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Rayanne J. Griffin

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SACRED SITE PROTECTION AGAINST A BACKDROP OF RELIGIOUS INTOLERANCE

I. INTRODUCTION

No chapter in human history has been so largely written in terms of persecution and intolerance as the one dealing with religious freedom. From ancient times to the present day, the ingenuity of man has known no limits in its ability to forge weapons of oppression for use against those who dare to express or practice unorthodox religious beliefs. . . . [E]ven in this nation, conceived as it was in the ideals of freedom, the right to practice religion in unconventional ways is still far from secure.¹

The history of Native American religious experience has been riddled with intolerance, ignorance, and persecution. It is against this backdrop that Native Americans continue to struggle for freedom of religious expression and the protection of their sacred sites. For most Native Americans, "[t]he right to practice . . . native religions is the right to be Indian."² Native American religious expression does not merely involve "going to church one day a week," but it is a culmination of beliefs based upon nature and the universe in which they live.³ Thus, the religious expression of Native Americans is impeded when their sacred sites are not afforded the same protection as other religious institutions.

"Over forty-four Native American sacred sites . . . are [currently] threatened by tourism, development and resource exploitation."⁴ They are also threatened by New Age religious practitioners who appropriate Native American traditions and sacred places, often leaving behind objects that are sacrilegious to the Native practitioner.⁵ Increased development of public lands has wreaked havoc on the sacred sites located within those areas, thus centering the controversy on the

1. *Prince v. Massachusetts*, 321 U.S. 158, 175-76 (1944) (Murphy, J., dissenting).

2. Lawrence R. Baca, *Federal Indian Law from Marshall to Marshall*, 41 FED. B. NEWS & J. 543 (1994).

3. Barbara S. Falcone, *Legal Protection (Or The Lack Thereof) of American Indian Sacred Religious Sites*, 41 FED. B. NEWS & J. 568 (1994).

4. S. REP. NO. 411, 103d Cong., 2d Sess. 5 (1994).

5. Michael Haederle, *Spirited Away, Native American Rituals are Trendy. But is This Homage or Another Rip-off?* L.A. TIMES, March 31, 1994, at E1.

struggle between the government's management of the public lands and the religious practices of Native Americans.⁶ Further, tourists often stop to observe Native Americans practicing their traditional ceremonies.⁷ Allowing continued public access causes ceremonies to lose much of their efficacy.

This comment focuses on the Native American religious experiences of the past, present, and future. Section II discusses the history of intolerance that has been the backdrop for Native American religious practice since presumably this nation was conceived under the auspices of religious liberty. Section III deals with the statutory and judicial history of Native American efforts to obtain religious liberty. Finally, section IV discusses the efforts to achieve religious freedom for Native Americans in the 103d and 104th Congresses, as well in the future.

II. NATIVE AMERICAN RELIGION AND A HISTORY OF INTOLERANCE

A. *Conflicting Views on What is Sacred*

The Euro-American concept of what is sacred is vastly divergent from the Native American concept. Traditionally, "amongst all native people, the concepts of religion and culture are inextricably intertwined."⁸ Native American religions are, of necessity and design, "as diverse as the tribes and individuals who practice them."⁹ The perceived homogeneity of Native American religion was conceived by persons ignorant of the complexity of Native American peoples. However, like diverse Christian beliefs, generalizations can be made in respect to Native American beliefs.

Religious beliefs and practices for Native Americans are "part of daily life: 'originally, sacred ways and practices were at the heart of

6. Jack F. Trope, *Protecting Native American Religious Freedom: The Legal, Historical, and Constitutional Basis For The Proposed Native American Free Exercise of Religion Act*, 20 REV. LAW & SOCIAL CHANGE 373, 374, 376 (1993). "Indian religions had suffered much at the hands of the federal government, and some traditional practices continued to be under siege by representatives of governmental agencies." Robert S. Michaelsen, *Law and the Limits of Liberty*, in HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM 116, 119 (Christopher Vecsey ed., 1991).

7. Christopher Vecsey, *Prologue*, in HANDBOOK *supra* note 6, at 7, 22. Tourists often gawk and yell at practitioners at Rainbow Bridge, a sacred site for the Navajo. *Id.*

8. S. REP. NO. 411, 103d Cong., 2d Sess. 8 (1994).

9. Rebekah J. French, *Free Exercise of Religion on the Public Lands*, 11 PUB. LAND L. REV. 197, 198 (1990); *see also* Vecsey, *supra* note 7, at 12.

living and survival.”¹⁰ As such, the coexistence of religion and culture is integral to Native American existence,¹¹ and includes the idea that “all things in the world are dependent upon each other” and must work in balance to create world order.¹²

“For many Native Americans, sacred sites on public lands are holy places of worship, their equivalent of churches, temples or synagogues.”¹³ These sites are sacred because of their relation to the Native American concepts of sacred time¹⁴ and creation.¹⁵ “Many of these ‘sacred sites’ are found on public lands.”¹⁶ These places are, unlike churches and synagogues, “believed to have spiritual power in and of themselves.”¹⁷ If the site is desecrated in such a way as to diminish its power, it is lost forever.¹⁸ Currently, there are literally hundreds of sacred sites in the Northwest alone,¹⁹ not to mention the thousands of others across the country. Quantification of sacred sites is difficult since many Native American religious beliefs are tied to maintaining secrecy of these sites.²⁰

All religions utilize holy places. However, Native American sacred sites have not been afforded the same protection as their counterparts because most Euro-Americans do not view them as conventional places of worship. Native American holy places are threatened by the government’s history of assimilationist policy, the

10. French, *supra* note 9, at 198 (quoting PEGGY BECK & A.L. WALTERS, *THE SACRED* 4 (1980)).

11. *Id.*; see also Deward E. Walker, Jr., *Protection of American Indian Sacred Geography*, in *HANDBOOK*, *supra* note 6, at 102-03; Robert S. Michealson, *The Law and the Limits of Liberty*, in *HANDBOOK*, *supra* note 6, at 116, 127.

12. French, *supra* note 9, at 198; (quoting P. Beck & A.L. Walters, *THE SACRED* 4 (1980)); Falcone, *supra* note 3, at 569.

13. S. REP. NO. 411, 103d Cong., 2d Sess. 2 (1994).

14. MIRCEA ELIADE, *THE SACRED & THE PROFANE*, *THE NATURE OF RELIGION* 37-39 (1959); see also French, *supra* note 9, at 198; Falcone, *supra* note 3, at 569; Walker, *supra* note 11, at 104.

15. ELIADE, *supra* note 14, at 110. Under the Native American concept of creation, ceremonies often must take place at a site which the particular tribe considers to be the center of its world. *Id.*; see also Falcone, *supra* note 3, at 569; Trope, *supra* note 6, at 376.

16. French, *supra* note 9, at 199.

17. Falcone, *supra* note 3, at 568. These sites may be considered holy to the Native American for numerous other reasons. They can be the dwelling places of spirits, the source of healing water and herbs, or places to make pilgrimages and vision quests. *Id.* at 569.

18. *Id.* at 569. If that site is “destroyed or altered in such a way as to diminish its power, so too is the ability to practice that particular site-specific religion.” *Id.*; see also Walker, *supra* note 11, at 110.

19. Walker, *supra* note 11, at 108.

20. Haederle, *supra* note 5, at E1. Additionally, the cultural and religious tenets among some tribes “mandate secrecy and prohibit disclosure of information concerning their sacred sites, beliefs, and practices”. S. REP. NO. 411, 103d Cong., 2d Sess. 8 (1994).

failure to understand religious beliefs, Western concepts of resource development, private property interests, and competing land use.²¹

B. *Colonialism / Removal / Missionaries and Their Effect on Native American Religion*

The threat to Native American religious expression grew with our nation. "The ever increasing occupation of Indian land, coupled with military and political capability to separate the Indians from that land, led to eventual prohibitions on free exercise of religion by Native Americans."²² The governmental obstacles to Native American religious ceremonies were numerous, ranging from promoting abandonment to complete prohibition.²³ One thing is clear, as European colonists arrived in the New World the lives of native peoples were drastically altered.

During the early phases of colonization, the Indian policy set by the British Crown dealt with indigenous populations as compromising sovereign entities.²⁴ However, missionary workers did make "attempts to indoctrinate the native populations in the ways of Christianity."²⁵ These attempts were generally futile, as "the Indian nations still controll[ed] their traditional land base . . . [and retained] access to sacred sites."²⁶ However, the attempts were founded on the colonialist view, as stated in the Federalist Papers, that "[p]rovidence has been pleased to give this one connected country to one united people - a

21. Falcone, *supra* note 3, at 569; *see also* Trope, *supra* note 6, at 376. Settlers and the federal government have throughout history ascribed their own concepts of religion to the cultural and religious practices of Native Americans. This is true although the Supreme Court recognized a potentially unlimited range of religious beliefs, no matter how "incredible" or "preposterous". U.S. v. Ballard, 322 U.S. 78, 87 (1944); Columbus, on his "first day in this Hemisphere," recorded in his diary that "the Native people should easily be made Christians, because it seems to me they have no religion." Walter R. Echo-Hawk, Speech at the Federal Bar Association Indian Law Conference (Apr. 6-7, 1995) (outline available from author). *See generally* French, *supra* note 9, at 199.

22. Falcone, *supra* note 3, at 569. As European colonists arrived in the New World, the lives of the native inhabitants were forever altered. The pervading sentiment from the colonists was their superiority of civilization. The attempts to civilize the savages ranged from missionary work, educational programs, and the introduction of culture, clothes, diet, and lifestyles. ROBERT A. DIVINE, ET AL., AMERICA PAST AND PRESENT: VOLUME ONE TO 1877, 6-7 (2d ed. 1987).

23. Falcone, *supra* note 3, at 569.

24. *Id.* The treatment of the New World and its inhabitants by the Crown seems strikingly similar to the sentiments of England toward Ireland in the mid 1500s. Colonization was seen as a logical continuation of the Elizabethan conquest. DIVINE, *supra* note 22, at 6-7.

25. Falcone, *supra* note 3, at 569.

26. *Id.*

people descended from the same ancestors, speaking the same language, *professing the same religion*, . . . each individual citizen everywhere enjoying the same national *rights, privileges and protection*.”²⁷

The continued expansion of the non-Indian population enabled acceptance of removal policies in Washington.²⁸ During this period the tribes lost not only their traditional land base, which held their sacred sites, but also thousands of their people.²⁹ The survivors’ “ability to engage in site specific religion was significantly impaired” as a result of losing their homelands.³⁰

Their darkest hour was, however, yet to come. The reservation period had “[t]he most devastating effects” on religious freedom.³¹ Reservations not only limited the Native Americans to a small area, but generally removed them from their ancestral homelands.³² Separating the Native Americans from their ancestral homes was not enough, and a policy of assimilation began to attain new intensity.³³

During this period, “for more than a century,” missionary organizations were “provided [with] direct and indirect support” in their efforts to Christianize the Native Americans.³⁴ Money and government cooperation were given to missionaries, among others, for the purpose of introducing the Indians to the “habits and arts of civilization.”³⁵ The aid greatly reinforced the federal assimilation policy. Efforts ranged from forced measures to more insidious forms of indoctrination into European culture.

27. THE FEDERALIST NO. 2, 38-39 (John Jay) (Penguin ed., 1961) (emphasis added). It is this thinking that led to the federal policy of dealing with Native American religious beliefs by funding christianizing efforts, authorizing the military and courts to incarcerate, starve and murder native peoples, and forcibly removing children from their homes and cultures to government and denominational schools. S. REP. NO. 411, 103d Cong., 2d Sess. 2 (1994). “Settlers who possessed no knowledge of germ theory speculated that God had providentially cleared the wilderness of heathens.” DIVINE, *supra* note 22, at 10. It is estimated that 90-95% losses were not uncommon for some tribes within the first century of contact with the Europeans. Of those that survived, the Europeans encountered a people “sick and dispirited . . . whose lives had been shattered,” reinforcing the divine providence theory. *Id.*

28. Falcone, *supra* note 3, at 569. The removal period lasted from approximately 1820 to 1860. As originally conceived by Jefferson, removal would allow the Indians to remain behind provided they were “civilized.” However, it soon became clear that the settlers would accept no less than the removal of all Indians. FELIX S. COHEN’S, HANDBOOK OF FEDERAL INDIAN LAW 240 (1986 ed.) [hereinafter COHEN’S].

29. Falcone, *supra* note 3, at 570.

30. *Id.*

31. The reservation policy continued from approximately 1860 through the 1880s. *Id.*

32. WILLIAM CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 17 (1981).

33. *Id.* at 18. This policy of forced assimilation began in the 1880s and continued through the mid 19th century. *Id.*

34. Trope, *supra* note 6, at 374.

35. COHEN’S, *supra* note 28, at 240.

An integral part of the assimilation policy was the "replacement of traditional religions with Christianity."³⁶ Native Americans were quickly targeted for assimilation into the *civilized* culture. The federal government hired missionaries as federal Indian agents, and Indian lands were regularly given to church denominations by the federal government.³⁷ The cooperation between the church and government in efforts to civilize the "savages" was extensive.

Eventually, the effort to Christianize Native Americans led to statutory bans on traditional religious practices.³⁸ The prohibitions were not only on religious and cultural practices.³⁹ The regulations of these practices were codified in 1883 under the Code of Indian Offenses.⁴⁰ The Code was promulgated under the direction of then Secretary of Interior Henry Teller. Teller's direction led to the banning of the Sundance, the Potlatch, and other practices.⁴¹ The codes and courts were, by design, used to destroy Native American institutions, not merely to promote order.⁴²

Destruction is exactly what this policy accomplished. Pursuant to Teller's policy, federal soldiers attempting to suppress the Ghost Dance⁴³ massacred 390 Sioux men, women and children at Wounded Knee in 1890.⁴⁴ Even "into the 1920s, the Bureau of Indian Affairs

36. S. REP. NO. 411, 103d Cong., 2d Sess. 1-2 (1994). This policy went as far as to promote "the separation of young Indian children from their parents and traditional culture through the federal boarding school system." *Id.* at 2.

37. Walter Echo-Hawk, *Loopholes in Religious Liberty: The Need For A Federal Law To Protect Worship For Native People*, 16 NARF LEGAL REV. 7 (1991). The government went as far as to use federal funds to establish a church on a Sioux reservation. This action was later upheld against a legal challenge. *Quick Bear v. Leupp*, 210 U.S. 50 (1908).

38. Falcone, *supra* note 3, at 570.

39. S. REP. NO. 411, 103d Cong., 2d Sess. 2 (1994).

40. Cohen's, *supra* note 28, at 141. The primary purpose of this code, was not only to penalize criminal offenses, but to "criminalize native culture, religious practices, and ceremonials." ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW: CASES AND MATERIALS* 145 (3d ed. 1983).

41. Falcone, *supra* note 3, at 576. The Sundance is of vital importance to the Plains Indians, in particular the Oglala Sioux. *Id.* at 546 n.47. The Potlatch is a feast and give-away ceremony which is vital to the Northwest Coast Indians. *Id.* at n.48.

42. Falcone, *supra* note 3, at 570.

43. Sharon O'Brien, *A Legal Analysis of the American Religious Freedom Act*, in *HANDBOOK*, *supra* note 6, at 27, 28. The Ghost Dance is a series of religious doctrines that originated between 1869 and 1872. The belief was that the "dead would return, and that the end of the world was near." PEGGY BECK & A.L. WALTERS, *THE SACRED* 170 (1980). The end of the world meant the elimination of all white people. *Id.*

44. For this act, Congress awarded the soldiers in the Seventh Calvary, the former unit of General Armstrong Custer, the Congressional Medal of Honor. BECK & WALTERS, *supra* note 43, at 170; see also Bo Emerson, *Popularity of Native American Lore Raises Questions of Exploitation*, ATL. CONST., Oct. 4, 1991 at D1.

(BIA) prohibited Native Americans from participating in [their traditional] ceremon[ies]."⁴⁵ The policy of aggressive prohibition of Native American religion and culture was continued until the 1930s.⁴⁶

C. 1933 - *A Flicker of Hope*

In 1933, the Native Americans saw their first flicker of hope when John Collier was appointed the Commissioner of Indian Affairs.⁴⁷ Mr. Collier, a former social worker and a student of Indian culture and spirituality, ceased "official prohibitions against Indian religious practices."⁴⁸ However, not until 1934 did the "federal government fully recogniz[e] the right to free religious worship on Indian reservations."⁴⁹

Even after government prohibitions were lifted, intolerances continued for Native Americans. The shift in policy "did little to overcome the nation's general ignorance of and prejudices against Indian religions."⁵⁰ These factors, along with the so called "settlers" continued the hardship on Native American religious practice.⁵¹

The twentieth century found little more tolerance for the free exercise of Native American religion. The population continued to expand, and the problems occurring in tandem with that expansion further burdened Native American sacred sites.⁵² "[I]mpeded by timber harvesting, mining, tourism, and other encroachments," the sacred sites were often altered from their original physical condition.⁵³ Competing developments increased the burden on federal agencies that administer these lands; increased bureaucracy and restrictions was the typical agency response.⁵⁴

45. French, *supra* note 9, at 199; see also C. EASTMAN, THE SOUL OF THE INDIAN, FEDERAL AGENCIES TASK FORCE, AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT 1 (1987).

46. Trope, *supra* note 6, at 374.

47. O'Brien, *supra* note 43, at 28; see also Falcone, *supra* note 3, at 571.

48. O'Brien, *supra* note 43, at 28. John Collier "viewed native institutions as strong, positive influences that needed to be preserved and encouraged." Falcone, *supra* note 3, at 571.

49. Falcone, *supra* note 3, at 571.

50. O'Brien, *supra* note 43, at 28. The Christian community's efforts at converting the Native Americans also continued. *Id.* at 28.

51. Falcone, *supra* note 3, at 571.

52. *Id.* The problems that were faced were a direct result of the increasing industrialization of the non-Indian population. As the cities became more populated, "travel and tourism . . . became more attractive" to those who lived there. *Id.* As a consequence, sacred sites that were previously ignored or isolated from non-Indian intrusion became meccas. *Id.*

53. *Id.*; see also Vincent Deloria, *Sacred Lands and Religious Freedom*, 16 NARF LEGAL REV. 1-2 (1991).

54. Falcone, *supra* note 3, at 571.

III. PRIOR LAWS AFFECTING NATIVE AMERICAN RELIGIOUS PRACTICE

A. *American Indian Religious Freedom Act of 1978*

To alleviate the burdens placed on Native American religious practice, lobbying efforts ensued. In 1978, formal recognition was given to First Amendment protection of Native American religious practices.⁵⁵ That year, Congress passed the American Indian Religious Freedom Act ("the Act").⁵⁶ The stated policy of the Act is to "protect and preserve for American Indians their inherent right to freedom to believe, express, and exercise the traditional religions . . . including but not limited to access to sacred sites, use and possession of sacred objects, and the freedom to worship through ceremonial and traditional rights."⁵⁷

The Act passed as a result of Congressional findings that no "clear, comprehensive, and consistent federal policy" can be found with respect to Native American religious freedom.⁵⁸ Further, Congress found that a "lack of knowledge or the insensitive and inflexible enforcement of federal policies" led to religious infringements.⁵⁹ President Carter signed into law this "first step by the federal government toward acknowledging" the government's role in promoting religious intolerance toward Native Americans.⁶⁰ The Act recognized the integral role that religious practice plays in Native American culture.⁶¹

While the Act was a breath of hope, it was not without problems. The first undertaking of the Act delineates policy goals, yet fails to "set forth any standards for what would be considered a violation."⁶² Additionally, it fails to determine the exact duties placed upon the federal government. Finally, the courts have narrowly interpreted the Act, holding it is a mere policy statement having "no teeth."⁶³ Thus,

55. French, *supra* note 9, at 200.

56. Pub. L. No. 95-341, 92 Stat. 469 (codified at 42 U.S.C. § 1996 (1988)).

57. *Id.* Legislative history supports the proposition that the Act contemplates public land regulatory agencies to make decisions in compliance with the provisions of the Act. *Wilson v. Block*, 708 F.2d 735, 746 (D.C. Cir.) *cert. denied*, 464 U.S. 956 (1983).

58. H.R.J. RES. 738, 95th Cong., 2d Sess. (1978) (enacted).

59. *Id.*

60. Falcone, *supra* note 3, at 571.

61. *Id.* at 572.

62. *Id.*

63. See *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 455 (1988). Rep. Morris Udall, the bill's primary sponsor, had a great deal to do with this conclusion. To insure the passage of the bill he characterized the bill as only a statement of policy. His comments were meant to convince opponents that Native Americans were in no way being elevated above others. 124 CONG. REC. 21,444-45 (1978) (statement of Rep. Udall).

the Act has been determined to give "no cause of action or any judicially enforceable rights."⁶⁴

The second undertaking of the Act required that the President command the federal agencies make regulations and policies more sensitive to Native American religious expression.⁶⁵ A task force, set up by President Carter, was to comply with this part of the Act.⁶⁶ "The task force requested all federal agencies to evaluate their policies and procedures in light of the act and conducted ten on-site hearings."⁶⁷ The report presented to Congress "contain[ed] thirty-seven pages of recommendations for specific changes."⁶⁸ The report, however, has not led to great change on the part of agencies in their attitudes toward Native American religious freedom.

B. *The First Amendment, Lyng & Smith*

1. The First Amendment

Since 1978, when the Act was passed, the courts have had ample opportunity to consider the "rights of Native Americans engag[ing] in traditional religious practices."⁶⁹ As the Act does not afford Native American religious practitioners judicial relief, appeals to the Court were presented on the basis of the First Amendment.⁷⁰

In the early 1980s, Native Americans who sought to prevent the disturbance or destruction of sacred sites were unsuccessful in the federal courts.⁷¹ The courts failed to protect Native American traditional practitioners.⁷² Prior to 1988, a balancing test was applied to determine if a plaintiff's free exercise rights had been violated.⁷³ This two-part test was used by federal courts as the standard for determining violations of free exercise rights since the Supreme Court's holding in

64. Falcone, *supra* note 3, at 572.

65. PUB. L. NO. 95-341 § 2, 94 Stat. 469, 470 (1978).

66. O'Brien, *supra* note 43, at 30. The "task force was composed of nine federal agencies . . . and [was] supported by representatives of American Indian Rights Fund and American Indian Law Center." *Id.*

67. *Id.*

68. Falcone, *supra* note 3, at 572.

69. S. REP. NO. 411, 103d Cong., 2d Sess. 2 (1994).

70. Falcone, *supra* note 3, at 573.

71. *Crow v. Gullett*, 706 F.2d 856 (8th Cir.), *cert. denied*, 464 U.S. 977 (1983); *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981); *Wilson v. Block*, 708 F.2d 735 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983) and 464 U.S. 1056 (1984); *Sequoyah v. Tennessee Valley Auth.*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

72. Trope, *supra* note 6, at 375.

73. Falcone, *supra* note 3, at 573. The Supreme Court's decision in *Lyng* dealt a "serious blow" to the *Sherbert* test. *Id.*

Sherbert v. Verner.⁷⁴ In the area of sacred sites, the courts added an additional element. The practitioners were required to show that the practice affected was "central or indispensable to their religions."⁷⁵

With the additional requirement added to the *Sherbert* test, Native American religious practitioners faced significant difficulty in protecting their sacred sites.⁷⁶ The early failures are integral to the development of a First Amendment analysis of Native American religious freedom.

In *Sequoyah v. Tennessee Valley Authority*,⁷⁷ the proposed government action was the flooding of the ancient Cherokee village of Chota with the construction of the Tellico Dam in Tennessee.⁷⁸ The site is believed to be the birthplace of the Cherokee people.⁷⁹ If the area were flooded, the Cherokees believed their ability to pass on spiritual beliefs and knowledge would be destroyed.⁸⁰ The Sixth Circuit rejected their claim holding that the Cherokees had failed to show that the area was "central" to their religious practices.⁸¹

Circumstances were no better for Native Americans in the Tenth Circuit. In *Badoni v. Higginson*,⁸² the issue once again was the building of a dam. The site at issue was "Rainbow Bridge, a nearby spring, prayer spot and cave that held positions of central importance" to the Navajo practitioner.⁸³ Additionally, the Navajos believe that Rainbow Bridge is the incarnate form of Navajo gods.⁸⁴ The National Park Service provided public access to this area after the site was flooded.⁸⁵ The court held that the government's interest in maintaining the lake level was more important than the burden on religious practice.⁸⁶

In *Crow v. Gullett*,⁸⁷ the Eighth Circuit was no more favorable to the Native American practitioner. Bear Butte was the sacred site at

74. 374 U.S. 398 (1963). This balancing test had two parts. First, the plaintiff had to prove that the government action prohibits her from engaging in a practice based on sincere religious beliefs. Once this is shown, the burden of proof rests on the government to show a legitimate state interest for its action and means that are "narrowly tailored to achieve that interest." *Falcone*, *supra* note 3, at 573.

75. *Trope*, *supra* note 6, at 377.

76. *Id.*

77. 620 F.2d 1159, 1160 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

78. *Id.* at 1160.

79. *Id.* at 1163.

80. *Id.* at 1162-63.

81. *Id.* at 1164.

82. 638 F.2d 172 (10th Cir.), *cert. denied*, 452 U.S. 954 (1981).

83. *Id.* at 177.

84. *Id.*

85. *Id.* The park service also allowed concessionaires to sell alcohol at the site. *Id.* at 178.

86. *Id.* at 178.

87. 706 F.2d 856 (8th Cir.), *cert. denied*, 464 U.S. 977 (1983).

issue in this case. The State of South Dakota had undertaken construction of viewing platforms, parking lots, trails and roads at Bear Butte in the Black Hills.⁸⁸ This site is sacred to the Lakota and Tsististas peoples.⁸⁹

The Eighth Circuit held the state interests in preserving the environment and improving public access to the park outweighed the religious interests of the Native Americans.⁹⁰ The court affirmed the district court holding; to prevail the plaintiffs would have to show "the coercive effect of the [restriction] as it operates against the practice of their religion."⁹¹ Once again the free exercise of religion by Native Americans fell victim to the courts' interpretation of the First Amendment.

2. *Lyng v. Northwest Cemetery Protective Association*

In 1985, a dim ray of hope emerged in the Ninth Circuit when the court decided *Northwest Indian Cemetery Protective Association v. Peterson*.⁹² However, this hope died quickly as the United States Supreme Court reversed *Peterson* with the decision in *Lyng v. Northwest Cemetery Protective Association*.⁹³

The issue in *Lyng*, was whether the Free Exercise Clause of the First Amendment can forbid government actions that would impact sacred sites.⁹⁴ In *Peterson*, the Ninth Circuit found the sacred site was a central and indispensable part of the Native Americans' religious practice⁹⁵ and held that the proposed road and timber harvesting was in violation of the First Amendment.⁹⁶ The court enjoined the completion of the road as well as the timber harvesting.⁹⁷

88. *Id.* at 857.

89. *Id.* Bear Butte is a frequent site of vision quests practiced by the Lakota people. Vision quests require privacy and quiet.

90. *Id.* at 859.

91. *Crow v. Gullet*, 541 F. Supp. 785, 790 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir.), *cert. denied*, 464 U.S. 977 (1983) (quoting *School Dist. of Abington v. Schempp*, 374 U.S. 203, 223 (1963)).

92. 764 F.2d 581 (9th Cir. 1985), *aff'd on reh'g*, 795 F.2d 688 (9th Cir. 1986), *rev'd sub nom. Lyng v. Northwest Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

93. 485 U.S. 439 (1988). For a complete discussion of the decision see Kathryn C. Wyatt, *The Supreme Court, Lyng and the Lone Wolf Principle*, 65 CHI-KENT L. REV. 623 (1989).

94. *Lyng*, 485 U.S. 439 (1988). Specifically, the government action involved in this case was the construction of a road and harvesting timber on land which is considered sacred by the Yurok, Karok, and Tolowa Indians. *Id.*; see *Falcone*, *supra* note 3, at 573.

95. *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 565 F.Supp. 586, 594 (N.D. Cal. 1983), *aff'd* 764 F.2d 581 (9th Cir. 1985), *aff'd on reh'g* 795 F.2d 688 (9th Cir. 1986), *rev'd sub. nom. Lyng v. Northwest Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

96. *Northwest Indian Cemetery Protective Ass'n*, 56 F. Supp. at 597.

97. *Id.* at 606.

In the Ninth Circuit's de novo review of the plaintiffs' First Amendment claim, the court used the two-part test from *Sherbert*.⁹⁸ After reviewing the district court findings, the Ninth Circuit held that the first part of the test had been satisfied since the construction would burden the Native Americans' free exercise rights.⁹⁹

The court then proceeded to analyze the second part of the test, namely whether the government had met its burden of proving a compelling state interest.¹⁰⁰ Ruling that the government had failed to do so, the Ninth Circuit affirmed the district court injunction, finally recognizing the free exercise rights of Native Americans.¹⁰¹

However, this victory would be short lived as the Supreme Court granted certiorari for *Lyng v. Northwest Cemetery Protective Ass'n*.¹⁰² The following year, the ray of hope for Native American religious freedom was gone as the Supreme Court reversed the Ninth Circuit's 1986 ruling.¹⁰³

In Justice O'Connor's opinion, the Court articulated its rejection of the traditional balancing test with regard to the government's land management decisions.¹⁰⁴ The Court held that the government action must coerce individuals to act contrary to their religious beliefs or penalize religious activity by a denial of equal protection.¹⁰⁵ Absent such a showing, the Court held that "the First Amendment provided no protection against governmental action, regardless of the impact upon Native American religious practitioners."¹⁰⁶ Thus the Court held that the First Amendment does not "divest the Government of its right to use what is, after all, *its* land."¹⁰⁷

The Court went on to state that the Forest Service was in conformance with the Act.¹⁰⁸ The Court clearly expressed, however, that the Act does not confer any cause of action or judicially enforceable

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

99. *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688 (9th Cir. 1986), *rev'd sub nom. Lyng v. Northwest Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

100. Richard M. Carson, *The Free Exercise of Native American Religions on Public Lands: The Development Of and Outlook for Protection Under The Free Exercise Clause of the First Amendment*, 11 PUB. LAND L. REV. 181, 188 (1990).

101. *Peterson*, 795 F.2d at 698. The court found that any relief granted to the Native Americans would be an accommodation, not establishment, of their beliefs. *Id.* at 694.

102. 481 U.S. 1036 (1987).

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

104. Trope, *supra* note 6, at 380.

105. *Id.*; Carson, *supra* note 100, at 189.

106. Trope, *supra* note 6, at 380.

107. *Lyng*, 485 U.S. at 453 (emphasis added).

108. Carson, *supra* note 100, at 189.

rights.¹⁰⁹ As mentioned earlier, the Court relied on the statements in the Congressional Record which found that the Act had “no teeth in it.”¹¹⁰

The Court’s decision concluded by discrediting the centrality test proposed by dissenting Justices.¹¹¹ That test involved a determination of those lands that are “central” to religious groups and whether governmental land management decisions would destroy that group’s belief.¹¹² The majority decided the test might require the Court to find certain “beliefs are not central to certain religions, thus ruling that some religious claimants misunderstood their own beliefs.”¹¹³

Nevertheless, all was not lost for the High Country in *Lyng*.¹¹⁴ The site tribes sought to protect was saved on October 28, 1990.¹¹⁵ However, irreparable harm had already been done to the First Amendment, as *Lyng* had further lessened the standard required to show a compelling state interest. The real damage was yet to come.¹¹⁶

3. *Employment Division, Department of Human Resources v. Smith*

In *Smith*,¹¹⁷ the Court did more than simply chisel away at traditional First Amendment jurisprudence; it took a sledgehammer to it.¹¹⁸ *Smith* considered whether the First Amendment required states to exempt sacramental use of peyote¹¹⁹ from their criminal laws. Prior to the 1990 *Smith* decision, several state courts had held that the First Amendment protected the sacramental use of peyote.¹²⁰ However, in

109. *Id.*; *Lyng*, 485 U.S. at 455.

110. 124 CONG. REC. 21,443, 21,445 (daily ed. July 18, 1978)(statement of Rep. Udall).

111. *Lyng*, 485 U.S. at 457-58.

112. *Id.* at 474 (Brennan, J., dissenting).

113. Carson, *supra* note 100, at 190.

114. 485 U.S. at 439.

115. Falcone, *supra* note 3, at 573. Congress passed a law that added the High Country to the Siskiyou Wilderness, thus prohibiting the logging road. However, this was not a recognition of the religious freedom of Native Americans, but was due to the area’s wilderness status. *Id.*

116. *Id.*

117. *Employment Div., Dep’t of Human Resources v. Smith*, 494 U.S. 872 (1990).

118. See Falcone, *supra* note 3, at 573.

119. Peyote is “a species of cacti that possesses psychedelic powers. Native American religious use of peyote . . . within the United States was well established in the nineteenth century.” Trope, *supra* note 6, at 380.

120. Trope, *supra* note 6, at 381. See *People v. Woody*, 394 P.2d 813 (Cal. 1964); *Whitehorn v. State*, 561 P.2d 539 (Okla. Ct. App. 1977) (holding the First Amendment protects the transportation and possession of peyote); *State v. Whittingham*, 504 P.2d 950 (Ariz. Ct. App. 1973) (holding that the use of peyote in a bona fide pursuit of religious faith is protected by the Free Exercise Clause), *rev. denied*, 517 P.2d 1275 (Ariz. 1973), *cert. denied*, 417 U.S. 946 (1974).

1990, the Supreme Court held that the First Amendment did not require states to exempt sacramental use of peyote from criminal laws.¹²¹

The respondents in *Smith* were members of the Native American Church whose religious practices include ingesting peyote as a sacrament.¹²² Alfred Smith and his co-worker were fired from their positions with a private employer because they admitted to ingesting peyote as a part of their religious practice.¹²³ The respondents' subsequent applications for unemployment benefits were rejected by the state of Oregon.¹²⁴ The respondents then argued that the criminal code violated the First Amendment because it prohibits the free exercise of religion.¹²⁵ The Supreme Court refused to grant the respondents request to apply the traditional *Sherbert* balancing test.¹²⁶ To justify this, the Court expanded on its holding in *Lyng*, finding that "incidental burdens to religion derived from laws of general application were constitutionally permissible."¹²⁷ Thus, the Court sent an even stronger statement that the First Amendment is no longer a method by which Native American practitioners can prevent the government from interfering with the practice of their religious beliefs.¹²⁸

Writing for the Court, Justice Scalia stated that a simple infringement upon the free exercise of religion was no longer enough to make a neutral law unconstitutional.¹²⁹ Justice Scalia went on to say that a law must violate both freedom of religion and other constitutionally based rights to be deemed unconstitutional.¹³⁰ This holding not only limited, but completely abandoned the *Sherbert* balancing test.¹³¹

In her concurrence, Justice O'Connor criticized the majority's complete rejection of the balancing test.¹³² However, it was her opinion in *Lyng* that paved the way for the *Smith* decision. In fact, Justice Scalia specifically cited Justice O'Connor's opinion in *Lyng* to support

121. *Smith*, 494 U.S. at 890.

122. *Id.* at 874.

123. *Id.*

124. *Id.* The state denied these benefits because the respondents had violated the Oregon Criminal Code with respect to use of controlled substances. *Id.* at 875.

125. *Id.* at 876.

126. *Id.* at 876. The *Sherbert* test had been consistently used since it was first declared in 1963. French, *supra* note 9, at 208.

127. Falcone, *supra* note 3, at 573 (quoting Employment Division Dep't of Human Resources v. *Smith*, 494 U.S. 872 (1990)).

128. S. REP. NO. 411, 103d Cong., 2d Sess. 3 (1994).

129. *Smith*, 494 U.S. at 881-82.

130. *Id.*

131. *Id.* at 878-82.

132. *Id.* at 891-903.

his argument that the traditional balancing test does not apply to challenges to criminal laws under the Free Exercise Clause.¹³³ Justice O'Connor argued to limit rejection of the balancing test to cases which would "require the government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."¹³⁴

Regardless of this seeming change of heart by Justice O'Connor, the Court's refusal to apply the *Sherbert* test sent shock waves throughout religious communities everywhere.¹³⁵ In *Smith*, the Supreme Court took religious freedom out from under the umbrella of First Amendment protection and thrust it into the middle of the political arena.¹³⁶

Therefore, religious practitioners must become active in the legislative process to find protection from generally applicable laws that burden their religion.¹³⁷ While the ruling in *Smith* impacts all religious practitioners, it primarily affects Native Americans.¹³⁸ The very nature of the political process mandates that those groups in the majority garner more respect in the society.¹³⁹ Along with respect, comes power to affect the majority's religious goals.¹⁴⁰ Nevertheless, all groups were concerned with the potential impact of *Smith* on religious practice.¹⁴¹

133. *Id.* at 883-85. The Court noted that it had never used this test to invalidate a criminal law. *Id.* As Justice Scalia stated, "[i]t is hard to see any reason why the government should have to tailor its health and safety laws to conform to the diversity of religious belief, but should not have to tailor its management of public lands." *Id.* at 885 n.2.

134. *Id.* at 900 (O'Connor, J., concurring) (quoting *Bowen v. Roy*, 476 U.S. 693, 699 (1986)). See Trope, *supra* note 6, at 382-83. Moreover, the hardship that the Court was placing on minority religions was noted by Justice O'Connor when she stated that, "to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility" is precisely why the First Amendment was enacted. *Smith*, 494 U.S. at 902.

135. S. REP. NO. 411, 103d Cong., 2d Sess. 3 (1994). Given the ruling and standards set forth in *Smith*, it is difficult to imagine the circumstances under which a law could rise to the level of a First Amendment violation. Falcone, *supra* note 3, at 573.

136. Luralene D. Tapahe, *After The Religious Freedom Restoration Act: Still No Equal Protection for First American Worshipers*, 24 N.M. L. REV. 331, 343 (1994).

137. *See Id.*

138. *Id.* at 344.

139. *Id.* at 343. The ruling in *Smith* ignores the framers' of the Constitution fears that the "tyranny of the majority would silence minority religion, speech and other civil rights unless removed from the political arena and given special protection." *Smith*, 494 U.S. at 902-903 (O'Connor, J., concurring).

140. Tapahe, *supra* note 136, at 343.

141. *Id.* at 344. The overriding concern was evident in the broad number of groups participating in the call for legislative reform. *Smith* created a crisis for all Americans in terms of religion when the Court abandoned the *Sherbert* test. S. REP. NO. 411, 103d Cong., 2d Sess. 3 (1994). The decision "fundamentally altered the basic nature of American religious liberty from a constitutional right protected by the courts to a statutory right dependent upon the goodwill of

C. RFRA 1993 - Inroads Toward Freedom of Religious Practice

As a result of this concern and activity, the legislature enacted the Religious Freedom Restoration Act ("RFRA") in 1993.¹⁴² While the law cooled the controversy and crisis created by the *Smith* decision, it did very little to protect Native American practitioners.¹⁴³ RFRA restores the compelling state interest test as the applicable standard in free exercise cases.¹⁴⁴ Further RFRA restores the First Amendment analyses of *Wisconsin v. Yoder*¹⁴⁵ and *Sherbert v. Verner*.¹⁴⁶ Although RFRA does not set a mandatory standard of review to be used in First Amendment cases, it does construct a "statutory prohibition against government action that substantially burdens religious free exercise."¹⁴⁷

Unlike AIRFA, RFRA § 3 (c) provides judicial relief to individuals whose free exercise rights have been burdened in violation of the Act.¹⁴⁸ However, while RFRA substantially advances the protection of free exercise rights, it does not remedy the issue of Native American sacred site protection.¹⁴⁹ The Court's holding in *Lyng*, which stated internal governmental affairs never constitute a burden on free exercise rights,¹⁵⁰ coupled with RFRA's legislative history, effectively left sacred sites outside of the protection of RFRA.¹⁵¹ Additionally, protection may remain lacking because of pre-*Smith* misconceptions about Native American sacred sites and religions.¹⁵² The legislative history of RFRA will undoubtedly mean business as usual for courts handling Native American claims.¹⁵³ Given the history of application

lawmakers and the outcome of votes." Echo-Hawk, *supra* note 21 at 175. Efforts to circumvent *Smith*, led to H.R. 272, 102d Cong., 1st Sess. (1991).

142. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 1988, 2000bb to 2000bb-4 (1993).

143. S. REP. NO. 411, 103d Cong., 2d Sess. 2 (1994).

144. 42 U.S.C. § 1988, §2000bb(b)(1) (1993).

145. 406 U.S. 205 (1972).

146. 374 U.S. 398 (1963). See also Tapahe, *supra* note 136, at 345.

147. Falcone, *supra* note 3, at 574. Any government action substantially burdening the free exercise of religion is prohibited unless it involves a compelling state interest and employs the least restrictive means to achieve its purpose. *Id.*

148. RFRA, 42 U.S.C. § 1988, § 2000bb-1 (1993). The relief may be used as a claim or a defense.

149. Falcone, *supra* note 3, at 574.

150. *Id.*

151. *Id.* The legislative history of RFRA makes it explicitly clear that the compelling state interest test would not apply to Native Americans exercising their traditional practices at sacred sites on public lands. S. REP. NO. 411, 103d Cong., 2d Sess. 3 (1994); see also Echo-Hawk, *supra* note 21, at 179-180.

152. Tapahe, *supra* note 136, at 345-47.

153. H.R. REP. NO. 88, 103d Cong., 1st Sess. (1993). According to the Judiciary Committee, the expectation is that the courts will continue to look to free exercise cases that occurred prior

in the courts, it is possible that no Native American religious activity, particularly at sacred sites on public lands, will ever be found to be substantially burdened.¹⁵⁴

Unfortunately, considerable room for judicial insensitivity and cultural bias still exist under a RFRA claim. When dealing with sacred site protection, Native American religious freedom is still at a crisis point. Thus, there is still a need for legislation to protect Native American religious freedom.

IV. LEGISLATIVE PROPOSALS FOR PROTECTION

A. *Original Proposal - Native American Free Exercise of Religion Act 1993 - Senate Bill 1021*

In response to these continued concerns, the Committee on Indian Affairs developed legislation to protect Native American "spirituality and religious ceremonies and practices."¹⁵⁵ The work of the Coalition and the Senate Committee culminated in the first comprehensive legislation to be introduced regarding Native American religious freedom. Senate Bill 1021 ("S. 1021"), the "Native American Free Exercise of Religion Act," was introduced by Senator Inouye on May 23, 1993.¹⁵⁶ The introduction was followed by a process of dialogue with federal agencies.¹⁵⁷

The dialogue process began in June of 1993 with an effort to assure a workable framework for protecting those Native American sacred sites located on public land and the practices associated with them.¹⁵⁸ For the next year the process continued with meetings, the purpose of which was to identify issues and areas of concern relating

to *Smith* to determine whether Native American free exercise has been burdened and if the least restrictive means have been used to achieve a compelling governmental interest. The bill was not meant to be a codification of prior decisions, but a restoration of the legal standards that were applied there. *Id.*

154. Tapahe, *supra* note 136, at 346-47. Since under RFRA, strict scrutiny will only be used if a burden is found, the result for Native American free exercise claims is likely to be the same as always: no protection. *Id.* at 347.

155. S. REP. NO. 411, 103d Cong., 2d Sess. 4 (1994). This work was done in conjunction with the American Indian Religious Freedom Coalition. This coalition, formed in 1990-92, was founded by the National Congress of American Indians, the Native American Rights Fund, and the Association on American Indian Affairs. The Coalition designated federal legislation concerning protection of Native American religious freedom as its number one goal for the 103d Congress. Echo-Hawk, *supra* note 21, at 178.

156. S. 1021, 103d Cong., 1st Sess. (1993).

157. S. REP. NO. 411, 103d Cong., 2d Sess. 4 (1994).

158. *Id.* The framework was intended to be workable from the agency vantage point to insure willingness of agency representatives to work with the Coalition and Committee to assure the bill provisions would work within their other statutory responsibilities. *Id.*

to S. 1021, between the Coalition and the Administration.¹⁵⁹ The main focus of these meetings was Title I, the sacred sites provision of S. 1021.¹⁶⁰

S. 1021 was an omnibus bill that would: (1) Grant procedural and substantive protection, including a cause of action, to protect sacred sites from adverse federal actions (Title I);¹⁶¹ (2) Overrule the holding in *Smith* with regard to peyote (Title II);¹⁶² (3) Address the equal protection rights of Native American prisoners, in the process it would overturn *O'Lone v. Shabazz*,¹⁶³ a Supreme Court case that had already dealt with these issues. (Title III);¹⁶⁴ (4) Increase access to eagle feathers and other sacred objects (Title IV);¹⁶⁵ and (5) Establish a private cause of action, similar to RFRA, that would protect all expressions of Native American religion (Title V).¹⁶⁶

The proposed Act would provide a "comprehensive and detailed response" and enumerate notice and comment procedures and would provide an enforceable cause of action with penalties.¹⁶⁷ Passage of

159. *Id.*

160. *Id.*

161. 139 CONG. REC. S6458 (May 23, 1993); Echo-Hawk, *supra* note 21, at 181. In TITLE I, Congress found that the "Federal government has the obligation to enact enforceable Federal policies which will protect Native American communit[ies]" culture and which will not "interfere with free exercise of Native American religions." *Id.* Additionally, the record shows that Congress "has never enacted a judicially enforceable law comparably restricting agency discretion for the sake of the site-specific requirements associated with the free exercise of Native American religions." *Id.*

162. *Id.* at S6461. The Congressional findings with respect to peyote were that since 1965 the sacramental use of peyote has been exempted from Federal laws governing controlled substances. *Id.* Further, even though several states had followed the federal governments lead, there is a lack of uniformity. *Id.* The Congress found that because of the trust responsibility, there was a duty to prohibit discrimination against Indians by reason of their religious beliefs and practices. *Id.*

163. 482 U.S. 342 (1987).

164. 139 CONG. REC. S6461 (May 23, 1993). In general, Congress found that Native American prisoners who practice Native American religions should have the same access as is afforded Judeo-Christian prisoners. *Id.* This provision includes physical characteristics of the prisoner, such as wearing their hair in a certain manner, as well as access to Native American religious facilities such as sweat lodges, teepees and other locations to facilitate Native American religious ceremonies. *Id.*

165. *Id.* The provision includes consultation with Fish and Wildlife Service to provide access to bald and golden eagles, their feathers, or any other parts, nests, etc., needed to facilitate Native American religious practice. *Id.* The provision also references the need for consultation regarding other animals and plants that might fall under the regulation of federal agencies, yet are integral to Native American religious practices. *Id.* at S6462.

166. *Id.* at S6462. This cause of action would apply the compelling state interest test and places the burden on Native American practitioners to prove, by a showing of any evidence, that the restriction is a result of Federal or State action. *Id.* Additionally, attorney's fees will be awarded to the prevailing party. *Id.*

167. Falcone, *supra* note 3, at 575.

this bill would "substantially redress the currently inadequate protection of Native American sacred religious sites."¹⁶⁸ A great deal of discussion resulted from the conflicting interests implicated under the bill's provisions.¹⁶⁹

The hearings and dialogue on S. 1021 centered on the constitutional issues raised by the Department of Justice ("DOJ").¹⁷⁰ The key issue the DOJ was concerned with was whether Title I of the bill violated the Establishment Clause.¹⁷¹ In particular, the DOJ was concerned with the potential for "impermissible entangl[ing] the Government with religion," in the notice and consultation sections.¹⁷² As a result of these concerns, the bill was refined and Senator Inouye introduced S. 2269.¹⁷³

B. A Revised Proposal - Native American Cultural Protection and Free Exercise of Religion Act 1994 - S. 2269

S. 2269 was introduced as a result of the year-long negotiations to refine S. 1021.¹⁷⁴ S. 2269 was introduced as a new measure which reflected a refinement of the provisions of S. 1021 as well as the results of consultation with the Administration.¹⁷⁵ The bill clarified some of S. 1021's provisions but for the most part failed to respond to the concerns voiced by the DOJ with regard to sacred site protection.¹⁷⁶ S.

168. *Id.*

169. These interests include those concerning federal land management and development of the public lands. Additionally, state land management agencies, mining, logging and other development interests are potentially impacted.

170. Echo-Hawk, *supra* note 21, at 181.

171. *Id.* at 181-182. For a more complete discussion of the constitutional issues of this bill see Trope, *supra* note 6, at 388-403. It is interesting to note that the Department of Justice did not take great issue with the peyote, prisoner, or eagle provisions, but rather focused concern on the sacred site provision. Echo-Hawk, *supra* note 21, at 182.

172. *Id.* These provisions would grant Native American religious leaders the power to "temporarily halt" federal action in violation of the Establishment Clause ruling in *Larkin v. Grendel's Den*, 459 U.S. 116 (1982); Echo-Hawk, *supra* note 21, at 182. Additionally, the DOJ was concerned with bolstering the constitutionality with a limitation of Title I to federally recognized tribes in order to bring it within the reasoning of the Court in *Morton v. Mancari*, 471 U.S. 535 (1974). *Id.* For a discussion of the provisions of Title I, see Trope, *supra* note 6, at 386.

173. S. 2269, 103d Cong., 2d Sess. (1994). The provisions dealing with prisoner's rights were protected under the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb et. seq. (1993). The Eagle feather provisions were protected by Presidential Directive of April 29, 1994, which was signed in response to negotiations between the administration, the Coalition and the Department of the Interior. Finally, the peyote issues were protected under the American Indian Religious Freedom Act Amendments of 1994, Pub. L. No. 103-344, 108 Stat. 3125 (Oct. 6, 1994). See Echo-Hawk, *supra* note 21, at 179-81.

174. S. REP. NO. 411 103d Cong., 2d Sess. 5 (1994).

175. Echo Hawk, *supra* note 21, at 182.

176. *Id.* S. 2269 basically ignored the Justice Department's recommendations with regard to the Establishment Clause concerns. This is because the Committee felt that the same concerns

2269 was not meant to amend AIRFA, enacted in 1978, but further the policies established in AIRFA.¹⁷⁷

As originally introduced, on July 1, 1994, the bill contained five titles, exactly mirroring the titles of S. 1021.¹⁷⁸ As amended, the bill: (1) deleted the Title II peyote provisions; (2) addressed the religious rights of individual Indians and their relation to tribal government; and (3) contained additional refinements as submitted to the Committee by the Departments of the Interior and Justice.¹⁷⁹

The original bill only provided protection for sacred sites.¹⁸⁰ However, the amended bill extended protection to the cultural and religious practices that are associated with those sites.¹⁸¹ Additionally, the bill refined the definitions of sacred sites and adverse impacts as well as the process of consultation.¹⁸² Title I, as amended, also provides several methods to address the potential for adverse impact.¹⁸³ Each step toward sacred site protection was achieved as a result of the dialogue process and supported by the federal agencies implicated.¹⁸⁴

Title II, previously the peyote provision,¹⁸⁵ was amended to become the prisoners rights provision of the bill.¹⁸⁶ As amended, the provision extends equal access rights to Native American prisoners and accommodates Native American religious practices if they do not conflict with "legitimate penological objectives."¹⁸⁷

Title III, entitled the Religious use of eagle feathers and other animals and plants, provides statutory authorization for the Executive

would not be present if the bill were to protect culture as well as religious practice. Hence, the change in the title of the bill. *Id.*

177. S. REP. NO. 411, 103d Cong., 2d Sess. 5 (1994).

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* This increased protection was included at the urging of the Department of the Interior. *Id.*

182. *Id.* With respect to the consultation provisions, the agencies proposed a new term that would define covered federal activities. *Id.*

183. *Id.* at 6. Consultation occurs between the agency and the affected party. *Id.* Memoranda agreements can be entered into which contain provision for access and actions of the government that would desecrate or destroy that site. *Id.* The agency is authorized to establish an administrative fact finding process and finally, there is to be federal court review as a last resort to resolve problems. *Id.*

184. *Id.* Amendments were also included to address concerns of the development companies that are potentially affected. *Id.*

185. See *supra* note 158, and accompanying text.

186. S. REP. NO. 411, 103d Cong., 2d Sess. 6 (1994).

187. *Id.*

Order signed on April 29, 1994.¹⁸⁸ Again, the implicated agencies were consulted and fully approved Title III as amended.¹⁸⁹

Title IV mirrors Title V of the original proposal. Title IV "authoriz[ed] a cause of action in the federal district courts for violation of any" protected rights.¹⁹⁰ The provision also "sets forth the burden of proof, production and persuasion on the parties to such an action."¹⁹¹

The Committee was advised by the DOJ that it is constitutionally permissible for these protections to be established.¹⁹² In Senate Bill 2269, the Committee found federal discrimination against Native American traditional culture and religious practice did not follow the neatly drawn "line" of "federally-recognized tribe status."¹⁹³ Thus, provisions were included to provide protection to all native peoples.¹⁹⁴

Included in its report, the Committee attached a letter from James T. Blum, a staff member of the Congressional Budget Office, regarding costs and budgetary considerations.¹⁹⁵ The findings of the Congressional Budget Office were that no significant costs would result from implementing Senate Bill 2269.¹⁹⁶ Additionally, the Standing Rules of the Senate required that an evaluation of regulatory and paperwork impact be included.¹⁹⁷ The Committee believed minimal impacts would result "on regulatory or paperwork requirements."¹⁹⁸

188. *Id.* The Executive Order provides that "eagle feathers and other animal parts" be made available to "tribes for religious and ceremonial use." *Id.* See *supra* note 160, and accompanying text.

189. *Id.*

190. S. REP. NO. 411, 103d Cong., 2d Sess. 7 (1994). See *supra* note 161, and accompanying text.

191. *Id.*

192. *Id.* at 8. However, the DOJ limited these protections to "federally-recognized tribes or their designees." *Id.*

193. *Id.* The Committee recognized that the protection must be afforded to all cultural and religious practices of "native peoples, including California Indians and Native Hawaiians." *Id.* The Committee designed the definition section of the amended bill to comport with these distinctions and to insure the statute is "constitutionally permissible." *Id.*

194. *Id.*

195. Letter from James T. Blum to Senator Inouye, reprinted in S. REP. NO. 411, 103d Cong., 2d Sess. 25 (1994).

196. *Id.* The CBO found that enactment would affect receipts and therefore a "pay-as-you-go procedure would apply." *Id.* The estimated effect on receipts was negligible. *Id.* Additional costs would result from the provisions of Title I, the sacred sites protection. The provision would establish criminal sanctions for intentional damage to sites. *Id.* The costs of implementing this would be \$100,000 and the revenue from fines is expected to be less than \$500,000 per year. *Id.* at 26.

197. S. REP. NO. 411, 103d Cong., 2d Sess. 26 (1994).

198. *Id.*

Further, the Committee received comments from the DOJ and the DOI as to the views of the Administration on Senate Bill 2269.¹⁹⁹ The DOJ noted at the outset that the Committee had their full support with regard to the goals of the bill.²⁰⁰ The DOJ noted, however, that several constitutional and legal concerns remained with the amended bill.²⁰¹

The Establishment Clause concern was heightened by an intervening decision in *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*.²⁰² The DOJ concluded that to avoid the Establishment Clause challenges, the legislation would have to rest on the special relationship between the federal government and the Indian tribes.²⁰³ Merely adding the cultural protection provisions would not eliminate the establishment concerns.²⁰⁴

The DOJ had additional concerns about the change in the burden of proof.²⁰⁵ The DOJ recommended the burden be changed from the "adverse impact" standard to the traditional "substantial burden."²⁰⁶ Finally, the DOJ recommended miscellaneous changes to alleviate the ambiguities that remained in the bill.²⁰⁷ The DOJ recommended amendments to the bill to provide for these concerns.

199. *Sheila F. Anthony, Views on S. 2269*, reprinted in, S. REP. NO. 411, 103d Cong., 2d Sess. 26 (1994).

200. *Id.* The DOJ noted that the protection of Indian religions was long overdue and their goal was to develop legislation that would protect that religious freedom without the mire of lengthy litigation. *Id.*

201. *Id.* at 27. The continued concerns of the Department of Justice included the Establishment Clause, a prohibition that was stated in *Larson v. Valente*, 456 U.S. 228, 244 (1982) (ruling "the clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). *Id.*

202. 114 S. Ct. 2481 (1994). Most important for the Justice Department was the concern with Justice Souter's opinion for the plurality that found "although the delegation was to an ostensibly secular entity, 'the territory of the village of Kiryas Joel,' . . . in reality, the school district was designed to include only" one religious sect. *Anthony, supra* note 199, at 27. Thus, the underlying group was religious and the delegation of authority therefore violated the Establishment Clause. *Id.*

203. *Anthony, supra* note 199, at 28. The recommendation was that the legislative protection be limited to federally-recognized tribes and Alaska Native Villages. As stated *supra*, the Committee was unwilling to tailor the legislation so narrowly.

204. *Id.* at 29.

205. *Id.* The standard in §§ 105 (c) and 501 (c) departs from the substantial burden standard that is traditionally a part of First Amendment jurisprudence. *Id.*

206. *Id.* The DOJ recognized that this change in burden of proof was more than likely an attempt to overturn the decision in *Lyng*, however they noted that § 105 (e) would already achieve this result and therefore the change in burden of proof was unnecessary. *Id.*

207. *Id.* at 30. These changes included defining terms specifying what would happen if the burden of proving alternatives was not met and the limitations of the judicial review provision. *Id.*

The Department of the Interior also recognized a number of concerns that required resolution before Administration approval could be given to the bill.²⁰⁸ The DOI expressed its support for Senate Bill 2269, however recommended "deletion of culture" from the principal provisions of the bill.²⁰⁹

Further, the compelling interests test, as an enhancement of the language and test in RFRA, was a concern for the DOI.²¹⁰ In particular, the DOI noted that "the bill should track RFRA as closely as possible" to avoid "new meanings and confusion" in the application of RFRA.²¹¹ The DOI was also concerned with the bill's broad application to non-federally-recognized tribes.²¹² Coverage was thought to be potentially problematic in that it broadened the "scope and manageability of the bill."²¹³ Finally, the DOI included a litany of other issues to be resolved prior to its complete and total support of the bill.²¹⁴

In August of 1994, the Senate Indian Affairs Committee forwarded Senate Bill 2269.²¹⁵ In advancing this bill, the Committee largely ignored the concerns of the Departments of Justice and Interior.²¹⁶ The bill went the way most other legislative efforts to protect sacred sites have gone. Thus, a need for legislative protection of Native American religious freedom, in particular protection of sacred sites, remains.²¹⁷

C. *The Future - An Executive Order?*

At the present time, Native American religious freedom is still in a state of peril. "Native groups are [however], requesting an Executive Order to establish notice and consultation procedur[es] . . . and

208. Ada E. Deer, Response to Request for Views, *reprinted in* S. REP. No. 411, 103d Cong., 2d Sess. 31 (1994).

209. *Id.* at 32. The DOI felt that the addition of culture, to alleviate constitutional problems, would be ineffective and would greatly broaden the scope of the bill. *Id.* Therefore the agency recommended the deletion of culture in order to forestall potential problems. *Id.*

210. *Id.*

211. *Id.* at 33. The arguments of the DOI closely resemble the concerns of the DOJ with respect to the review standard and the compelling interest test.

212. *Id.* at 34.

213. *Id.* at 35. The Department of Interior felt that reliance on the federal recognition requirement would satisfy the concerns of constitutionality of the scope of the bill and its manageability. *Id.*

214. *Id.* at 35-36.

215. Echo-Hawk, *supra* note 21, at 182. However, due to opposition from developers, action on the measure has been greatly hindered. *Id.*

216. *Id.* at 182.

217. *Id.* at 183.

may, [perhaps, request] a short cause of action bill."²¹⁸ The proposed Executive Order would create administrative solutions to the problem of protecting sacred sites.²¹⁹ A version of the Executive Order from the National Council on American Indians and the Departments of Interior and Justice would, first, create a process for sacred site protection agreements between tribes and agencies.²²⁰ Next, it would require agencies to notify tribes when dealing with listed sacred sites.²²¹ Finally, it would require agencies to promulgate regulations to protect the sites and provide access.²²²

The vitality of the Executive Order remains in question. However, with the present composition of Congress the prospects for gaining such protection there are dismal.²²³ The projections for the 104th Congress are quite grim even in the eyes of the Senate Indian Affairs Committee.²²⁴ At this time, the members of the Committee have felt that the atmosphere is not ripe for reintroduction of a sacred site protection bill.²²⁵

The Committee, however, fully supports the proposed Executive Order and believes that it would acknowledge the Department of Interior's commitment to careful management.²²⁶ Under the Executive Order, the guidelines set forth by the Bureau of Land Management would prioritize sacred sites.²²⁷ However, there is the unfortunate realization that nothing occurs in a vacuum and, therefore, nothing would prohibit an action merely upon showing an impact on a sacred site.²²⁸

V. CONCLUSION

The future for Native American religious freedom remains unclear. The current status of the law with regard to sacred sites remains the Supreme Court's holding in *Lyng*. Under post-*Lyng* analysis it is

218. *Id.* At the writing of this article, the Executive Order, proposed to the tribes at the April 28, 1995 meeting with the President, remains in the Executive Office. It is unclear what has occurred and whether the Order will meet the satisfaction of the Native groups.

219. Craig Alexander, Address at Federal Bar Association, Indian Law Conference (Apr. 7, 1995).

220. *Id.*

221. *Id.*

222. *Id.*

223. Echo-Hawk, *supra* note 21, at 183.

224. Diane Humetewa, Address at Federal Bar Association, Indian Law Conference (Apr. 7, 1995).

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

doubtful whether an Indian claimant could ever meet the burden of proving that the government action constitutes a prohibition of a religious practice rather than a lack of accommodation.²²⁹

Native Americans are, therefore, left to the small protection afforded under AIRFA and RFRA until some other legislation or reform manifests itself. Even if protection were to come in the form of a statute or an Executive Order one problem remains. There is an underlying lack of understanding of Native American religious practice that will always be predominate. The burden of ignorance and intolerance may well be greater than any governmental constraint.

While ignorance may remain, "[t]he framers of the Constitution did not envision a nation where all would know and understand each other's religious affiliations, but a nation where tolerance predominates."²³⁰ Thus, there must be continued efforts to fill the immense void that remains in understanding and protecting Native American religious freedom.

Rayanne J. Griffin

229. Carson, *supra* note 100, at 192.

230. Falcone, *supra* note 3, at 575.

