

***The Need for Stronger Legal Protection of
Native American Sacred Places***

Strategy Paper

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Introduction

This strategy paper addresses the need for stronger legal protection for sacred places. To Native Americans, undisturbed sacred places are integral to the practice of their religious beliefs. These are places where Native American people visit to experience vision quests, conduct traditional ceremonies, gather sacred herbs and medicinal plants, to send prayers to the Creator and give thanks to Mother Earth. If further destruction and loss of Native American sacred places occurs, Native peoples stand to lose their heritage, religious beliefs and identity as a people.

My concern for this issue arose out of local struggles to protect Migi zii wa sin, Eagle Rock, which is a sacred place to my Ojibwa tribe, the Keweenaw Bay Indian Community. Currently, Eagle Rock is being threatened by a proposed sulfide mining operation on the Yellow Dog Plains near Marquette, Michigan. The proposed “Eagle Project” plans to blast a mine portal directly into Eagle Rock which will prohibit tribal members from accessing the site and physically destroy the natural features and spirit of Eagle Rock. In addition, the potential negative environmental and cultural impacts associated with the proposed mining project are equally devastating to traditional Ojibwa beliefs and spiritual responsibilities as caretakers of the land for future generations.

Across the United States and the world, many other sacred places are under threat from development projects, exploitation, pollution, recreation, and vandalism. Unfortunately, current U.S. Federal and State laws are not strong enough to protect sacred places. The complexity of this issue involves questions of land-use rights versus religious freedom rights. For Native people who want equal protection under the

Constitution's First Amendment to exercise their religions, the protection of sacred places is a serious issue.

Brief History and Scope of Issue

Since time immemorial, indigenous cultures of North America worshipped at sacred places through ancient ceremonies carried on from generation to generation. Sacred places can be fresh water streams, waterfalls, mountain landscapes or any other significant spiritual place where Native Americans have historically prayed, gathered medicinal plants, and/or made offerings to deities. With the arrival of Europeans, however, Native Americans have consistently faced obstacles preventing them from practicing their religions and protecting sacred places. U.S. policy from the 1880s to 1930s explicitly outlawed Native American religions under the Civilization Regulations (The Morningstar Institute 2002). During this time, Native American religions were driven underground and people were prohibited from visiting or praying at their sacred places. Further U.S. education policies during the assimilation era during the 1930s to 1950s forced Native children into government boarding schools and forbid them from speaking their Native languages and practicing their religions. The overall impact of these U.S. policies severely devastated Native American cultures and religions, some to the point of extinction (The Morningstar Institute 2002).

The American Indian Religious Freedom Act of 1978 marked a turning point in U.S. Indian policy. The Act changed the policy of the U.S. from one of outlawing and

disrespecting Native American religions to one of protecting and respecting them. The Act states:

It shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites. (American Indian Religious Freedom Act of 1978).

Additional laws have been enacted to protect sacred places such as the Native American Graves Protection and Repatriation Act, Executive Order 13007 on Indian Sacred Sites, the National Historic Preservation Act, and the National Environmental Policy Act. Contrary to all of these laws, however, Native Americans have not been able to legally protect their sacred places in court.

The Supreme Court case *Lyng v. Northwest Indian Cemetery Protection Association* was a pivotal case that limited Native American religious freedom and the protection sacred places. In this case, the U.S. Forest Service proposed building a logging road through a section of the Six Rivers National Forest in California, despite substantial evidence that the area was used for religious purposes by Native American tribes who had ancestral ties to the area. The Court ruled that the construction of the Forest Service road did not violate the Constitution's First Amendment stating, "The affected individuals here would not be coerced by the Government's action into violating their religious beliefs; nor would the governmental action penalize the exercise of religious rights by denying religious adherents an equal share of the rights, benefits, and

privileges enjoyed by other citizens.” The Court found that the Constitution’s First Amendment and the American Indian Religious Freedom Act did not provide a statutory cause of action to protect Native American sacred places and that Congress would have to enact a law specifically for that purpose (Harjo 2009).

In a dissenting opinion, Supreme Court Justice William J. Brennan Jr. warned, “The land-use decision challenged here will restrain respondents from practicing their religion as surely and as completely as any of the governmental actions we have struck down in the past, and the Court’s efforts simply to define away respondents’ injury as non-constitutional is both unjustified and ultimately unpersuasive....,” (*Lyng v. Northwest Cemetery Protection Association 1989*). Justice Brennan also pointed out, “the Court’s refusal to recognize the constitutional dimension of respondents’ injuries stems from its concern that acceptance of respondents’ claim could potentially strip the Government of its ability to manage and use vast tracts of federal property.”

Essentially, the Court put the federal government’s land-use rights above Native American religious freedom. Furthermore, the Court failed to acknowledge the site-specific nature of Indian religious practices and the Native American perception of land as sacred. In an email-interview, Suzan Shown Harjo, President of the Morning Star Institute emphasized, “The consequences of this decision are that Native Americans and traditional religious practitioners are the only peoples in the United States who cannot use the Constitution’s freedom of religion clause as a right of action to protect sacred places.”

Today, across the United States there are at least thirty-six highly publicized sacred places threatened or endangered (Sacred Lands Film Project 2009). Yucca

Mountain located within the Western Shoshone Nation in Nevada has long been a powerful spiritual place to the Shoshone people in which rock prayer rings transmit prayers to the Great Spirit and messages back to the people. Unfortunately, this sacred place is the sole site considered for the storage of 98% of all U.S. nuclear and radioactive waste (Corbin 2001).

Another sacred place currently under threat is the Petroglyph National Monument in Albuquerque, New Mexico. This sacred place holds one of the largest concentrations of ancient petroglyphs in the country and it is visited regularly by nineteen Pueblo tribes to receive spiritual messages from their ancestors (Corbin 2001). Located in the midst of booming suburban development, the area surrounding the Petroglyph National Monument is proposed for a six-lane highway to provide easier access to a new housing development near Albuquerque, New Mexico. This example highlights that even a sacred place holding federal status as a National Monument, does not receive the protection it needs when it comes to suburban development.

The San Francisco Peaks is another example of the urgent need for stronger legal protection of sacred places. The San Francisco Peaks are three 12,000 foot volcanic peaks that rise out of the Colorado Plateau, just south of the Grand Canyon and north of Flagstaff, Arizona. Regarded sacred by thirteen tribes, many who pray in the mountains and gather sacred herbs and medicines along its slopes (Corbin 2001).

The San Francisco Peaks have long been at the center of land-use conflict, within the domain of the U.S. Forest Service. The most recent threat has been the proposed

development of expanded recreational ski slopes which propose the use wastewater to create snow on top of the San Francisco Peaks. Several lawsuits have been filed against the U.S. Forest Service's proposal, arguing for both Native American religious freedom and environmental protection. In June 2009, the Supreme Court denied a petition by tribes and environmental groups to hear the case. The Court's denial to hear this case demonstrates the urgent need for Congress to enact stronger laws to protect sacred places. The Supreme Court's refusal most assuredly stems from its previous recommendation in *Lyng v. Northwest Cemetery Protection Association*, in that Congress will have to enact a law specifically for the protection of sacred places.

The scope of the issue to protect sacred places is broad, spanning numerous sacred places across the country and the world. At the heart of these issues are conflicting worldviews. As Justice Brennan forthrightly described in his dissenting opinion in the *Lyng* case, "The dominant western culture, which views land in terms of ownership and use, and that of Native Americans, in which concepts of private property are not only alien, but contrary to a belief system that holds land sacred," (*Lyng v. Northwest Cemetery Protection Association 1989*). One of the main arguments raised in the *Lyng* case was the fact that Native American religions are fundamentally different and not well understood compared to the dominant religions of mainstream American society.

Assessment of Current Interventions & Recommendations

Currently, there are strong advocates dedicated to a movement to protect sacred places. Leaders such as Harjo, President of the Morning Star Institute and Christopher

Peters, President of the Seventh Generation Fund for Indian Development, have both worked for decades to educate the public on issues such as Native American religious freedom and the need for protection of sacred places (Taliman 2002). In an article by Valerie Taliman entitled “Sacred Landscapes,” Christopher Peters stated “We’re talking about a few places – the last remaining few – that can still preserve an identity and religious understanding of our peoples. Once they are gone, the Native paradigm and worldview are gone.”

Harjo has helped Native people recover many sacred places and has played a key role in the development of laws such as the American Indian Religious Freedom Act and Executive Order 13007 on Indian Sacred Sites. She also helped found the Morning Star Institute which is a national, non-profit Native American rights organizations devoted to the promotion and protection of Native American cultures and arts through research, education and advocacy. In an email-interview with Harjo, she concluded “Congress must enact a statutory cause of action for protection of Native American sacred places and the federal agencies must use all available authorities to convey or otherwise protect sacred places,” and “Successful intervention will be achieved when sacred places are no longer desecrated, damaged or destroyed.”

Vine Deloria sheds light on the connection of sacred places to Native American religions in his book God is Red. Deloria explains “Thousands of years of occupancy on their lands taught tribal peoples the sacred landscapes for which they were responsible and gradually the structure of ceremonial reality became clear. The vast majority of Indian tribal religions, therefore, have a sacred center at a particular place, be it a river, a

mountain, a plateau, valley, or other natural feature. This center enables the people to look out along the four dimensions and locate their lands, to relate all historical events within the confines of this particular land, and to accept responsibility for it” (Deloria 2003). Native writers, teachers and advocates can play an important role in informing the public and policy makers on this issue.

The Earth Island Institute’s Sacred Land Film Project produces a variety of media and education materials to deepen the public understanding of sacred places, as well as the understanding of indigenous cultures and issues of environmental justice (Sacred Land Film Project 2009). The Sacred Land Film Project has created a successful documentary film, *In Light of Reverence* produced by Christopher McLeod, which highlights three Native American tribes, the Hopi, Winnemem Wintu, and Lakota Sioux, and the struggles they’ve encountered to protect their sacred lands in the United States of America. This film has spurred growing international interest by indigenous communities all over the world who are also striving to protect their last remaining sacred places. Due to such growing international interest, the Sacred Land Film Project has started to develop a new documentary film entitled *Losing Sacred Ground* which will give voice to sacred places throughout the globe. Documentary films such as these may hold enormous potential to spread awareness of this issue and to inspire action to protect sacred places. “The Sacred Land Film Project is helping build the growing movement to preserve lands sacred to Native Americans,” said Wilma Mankiller, Principal Chief of the Cherokee Nation (Sacred Land Film Project 2009).

On a national level, it is clear that U.S. Native leaders stand unified to protect sacred places. Many additional Native organizations such as the Native American Rights

Fund, the Association of American Indian Affairs and the National Congress of American Indians support legislation that would provide stronger legal protection of sacred places. During a gathering to protect Native sacred places in San Diego, California in November of 2002, participants considered strategies for protecting Native sacred places and unanimously agreed to carry their position to the National Congress of American Indians. Some of the essential elements include a cause of action for the protection of sacred places, early and meaningful consultation with traditional religious leaders and tribal leaders, respect for confidentiality and private information about sacred places, and severe federal penalties for the violation of sacred places (Harjo 2002, Gathering to Protect Native Sacred Places)

During the Clinton era of the 1990's, Native Americans made progress protecting sacred places. For instance, federal hearings took place regarding a proposed gold mine on Bureau of Land Management lands at Indian Pass in Southern California which is a sacred place to the Quechen where visions are sought. The Advisory Council on Historic Preservation stated, "If implemented, the project would be so damaging to historic resources that the Quechen tribe's ability to practice their sacred traditions as a living part of their community life and development would be lost," (Taliman 2002). In turn, the Department of Interior denied the mining proposal. In addition, Clinton signed Executive Order 13007 on Indian Sacred Sites which made it the responsibility of federal land management agencies to accommodate access to and ceremonial use of Indian sacred sites and to avoid adversely affecting the physical integrity of such sacred sites. Unfortunately, these policies changed immediately with the Bush Administration when

newly appointed Interior Secretary Gale Norton reopened the Quechen mining permit for consideration.

In 2002, leaders in the U.S. House of Representatives introduced legislation to protect sacred places. Representative Nick Rahall (D-WV), Chair of the House Committee on Natural Resources and Co-Chair of the Native American Caucus with Representative Dale Kildee (D-Mich) proposed the Native American Sacred Lands Act (H.R. 5155). This Act proposed to turn President Clinton's Executive Order 13007 into federal law as well as allow tribes the opportunity to petition the federal government to prevent damage to sacred places (Taliman 2002). Rahall and Kildee understand the importance of protecting further harm to Native American sacred places. Rahall recommended "We must enact comprehensive legislation that prohibits the loss of further Native American sacred lands...We must not stand idly by as these unique places are wiped off the face of the Earth," (Taliman 2002).

A complimentary law was also introduced within the Senate Committee on Indian Affairs in 2002. During a Senate oversight hearing regarding Native American sacred places, Harjo asserted the need for Native Americans to receive equal protection of their religious rights stating "All the other religions have several doors to the courthouse. We do not have even one door. Native Americans need protection for our places of worship and for our exercise of religious liberties, too," (Oversight Hearing on Native American Sacred Places before the Senate Committee on Indian Affairs 2003). Tex Hall, former Chair of the National Congress of American Indians, also made it clear to the Senate Committee on Indian Affairs that existing laws lack meaningful enforcement to protect

Native American sacred places (Taliman 2002). Despite such efforts to support stronger legislation to protect sacred places, neither the House nor Senate has been able to progress either of the proposed laws out of their respective committees.

With the Obama Administration, there is new hope that sacred places will receive the protections they deserve. In 2008, the National Congress of American Indians approved a Policy Statement on Sacred Places which was transmitted to the Presidential Transition immediately following the results of the 2008 national election. The policy statement calls for a Congressionally enacted right of action for tribes to defend their sacred places, an updated Executive Order to include a specific right of action for legal protection of Native American sacred places, and the establishment of federal policies to ensure consultation with tribal and religious leaders. It also specifies the need for confidentiality of culturally sensitive areas, strengthened law enforcement and administrative policies of existing laws, the appointment of Native Americans within federal land-management agencies, and the creation of trust easements for sacred places (NCAI Policy Statement on Sacred Places 2008).

Conclusion

The protection of sacred places is an urgent issue for many tribal nations across the country, on the brink of losing their sacred lands due to increasing pressures such as development, industry, and recreation. These remaining sacred places are integral to Native American religions. In a sense, they are Mother Earth's cathedrals where traditional ceremonies take place, traditional medicines are gathered, and prayers are sent

to the Creator. However, these sacred places are not receiving the recognition, respect and protection they need. U.S. federal laws such as the First Amendment's Free Exercise Clause, the American Indian Religious Freedom Act, the National Historic Preservation Act, and the Native American Graves Protection and Repatriation Act are not strong enough to protect sacred places, especially when questions of land-use rights and development are involved.

There is a growing movement to protect sacred places. There is a need for greater public understanding and recognition of this issue, especially for policy makers, land-use managers and developers whose decisions can directly impact sacred places. Policy makers who take initiatives to implement stronger laws to protect of sacred places should consult closely with tribal nations and religious practitioners to ensure that legislation is comprehensive enough to fully protect sacred places now and into the future.

Works Cited

Advisory Council on Historic Preservation. Consultation with Indian Tribes in the Section 106 Review Process: A Handbook. Washington, DC, 2008.

Corbin, Amy. "Petroglyph National Monument." Sacred Land Film Project. 1 Sept. 2001.

Earth Island Institute. July 2009 <<http://www.sacredland.org/index.php/petroglyph-national-monument/>>.

Corbin, Amy. "San Francisco Peaks." Sacred Land Film Project. 1 Sept. 2001. Earth

Island Institute. July 2009 <<http://www.sacredland.org/index.php/san-francisco-peaks/>>.

Corbin, Amy. "Yucca Mountain." Sacred Land Film Project. 1 Oct. 2001. Earth Island Institute. July 2009 <<http://www.sacredland.org/index.php/yucca-mountain/>>.

Deloria, Vine. God is Red A Native View of Religion. Golden, Colorado: Fulcrum Pub., 2003.

Exec. Order No. 13007, 3 C.F.R.: Indian Sacred Sites (1996).

Harjo, Suzan S., comp. Gathering to Protect Native Sacred Places: Consensus Position on Essential Elements of Public Policy to Protect Native Sacred Places. Issue brief. San Diego, California, 2002.

Harjo, Suzan S. "Sacred Places at Risk." Colorlines Nov.-Dec. 2008: 27-29.

Harjo, Suzan S. "Stratigic Paper on Sacred Places." E-mail interview. July-Aug. 2009.

Keweenaw Bay Indian Community. Tribal Historic Preservation Office. Assessment of Migi zii wa sin (Eagle Rock). By Cohen Summer. Baraga, Michigan, 2007.

Lyng v. Northwest Indian Cemetery Protection Association. No. 485 U.S. 439. Supreme Court. 19 Apr. 1988.

Martinez, Dennis. "Traditional Environmental Knowledge." Indigenous Peoples' Restoration Network. Society for Ecological Restoration International. July 2009 <http://www.ser.org/iprn/pdf/Traditional_Environmental_Knowledge.pdf>.

The Morning Star Institute. Fact Sheet: Protection of Native American Sacred Places. Issue brief. Washington, DC, 2002.

National Congress of American Indians. NCAI Policy Statement on Sacred Places. 23 Oct. 2008. July 2009 <<http://www.ncai.org/ncai/resolutions/doc/PHX-08-069cFINAL.pdf>>.

Oversight Hearing on Native American Sacred Places Before the Senate Committee on Indian Affairs (2003) (testimony of Suzan Shown Harjo, President, The Morning Star Institute).

Project, Harvard. The State of the Native Nations Conditions under U.S. Policies of Self-Determination. New York: Oxford UP, USA, 2008.

Sacred Land Film Project. Summer 2009 <<http://www.sacredland.org>>.

Taliman, Valerie. "Sacred Landscapes." Sierra Nov.-Dec. 2002: 36-43, 73.

United States. Cong. American Indian Religious Freedom Act. Cong Public Law 95-341, 42 U.S.C. 1996 and 1996a. 1978.

United States. Cong. National Historic Preservation Act. Cong Public Law 89-665; 16 U.S.C. 470 et seq. 1966.