

Access to Sacred Sites on Federal Public Lands: Lessons for the Future

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Preview

- At its core, Federal Indian law attempts to define the place of tribes and Indian peoples within the U.S. legal system.
- Tendency is to focus on litigation, particularly given the U.S. Supreme Court's Indian law jurisprudence since 1978.
- Disputes over access to sacred sites on Federal land provide a microcosm for examining federal Indian law and provide insights for developing different approaches to these issues.
- Requires us to understand
 - What are Sacred Sites?
 - Why are they on Federal Public Lands?
 - Why do they present a problem?

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What are Sacred Sites?

- While tribes and tribal members follow a variety of religions, many, if not most, traditional tribal religions are land-based.
- Unlike sacrament-based religions, which require the performance of certain acts, land-based religions require that certain acts be performed at certain places, often at certain times of the year.
- The "at certain places" requirement often presents a problem, given the United States' history of relocating tribes.
- Many tribes are no longer on their traditional lands, and the federal government has assumed ownership of those lands.
- As a result, Indians are often dependent on the federal government's willingness to permit access.

Why are they on Federal Public Land?

- Only federal government can acquire transferable title from Indians and from tribes
- About 30% of lands within the U.S. are owned by the federal government

Why does this present a problem?

- Responsibility for managing federal lands is spread across a wide spectrum of departments and agencies, although the vast bulk of these lands, almost 94%, are the responsibility of four agencies
 - Bureau of Land Management (39% of federal lands)
 - U.S. Forest Service (29% of federal lands)
 - U.S. Fish and Wildlife Service (14% of federal lands)
 - National Park Service (12% of federal lands)
- Federal agencies who manage lands have a variety of purposes and must balance a wide variety of uses, from recreation to resource extraction
 - Each agency has a statutorily defined mission
 - Each agency is also subject to statutes such as National Environmental Policy Act, National Historic Preservation Act, Endangered Species Act
- One of the demands placed on federal land managers is for access to sacred sites, either for single event or for regular activities

Why isn't the Free Exercise Clause the answer?

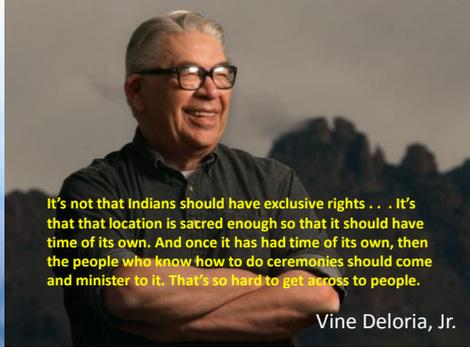
- The US Constitution explicitly protects an individual's right to free exercise of religion
- Why doesn't this Constitutional right trump the federal statutory rights?

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Two Reasons

- Free Exercise test never adequately covered land-based religion
 - Freedom to Believe v. Freedom to Act based on very Judeo-Christian approach to religion
 - Definition of “substantial burden” under *Sherbert*
 - *Smith*’s neutral laws of general applicability (not even under hybrid rights exception)
- Free Exercise Clause must be balanced against Establishment Clause
 - Competing users sometimes challenge federal accommodation of Indian religions as an unconstitutional establishment of religion (despite the fact that many national parks contain a chapel)

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

Vine Deloria, Jr.

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What about Federal laws regarding religion?

- American Indian Religious Freedom Act
- Executive Order 13007
- Religious Freedom Restoration Act

American Indian Religious Freedom Act

- ... 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.

Executive Order 13007

- In managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites.
- This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies, officers, or any person.

Religious Freedom Restoration Act

- Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
- (b) Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person
 - (1) furthers of a compelling governmental interest; and
 - (2) is the least restrictive means of furthering that interest
- A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.

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What happened

THE CASE STUDIES

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Historical Process

- Historically, most agency planning was done internally then proposed alternatives were made available for public comment
- In 1970's and 1980's, series of cases in which Indians sued government, seeking either access to site or to block other activities which would interfere with access
- Indians regularly lost (e.g., *Wilson* and *Lyng*), even law appeared favorable

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The Change

- Decision in *Lyng* (Six Rivers/Chimney Rock case) gave great deference to federal government and site managers
- Individual site managers (Medicine Wheel, Devils Tower) began experimenting with consultation earlier in administrative process
- Earlier consultation would later be mandated by Executive Order 13007
- We will take a look at four case studies (one under old process, one during transition, two under the new process)

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Six Rivers National Forest

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Six Rivers National Forest

managed by U.S. Forest Service

- In mid- 1970's, USFS decided to permit timber harvesting in part of forest and complete G-O road (forest includes areas sacred to three tribes)
- Followed historical process of doing extensive work internally before seeking public comment
- Statutory mission: National Forests are to be managed for outdoor recreation, range, timber, watershed, and wildlife and fish purposes, as well as for the maintenance of areas as wilderness.
- After 10 year process, USFS ignored recommendations of report it commissioned and decided to proceed with plan
 - ½ mile "protective zones" (problems: identification of sites, still has severe impact)

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Six Rivers National Forest

managed by U.S. Forest Service

- In resulting Free Exercise litigation, Sup. Ct found "no burden" on religion
 - grave concern about giving veto over government managing "what is, after all, its land"
- Parts of forest listed pursuant to the National Historic Preservation Act, but concessions deemed sufficient
- Key: commercial timber harvesting never implemented and road not completed – legislature declared area a protected Wilderness Area

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Devils Tower



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Devils Tower

managed by National Park Service

- The Park Service has the dual mission of (1) conserving, preserving, protecting, and interpreting the natural, cultural, and historic resources of the nation for the public and (2) providing for public enjoyment of those resources.
- In mid 1990's, NPS determined it needed a climbing management plan based on increased number of climbers. NPS also noticed increase in number of prayer bundles

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Devils Tower

managed by National Park Service

- Departed from usual process by adding working group which included representatives of climbing community, environmental organizations, local government, and Indian communities
- Final plan included route limits to protect raptor nest, visitors' center display, signs about staying on the path and avoiding prayer bundles, and a voluntary June climbing moratorium
- Area residents and a commercial climbing guide filed suit, which was dismissed on highly technical standing grounds

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CaveRock

CaveRock is on the shores of Lake Tahoe and is 360 feet high and 800 feet wide; it is the remnant of a volcanic plug which rose from the surrounding area over three million years ago. At the top is a small cave, formed by wave action from the time when Lake Tahoe was considerably larger.

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CaveRock

managed by U.S. Forest Service

- Washoe Indians consider Cave Rock a sacred site, to be accessed only by Washoe healers. As non-Indians settled the area, they began using Cave Rock as both a transportation corridor and a recreation area. Rock climbing began in the late 1980's and was the type requiring fixed gear
- In 1998, USFS requested that Cave Rock be placed on the National Register of Historic Places, and request was granted
- Listing means sited must be preserved in its historic form. Forest Supervisor determined the relevant date to be 1965, the year the last Washoe shaman who last regularly visited Cave Rock died
- Climbers filed suit challenging decision to ban rock climbing, alleging it violated Establishment Clause. Court upheld plan, finding that the law permits preservation of national monuments that may have a religious significance

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Coconino National Forest and Arizona Snowbowl



SnowBowl is a ski resort north of Flagstaff, Arizona, located on 777 acres of Humphrey's Peak, part of the San Francisco Peaks. The San Francisco Peaks constitute about 74,000 acres of the 1.8 million acre Coconino National Forest

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Coconino National Forest and Snowbowl managed by U.S. Forest Service

- Snowbowl operates under a special use permit and draws visitors year round from throughout the state; it provides substantial economic benefits to the local area
- In 1992, owners sought permission to upgrade and expand the facilities, with goal of stabilizing demand by providing for artificial snow
- Needed 1.5 million gallons of water per day; only cost effective option was to buy class A+ reclaimed water, the highest category water recognized under Arizona law and is authorized for use on food crops, school playgrounds, and for making snow.
- In 2005 the Forest Service approved the request
- Tribes filed suit, alleging violations of RFRA, NEPA, and NHPA. Court of appeals upheld Forest Service:
 - No "burden", so no RFRA violation
 - Sufficient consideration under NEPA
 - Sufficient consultation under NHPA
- Supreme Court refused to hear the case, and the Navajo took their complaint to the UN Special Rapporteur

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What we can learn

THE LESSONS

Lessons Learned: Overview

- Things to consider:
 - Role of Site Manager
 - Timing of when tribes were able to have input into the decision-making process
 - Results of court challenges
 - Role played by other statutes relating to protection of cultural and environmental resources

Lesson 1

- Make the decision you are requesting palatable to decision-maker and easy to reach, whether that be a federal executive official, a judge, or a legislator (Don't forget legislature (Wilderness Act in Six Rivers))
 - CaveRock and climber problems
 - Devils Tower and (1) Voluntary moratorium and (2) standing
 - Ski resort and snow
 - Six Rivers and Wilderness act
- Don't underestimate desire to avoid hard questions
- Don't underestimate ability of power to prevail v. law

Lesson 2

- Site Manager (that is, the Government) always wins
- Site Manager is the person to convince (remember mission of agency)
 - Six Rivers (ignored own report)
 - Devils Tower (cultural interpreter – request for voluntary moratorium)
 - CaveRock (focus on cultural preservation)
 - Snowbowl (nature of use; economics)

Lesson 3

- The more involvement and input Indigenous people have in the decision making process itself (as opposed to merely challenging the end result of that process), the more likely they are to have a positive influence on the decision
 - Six Rivers
 - Devils Tower
 - Cave Rock
 - Snowbowl

Lesson 4

- Don't rely strictly on the courts
- The deference given by U.S. courts to federal agencies creates a presumption in favor of upholding an agency's actions, making it even more important for Indigenous people to have input into the decision making process and to focus on site manager

Lesson 5

- Don't be naïve about the law
- Don't rely too heavily on "process" statutes
 - See role of NHPA at Six Rivers and Snowbowl versus Cave Rock
- Don't mistake statements of policy for enforceable rights
 - American Indian Religious Freedom Act
 - Executive Order 13007

Lesson 6

- Don't rely strictly on Indian/Indigenous peoples law
- In the U.S., statutes regarding protection of the environment, endangered species, and cultural resources provide other bases for agency action and challenging agency action
 - Raptors at Devils Tower
 - Cultural preservation at Cave Rock

Lesson 7

- Collaborate with other interest groups
 - Remember that other tribes may have competing claims
- Look to environmentalists, etc

**QUESTIONS?
COMMENTS?**
