that in itself contradicts the whole idea's premise. Second, it would diminish the source of both tribal nations' cultural and spiritual identity. As mentioned in Chapter 4, arguments based on spiritual

¹⁸⁰ Mark Spence, "Dispossessing the Wilderness: Yosemite Indians and the National Park Ideal 1864-1930," *Pacific Historical Review* 65, no. 1 (1996): 39-41; Julian Brave NoiseCat, "The Forgotten History of 'Violent Displacement' that Helped Create the National Parks," *The Huffington Post*, last updated August 26, 2015, http://www.huffingtonpost.com/entry/national-park-service-anniversary-indigenous-people_us_55dcdd7ce4b0a40aa3ac9998.

¹⁸¹ "Devils Tower Climbing Information," *National Parks Service*, accessed October 30, 2016, <https://www.nps.gov/deto/planyourvisit/climbing.htm>; "Devils Tower," *National Parks Service*, accessed November 28, 2016, <https://www.nps.gov/deto/index.htm>.

and cultural restrictions must outweigh the value of the scope of work in order to be considered a substantial burden to Native Americans. It is clear that the DOE's decision to formally nominate Yucca Mountain for the NWR found that the vested government interest in finding a solution for nuclear waste and not losing money outweighed the ruin of a pinnacle of spirituality and culture. This is further noted when recalling that the government forced itself into the Shoshone land title by determining an outlying ancient wrong, paying monetary compensations to the tribal nation, later retracting the ancient wrong verdict altogether, but finally asserting that monetary payment made any claim irrelevant. The Supreme Court's decision to prejudicially bequeath the Shoshone land title to the United States just two years prior to the 1987 NWRPA amendment formally established Yucca Mountain as the only viable site for NWR no matter what.

The 2002 DOE site summary recognition declared that a substantial burden would not be made on the Native American tribes despite the fact that the tribes could not practice their ceremonies elsewhere. Yucca Mountain was their homeland; there is no way to choose a new one. As a result, the Western Shoshone continued with land rights claims in hopes that it would garner a firmer argument for the protection of the sacred mountain. In 2003, the Western Shoshone National Council individually filed a motion in district court seeking relief of cultural and spiritual negligence in *Western Shoshone National Council v. United States*.¹⁸² The Shoshone asserted that the proposed disposal of nuclear waste at Yucca Mountain was a direct violation of the 1863 Treaty of Ruby Valley. The Shoshone made four demands:

- (1) A writ of prohibition should be granted, preventing the United States from authorizing or approving any action allowing for a nuclear repository or construction of a rail line for transportation of nuclear waste to be built at Yucca Mountain;
- (2) The United States should be permanently enjoined from constructing a repository or rail line to transport nuclear waste to Yucca Mountain;
- (3) Declaratory judgment should be issued, because the plan to dispose of nuclear waste at Yucca Mountain violated the treaty of Ruby Valley; and

¹⁸² *Western Shoshone Nat'l Council v. United States*, 357 F. Supp.2d 172, 174 (D.D.C. 2004)

- (4) The court should “set aside and hold unenforceable the past approvals, permits, and activities at Yucca Mountain.”¹⁸³

Similar to the *United States v. Dann* litigation, the United States motioned to dismiss the accusations stating that the Shoshone had no enforceable rights under the Treaty of Ruby Valley once again referencing the 1962 ICC verdict. Additionally, the U.S. claimed that it had not relinquished sovereign immunity and the court had no jurisdiction to adjudicate on issues that fell within the NWPA of 1982.¹⁸⁴ In turn, the Western Shoshone maintained that the ICC ruling was void and believed the U.S. government to be in breach of fiduciary duties that arose from the mismanagement of the land thereby causing the US to fail to act in accordance with the rights and duties outlines in the Treaty.¹⁸⁵ Ultimately the courts ruled in favor of the United States citing that as a sovereign government, the United States was immune from certain title claims unless it relinquished its immunity. In the case of Yucca Mountain, it did not.

Ethnographic and cultural resource management studies have determined that parts of the massif and its surrounding areas are highly significant. The Final EIS published by DOE considers 150 sites in and around the area to be eligible for nomination on the National Register of Historic Places.¹⁸⁶ This opinion has not altered the course of the project. In this researcher’s estimation, the Native American voice had not been heard. Despite extensive documentation on environmental and economic impacts at Yucca Mountain, the Western Shoshone’s attempts to protect their sacred land paled in comparison to the US government’s vested fiscal interest.

¹⁸³ *Western Shoshone Nat’l Council v. United States*, 2005 WL 60790 (D. Nev. 2005); Andrew J Butcher, “In Search of a Remedy to the Nuclear Storage Conundrum: Western Shoshone National Council v. United States.” *Energy LJ* 28 (2007): 208.

¹⁸⁴ Butcher, 208.

¹⁸⁵ *Western Shoshone National Council v. United States*, 73 Fed. Cl. 59 (2006).

¹⁸⁶ “Final Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada,” *Department of Energy*, accessed January 11, 2017, https://energy.gov/sites/prod/files/EIS-0250-FEIS-01-2002_0.pdf.

The project was ultimately set back and tabled due to funding issues and discrepancies in the EPA's 10,000 year radiation compliance implemented solely for Yucca Mountain.¹⁸⁷ The shelved project then raises the question: does the Native American loss in this court really matter? The answer is a resounding yes. Despite the fact that the project lost federal backing in 2010, the U.S. Court of Appeals issued a decision in 2013 ordering the NRC to restart Yucca Mountain licensing proceedings pursuant to NWSA 1982.¹⁸⁸ The NRC is legally required to resume its examinations on Yucca Mountain until funding depletes or Congress determines otherwise. NRC has determined that Yucca could meet current regulatory requirements for performance in the future.¹⁸⁹ Supplemental EIS statements have also been published mirroring this determination.

The United States claims that it is dedicated to fostering better relationships with tribal nations and yet the judicial process consistently undermines Native American arguments of violation when they are presented.¹⁹⁰ Principal for Foreign Affairs for the Western Shoshone, Ian Zabarte, and many other *Newe*, have expressed alarm over the systematically biased policies that place a substantial risk on Native Americans practicing their traditional religious lifeways.¹⁹¹ The encumbrance of treaty breeches long preceded NRC licensing agreements, but this type of land appropriation is something that tribal nations continue to face in contemporary situations.

¹⁸⁷ Matthew L. Wald, "Calls to Yucca Mountain as a Nuclear Waste Site, Now Deemed Safe," *The New York Times*, last updated October 16, 2014, <http://www.nytimes.com/2014/10/17/us/calls-to-use-a-proposed-nuclear-site-now-deemed-safe.html>.

¹⁸⁸ Ken Silverstein, "Nuclear Waste Will Never Be Laid To Rest At Yucca Mountain," *Forbes*, last updated August 24, 2013, <http://www.forbes.com/sites/kensilverstein/2013/08/24/nuclear-waste-will-never-be-laid-to-rest-at-yucca-mountain/2/#7000c8d96d10>.

¹⁸⁹ Bipartisan Policy Center Nuclear Waste Council, "Moving Forward with Consent-Based Siting for Nuclear Waste Facilities," <http://bipartisanpolicy.org/library/consent-based-siting-nuclear-waste/>.

¹⁹⁰ Luigi R. Einaudi, Strengthening Support for Human Rights, statement made at the Organization of American States General Assembly, 20 May 1992.

¹⁹¹ Ian Zabarte, "The Sale of Yucca Mountain was an Attack," *Indigenous Country Today Media Network*, last updated October 2, 2015, <http://indiancountrytodaymedianetwork.com/2015/10/02/sale-yucca-mountain-was-attack>.

Chief Justice Marshall's infamous trilogy set a longstanding precedence of discriminatory law that legalized the government's ability to manipulate stipulated treaties in favor of the United States. In the centuries since *Johnson v. M'Intosh*, many legal scholars have come to view the case in a similar canon as *Dred Scott v. Sandford*;¹⁹² yet unlike the former ruling, *Dred Scott v. Sandford* has since been determined *obiter dicta*- a non-binding precedent.¹⁹³ *Johnson v. M'Intosh* still remains law and continues to be cited as authority in lower courts.¹⁹⁴

The United States constitution recognizes tribal nations as self-governing entities, but it does not formally constitutionalize exclusive Native American rights. The courts have proved themselves to be both unable and often unwilling to prevent the confiscation of tribal lands. The failure to do so is mostly due in part by the cultural divide between Indians and non-Indians as well as the limited judicial protections currently in place. While there have been some successful cases involving treaty claims, it is not a reliable means of protection when it comes to public development cases. The lack of definitive jurisprudence in both religious and land title spheres offers an ever-dwindling number of ways in which Native Americans can protect their sacred natural sites. Historically, neither religious nor treaty claims were successful legal avenues for sacred site protection. How, then, can current contemporary sacred site conflicts be addressed in court?

¹⁹² The Dred Scott case was a landmark U.S. decision that denied an enslaved man the right to sue for his freedom because the courts considered him property and not a citizen. Banner, 11; 60 U.S. 393 (1857).

¹⁹³ Edward J. Bander, "The Dred Scott Case and Judicial Statesmanship," *Villanova Law Review* 6, no. 4 (1961): 521.

¹⁹⁴ Banner, 12.

Chapter Six: NHPA, NEPA, and Federal Regulatory Claims: a Case Study of the Dakota Access Pipeline

In recent years, many tribal nations have steered towards utilizing NHPA Section 106 and NEPA reviews as their primary argument in courts when applicable. Since many sacred sites are located within federally-owned areas, agency regulatory laws would ideally seem like the best practice method of protection. Both respective processes require governmental agencies to address potential historic and environmental hazards through consultation processes. NHPA is one of the more narrow cultural resource authorities concerning historic properties. Section 106 serves as a historic consultation among all concerned stakeholders including but not limited to tribal nations, local governments, and applicants for state and federal permits.¹⁹⁵ Alternatively, NEPA reviews address environmental hazards in a broader sense by covering numerous types of hazards to the human environment. It is the primary environmental legislation and seeks to notify parties of proposed actions, garner public opinion, and advise them on consultation decisions with other official bodies.¹⁹⁶ Despite sounding like the ideal protection measure for SNS, both consultative processes ironically sometimes lack the most integral part of its process: consultation. Unfortunately, this holds especially true for the current Dakota Access Pipeline (hereinafter DAPL) litigation in North Dakota that has been a primary topic of discussion in the study of cultural resource protection and has gained prominent and world-wide media attention.¹⁹⁷

¹⁹⁵ King, *Cultural Resource Laws and Practice*, 110.

¹⁹⁶ Dongoske, 36; King, *Cultural Resource Laws and Practice*, 70, 110.

¹⁹⁷ “Stop the Dakota Access Pipeline,” *Camp of the Sacred Stones*, accessed November 2, 2016, <http://sacredstonecamp.org/>.

Significance of Lake Oahe, Cannonball Ranch, and Surrounding DAPL Corridor

Since time immemorial, the Standing Rock Sioux Tribes' (hereinafter SRST) ancestors, Oceti Sakowin or Great Sioux Nation, have utilized and occupied areas throughout the Great Plains including much of the area that the proposed DAPL is to be constructed. The tribe's traditional ancestry extends beyond the current Reservation border encompassing both federal and private lands that are included within the proposed undertaking of the pipeline's construction. The Lakota and Dakota people of the SRST have relayed that their ancestral grounds are historically and culturally interrelated within the traditional territory in addition to areas directly adjacent.¹⁹⁸

For the SRST, there exists a profound spiritual connection to the land; they identify their hallowed familial lands as Grandmother Earth, or *Unci Maka*. For the Standing Rock Sioux Tribe, spirituality and their connection with the land provides a guide for structured daily living. Religious practice allows the Lakota and Dakota people to understand fully how they should live balanced between the forces of Mother Nature and the spiritual movement of people and animals.¹⁹⁹ Within the SRST belief system and their larger creation account is the story of the "stone people." The stone features currently found throughout the northern plains are the tangible evidence of SRST's ancestral spiritual walk of life. Stone features, at one time, were integral components of the spiritual life of the Dakota and Lakota people. The creations of certain forms and stone configurations had the ability to heal and transform. In particular, stone circles reflected a continuum between time, space, spirits, and physical matter.²⁰⁰ Stone structures are

¹⁹⁸ Complaint for Declaratory and Injunctive Relief at 11-12, *Standing Rock Sioux Tribe v. U.S. Army Corp of Engineers*, No. 16-5259 (C.A.D.C. Jul. 27, 2016).

¹⁹⁹ Declaration of Tim Mentz, Sr. In Support of Motion for Preliminary Injunction at 5, *Standing Rock Sioux Tribe v. U.S. Army Corp of Engineers*, No. 16-5259 (C.A.D.C. Sept 2, 2016).

²⁰⁰ Ronald Goodman, *Lakota Star Knowledge: Studies in Lakota Stellar Theology*, (Rosebud: Sinte Gleska University, 1992), 7.

evidence of a highly spiritual religious practice once performed by the SRST; it is through these formations that spiritual advisors and medicine people made individual commitments and where spiritual pledges are filled.²⁰¹ The use of the stone feature sites was conducted in conjunction with spiritual advisors and medicine bundles. The stone features allowed the SRST to ascend into a spiritual portal and communicate with *Tunkasina*, or Grandfather. This spiritual practice was a vital way for the Lakota and Dakota people of the SRST to sustain their cultural and spiritual identity through prayer.²⁰² Every stone ring was a *wa hocho 'ka*, or fasting stone ring, and it represented a spiritual threshold for individuals who seek guidance and understanding from *Tunkasina*. These fasting ceremonies are called vision quests and the stone formations were indispensable to their practice. Vision quests are considered to be one of the seven sacred rites given to the Lakota/Dakota by the White Buffalo Calf Pipe Woman who gifted the tribal nation with the sacred *canupa* pipe. The SRST gathered at these rings to pray “with one heart and one mind for the protection of the tribe.”²⁰³

The stone rings were not only integral for fasting ceremonies. The *wa hocho 'ka* was the epicenter of all spiritual life beginning with coming of age ceremonies when young men would receive direction of their future goals and roles as a young tribal member. As the men got older, additional rings, arcs, stone effigies or alignments were added to the existing ring. Medicine bundles were additionally created at the site of the stone feature and were based off gifts given to medicine people by *Tunkasina*. When a man passed away, his stone feature became his final resting place; his spirit was returned to the place that guided him throughout his lifetime. He was either physically brought to the stone formation or his spirit was kept and returned to the site. It

²⁰¹ Declaration of Tim Mentz, Sr., 6.

²⁰² Ibid, 7.

²⁰³ Ibid, 7.

was only when either the body or spirit came back to the feature that the man could find peace with the grandfathers.²⁰⁴ Unfortunately, current Lakota/Dakota people do not have access to their ancestor's sacred sites and are not willing to document the knowledge of these areas because of a pledge to keep this spiritual practice within the SRST. The practice is still kept verbally and has become part of the SRST oral tradition.²⁰⁵ Though the tribal nation cannot visit the stone places of power, a connection to the stone features still remains within generational sacred bundles that derived from these specific sites.

In addition to objecting the desecration of stone formations, the SRST have concerns over the desecration of their water source, the Missouri River. To the Sioux, the Missouri River and all its tributaries including the Cannonball River that runs adjacent to the Standing Rock Sioux Reservation are considered sacred. Faith Spotted Eagle, a female elder of the Yankton Sioux, states that water is considered the first medicine. It is used for healing ceremonies, it can clean a bleeding spirit, and it can calm a person to restore their balance. She claims that water contains memory- that when her people sing or speak to the water during a ritual, it can hear them and later shares what it has learned.²⁰⁶

Brief History of the Dakota Access Pipeline Controversy

The SRST is currently involved in a dispute over a \$36 billion 1,172-mile pipeline that will connect two contiguous oil and gas deposits in the United States to existing pipelines in Illinois. The pipeline will connect the Bakken Formation and the Three Forks production area

²⁰⁴ Ibid, 8.

²⁰⁵ Ibid, 9.

²⁰⁶ Jessica Ravitz, "The sacred land at the center of the Dakota pipeline dispute," *CNN*, updated November 1, 2016, <http://www.cnn.com/2016/11/01/us/standing-rock-sioux-sacred-land-dakota-pipeline/index.html>.

beginning at the North Dakota/Canadian border southeast to South Dakota, running through Iowa, and ending its terminus in Illinois (Figure 5.1).²⁰⁷ According to developers of the project, Energy Transfer Partners L.P. and subsidiary Dakota Access, LLC, the DAPL will translate into millions of dollars in state and local revenues, an estimated \$156 million in sales and income taxes, create 8,000- 12,000 construction jobs and up to 40 permanent operational jobs.²⁰⁸ Additionally, a US Geological survey indicates that the Bakken oil potential is massive; an estimated 7.4 billion barrels of undiscovered oil is thought to exist in the US segment of the Bakken Formation.²⁰⁹ Upon its completion, the pipeline will shuttle 470,000 barrels of crude oil a day, which is enough to create 374.3 million gallons of gasoline per day.²¹⁰ The Dakota Access, LLC has stated publicly that the proposal was chosen carefully and that agricultural experts, farmers, and engineers were consulted in order propose a route that had taken every aspect of the land into consideration.²¹¹ While the developers may have consulted with farmers and agricultural experts, they did not consult with the Dakota and Lakota people of the SRST who maintain that the pipeline desecrates sacred ancestral lands, sites of spiritual and cultural significance, and ancient burial grounds.

The DAPL will be routed beneath the United States Army Corps of Engineers (hereinafter USACE) created Lake Oahe, which is located .55 miles south of the Reservation's

²⁰⁷ "The Route," *Energy Transfer Partners L.P.*, accessed November 2, 2016, <http://www.daplpipelinefacts.com/>

²⁰⁸ "Overview" *Energy Transfer Partners L.P.*, accessed November 2, 2016, <http://www.daplpipelinefacts.com/about/overview.html>.

²⁰⁹ Alex Demas, "USGS Releases New Oil and Gas Assessment for Bakken and Three Forks Formations," *United States Geological Survey (USGS)*, accessed November 3, 2016, https://www2.usgs.gov/blogs/features/usgs_top_story/usgs-releases-new-oil-and-gas-assessment-for-bakken-and-three-forks-formations/.

²¹⁰ Holly Yan, "Dakota Access Pipeline: What's at stake?" *CNN*, last updated October 28, 2016, <http://www.cnn.com/2016/09/07/us/dakota-access-pipeline-visual-guide/>.

²¹¹ "The Route."

water intake (Figure 5.2).²¹² If the pipeline leaks, the SRST will not be able to utilize their main source of drinking water. The potential desecration would severely impact the water source that the Dakota/Lakota people hold so sacred. The SRST's preferred tribal-run cultural resource management firm, Mentz-Wilson Consultants LLC (dba. Makoche Wowapi), have been surveying and documenting sacred stone sites and other significant places within the aboriginal homeland since 2009.²¹³ They have recorded thousands of historically significant sites located within in the Bakken region, notably the Missouri River. Ceremonial stone formations were historically placed along integral waterways, like the Missouri and Cannonball Rivers, in order to harness its purifying nature. Many of these stone formations are located within in the direct path of the proposed pipeline, especially at the privately-owned Cannonball Ranch and Lake Oahe which are the crossing points of the DAPL.²¹⁴ The prevalence of ancient stone artifacts along the Missouri and Cannonball River indicates water's role in deeply held spiritual beliefs and suggest a long practiced tradition that has expanded over deep time.²¹⁵ Both the stone features and the rivers are essential to SRST lifeways; it is no wonder that when the DAPL was proposed in 2014 that they were troubled and irritated.

Protection Under NEPA and NHPA Regulatory Laws

After two years of planning, the USACE issued construction authorization for the DAPL on July 25, 2016.²¹⁶ Accompanying the sanction, the Corps published an EA and a Finding of No

²¹² "Environmental assessment: Dakota Access Pipeline Project, crossings of flowage easements and federal lands," *U.S. Army Corp of Engineers Omaha District*, last updated July 25, 2016, <http://cdm16021.contentdm.oclc.org/cdm/ref/collection/p16021coll7/id/2801>

²¹³ Declaration of Tim Mentz, Sr., 2.

²¹⁴ *Ibid*, 1035.

²¹⁵ Complaint for Declaratory and Injunctive Relief at 12; *Standing Rock Sioux Tribe v. U.S. Army Corp of Engineers*, No. 16-5259 (C.A.D.C., July 27, 2016).

²¹⁶ *Ibid*, 19.

Significant Impact (hereinafter FONSI) in regard to the portions of the DAPL corridor that would affect federally-owned property along the Missouri River. Both the EA and the FONSI concluded that there were no significant impacts that would have substantial environmental effects. Authorizations were issued under Nationwide Permit 12 (hereinafter NWP 12) pursuant to the Clean Water Act of 1972 (hereinafter CWA). For more streamlined NEPA reviews that are deemed to have minimal to no significant impact, Nationwide Permits are often utilized as *de facto* federally authorized conditions. Nationwide Permits relate only to USACE review and are mostly utilized for common environmental projects that include but are not limited to structure maintenance or utility line upkeep. Nationwide Permits are the USACE's equivalent to other federal agency's use of a NEPA CATEX or NHPA Section 106 Programmatic Agreements. In layman's terms it is a type of blanket review that allows a federal agency to move a project along quickly in order to mitigate delay of funding. NWP 12 in particular specifically authorizes "the construction, maintenance, repair, and removal" of pipelines throughout the nation, where the activity will affect no more than a half-acre of regulated waters at any single water crossing.²¹⁷ USACE has used the NWP 12 to verify several other pipelines including the equally controversial Keystone XL Pipeline in 2012. That same year, USACE conditioned the Flannigan South crude oil pipeline under NWP 12 without public notice, CWA review, or project-specific NEPA evaluation.²¹⁸

²¹⁷ Reissuance of Nationwide Permits (NWP 12), 77 Fed Reg. 10,184, 10,271 (Feb. 12, 2012)

²¹⁸ Doug Hayes, "Re: Comments on the U.S. Army Corps of Engineers' Proposal to Reissue and Modify Nationwide Permit 12, Docket No. COE-2015-0017," *Sierra Club*, last updated August 1, 2016, http://www.desmogblog.com/sites/beta.desmogblog.com/files/Comments_of_Sierra_Club_et_al_on_NWP_12.pdf; Steve Horn, "Weeks Before Dakota Access Pipeline Protests Intensified, Big Oil Pushed for Expedited Permitting," *Desmog*, last updated September 8, 2016, <http://www.desmogblog.com/2016/09/08/dakota-access-pipeline-big-oil-nationwide-permit-12>.

Employing NWP 12 for the DAPL permitting process was detrimental and questionable at best. Its previous use in authorizing Flannigan South and the southern leg of the Keystone XL Pipeline known as the Gulf Coast Pipeline, allowed for a precedent that actively sought to remove extensive NEPA consultation. Unfortunately, a similar situation occurred in the DAPL permitting process. USACE decision to enact NWP 12 circumvented a formal and extensive compliance with NEPA and NHPA; USACE abdicated statutory responsibility to ensure that the undertaking on federal flowage easements around Lake Oahe and federally-owned waterways did not do harm to any culturally or historically-significant sites.²¹⁹

Nationwide Permits, despite being *de facto*, have General Conditions, which should be met. General Condition 20 (hereinafter GC 20) specifically addresses historic properties and the right of the proponent to submit a pre-construction notification if the “authorized activity may have the potential to cause effects to any historic priorities listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties.”²²⁰ GC 20 mandates that if a district engineer determines that a proposed activity may affect potentially eligible or listed property on the National Register of Historic Places the project will lose authorization until Section 106 has been satisfied.²²¹ District engineers, the federal agency, and permittees are all responsible for making sure their commitment to historic and cultural properties is fulfilled. Ideally, GC 20 would work in conjunction and not in lieu of a Section 106 consultation. The collaboration between both NEPA and NHPA consultations would have resulted in a more thorough evaluation of the undertaking.

²¹⁹ Complaint for Declaratory and Injunctive Relief, 1.

²²⁰ Declaration of Tim Mentz, Sr. In Support of Motion for Preliminary Injunction, 13-14.

²²¹ “2012 Nationwide Permits, Conditions, District Engineer’s Decision, Further Information, and Decisions (with corrections),” *United States Army Corps of Engineers*, accessed January 3, 2017, http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2012/NWP2012_corrections_21-sep-2012.pdf.

By conditioning the commission with a Nationwide Permit, the federal agency circumvented a time-consuming review process. This came at a larger cost to tribal nations. In conjunction with an environmental review, a Section 106 consultation was required by the agency due to the close proximity of the SRST Reservation to the proposed scope of work. In the case of the DAPL, the Section 106 consultation largely failed due to the lack of communication between the THPO, SHPO, and the consulting federal agency.

It should also be noted that an additional reason that the NHPA Section 106 consultation failed is due to the USACE's NHPA consultation approach. The USACE uses different regulations than other federal regulatory agencies for complying with Section 106. These regulations are generally known as "Appendix C" and have not been approved by ACHP as a counterpart regulation for implementing Section 106.²²² Appendix C differs from other agency consultations in some of its core elements such as undertaking definition, APE delineation, and the scope of effort for historic property identification. Under Appendix C, USACE focuses only on activities performed in water and undertakings are limited to the United States waterway and the immediate uplands. By doing so, the USACE takes no responsibility for effects on historic properties that may occur as a result of indirect effects.²²³ Further, unlike a more traditional Section 106 consultation, Appendix C offers little to no obligation to consult with stakeholders.²²⁴ As a result, historic properties have a much greater chance of suffering from both direct and indirect effects as a result of USACE permitting actions.

²²² "Section 106 Reviews for United States Army Corps of Engineers Permits and Undertakings with Small Federal Handles," *Advisory Council on Historic Preservation*, published November 3, 2015, <http://www.achp.gov/docs/fapc.pdf>.

²²³ *Ibid*, 1.

²²⁴ *Ibid*, 1.

For DAPL, the compliance measures as well as federal and state reviews were combined.²²⁵ Archeologists working for Dakota Access reviewed the pipeline's originally proposed corridor citing 149 potentially eligible National Register sites of which 91 were stone features.²²⁶ The Pipeline was rerouted in order to avoid these sites in the early stages of planning. While the survey yielded a number of significant findings, the SRST, THPO, and Makoche Wowapi argued that the USACE failed to accurately consult with the tribal nation before permitting Dakota Access to build the DAPL. The USACE conducted a Section 106 consultation, but the agency did not undertake in a tribal survey. This is wholly due to the agency's outlined limited area of potential effect.

The nature of the early consultation efforts is hotly contested between the USACE and Dakota Access and the tribal nation. The former maintains that they made multiple attempts to contact the THPO regarding DAPL construction during its early planning stages in addition to a soil boring consultation.²²⁷ The latter holds that February 17, 2015 was the first time the THPO received a letter from USACE initiating a formal Section 106 consultation on the Lake Oahe component of the DAPL.²²⁸ The THPO maintains that the letter was generic but committed to full participation in the consultation process recommending that a full TCP and archaeological Class III survey should be performed on the DAPL corridor and surrounding area using tribal

²²⁵ Chip Colwell, "How the archaeological review behind the Dakota Access Pipeline went wrong," *The Conversation*, last updated November 20, 2016, http://theconversation.com/how-the-archaeological-review-behind-the-dakota-access-pipeline-went-wrong-67815?utm_campaign=Echobox&utm_medium=Social&utm_source=Facebook#link_time=1479736813.

²²⁶ Britain Eakin, "Pipeline Will Proceed Despite Tribal Protests," *Courthouse News Service*, last updated September 9, 2016, <http://www.courthousenews.com/2016/09/09/pipeline-will-proceed-despite-tribal-protests.htm>.

²²⁷ *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*. Citation: 46 ELR 20168. No. 16-1534, (D.D.C., 10/19/2016), 11.

²²⁸ Complaint for Declaratory and Injunctive Relief at 10.

monitors.²²⁹ The THPO was concerned that the exclusion of tribal participation in the Section 106 consultation would result in an incorrect National Register nomination as well as incorrect type placement. Corps failed to respond until September 2015 inquiring about any knowledge of concerns the SRST had about the scope of work. The THPO answered in a letter that emphasized:

Section 106 of the National Historic Preservation Act requires full consultation with the requesting THPO offices at the earliest stages. Our office was not afforded the opportunity to participate in identification efforts. The SRST THPO has not been able to determine the significance of known sites because of exclusion thus far in the Section 106 process, i.e., consultation, identification, and resolution of adverse effects. We remain concerned about the irreparable damage to these known sites that will occur if the ancillary facilities, staging areas, and roads are built without adequate buffers.²³⁰

The SRST maintains that instead of acknowledging the THPO, the USACE published a Draft EA for the Lake Oahe corridor of the DAPL²³¹; there was no mention of potential tribal impacts despite the THPO's reaction underlining the SRST's concern. Previous to this communication there had been correspondence regarding bore hole testing which the SRST had significant concern. Section 106 consultation process never took place for this undertaking.²³² Around the time the EA was completed, Dakota Access sent the tribal nation the results of an archaeological survey done by non-tribal consultation. Neither Dakota Access nor the USACE consulted with SRST about potential effects or invited the tribe in participation.²³³

After many failed attempts from the THPO to contact the USACE Omaha District Commander, the latter visited the SRST Reservation on February 29, 2016.²³⁴ USACE

²²⁹ Ibid, 11.

²³⁰ Ibid, 13.

²³¹ "Draft Environmental Assessment Dakota Access Pipeline Project Crossings of Flowage Easements and Federal Lands," *United States Army Corps of Engineers*, accessed November 6 2015, <http://cdm16021.contentdm.oclc.org/cdm/ref/collection/p16021coll7/id/2426>.

²³² *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 11.

²³³ Complaint for Declaratory and Injunctive Relief

²³⁴ Ibid, 15.

archaeologists conducted a follow up appointment on March 7, 2016, for a preliminary site visit. It was at that meeting that the THPO and SRST tribal historian and cultural specialist presented the USACE with information regarding archeological, cultural, and historic sites that would be affected by the DAPL construction.²³⁵ The preliminary site visit was conducted just four months prior to permit authorization. Preceding the site visit Dakota Access utilized data garnered by a Class III Archaeology survey performed by the Corps in 2010.²³⁶ It was not until after the THPO wrote a letter in June 2016 stating that the non-Native archaeologists which had been used to survey the DAPL corridor could not rightly address the historic significance and impacts of the pipeline's construction did the USACE take action. The letter itself was not addressed; instead, the USACE Omaha Branch Chief invited the SRST's THPO to participate in "post construction discoveries of cultural resources and/or burials."²³⁷ In addition to the immediate corridor at the confluence of Lake Oahe, the SRST expressed concern over culturally significant sites within the staging areas of construction. Everything not within the direct line of Lake Oahe was determined outside of USACE jurisdiction and subsequently dismissed. While the argument concerning jurisdiction may seem valid, it actually violates the Section 106 review because it fails to take into consideration the entirety of the area of potential effect. Merely focusing on the production corridor puts surrounding potentially eligible properties in danger.

When accompanying the USACE on surveying for the DAPL corridor, Makoche Wowapi and former THPO Tim Mentz, were not provided with GIS shape files for the pipeline location or GPS units and were denied access to unbroken ground that would have been in the buffer area of potential effect. In a supplemental document submitted to the courts for preliminary

²³⁵ "Environmental assessment: Dakota Access Pipeline Project, crossings of flowage easements and federal lands," 1046.

²³⁶ Ibid, 1036.

²³⁷ Complaint for Declaratory and Injunctive Relief, 17.

injunction, Mentz recorded that he and his cultural resource team were not given the same opportunity to survey the corridor as the Corps archaeologists. He stated that on other federal undertakings, the principal agency alerts the applicant that if access is denied to areas under review, the agency is unable to determine the status of a project. By denying access, the agency can withhold until the project is reviewed under a Programmatic Agreement or is signed off by the ACHP.²³⁸ Unfortunately in the case of the DAPL, permits were granted despite lack of sufficient cultural and historical surveys.

In the opening remarks of the EA and FONSI published by the USACE on July 20, 2016, the agency stated that they engaged in a preliminary Section 106 consultation with tribal governments, the THPO, SHPO, ACHP, and interested parties. The FONSI expresses that the DAPL was purposefully not planned to bisect the SRST Reservation but instead recognized the close proximity in which the project could be affected by the DAPL construction.²³⁹ USACE determined that a Section 106 consultation process was initiated in October 2014 and sent to all interested parties. The USACE recommended a “No Historic Properties Affected” determination and the North Dakota SHPO concurred on April 22, 2016.²⁴⁰ It should be noted that the USACE maintains in the FONSI that the Section 106 consultation for the DAPL construction had not been completed and remains ongoing.²⁴¹ Clearly there is a discrepancy. The NHPA requires that prior to any federal agency effect determination, the organization must “complete the section 106 process prior to the approval of the expenditure of any Federal funds on the undertaking or prior

²³⁸ Declaration of Tim Mentz, Sr. In Support of Motion for Preliminary Injunction, 17-18.

²³⁹ “Environmental assessment: Dakota Access Pipeline Project, crossings of flowage easements and federal lands,” 86.

²⁴⁰ Ibid, 80.

²⁴¹ “Environmental assessment: Dakota Access Pipeline Project, crossings of flowage easements and federal lands,” 1035.

to the issuance of any license.”²⁴² The USACE claims that there is no Section 106 determination in a Final EA and yet they reiterate within the document that they have engaged in the process, or at least their equivalent. The project, in theory, should not be allowed to proceed without a definitive effect determination and yet the SRST finds themselves struggling to maintain their sacred sites.

On May 6, 2016, the ACHP sent a letter to the USACE disagreeing with the “No Historic Properties Affected” determination at Lake Oahe stating “the federal agency remains responsible for taking into account the effects of the undertaking on historic properties.”²⁴³ A formal objection to the USACE finding was issued thirteen days later on May 19. ACHP held that the USACE misapplied the NHPA Section 106 consultation process by only considering historic properties within the areas of the corridor’s passage and not addressing indirect impacts of the surrounding uplands where the Reservation was located. Given the close relationship between the project and multiple federal approvals, “a greater effort to identify and evaluate historic properties” was required.²⁴⁴

It is no surprise that when the SRST claimed that a proper Section 106 review was never conducted that the USACE retorted that the DAPL did not bisect the Reservation nor would it adversely affect it.²⁴⁵ The FONSI went so far as to address that despite the tribal historians’ providing the USACE with additional cultural and spiritual sacred natural sites within the DAPL corridor they considered it “additional information.”²⁴⁶ While the USACE appreciated the intelligence, they did not believe it warranted an amendment to the established “No Adverse

²⁴² 54 U.S. Code § 306108

²⁴³ Complaint for Declaratory and Injunctive Relief, 17.

²⁴⁴ Ibid, 17-18.

²⁴⁵ “Environmental assessment: Dakota Access Pipeline Project, crossings of flowage easements and federal lands,” 1044.

²⁴⁶ Ibid, 1046.

Effects” considering only a small portion of the DAPL would be built on federal lands. The remainder of the project would take place on public and private land after Dakota Access LLC completed its eminent domain process and consultation with private owners. Since there was no federal regulator of the oil pipeline, legally there is no federal project except insofar as where the DAPL crosses Lake Oahe.

On July 27, 2016, two days after permits were granted to Dakota Access, the SRST filed a Complaint for Declaratory and Injunctive Relief from the pipeline’s construction claiming that the tribe had not been consulted pursuant to Section 106 of the NHPA. The STSR wanted USACE to declare themselves in violation of these acts and halt the project stating that the above issues would be detrimental to economic, spiritual, and cultural well-being.²⁴⁷ In a ruling on September 9, 2016, U.S. District Judge James E. Boasberg acknowledged that "the United States' relationship with the Indian tribes has been contentious and tragic," but went on to determine that the SRST had not demonstrated that their spiritual or cultural rights would be violated by its construction.²⁴⁸ He determined that though he was aware that injury might be significant, Boasburg determined that the SRST did not provide significant enough information to show that DAPL construction would cause substantial burden.²⁴⁹ The courts claimed that attempting to file for a preliminary injunction based solely on the possibility of irreparable damage is inconsistent with the court’s definition as an extraordinary remedy that can only be rewarded if the plaintiff showed they were entitled to that relief. Denying the SRST an injunction based on the fact that the courts did not deem systematic seizure and desecration of sacred ancestral sites and burial

²⁴⁷ Complaint for Declaratory and Injunctive Relief, 3.

²⁴⁸ Merrit Kennedy, “Judge Rules that Construction Can Proceed on Dakota Access Pipeline,” *NPR*, last updated September 9, 2016, <http://www.npr.org/sections/thetwo-way/2016/09/09/493280504/judge-rules-that-construction-can-proceed-on-dakota-access-pipeline>.

²⁴⁹ *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineer*, 56.

mounds is revealing of how the United States views not only sacred site protection, but historic preservation in general. Boasburg ruled that irreparable injury claims on private and federal lands was moot due to the fact that at the time of the verdict, 48% of the pipeline had been completed.²⁵⁰ In regard to the NHPA Section 106 review, the courts found that the USACE “likely complied” with its obligation to consult the SRST.²⁵¹ The SRST appealed the verdict; the U.S. Court of Appeals ruled in favor of USACE and Dakota Access. The courts continue to maintain that the 106 review was adequate. Part of the technicality regarding the DAPL case lies in the fact that the SRST may not have raised the inadequacy of the USACE Appendix C review. As a result, the adequacy of the review is based solely on the context of USACE’s definition of the area of potential effect, which has historically been deemed insufficient by ACHP.

In the case of SRST and USACE, the consultation process was fundamentally flawed. This is not to say that all Section 106 consultations are flawed- quite the opposite. NHPA’s Section 106 review has been an overall successful federal regulation for historic and cultural properties, but ultimately the regulation does not guarantee protection for any site. It is a tool to give time to the investigation of potential historic properties.. Section 106 reviews should be completed in good faith keeping in mind the sensitivities of each respective property, but the level and depth of consultation will ultimately vary between organizations. Each department has its own implementation regulations for both NEPA and NHPA so there is an overall lack of consistency from agency to agency. Unfortunately, this disconnection concerning the importance of executing this process is often overlooked by the very entities that implement them. It is each

²⁵⁰ Kennedy, NPR.

²⁵¹ Levi Rickert, “Federal Judge Rules Against Standing Rock Tribe’s Lawsuit; Feds Halt Construction,” *Native News Online*, last updated September 9, 2016, <http://nativenewsonline.net/currents/federal-judge-rules-standing-rock-tribes-lawsuit-contruction-can-continue-dapl/>.

organization's job to make sure projects are in compliance with regulatory laws, but the government agencies do not have the same personal or cultural investments as tribal nations. Federal agencies have the right intentions in regard to safeguarding cultural and historical properties, but occasionally that intent gets lost within the agency's mission. Personal experience in a federal agency has taught this scholar that federal entities will require utilizing project conditions and programmatic allowances if they are applicable to the scope of work despite any historic or cultural nature of a property.

What an agency believes is an adequate consultation effort will more often than not be inconsistent with what a tribal nation or other invested party believes is satisfactory. Federal agents are far removed from the personal nature of projects and are often under specific deadlines. The meaningfulness of the entire process can often get lost between the regulatory reviewer and tribal nations. This discrepancy is partly due to the fact that there is a completely different mindset between each party. Tribal nations are far more concerned in protecting sites like the San Francisco Peaks, Yucca Mountain, and Lake Oahe because the physicality of the location transcends the western everyday understanding of a historically sensitive site. Sacred or ancestral land is tied deeply within the fiber of Native American life that their desecration has the ability to destroy powerful generational connections. That spiritual relationship is something that is difficult to understand and even harder to translate into an American policy system that has established a long legal precedence of undermining it.

Ultimately, tribal nations should have a much larger role in the Section 106 process for all projects affecting tribal lands, and most importantly, lands containing known SNS. While it is mandatory that federal agencies must alert THPOs of any potentially hazardous undertakings to tribal cultural or environmental resources, tribal input is not always comprehensively or formally

integrated into archeological surveys. Federal agencies and private companies will often hire outside consultants to perform preliminary archeological surveys for prospective projects. Hiring archaeologists outside of the tribal nation can be problematic when determining the significance of Native American sacred sites. In cases like the SRST who refuse to document stone feature location and their historic and spiritual context, it would be easy for a non-Indian archeologist to overlook its cultural significance. Sadly, this was the case for DAPL discussion. The tribal cultural resource management team was not provided with adequate information to complete a proper survey and as a result the USACE was unaware of many significant culturally-sensitive sites.²⁵²

More and more United States courts and federal organizations are recognizing the need for better communication with tribal nations in order to preserve sacred sites. The U.S. Department of Justice, Department of the Army, and Department of the Interior issued a joint statement regarding Boasburg's verdict indicating that they appreciated the court's decision regarding NHPA compliance, but the Army restricted authorization from construction on USACE land bordering Lake Oahe until further NEPA and other regulations that could be further addressed.²⁵³ Despite the joint statement, the SRST have suffered considerably due to the activities of Dakota Access and Energy Transfer Partners. On September 3, 2016, burial grounds and significant cultural artifacts were unearthed just a day after the SRST submitted documents to court identifying those exact sites.²⁵⁴ Again on October 17, the Energy Transfer Partners

²⁵² Colwell, "How the archaeological review..."

²⁵³ "Joint Statement from the Department of Justice, the Department of the Army and the Department of the Interior Regarding Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers" *Department of Justice*, last updated September 9, 2016, <https://www.justice.gov/opa/pr/joint-statement-department-justice-department-army-and-department-interior-regarding-standing>.

²⁵⁴ "Standing Rock Sioux Tribe Condemns Destruction and Desecration of Burial Grounds by Energy Transfer Partners," *Indian Country Media Today*, last updated September 4, 2016,

discovered a sacred cultural site during construction. Artifacts were found but not reported until October 27.²⁵⁵ DAPL interests even went so far as to purchase privately owned Cannonball Ranch, an area that contains a known sacred burial site.²⁵⁶

Currently, the DAPL has been constructed on both sides of the federally-owned waterway. In early December 2017, former President Barak Obama and the USACE denied Dakota Access the necessary easements to break ground at the site.²⁵⁷ Due to the backlash from tribal nations and environmental and human rights advocates, the agency determined that a comprehensive EIS with full public input and analysis was necessary.²⁵⁸ While the SRST celebrated a brief momentous victory, the triumph was cursory. On January 24, 2017, President Donald Trump signed an executive action to advance approval of the DAPL.²⁵⁹ While executive actions do not override the law, the action does streamline regulatory processes. This author is fearful that “streamlining,” in this instance, will mean an additionally compromised EIS if there is one drafted at all.

<http://indiancountrytodaymedianetwork.com/2016/09/04/standing-rock-sioux-tribe-condemns-destruction-and-desecration-burial-grounds-energy>.

²⁵⁵ Chelsey Luger, “DAPL Desecrated Sacred Sites, Took 10 Days to Tell State, as Human Rights Abuses Continue,” *Indian Country Today Media Today*, last updated November 3, 2016, <http://indiancountrytodaymedianetwork.com/2016/11/03/dapl-desecrated-sacred-sites-took-10-days-tell-state-human-rights-abuses-continue-166336>.

²⁵⁶ Giorganne Nienaber, “Court Denies Standing Rock Request to Stop Construction of DAPL,” *The Huffington Post*, updated October 10, 2016, http://www.huffingtonpost.com/georgianne-nienaber/court-denies-standing-roc_b_12429026.html.

²⁵⁷ Nathan Rott and Eyder Peralta, “In Victory For Protesters, Army Halts Construction of Dakota Pipeline,” NPR, last updated December 4, 2016, <http://www.npr.org/sections/thetwo-way/2016/12/04/504354503/army-corps-denies-easement-for-dakota-access-pipeline-says-tribal-organization>.

²⁵⁸ Joey Podlubny, “Victory for Standing Rock: DAPL Easement Not Granted,” *Earthjustice*, last updated December 4, 2016, <http://earthjustice.org/news/press/2016/victory-for-standing-rock-dapl-easement-not-granted>.

²⁵⁹ Athena Jones, Jeremy Diamond, and Gregory Kreig, “Trump Advances Controversial Oil Pipelines with Executive Action,” *CNN*, last updated January 24, 2017, <http://www.cnn.com/2017/01/24/politics/trump-keystone-xl-dakota-access-pipelines-executive-actions/index.html>.

Just as NHPA Section 106 reviews do not mandate protection of historically-significant properties, neither do NEPA EIS assessments. Referring to the brief context to NEPA review outlined in Chapter 3, EIS are extensive and can take anywhere from months to years to finalize.²⁶⁰ The timeline can work for or against tribal nations, but there is a general hope that either party will lose interest in the project by the time the document is finalized. That is not the most fruitful way of going about site protection but is unfortunately often the case. An EIS will consider public input, but the final analysis does not require the agency to change its opinion. The organization is only required to make public its final decision. There are many aspects that determine the outcome of an EIS determination, but two key factors are money and the current political climate. Sadly, personal experience has shown that these elements occasionally weigh heavier on a final decision than cultural or historic resources. Again, NEPA and NHPA processes have not been all bad. It is fair to say, however, that since their implementation in the latter half of the 20th century, compliance systems have become muddled with political agendas and often times rubber stamped in order to facilitate swifter review.

²⁶⁰ Helen Leanne Seassio, “Legislative and Executive Efforts to Modernize NEPA and Create Efficiencies in Environmental Review,” *Texas Environmental Law Journal* 45, no. 3 (2015): 318.

Chapter Seven: Conclusion

Instances of unreliable legal protection concerning SNS such as those at the San Francisco Peaks, Yucca Mountain, and Lake Oahe, highlight the challenges of landscape and site protection faced by tribal nations throughout the country. It is clear that current laws and policies dedicated to protecting sacred natural sites are either not performing to their original intention or are being manipulated to fit alternative political agendas. The almost-annual desecration of sacred sites has culminated into the current protests at Lake Oahe. The Dakota Access Pipeline protests have become a catalyst for a much larger issue: the lack of judiciary support protecting tribal nations' culturally-sensitive places. The congregation of hundreds of Native American tribes in protest of the desecration of the SRST's ancestral land is the result of Native Americans being neglected by the United States legal system for far too long. It is a movement of cultural and political solidarity that has not gone unnoticed by the media, international organizations, and heritage organizations. Native American activists, environmental advocates, and protesters from Alaska²⁶¹ to New York²⁶² have come together to stand in unanimity; it is not just about a pipeline, nuclear waste repository, or repossessed wastewater. Native Americans and indigenous people recognize that the threat to sacred sites at Standing Rock can happen nationally- it already has. Legal processes have historically been utilized to circumvent Native American viewpoints concerning the importance of sacred natural sites to their culture and religion. Current laws and regulations have established a precedent of neglect

²⁶¹ Michelle Theriault Boots, "Activists gather in Anchorage in solidarity with Dakota Access pipeline protests," *Alaska Dispatch News*, updated October 31, 2016, <https://www.adn.com/alaska-news/2016/10/30/activists-gather-in-anchorage-in-solidarity-with-dakota-access-pipeline-protest/>.

²⁶² Sophie Lewis, "Dakota Access Pipeline protesters shut down Grand Central station," *CNN*, updated November 1, 2016, <http://www.cnn.com/2016/11/01/us/grand-central-nodapl-trnd/>.

and leave Native Americans vulnerable to prejudiced outcomes that can be detrimental spiritual and cultural wellbeing.

The crux of the issue lies in the disconnect between western and traditional Native American understandings of what constitutes as culturally-significant as well as the understanding of the significance of SNS to indigenous communities. As discussed throughout this thesis, Native American religion, culture, and views of land do not fit within the conventional understanding of Eurocentric principles upon which the United States Constitution was founded. Native American practices require the physical site in order for ceremonies and religious practices to be significant. Their spiritual practice is contingent upon being able to harness the energy provided by the sacred landscapes. The connection facilitates feelings of cultural identity. Without it, ceremonial rituals lack their intended purpose. Judeo-Christian and Native American concepts of spirituality diverge even on the most rudimentary of principles. It is not surprising that there has been a gross misunderstanding of religion and spirituality as a whole between tribal nations and the United States court system. It is even less surprising that the early American legal system has established a long legal pattern of Native American conquest.

The American legal system is rooted within the larger legal tradition of English common law brought to the American colonies from England.²⁶³ This category of law is based on precedent. As such, judges have an enormous role in shaping United States regulation. As discussed in Chapter Five, the precedent for Indian law and policies is founded upon prejudiced colonial ideals established by early judiciaries such as Chief Justice John Marshall. Though archaic, the Marshall Trilogy and “pretension of conquest” unfortunately still remains at the

²⁶³ “Common Law and Civil Law Traditions,” *University of California at Berkeley*, accessed January 5, 2017, <https://www.law.berkeley.edu/library/robbins/pdf/CommonLawCivilLawTraditions.pdf>.

heart of contemporary federal Indian law and policies as exemplified throughout this thesis. Throughout the latter half of the 20th century, equitable solutions for Native American sacred site protection such as AIRFA and RFRA have been implemented but have repeatedly been squandered by interpreting the law to reflect western instead of traditional Native American ideologies.

This thesis has evaluated three case studies in order to assess the degree of success that the current regulatory framework in the United States has for SNS protection. In the case of the San Francisco Peaks and religious freedom claims, the Navajo fell short because their religion was not considered to have the same value as mainstream faiths such as Christianity, Judaism and Hinduism. Instead the Native American religion was considered by the judicial system to be a “subjective spiritual experiences.”²⁶⁴ This implies that Native American religion was not a coherent system of religious practices. Demoting Native American religiosity to “spiritual” devalues it as an intrinsic dimension of a broader religious concept. In doing so, Native Americans lose virtually all ability to apply religious freedom as a means for protection.

The use of treaty claims at Yucca Mountain was ineffective because the government unethically abrogated Western Shoshone land. The way in which the United States manipulated treaty rights and an ICC decision severely compromised the integrity of the site. The United States altered its determination on whether the Western Shoshone ever maintained claim to Yucca Mountain depending on the circumstances at the time. Initially, the United States held that the Treaty of Ruby Valley was merely a treaty of friendship and not delineation of tribal estate; this argument aided in the dissolution of Shoshone title by the ICC. Once payment was made to the Interior on behalf of the tribal nation, the United States altered its initial accusation to reflect

²⁶⁴ *Navajo Nation v. United States Forest Service*, 3.

that the Shoshone title had in fact not been extinguished prior to the ICC determination. Upon payment, however, the tribal nation “willingly” relinquished its ownership. The government utilized the use of trusteeship and eminent domain to manipulate the conclusion of the Shoshone fight. As part of the U.S. government’s trustee relationship, the administration bears responsibility for overseeing Native American affairs. In the case of the Shoshone, the government did anything but. Trusteeship reflects the underlying notion that indigenous tribes are not capable of owning or managing the things they hold most sacred. This is not only offensive but also contradictory. Native Americans have their own best interests in mind; they are aware of what is sacred and what needs protecting. Allowing them the right to operate and protect their own revered spaces is the best possible option for SNS preservation.

In regard to federal regulations like NHPA and NEPA, the lack of agency-wide consistency could be disadvantageous to the protection and discovery of sacred sites. Though good intentions are present in agency reviews, expedited assessments are always encouraged. Lack of consistency between federal agency review could unfortunately mean the use of *de facto* conditions or misapplied programmatic allowances in order to circumvent comprehensive Section 106 consultations, tribal surveys, or EIS reviews. As mentioned in Chapter 6, NHPA and NEPA review processes do not guarantee that a historic property will be protected. They advocate for inclusive assessments in order to best safeguard a potentially hazardous undertakings, but there is never a definitive guarantee. Despite their far-from-perfect nature, federal regulatory acts have the most promise for future sacred sites lawsuits.

The primary advancement in Native American policy must be to work with tribal nations to formally acknowledge that Native American spirituality should maintain the same freedoms of equality and protection as mainstream religions such as Christianity, Hinduism, and Judaism. In

order to do so, outlining better definitions of “sacred,” “spirituality,” and “substantial burden” in regard to Native American culture and lifeways is imperative. While these definitions currently exist, it appears as if the court system is not willing to recognize them. Take, for instance, the San Francisco Peaks case. The massif is eligible for the National Register because of its ostensible significance to the Navajo and Hopi. Both the Forest Service and the courts recognized that the construction of the Snowbowl would be an adverse effect to the tribal nations’ religion yet subsequently dismisses that spirituality as subjective. Due to the apparent subjectivity of the Navajo religion, no substantial burden would be imposed on the tribal nation. The lack of definitive and conflicting definitions for all above terms allows for a significant amount of ambiguity when taken to higher court. Without better clarification, tribal nations will never be able to demonstrate substantial burden in court. A technical guidance document that includes Native American input would aid significantly in defining terms and outlining ways to protect sacred sites.

The term substantial burden is used extensively in AIRFA and RFRA claims, but its significance extends beyond religious claims. Substantial burden is additionally taken into consideration in regulatory analyses. This thesis has argued that neither religious nor land claims have the ability to garner much success for sacred site protection. With the right revisions, federal regulatory frameworks could significantly improve how traditionally revered sites are revealed and safeguarded. It has been mentioned that both NEPA and NHPA have inconsistent implementation guidelines across each agency. Revised regulations that establish one consistent standard for all agencies would greatly mitigate the irregularities between organizations. In an ideal world, a streamlined, unified process would eliminate some of the backdoor regulations that some agencies attempt to use to avoid the more comprehensive reviews. Ultimately, all

agencies should be engaging in an honest, balanced analysis that takes into consideration the effects their actions have on the stakeholders. NEPA and NHPA already contain provisions for stakeholder comment, but a more thorough and meaningful tribal input is imperative in order to initiate this change.

Occasionally (and unfortunately) in the regulatory review process, a tribal nation might not be consulted at the start of a project due the use of a programmatic allowance or just poor communication. This cannot happen. In order for sacred sites to be preserved and protected appropriately, tribal nations should be brought into the consultation process as soon as possible. They should have the opportunity to work in conjunction with archeologists in order to identify potential traditional cultural properties that were not previously identified. Archaeologists are crucial in documenting and surveying historic properties, but they often see the world through a scientific lens.²⁶⁵ When dealing with sacred natural sites and traditional cultural properties, information from tribal nations is imperative. Tribal nations are the most familiar with their cultural and spiritual property. In the case of the DAPL construction, the contracted archaeologists did not conduct a tribal survey. There was little collaboration between the tribal and contracted archeologists. As a result, sacred property was irreparably destroyed.

Another possible option for sacred site protection would be to propose new legislation that would strengthen already existing statutory framework. There have been attempts to create legislation specifically targeted towards sacred land protection, but the results have died in the face of strong opposition. In July 2002 the Sacred Lands Protection Act (H.R. 5155) was introduced but never moved out of committee. This act proposed that government agencies must accommodate access and ceremonial usage of SNS by Native American religious practitioners,

²⁶⁵ Colwell, "How the archaeological review..."

avoid damage, and consult with tribal nations prior to taking significant actions. The act furthermore deemed federal lands unsuitable for any or certain types of undertaking if the head of the government department determines that the proposed undertaking will have a significant impact on the tribal nation.²⁶⁶ Similarly, at the state level, Governor Gray Davis vetoed the Native American Sacred Sites Protection Act proposed by Californian Senator John Burton in 2002. The Native American Sacred Sites Protection Act mimics other agency-wide provisions that require governmental departments to notify and consult with tribal nations when determining if a negative declaration or an EIS is required for a federal permitted project. The bill sought to make the policy of the state to protect SNS and Native American's freedom to practice their religion in a traditional, meaningful way on federally-owned SNS.²⁶⁷ While neither Act has been passed, the fact that there are congressmen and senators willing to advocate for sacred sites protection is a promising start for the future.

Ultimately, a reevaluation of current systems established to safeguard sacred natural sites is long overdue in the United States. The necessity for new cultural resource and land development legislation is becoming critical as sacred places continue to be threatened by economic expansion and government interest. The DAPL project has made it exceedingly clear that indigenous peoples need a larger say when it comes to their hallowed areas. In an effort to take back what they believe is rightfully theirs, some tribal nations have looked outside of legal protection to nonprofits like the Native American Land Conservancy. This charitable organization purchases land that contains sacred sites and preserves them through protective land management.²⁶⁸ While this is a wonderful and viable opportunity to tribal communities with the

²⁶⁶H.R. 2419 (108th): Native American Sacred Lands Act.

²⁶⁷ S.B. 1828, 2002 Sen. (Ca. 2002).

²⁶⁸ "The NALC's Mission," *The Native American Land Conservancy*, accessed January 5, 2017, <http://nalc4all.com/about.html>.

funding, not all are so lucky. Open collaboration between Native Americans and federal agencies is vital. Definitive and constructive regulatory laws must either be updated or created so that sacred natural sites can be properly and sympathetically conserved for their spiritual, cultural, and historic value. Only then can sacred natural sites be protected from detrimental ruin.

LIST OF ABBREVIATIONS

AA	Antiquities Act (1906)
ACHP	Advisory Council on Historic Preservation
ADEQ	Arizona Department of Environmental Quality
AIRFA	American Indian Religious Freedom Act (1978)
APA	Administrative Procedure Act (1946)
ARPA	Archaeological Resource Protection Act (1979)
CATEX	Categorical Exclusion
CWA	Clear Water Act
DAPL	Dakota Access Pipeline
DEIS	Draft Environmental Impact Statement
DOE	Department of Energy
EA	Environmental Assessment
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
ESA	Endangered Species Act
FONSI	Finding of No Significant Impact
GC 20	General Condition 20
ICC	Indian Claims Commission
ICRA	Indian Civil Rights Act (1968)
IGO	Intergovernmental Organizations
IUCN	International Union for the Conservation of Nature
MOA	Memorandum of Understanding

NAGPRA	Native American Grave Protection and Repatriation Act
NEPA	National Environmental Protection Act
NHPA	National Historic Preservation Act
NPS	National Park Service
NRC	Nuclear Regulatory Commission
NWR	Nuclear Waste Repository
NWP 12	Nationwide Permit 12
NWPA	Nuclear Waste Repository Act
RFRA	Religious Freedom Restoration Act (1993)
SHPO	State Historic Preservation Office
SNS	Sacred Natural Sites
SRST	Standing Rock Sioux Tribe
STATEX	Statutory Exclusion
TCP	Traditional Cultural Property
THPO	Tribal Historic Preservation Office
UNESCO	United Nations Environmental, Scientific and Cultural Organization
USACE	United States Army Corps of Engineers
WB	World Bank
WWF	World Wildlife Fund

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Appendix A: Illustrations

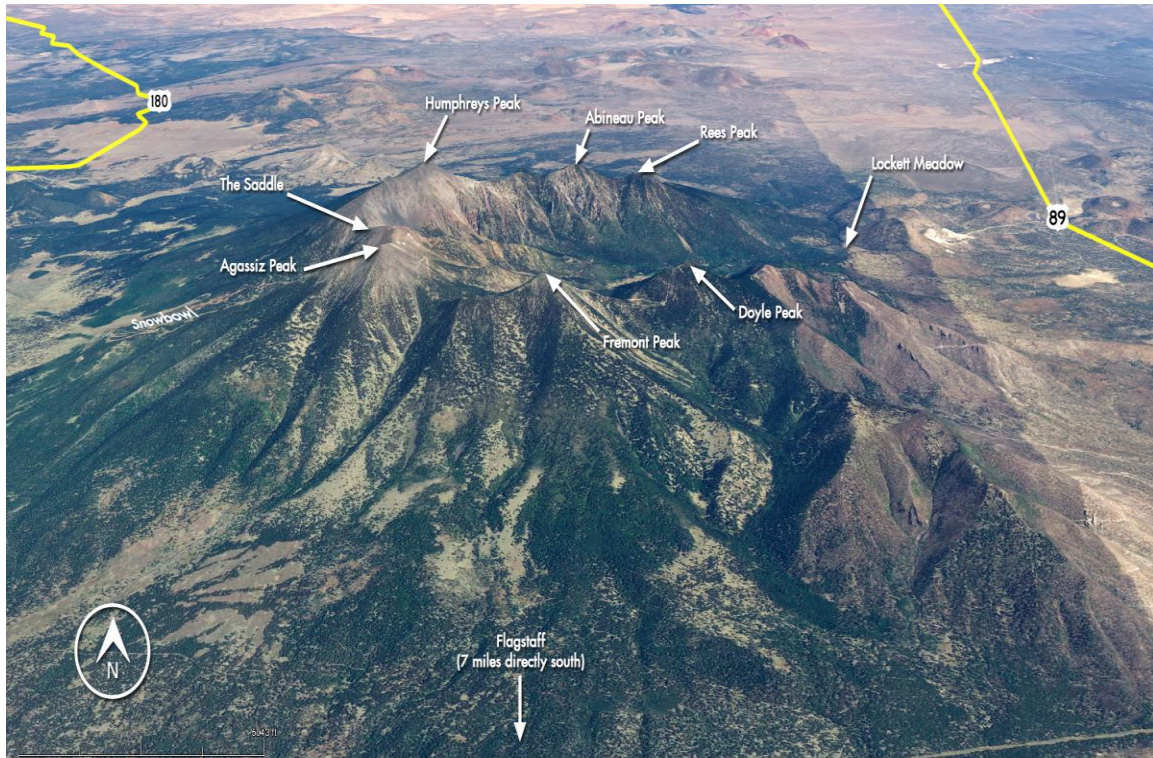


Figure 3.1 Map Indicating Location of the San Francisco Peaks
“History of the San Francisco Peaks and How they got Their Names,” United States Forest Service, <http://www.fs.usda.gov/detail/coconino/about-forest/about-area/?cid=stelprdb5340115>.

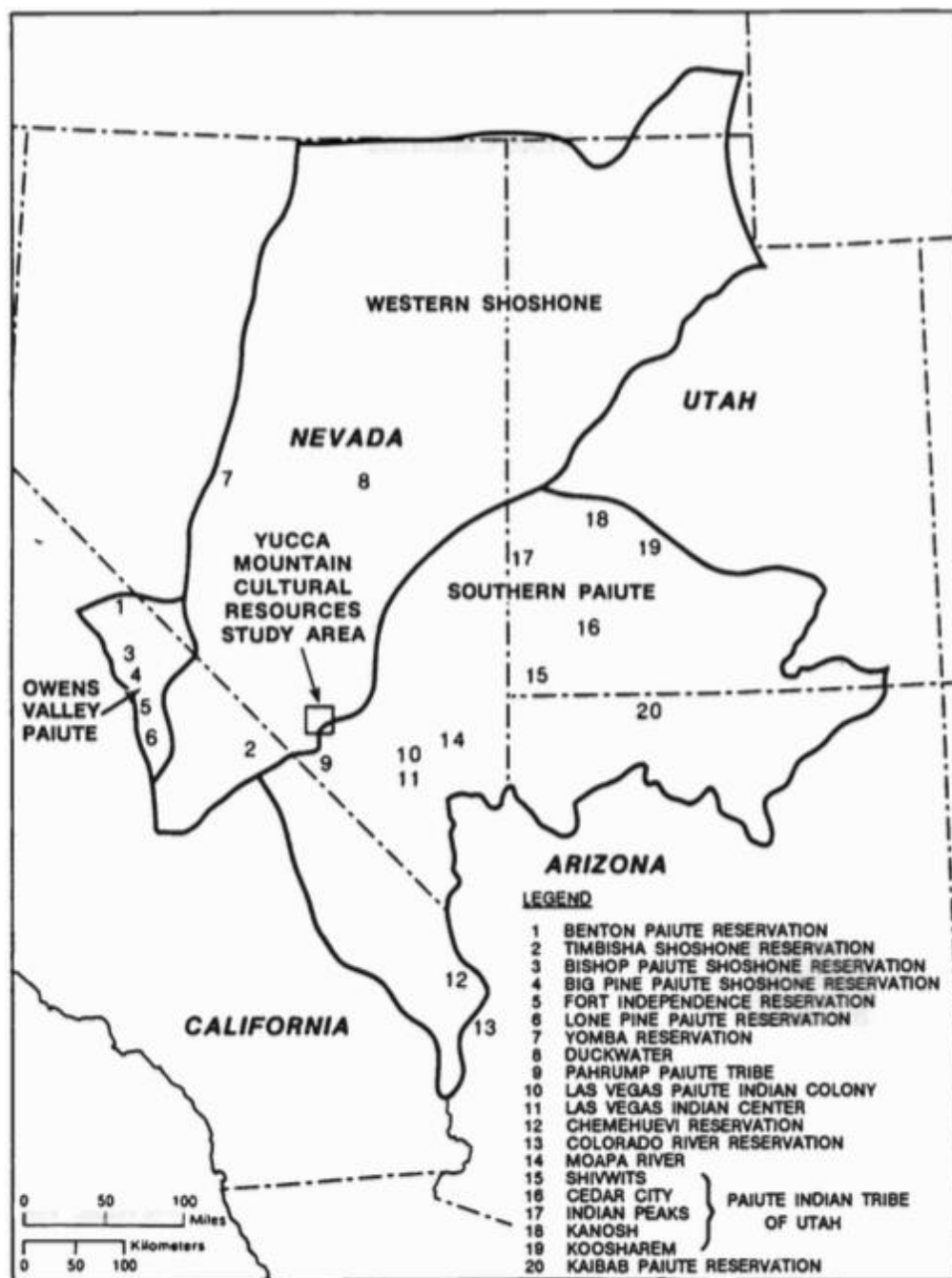


Figure 4.1 Map of Western Shoshone Territory and Yucca Mountain Repository Site
 Richard W. Stoffle, David B. Halmo, Michael J. Evans, and John E. Olmsted, "Calculating the Cultural Significance of American Indian Plants: Paiute and Shoshone Ethnobotany at Yucca Mountain," *American Anthropologist* 92, no.2 (1990): 418.



Figure 5.1 Map of Proposed Dakota Access Pipeline Route

Lyndsey Gilpin, “These maps help fill the gaps on the Dakota Access Pipeline,” *High Country News*, last updated November 5, 2016, <http://www.hcn.org/articles/these-maps-fill-the-gap-in-information-about-the-dakota-access-pipeline>.

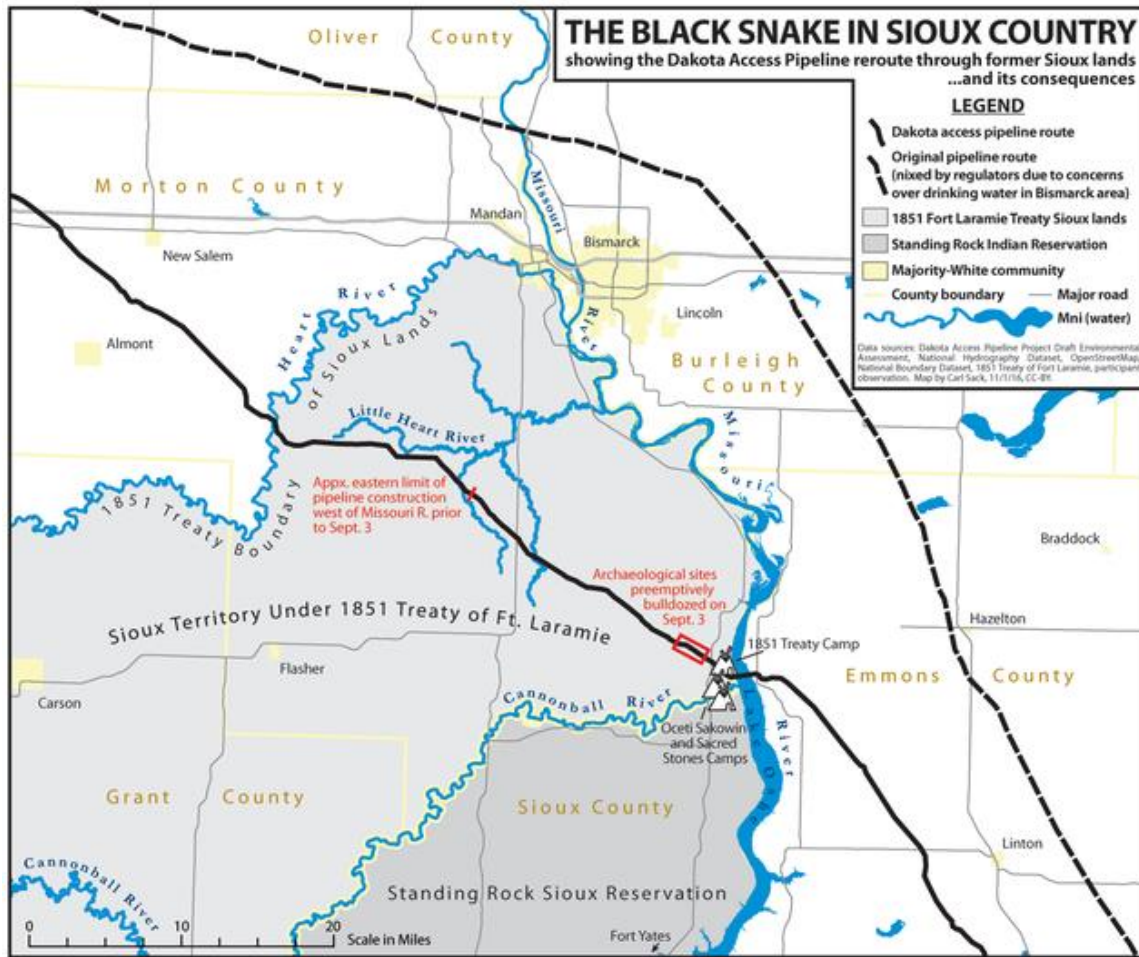


Figure 5.2 Map Depicting Only North Dakota Segment of the Dakota Access Pipeline
Carl Sack, “A #NoDAPL Map,” *The Huffington Post*, last updated December 2, 2016,
http://www.huffingtonpost.com/entry/a-nodapl-map_us_581a0623e4b014443087af35.